

For Defense

For Defense Memorandum

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A Report of the
National Academy of Sciences
on the
Work of the

MICROPHONE

· SYSTEMS DEVELOPMENT STUDY
OF
ALTERNATIVE LEGAL DEFENSE SERVICES
FOR
MONTGOMERY COUNTY, TENNESSEE
--Final Report--

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FOREWORD

The National Center for Defense Management (NCDM) was founded late in 1974 through a grant from the Law Enforcement Assistance Administration (LEAA) to the National Legal Aid and Defender Association (NLADA). NCDM was born out of the need to enhance and improve the efficiency of systems for the defense of the poor through sound planning, management assistance and management training, and to maximize the quality of such systems while maintaining their cost-effectiveness.

Under the terms of the LEAA grant awarded to NLADA, the principal goals of the National Center for Defense Management are as follows:

- To conduct management studies and analyses of the operations of existing defender offices and other defense delivery systems, with a view to making practical recommendations which will assist such offices and systems in achieving goals of improved effectiveness, and conduct evaluations of such offices and systems;
- To provide management consultation and technical assistance for defender offices and organized defense systems requesting such services, assisting these offices and systems in their efforts to design and implement improved management systems and procedures;
- To provide management training programs designed specifically for defender managers; and
- To furnish technical assistance to organizations, communities, states or other groups which desire to establish new or improved systems (including defender systems) for the provision of legal representation to eligible criminally accused or convicted persons, or persons facing juvenile court proceedings.

EXECUTIVE SUMMARY

The implication of judicial opinion on the availability of legal defense services to indigent criminal defendants pursuant to the Sixth Amendment of the U. S. Constitution has had a significant impact on communities throughout the United States which are attempting to provide such quality representation in a cost-effective manner. Montgomery County has attempted to come to grips with this problem through the provision of outside technical assistance by the National Center for Defense Management (NCDM). John Richardson, President of the Montgomery County Bar Association, through a request to the Tennessee Law Enforcement Planning Agency, communicated the need for a legal systems development study to address such problems unique to that county.

Nature of the Request

In a letter prepared on September 9, 1975 to the Courts Specialist of the Tennessee Law Enforcement Planning Agency, John Richardson, President of the Montgomery County Bar Association, alluded to the fact that he had been directed by his Association to request technical assistance in the form of a study of the effectiveness of the appointed counsel system in Montgomery County.

The request was transmitted through the LEAA Regional Office in Atlanta, Georgia and the Courts Division of the Office of Regional Operations, LEAA, in Washington, D. C. The request was forwarded to NCDM for necessary action.

The problem was identified as follows:

- A need for statistical data relating to the indigent caseload in the General Sessions, Juvenile and Criminal Courts systems;
- Man-hours required of appointed counsel for effective indigent representation;

- The projected caseload and related attorney man-hours for future indigent defense services;
- The present and projected future effectiveness of the existing appointed counsel system;
- The most feasible alternative defense system for indigent representation; and
- Staffing, governing and funding recommendations for such an alternative system.

The request was forwarded because no such assistance was available within Montgomery County.

The National Center for Defense Management (NCDM) established five major study goals:

- A description of the existing system;
- A projection of the future environment;
- Development of choices among alternative legal defense systems;
- An analysis of the impact of such alternatives; and
- The resources required to implement a recommended best alternative.

Procedures

Two preliminary visits were made: The first by William R. Higham, NCDM Director, August 25th through 27th, 1975; the second by Gustav Goldberger, Associate Director for Defense Services, on November 5, 1975. The former visit provided information peculiar to Montgomery County while the latter addressed the broader perspective of statewide implications. A consulting team of attorneys and a systems analyst visited Montgomery County and Nashville, Tennessee during the first week of December 1975, performed the necessary interviews, gathered the necessary administrative data and initiated a docket study which was subsequently accomplished by a law graduate

and a final year law student.

Report Preparation

A report was prepared which addresses these areas:

- The constitutional requirements and legal precedents for quality representation to indigent criminal defendants;
- The major legal defense systems which could be employed in providing such representation. These included a Coordinated-Assigned Counsel (CAC) System, a Defender System and a Mixed System of Defender and CAC components;
- The qualitative and cost benefits which could be accrued through use of either of these systems;
- The resolution of the above into recommendations to Black Hawk County as to viable options they might pursue.

Summary of Recommendations

The National Center for Defense Management makes the following recommendations:

- I. THAT THE MONTGOMERY COUNTY BAR ASSOCIATION ESTABLISH A NOT-FOR-PROFIT CORPORATION RESPONSIBLE FOR THE CREATION OF A MIXED DEFENSE SYSTEM, CONSISTING OF A DEFENDER OFFICE AND A COORDINATED ASSIGNED COUNSEL PROGRAM TO PROVIDE DEFENSE SERVICES TO INDIGENT CRIMINALLY ACCUSED.
- II. THAT THE NOT-FOR-PROFIT CORPORATION BE HEADED BY A BOARD OF DIRECTORS COMPOSED OF REPRESENTATIVES FROM THE PRIVATE BAR, THE JUDICIARY, THE FUNDING SOURCE AND THE CLIENT COMMUNITY. THE BOARD OF DIRECTORS' PRINCIPLE FUNCTION WILL BE TO APPOINT THE CHIEF DEFENDER AND THE ADMINISTRATOR OF THE COORDINATED ASSIGNED COUNSEL PROGRAM, AND PROVIDE GENERAL SUPERVISION OF THE SYSTEM.
- III. THAT THE BOARD OF DIRECTORS DELEGATE 75% OF THE INDIGENT CASELOAD TO THE DEFENDER OFFICE AND 25% OF THE INDIGENT CASELOAD TO THE COORDINATED ASSIGNED COUNSEL PROGRAM.
- IV. THAT THE BOARD OF DIRECTORS MAKE APPLICATION TO THE JUDGE ADVOCATE, FORT CAMPBELL, KENTUCKY FOR THE CREATION OF AN ARMY EXPANDED LEGAL ASSISTANCE PROGRAM (ELAP) AT FORT CAMPBELL TO ASSIST IN PROVIDING DEFENSE SERVICES TO INDIGENT MILITARY PERSONNEL AND THEIR DEPENDENTS IN MONTGOMERY COUNTY.

- V. THAT THE DEFENDER OFFICE DEVELOP AND IMPLEMENT INTENSIVE ENTRY-LEVEL TRAINING, INSERVICE TRAINING AND CONTINUING LEGAL EDUCATION PROGRAMS FOR ALL STAFF ATTORNEYS AND PRIVATE ATTORNEYS INTERESTED IN HANDLING ASSIGNED CASES.
- VI. THAT THE CHIEF DEFENDER AND THE CAC ADMINISTRATOR DEVELOP COORDINATED PROCEDURES WHICH WILL ASSURE THAT ALL INDIGENT CRIMINALLY ACCUSED HAVE IMMEDIATE ACCESS TO COUNSEL.
- VII. THAT THE DEFENDER OFFICE SHOULD PROVIDE FULLTIME INVESTIGATION AND OTHER SUPPORT CAPABILITIES TO BOTH STAFF ATTORNEYS AND ASSIGNED COUNSEL.
- VIII. THAT DEFENDERS AND ASSIGNED COUNSEL RECEIVE ADEQUATE COMPENSATION FOR THEIR SERVICES.
- IX. THAT THE DEFENDER OFFICE BE RESPONSIBLE FOR THE CONSISTENT APPLICATION, OF FAIR STANDARDS FOR DETERMINATION OF INDIGENCY TO ALL DEFENDANTS.
- X.. THAT MONTGOMERY COUNTY BAR ASSOCIATION MAKE APPLICATION TO THE TENNESSEE LAW ENFORCEMENT PLANNING AGENCY (STATE PLANNING AGENCY) FOR A GRANT TO ASSIST IN THE IMPLEMENTATION OF THIS RECOMMENDED PILOT PROGRAM.

To allow for a full consideration of possible defense systems suitable for Montgomery County, NCDM has presented in this report three alternative defense systems complete with budget projections. The recommendation expressed should merely serve as a focal point for such consideration.

INTRODUCTION

A. Background

The Sixth Amendment to the U. S. Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right. . .to have the Assistance of Counsel for his defence." The United States Supreme Court has defined the Sixth Amendment right to appointed counsel as applicable to "any person haled into court, who is too poor to hire a lawyer",¹ and has held that this Sixth Amendment right is incorporated into the due process clause of the Fourteenth Amendment and thus is applicable to state prosecutions to the same extent as to Federal prosecutions. Since Gideon involved a felony charge, the question remained whether the Sixth Amendment's "all criminal prosecutions" language included misdemeanors as well as felonies. On June 12, 1972, the U. S. Supreme Court finally answered this question by holding that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial."² This ruling has imposed substantial new burdens upon the criminal justice system throughout the country to the extent that legal defense services must be provided to all indigents accused of crime--whether felony or misdemeanor--where imprisonment is a possible penalty.

Prior to the Argersinger case, lower courts throughout the nation were required only to provide legal counsel to indigents accused of felony offenses. In Tennessee, however, the requirement to provide counsel in misdemeanor cases

¹Gideon v. Wainright, 273 US 334, 344 (1963).

²Argersinger v. Hamlin, 407 US 23, 37 (1972).

preceded the Argersinger decision. The Tennessee Constitution provides, "(T)hat in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel. . ."³ Long before the U. S. Supreme Court required states to provide counsel to the indigent criminally accused, the Tennessee legislature enacted statutes attentive to the needs of such persons. The statutes are emphatic about the representation of indigents in felony cases:

"In all felony cases, if the accused be not represented by counsel and the court determines that he is an indigent person who has not competently waived his right to counsel, the court shall appoint to represent the accused either the public defender, if there be one in the county, or, in the absence of a public defender, a competent attorney licensed in this state."⁴

Also, the statutes anticipated the Argersinger cases by providing that:

"Every person accused of any crime or misdemeanor whatsoever is entitled to counsel in all matters necessary for his defense, as well as to facts as to law."⁵

Furthermore, Tennessee has adopted a fair and realistic definition of an indigent person:

"Any person who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney."⁶

Despite the enactment of this legislation, its implementation appears to be lagging behind. As a result, the indigent criminally accused does not always receive the effective assistance of competent counsel which is required by state law.

"The . . . constitutional and statutory guarantees rested in the law book and only on some occasions came forth with any meaningful results. The poor man as a criminal indigent defendant had to trust to the Judge and the appointed counsel for any representation."⁷

³1870 Constitution of the State of Tennessee, Article 1, Section 9.

⁴TCA § 40-2017.

⁵TCA § 40-2002.

⁶TCA § 40-2014(a).

⁷Haemmel, William C., The Poor Man Before the Bar of Justice in Tennessee- Legal Aid and Services, Public Defenders, and the Criminal Indigent Defendant Act. 38 Tenn. Law Review 33, p. 46.

This is particularly the pattern in misdemeanor cases wherein very few attorneys are being appointed to defend indigent misdemeanor defendants.

The pattern of requiring an indigent criminally accused to rely on the Judge has been criticized by the President's Commission on Law Enforcement and the Administration of Justice:

"An individual forced to answer a criminal charge needs the assistance of a lawyer to protect his legal rights and to help him understand the nature and consequences of the proceedings against him. . . .Ours is an adversary system of justice, which depends for its vitality upon vigorous and proper challenges to assertions of governmental authority and accusations of crime. Reliance upon the judge or prosecutor to protect the interests of defendants is an inadequate substitute for the advocacy of conscientious defense counsel. Limiting the right to counsel gravely endangers judicial search for truth."⁸

Furthermore, the Argersinger decision demands that the states end the pattern of not providing counsel to indigent persons accused of misdemeanors. The decision imposes substantial new burdens upon the criminal justice system to the extent that legal defense services must be provided to all indigents accused of crime, whether felony or misdemeanor, where imprisonment is a possible penalty. In this connection and relevant to the Tennessee situation, it has been aptly stated:

" . . .Tennessee will be one of the states that is most drastically affected by the decision. Should the Tennessee courts decide to be cautious. . .they will have to appoint counsel for every indigent who is accused of an offense that carries a possible prison sentence, unless he waives his right to counsel. This practice will put an immense strain on the public defender system and will probably result in the drafting of many practicing attorneys who have not previously represented indigent clients in criminal cases."⁹

⁸Task Force Report: The Courts, p. 52.

⁹3 Memphis State Law Review 156 (1973) Right to Counsel Extended to Any Imprisonable Offense - Reverberations of Gideon's Trumpet.

Since 1963, many jurisdictions have made fine progress in responding to the mandate of Gideon and its progeny. In many criminal courts, however, the defense of indigents remains substandard. The Argersinger decision brought about a realization, even to jurisdictions that were effectively responding to the earlier mandates of the United States Supreme Court, and to their own local requirements, that the existing defense systems should be examined for their effectiveness and capability of handling additional demands.

Today, courts have become attuned to the need to provide quality representation. The client community, likewise, has become more aware of their right to effective legal representation. The accused is no longer resigned to his own helplessness, nor is he unassertive of his rights. Increasingly, the criminal defendant has come to know the difference between the competent attorney acting with zeal and the attorney who is less proficient and active. The criminally accused is demanding the former. Courts across the nation, and particularly in Tennessee, have responded to this development.

Recently, the Tennessee Supreme Court adopted a new demanding standard for effective assistance of counsel in a criminal case.¹⁰ For many years a Tennessee defendant was thought by the Courts to have been effectively represented if his lawyer was not so incompetent as to "make trial a farce, sham, or mockery of justice."¹¹ In Baxter v. Rose, however, the Tennessee Supreme Court unqualifiedly discarded the "farce and mockery" rule. The new test is "whether the advice given or the services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases."¹² The court chose two federal cases (Beasley v. United States and U.S. v. DeCoster)¹³ as

¹⁰Baxter v. Rose, SW2d (1976).

¹¹State ex rel Richmond v. Henderson, 439 SW2d 263, 264 (1969).

¹²Beasley v. United States, 491 F2d 687 (6th Cir. 1974).

¹³United States v. DeCoster, 487 F2d 1197 (D.C. Cir. 1973).

delineators of the guideline for competence. With obvious approval, the Tennessee Supreme Court quoted the following minimal standards of conduct by defense counsel:

"In General - Counsel should be guided by the American Bar Association Standards for the Defense Function. They represent the legal profession's own articulation of guidelines for the defense of criminal cases.

Specifically - (1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. (2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them. . . counsel should also be concerned with the accused's right to be released from custody pending trial, and be prepared, when appropriate, to make motions for a pre-trial psychiatric examination or for the suppression of evidence. (3) Counsel must conduct appropriate investigations, both factual and legal to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that "all available defenses are raised" so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research."¹⁴

It is important to note that the type of competence demanded is not that of competence in the general practice of law but rather competence in the specific practice of criminal law. The Court cited the code of Professional Responsibility - the commonly accepted guide for ethical conduct by lawyers:

"A lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle.

¹⁴United States v. DeCoster , 487 F2d 1197, 1203-1204 (D.C. Cir. 1973).

... (it) would preclude the appointment of counsel not competent in the field of criminal law, irrespective of expertise in other fields." ¹⁵

Under this standard, it is likely that some of the ablest and most ethical lawyers in Tennessee are less than competent in a criminal case. Both Argersinger and Baxter cases clearly mandate that the criminal justice system provide indigent accused effective representation by attorneys competent and skilled in the criminal practice in all felony matters and at least those misdemeanor cases involving the probability of a jail sentence.

Unfortunately, neither of these cases referred to have addressed the funding implications and the governmental agencies that have the fiscal responsibility for such defense capability are understandably frustrated in their efforts to meet those standards. It was left to them to develop and finance systems that would best meet the local needs.

There are essentially three generic indigent defense systems now being used throughout the country:

1. 100% use of court-appointed counsel;
2. Primary use of full-time defenders;
3. A mixed system employing substantial use of the above two.

These three systems for the delivery of services will be analyzed in greater detail in the context of Montgomery County, Tennessee.

¹⁵McKeldin v. State, 516 SW2d 82, 86 (1974).

B. Statement of the Problem

Montgomery County currently uses a 100% appointed counsel system to provide defense services to the indigent criminally accused. Although there are approximately thirty-five lawyers in the local bar, only a few consider themselves criminal law specialists. Some, in accord with their ethical obligation, state that after years of work in other areas of law they are uncertain as to their full competence in criminal matters. They are particularly weary of grappling with the increasingly complex constitutional aspects of criminal law. The courts of the county have sought to spread the appointments equitably throughout the bar, permitting alternative service to the court by some attorneys. This pattern, however, has resulted in a burden on the local bar and gives rise to questions among members of the bar as to the quality of criminal representation at a time when courts are increasingly alert to even relatively minor deficiencies in representation. Additionally, members of the bar have found the method of compensation erratic and inadequate. Though proud of their public service tradition, those involved in the Montgomery County criminal justice system are asking: Is there a better method of providing quality, cost-effective service to indigent criminally accused consistent with local traditions and resources?

C. Nature of the Request

On September 4, 1975 the Montgomery County Bar Association unanimously adopted a resolution to request technical assistance through the Tennessee Law Enforcement Planning Agency from the National Legal Aid and Defender Association.¹⁶ With the endorsement of the Tennessee Criminal Justice Planner,

¹⁶Copies of the request and approval are at Appendix A.

the local bar chose NLADA's National Center for Defense Management to prepare a study of the appointed counsel system in Montgomery County and to recommend whether a public defender's office would provide better service. Attention was also to be directed toward the possibility of establishing defender offices on regional or circuit level. A format consistent with a projected statewide study was recommended by the State Planning Office.

D. Objectives of the Study

John Richardson, President of the Montgomery County Bar Association, in a letter to the Tennessee Law Enforcement Planning Agency, set forth as objectives of the study the following:

- The compilation of statistical data with reference to the number of indigents now coming through the General Sessions, Juvenile and Criminal Court system of Montgomery County.
- A study as to the number of man hours spent by appointed counsel in order to effectively represent indigents in the court system.
- A projection of the number of indigents who will be coming through the court system in the future and the number of man hours required to effectively represent them.
- A study of the effectiveness of the present system of indigent representation with a projection as to its continued effectiveness.
- A listing of the alternative methods available and feasible for handling the representation of indigents in the criminal court system and a recommendation as to the most feasible method among the alternatives.
- In the event a public defender system is recommended, a study of staffing requirements, possible sources of funding, a system of governance and other related matters.

. II

METHODOLOGY

A. The Planning Process

The planning process of making rational choices for the future involves the following steps:

- Describe the current system;
- Project the future environment;
- Develop choices among alternative systems;
- Analyze the impact of the alternatives ("pre-evaluation");
- Allocate resources of choices and implement them;
- Evaluate the impact ("post-evaluation");
- Repeat the process on a regular and continuing basis.

This report concerns itself with the first five steps in the planning process. First, the Montgomery County criminal justice system, criminal justice process and court appointment procedures are described. The present defense services, then, are assessed from the perspective of the judiciary, the private bar, prosecutorial and other court officials. Second, influences on the future criminal workload of the Montgomery County court system are made. Third, alternative defense systems are described and projected costs are discussed. Fourth, each alternative defense system is analyzed as to its capability of providing competent defense services. Finally, the report has made certain recommendations which in their implementation should represent a substantial improvement in the provision of defense services to the indigent criminally accused in Montgomery County.

B. Investigative Procedures

NCDM staff commenced the study with two separate preliminary visits. William Higham, the Director of NCDM, made the first preliminary visit to Montgomery County on August 26-27, 1975, in order to attend a meeting of the Montgomery County Bar Association. At that meeting, local attorneys expressed the dilemma they faced in attempting to meet the needs of the numerous indigent criminally accused: Only one or two of the approximately 35 bar members have proficiency and expertise in the field of criminal law. In order to provide counsel to the large caseload, the remainder of the bar, although not fully competent in the criminal practice, fill in as best they can. The attorneys present at that meeting were unanimous in their desire for assistance; hence the bar association's request for technical assistance.

On November 5, 1975, NCDM Associate Director, Gustav Goldberger, went to Montgomery County and Nashville, Tennessee for another pre-site visit. The purpose of this visit was to meet with judges, private bar members, the County Attorney, State Planner, and other key persons vitally interested in and knowledgeable about the criminal justice system in Tennessee in general and Clarksville in particular. Additionally, there was a need for understanding the existing circumstances and for gathering statistical and other relevant data.

Following this visit, NCDM staff made extensive preparation for the site visit. This included the preparation of a consultant handbook containing orientation material, preparation of an interview list of persons involved with the criminal justice systems in Montgomery County and other contiguous counties in the 9th and 21st Judicial Districts. Further, it included the arranging of a time schedule for such interviews and designing

appropriate survey instruments to determine the relevant docket data.

Prior to the site visit, the study team met for an orientation session to familiarize team members with the situation in Montgomery County and to discuss and coordinate specific assignments. During this session the study team decided to perform the site visit in two stages. Accordingly, they formed two groups. The first group examined the possibility of a regional approach and all counties in the 9th and 21st Judicial Districts were visited for purposes of ascertaining the extent to which such a regional approach to defender services was feasible. The second group concentrated their efforts in Montgomery County; interviews were conducted and a docket study was initiated.

While on-site in early December, the first group concluded and ruled out the feasibility of a regional approach. The entire study team then focused its attention on Montgomery County. The full study team concluded the field visits with a comprehensive discussion of all materials, notes, observations and opinions derived from their on-site experience. Additionally, preliminary findings and recommendations were formulated.

Following the field visit, the NCDM staff collected and analyzed the results of the docket study, interview notes, consultant reports and other data, and prepared this report.

III

DESCRIPTION

A. The Montgomery County Court System

The framework of the Tennessee court system is established by Article 6, Section 1 of the State Constitution. The Supreme Court of Tennessee is the highest appellate court and has no original jurisdiction. It hears all cases removed from the Court of Appeals or Court of Criminal Appeals to it by certiorari; and all appeals and writs of error from circuit, criminal, and chancery courts, of which jurisdiction has not been given to the Court of Appeals. The state system is divided into three geographical grand divisions (West, Middle, East). This division affects the location of the Supreme Court; in the West Division it sits in Jackson, in the Middle Division it sits in Nashville, in the East Division it sits in Knoxville. Montgomery County is in the Middle Tennessee Division.

The Court of Appeals was originally established in 1895 as the Court of Chancery Appeals, reorganized in 1907 as the Court of Civil Appeals and again reorganized in 1925 as the Court of Appeals. It is composed of nine judges and extends only to civil cases and therefore does not relate to the criminal caseload in Montgomery County or elsewhere.

The Court of Criminal Appeals was established in 1967. It is composed of seven judges, serving eight-year terms. The jurisdiction is appellate only and extends to all criminal cases, felony and misdemeanor cases arising under the Post-Conviction Procedure Act; criminal contempt proceedings and extradition cases. Where the sole question is the constitutionality of a statute or ordinance, the Supreme Court has exclusive jurisdiction. For Montgomery County purposes, this Court of Criminal Appeals also sits at Nashville.

Courts of General Sessions are created by special acts applicable to each county. Montgomery County has one General Sessions Court presided over by Judge Carol Catalano. Generally they have all the civil and criminal jurisdiction of Justices of the Peace. In counties where Courts of General Sessions are created, Justices of the Peace have no civil or criminal jurisdiction. For all practical purposes, all criminal cases originate in the General Sessions Court except for direct indictments to the Criminal Court. The General Sessions Court can hear and render final judgment in all misdemeanor cases where there is a written plea of guilty, or the defendant requests a trial on the merits and expressly waives indictment, presentment, grand jury and jury trial. The court can impose punishment within legal limits, but may impose a fine of only up to \$50.00.

Among other things, the General Sessions Court in Montgomery County handles juvenile matters, preliminary hearings for felonies that are not presented directly to the grand jury, and bail matters. It seem to be the practice to allow the General Sessions Courts to reduce felonies to charges within its jurisdiction which may have questionable validity.¹⁷ As in the case of Justices of the Peace Courts, the General Sessions Courts are not of record. Following disposition in General Sessions Court, any person aggrieved may appeal to the criminal Court on the basis of a 'de novo' trial; i.e., a new trial is conducted with or without a jury.

Montgomery County has a special Criminal Court, which is a branch of the 9th Judicial Circuit Court, dealing solely with presentment and indictment for criminal offenses under state statute. This Criminal Court is presided over by the Honorable Judge Sam Boaz. Most criminal cases that are disposed of in the Criminal Court are felonies that were bound over to the

¹⁷ See TCA § 40-423; TCA § 40-118; Solomon v. State, 529 S.W. 2d 743.

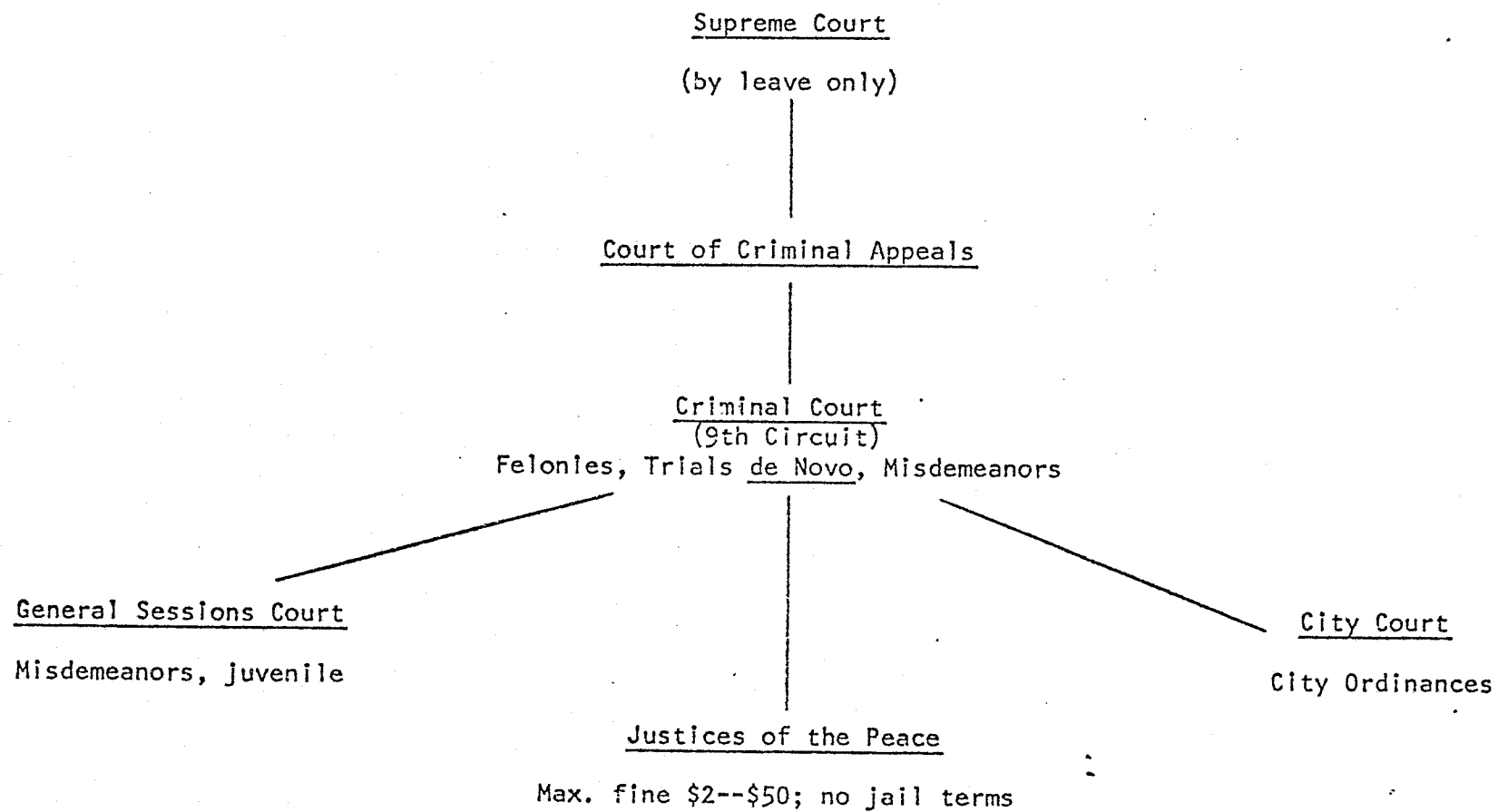
grand jury from General Sessions and indictments have been issued. Occasionally, indictments are referred directly out of grand jury and as stated above, misdemeanor cases can be taken to said Court for a trial de novo. The Criminal Court is of record, and appeals lie to the Court of Criminal Appeals.

Clarksville is a home-rule municipality and has established a City Court to try violators of municipal ordinances. This Court may impose maximum penalties of 30 days' imprisonment, of \$50.00 fine, or both. Also, this Court has authority touching upon arrest and preliminary trial, discharging, and, binding over, of those charged with offenses against the state committed in the City of Clarksville.

The Justice of the Peace can dispose of guilty pleas involving fines of \$2.00 - \$50.00 and can try misdemeanor cases that carry a maximum punishment of \$50.00 and no possible jail term. Should the offense before the Justice of the Peace be over that amount or provide for imprisonment, the case must be bound over to the higher court for further disposition. By case law, however, the justice of the peace may reduce a charge to fit the jurisdiction of the Court.

Figure 2.1 on the following page is a diagram of the Montgomery County Courts System.

Figure 2.1. MONTGOMERY COUNTY CRIMINAL COURT SYSTEM



B. Criminal Justice Process -- Montgomery County

The NCDM staff has prepared a graphic display depicting the process wherein the defendant follows the criminal justice system of Montgomery County. To support this display, it will be helpful to describe the general requirements in connection with arrest procedures. A person can be arrested by any one of three law enforcement agencies, the Clarksville Police, Montgomery County Sheriff or the State Highway Patrol. In any case, the defendant is brought to the Justice of the Peace, the City Court or General Sessions Court for preliminary arraignment and bail consideration. The defendant must be advised of his right to counsel, grand jury and jury trial depending on the nature of the offense. He must be afforded reasonable time to procure counsel and in the event of indigency receive appointment of counsel upon request.

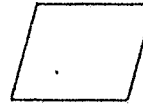
A preliminary examination is held before the magistrate, witnesses for the prosecution are presented and the defendant may make a statement. If the magistrate finds no probable cause to believe that the defendant committed the crime charged, he is discharged forthwith. Otherwise the defendant is committed for further proceedings. No plea will be accepted without counsel or written waiver of same and a waiver will not be accepted unless the Court first advises the defendant of his right to counsel and determines mental capacity by inquiry into the defendant's background, experience, conduct and such other matters as are appropriate.

Separate charts have been developed for the following:

- Misdemeanors - General Sessions Court
- Felonies - General Sessions Court and Grand Jury
- Felonies - Criminal Court (Circuit Court)
- Misdemeanors - Criminal Court (Circuit Court)

The flowchart display is designed to show the following:

- Where the accused enters the system--

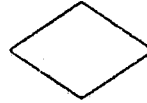


- Where the accused goes through some processing--



- Where a decision is required which will determine where

the defendant will proceed next--



- Where the defendant will leave the criminal justice

system--



- Where the defendant will transfer to another subsection

of the criminal justice process or where the display will

recommence in the same subsystem--



Figure 2.2. Misdemeanors - General Sessions Court

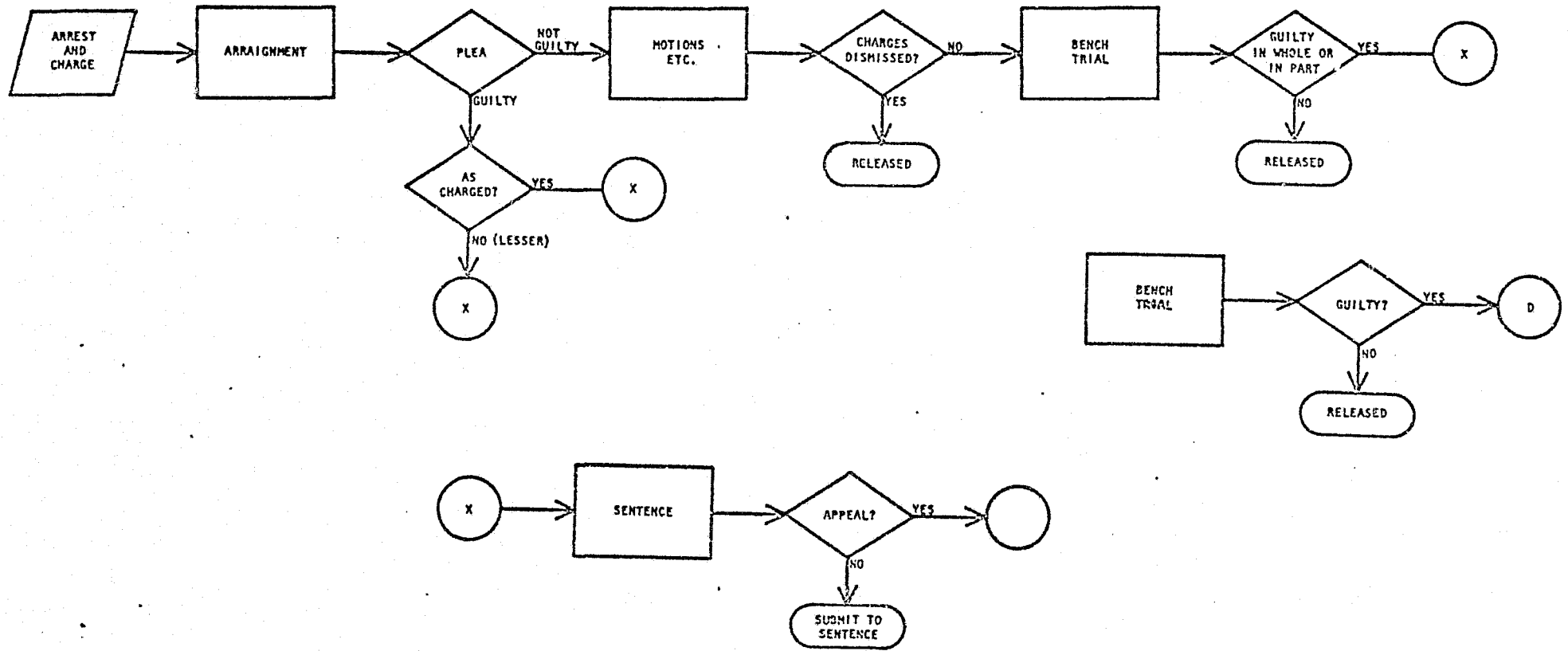


Figure 2.3. Felonies - General Sessions Court and Grand Jury

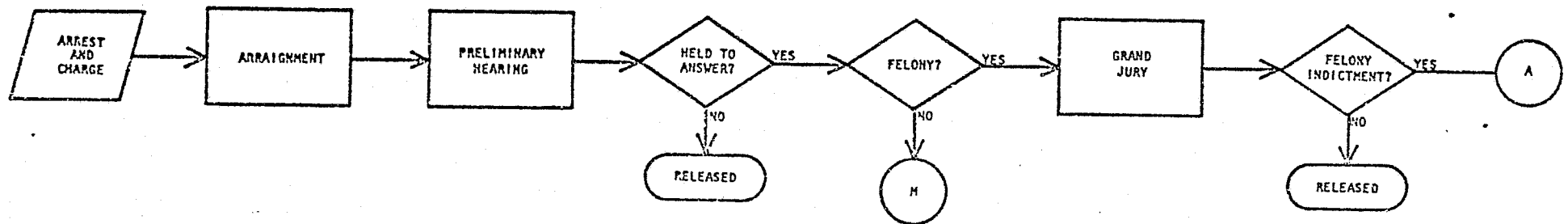


Figure 2.4. Felonies - Criminal Court (Circuit Court)

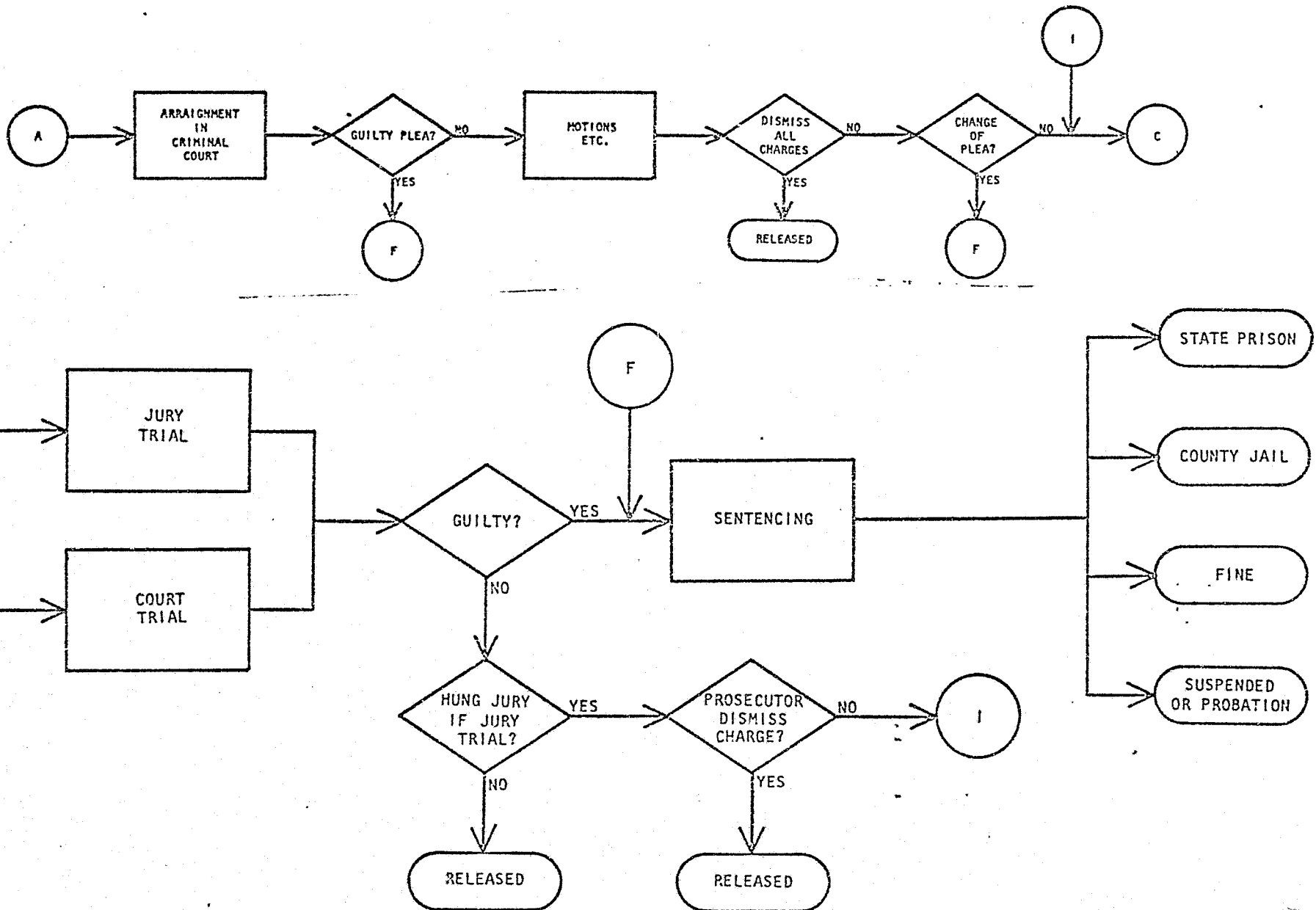
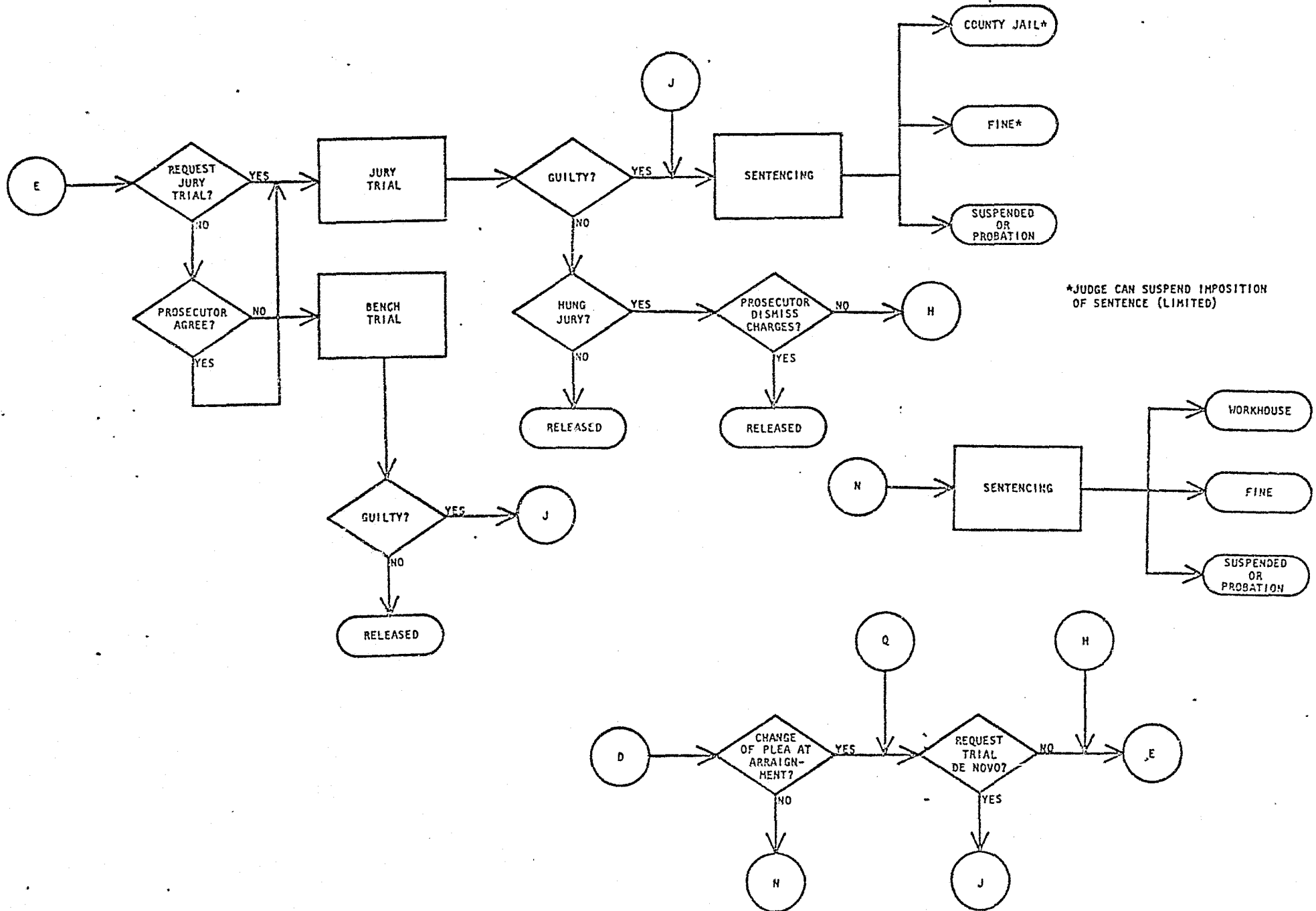


Figure 2.5. Misdemeanors - Criminal Court (Circuit Court)



C. Court Appointments

The Tennessee Code requires the appointment of counsel by the court where the defendant desires and is unable to employ counsel.¹⁸ For the purpose of determining the eligibility of a criminally accused for appointed counsel, the statutes define an indigent person as

"any person who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney."¹⁹

Other sections of the statutes require the appointment of a public defender or competent attorney; that counsel have sufficient opportunity to prepare a defense;²⁰ that appointed counsel continue representation at all stages of the proceedings, including appeals.²¹ Counsel fees are regulated by statute,²² which provides that counsel is entitled to \$100 for each trial day up to a maximum of \$500; \$500 maximum is allowed for proceedings in the Supreme Court.

As a practical matter, the vouchers are submitted, adjusted and approved by the Executive Secretary to the Supreme Court; funds available to the Court for such fees are appropriated annually by the Legislature and placed in a fund under the Indigent Defendant Act.²³ The annual I.D.A. fund deficit is substantial and as a result, the Executive Secretary must keep the fees down, or even worse, deny compensation. In June 1965, a fee schedule was established providing for \$25 per guilty plea and up to \$50 per day for trial work.

The counsel fee problem remains serious. The 1975-76 recommended appropriation for adult indigent defendants' counsel was set at \$750.00 for the

¹⁸TCA § 40-2003.

¹⁹TCA § 40-2014.

²⁰TCA § 40-2017.

²¹TCA § 40-2018.

²²TCA § 40-2023.

²³TCA § 40-2024, 2028.

entire state and is limited to felonies only. An additional appropriation of \$40,000 was allocated for juveniles. There are no funds for misdemeanor representation at all and lawyers appointed in this category are obligated to participate on a pro bono basis.

The outlook for more equitable compensation was attempted on January 2, 1975, when the Tennessee Supreme Court adopted a new Rule 44. Effective July 1, 1975, this new rule provides for a maximum rate of \$30 per hour for time spent in court, not to exceed the statutory \$100 daily maximum; \$20 per hour is allowed for preliminary hearings, trial preparation and miscellaneous with a ceiling of \$500 for any one case. This "improvement", however, only creates the basis for a more equitable distribution of the state funds that remain substantially inadequate.

The courts in Montgomery County, both General Sessions and Criminal Court, have made every effort to spread the burden of appointments throughout the entire bar membership. Those lawyers that do not feel sufficiently competent to handle criminal work are asked to provide alternative service. The courts maintain and adhere to a rotational selection process as much as possible, and only in the most serious of cases will they make specific choice of counsel most expert in handling the more complex criminal cases. The spirit of public service prevails; defendants in Clarksville are not denied counsel for lack of funds and attorneys willingly give of their time without the expectation of a reasonable fee. Misdemeanors are indeed carried by appointed counsel entirely gratis. Suffice it to state that the appointment system in Tennessee in general and Montgomery County in particular is at best an effort to accomplish legal defense objectives for a great number of indigent defendants with considerable meager resources.

D. Influences of Fort Campbell

A study of the criminal justice system in Montgomery County would be incomplete without considering Fort Campbell and its influence on that system. Fort Campbell is a military reservation located near Clarksville and is really an integral part of that community. As of February 1976, 22,228 military personnel were stationed there together with 23,000 military dependents living on or near the base. This represents a sizeable proportion of the Montgomery County population which is estimated at 72,000.

According to the Montgomery County District Attorney's Office, as many as 80 percent of all misdemeanor cases disposed of in the General Sessions Court are military related; that is, they involve soldiers, dependents or other civilian workers residing at Fort Campbell. Many of these cases relate to disorderly conduct, bad check charges and driving while intoxicated. In the felony category the percentage was estimated at 50 percent military related. These estimates were supported by informed opinions derived from military personnel at the base. Approximately 50 percent to 80 percent of all drug cases appear to involve the military and a substantial increase in reported burglaries (146 in 1973 to 375 in 1974) may be related to the drug situation.

The study team attempted to ascertain whether military personnel were experiencing unusual problems in connection with the criminal justice process in Montgomery County. After extensive conversation and correspondence with staff at the Office of the Judge Advocate General it was learned that defendant-soldiers frequently felt that they had not been provided the services they had expected or desired. Their comments or complaints could be described as follows:

- Attorneys were not appointed when clearly they could not afford counsel.
- Bond was set unusually high; they were not being released to their commanding officers pending trial.
- The Judge Advocate Corps were not intervening in their behalf.
- As a result of the above, they were inclined to dispose of their cases on the basis of a quick plea of guilty even where there were possible defenses available.
- These guilty pleas would have unexpected and often serious consequences with respect to their Army status, such as reprimands and possibly administrative discharges.

These comments were taken up with the JAG officers at Fort Campbell and they appeared most enthusiastic in favor of a public defender office which they felt could alleviate a number of the problems recited above.

"Working with a public defender would be ideal. When men join the Army they are told that they will get the best legal services from the Army. Then they find themselves in a strange town where the amount the JAG Corps can do for them is about nil."

In fact, the military attorneys are most anxious to assist the Montgomery County Court in dealing with the defense of those that are stationed at Fort Campbell. They have been concerned with the situation for some time.

"We are very pleased that someone is trying to do something for the soldiers. We want to help in any way we can. Most of us would love to help out in the civilian courts in any way we can."

"I would be willing to take the Tennessee Bar Exam in order to help the soldiers in the Tennessee Criminal Courts. The Army is not giving them what they promised."

The Department of the Army Office of the Judge Advocate General has created an Expanded Legal Assistance Program (ELAP). It encourages

JAG Corps Attorneys to appear in civilian courts as legal representatives in cases where military personnel or their dependents cannot afford counsel. This program is presently in operation on 13 Army Installations in 11 states and negotiations for initiating such a program in other states are in progress. An ELAP program could be started at Fort Campbell upon the initiation of the local Judge Advocate and upon approval of Headquarters of the Judge Advocate General. Consultants were informed that:

"A successful program depends on many factors, not the least of which are the attitude and approval of the local Bar Association and the availability of adequate personnel."

Accordingly, it would appear that further initiative by the Bar and the Courts in Montgomery County with respect to this matter could do much to solve the problems resulting from the implications of Fort Campbell. The military lawyers reportedly are anxious to cooperate.

The issue of license to practice was considered. JAG attorneys who are not members of the Tennessee Bar could be admitted on waiver in some cases; they could of course take the Bar Exam; or they could gain admission on a case-by-case basis with permission of the Court in association with appointed counsel or public defender. Furthermore, the military lawyer could assist in related matters that do not require formal appearance such as investigation, legal research and counseling.

IV

ASSESSMENT OF DEFENSE SERVICES AS PERCEIVED BY--

A. The Judiciary

The study team interviewed several members of the judiciary presiding in Montgomery County, the 9th and 21st Judicial Circuits as well as Justices of the State Supreme Court. It was pointed out in the introduction that part of the study design was to obtain a wider perspective of indigent defense services in Tennessee to determine the possibility of a regional or circuit approach to a defender office to include Montgomery County. These considerations were discussed with the Judges and their opinions concerning defense services in general were solicited. The interviews were conducted on the basis that comments would not be directly attributable to the respective judge. Their comments therefore are quoted at random and run as follows:

"I have been practicing for many years and never got a penny for representing indigents. I am proud of the fact that I waived all compensation."

"I wish the state did not have to go the public defender route but at this point in time it is needed."

"The present system is hideously bad but not because of the attorneys."

"Very few people are without lawyers. If they don't have a lawyer it is probably because they don't want one."

"It does not take much expertise to compete with the District Attorney General's Office."

"Top law firms do not deal with criminal law at all, and when any of the top-flight civil attorneys get involved in criminal matters they do a disastrous job."

"Some attorneys are overpaid and some are underpaid."

"I don't approve of partial payment. You should either pay the attorney adequately or don't pay him at all."

"There are no facilities whatsoever for investigation."

"The attorneys who represent poor people in this state are incompetent."

"People with money do not go to the electric chair."

These comments speak for themselves. It is the general impression of the team, however, that while many judges had an emotional and nostalgic attachment for the days when lawyers served out of a pure sense of civic and professional duty, they had come to accept the fact that new conditions and attitudes make a defender approach necessary. Almost all of the judges interviewed favored a statewide system but felt that the Legislature was not ready to put up the money for it at this time. There appeared to be a recognition that appointed counsel was not always up to the standards of a criminal practitioner; that investigative resources were limited in the extreme and that appointed counsel were underpaid. The local judges in Montgomery County expressed confidence in the quality of representation provided indigent accused; it was stated that over half of the local bar had some expertise in criminal law; that compensation was adequate in some cases and not in others. One judge was not enthusiastic about the prospects of a public defender office but allowed that the success of such an innovation would depend largely upon the attorneys operating such an office.

Concern was voiced in connection with the manner in which defenders would be selected. It was felt that a defender office, if created, should not be as large as the prosecutor's.

It is fair to state that, while the judges in Montgomery County have differing philosophical views on the subject, they agree that something

should be done to alleviate the burden of the local bar and if a defender approach is a solution, so be it. Neither Judge Sam Boaz nor Judge Catalano would appear to be in serious opposition to a defender office should that be the most effective way in which to provide quality representation.

B. The Private Bar

The personal interviews of some private lawyers revealed a strong preference for the creation of a defender system. They felt that defenders would have a more current knowledge of criminal law and procedure and would possess greater expertise in criminal trial techniques.

"I know one of the best lawyers in Clarksville who is very good at handling large estates, but I don't think he has much experience with Wade and Miranda and the various other new Supreme Court decisions. I think he'd be the first to say that he feels pretty lost when he get in criminal court."

"There are fine attorneys in this town who I haven't seen in criminal court in twenty-five years. When they come over here, I think it's unfair to the defendants to appoint them to defend them. They are not criminal lawyers. There are certain kinds of civil cases that, when a man comes to me, I send him over to those fellows."

"We have a lot going on here. We have a population of about 70,000. But then there is Fort Campbell. Now there are usually about 20,000 soldiers out there. Crime is most prevalent with young men between 18-30 years of age. It would take another Montgomery County to produce another 20,000 potential defendants. We also have the college here. For years we didn't even know it was out there, but now with drugs and such the boys and girls get in more trouble than they used to."

It is not unusual for lawyers to be clannish and protective of each other particularly in a small jurisdiction. It was the opinion of the study team that the members of the Montgomery Bar were indeed very conscientious with respect to indigent representation; that the lack of funds

did not enter into the consideration of the amount of time spent on indigent cases. In fact, one attorney took an appointed case to the U. S. Supreme Court and tried the case twice for a reported total sum of \$300.

The following comments do not appear to be atypical:

"We don't have a lawyer in Clarksville, that I know of, who isn't making a pretty good living. Most of them are found in church on Sunday. . .and I just think the lawyers in Clarksville are way, way out in front when it comes to being gentlemen. The morality of the lawyers in Clarksville is something special. I know. There was a time since I've been practicing law here that that couldn't be said."

"We had an attorney in town, who recently passed away. He was a churchman and probably pretty nearly a millionaire. He could turn out a tremendous lot of work. He never had a nice law office until a year or two before his death. But nobody could tell when he was being paid on a case and when he was appointed. There was no way to tell the difference."

The consultant team had at first considered sending out questionnaires to the Montgomery County bar members soliciting their views on the establishment of a defender office. Upon reflection, it was determined that those views had been clearly expressed by the bar association and that additional inquiry would be redundant. The private bar view appears to be that there is a need to upgrade the expertise in criminal law; that the local attorneys are busy with their private practices allowing them little time to develop such expertise; and that the funds available for appointed work are an inadequate economic incentive for any lawyer to specialize in criminal practice. Accordingly, the consensus seems to be that a defender office may be a good solution.

V

INFLUENCES ON THE FUTURE WORKLOAD
OF INDIGENT DEFENSE SERVICES IN MONTGOMERY COUNTY

In order to compare and evaluate alternative defense systems which may be used in Montgomery County in the future, it is first necessary to project the indigent caseload in the county court system. Factors affecting this caseload can be categorized as general influence on criminal caseload and changing trends in indigency rates. This section describes several factors in this category and the effect on indigent caseload in the adult and juvenile court systems.

A. General Influences on Criminal Caseload

The reported crime data should be the starting point for any analysis of the criminal justice system. In Table 5.1, sample reported crime data of seven major offenses for 1973 and 1974 is displayed.

Table 5.1. Reported Major Offenses in Montgomery County, 1973-1974		
Offense	1973	1974
Murder	6	8
Forcible Rape	13	16
Robbery	44	114
Aggravated Assault	57	60
Burglary	484	802
Larceny/Theft	805	1,118
Motor Vehicle Theft	201	194

The increase of reported crime for Montgomery County appears to be representative of the statewide trend. The Tennessee Law Enforcement Planning Commission reported that "(c)rime rate trends for Tennessee have continually increased from 1969 through 1973." Their data shows, relative to 1968, an increase of nearly 60% in reported crime by 1974. Meanwhile, the population of Tennessee rose only 7% during the period 1970-1975. The population of Montgomery County, on the other hand, rose 13%, nearly twice the state rate, during the same period.

A more direct impact on the criminal caseload handled by the courts than reported crime is the number of arrests. Table 5.2 displays the number of adult and juvenile arrests in Montgomery County for major offenses in 1973. Although this data is insufficient to project changes in the criminal caseload, it does offer a flavor of the magnitude of the situation in Montgomery County.

Table 5.2. Adult and Juvenile Arrests for Major Offenses in Montgomery County, 1973		
Type of Crime	Under Age 18	Over Age 18
Murder & Non-negligent Homicide	2	33
Manslaughter	1	1
Forcible Rape	0	9
Robbery	0	31
Aggravated Assault	7	31
Burglary & Breaking & Entering	65	72
Larceny/Theft	113	82
Auto Theft	16	7

The criminal caseload in Montgomery County has risen significantly over the past five years. The felony caseload in Criminal Court in 1974 was more than 60% greater than the 1971 caseload. Table 5.3 displays the criminal caseload in Montgomery County from 1971 through 1974, including General Sessions Court.

Table 5.3. Criminal Caseload for Montgomery County, 1973-74								
Year	CRIMINAL COURT (9th Judicial Circuit)						CRIMINAL COURT OF APPEALS	SUPREME COURT
	Misdemeanors			Felonies				
	Cases Filed	Cases Concluded	Cases Pending	Cases Filed	Cases Concluded	Cases Pending	Appeals Filed	Appeals Filed
1971	45	72	*	217	213	*	7	1
1972	55	67	*	259	236	*	9	0
1973	79	70	14	268	262	75	14	0
1974	58	85	21	349	348	108	13	0

*Data not available.

Table 5.4 displays a more detailed account of the caseload in Montgomery County Criminal Court for 1974 and the first 10 months of 1975 by type of crime.

In addition to the caseload in Montgomery County Criminal Court, the study team investigated the criminal caseload in Juvenile Court and General Sessions Court. Table 5.6 displays the caseload in Juvenile Court for Clarksville and Montgomery County, Tennessee for the period 1972-1975.

Not all of the juvenile offenses would require the potential assistance of counsel. For the purpose of this study it is sufficient to limit the focus to the Delinquent Acts, drugs and some of the unruly cases. The type

of unruly acts this study is concerned with are the runaway and ungovernable behavior cases of which there were a total of 68 in 1973, 63 in 1974, and 92 in 1975.

Table 5.4 PROCEEDINGS IN JUVENILE COURT For Clarksville and Montgomery County, Tennessee 1972-1975				
<u>TYPE OF OFFENSE</u>	<u>1972</u>	<u>1973</u>	<u>1974</u>	<u>1975</u>
Delinquent Acts	304	291	279	363
Unruly	171	120	106	196
Drugs	14	10	14	37
Dependent & Neglected	40	50	37	83
Traffic	320	302	276	300
Custody	NR	NR	NR	30
TOTALS	849	773	712	1009
Source: Annual Reports of the Juvenile Court NR - Not reported separately prior to 1975				

The study team used the monthly and annual reports of the individual courts to determine the caseload for the Criminal and Juvenile Courts. Similar data for the General Sessions Court was unavailable. To obtain this caseload data the study team administered an extensive docket study of the General Sessions Court. The docket study disclosed that approximately 6,000 cases are filed each year in General Sessions Court. Of those cases, approximately 63%, 3,800, are minor offenses. Of the remaining 2,200 cases, about 9%, 200 cases, are felonies which are referred to Criminal Court. The remaining 2,000 cases are misdemeanors which potentially could result in imprisonment, and, therefore, are affected by the mandate of the Argersinger decision. The actual possibility of imprisonment, however, is unrealistic at this time in any more than half of these misdemeanor cases. In future projections of the

criminal caseload, therefore, 50%, 1,000 cases, are used.

The above data reveals that the number of reported crime and arrests, population and court caseload has steadily increased during the past five years in Montgomery County. The study team believes, based on their investigation, that this rise will continue during the remainder of this decade. The projected caseoads for Criminal Court, Juvenile Court, and the Court of Criminal Appeals are extrapolated from the caseloads for previous years and reported in Tables 5.2, 5.3 and 5.4. The projected caseload for General Sessions Court was derived from the docket study. In Table 5.5, the study team, therefore, projects the following yearly caseloads for Montgomery County during the period 1976-1980:

Table 5.5 Projected Yearly Caseloads
for Montgomery County 1976-1980

Criminal Court--felonies	375
--misdemeanors	100
General Sessions Court	
--misdemeanors	1,000
Juvenile Court--	525 (includes 100 unruly cases)
Appeals to Court of Criminal Appeals	16

B. Trends and Indigency Rate

Although the general impact on criminal caseload, discussed above, greatly affects the number of cases requiring a court-appointed counsel, the greatest effect on this workload is the indigency rate. As discussed earlier in this report, recent Supreme Court decisions and changing social beliefs have fostered the concept and activity of providing legal assistance

to indigent defendants.

Actually determining the indigency rate, the percentage of defendants eligible for court-appointed counsel, is a difficult process. Perceptions of "indigency" vary and usually solid statistical data is not available. Comments of various persons interviewed in Montgomery by the study team during the site visit illustrate the problem.

- The Judge of the Criminal Court estimated the indigency rate among defendants accused of felonies to be 75%.
- The District Attorney General estimated the theoretical indigency rate to be near 100%, but in actual practice to be about 60%.
- Local members of the Montgomery County Bar Association estimated the indigency rate to be between 30-40%.

Studies conducted in Tennessee and in the nation also have resulted in different estimates.

- The Judicial Conference of Tennessee estimated in 1965 that about 50% of all defendants accused of felonies would be indigent as defined by the Tennessee Indigent Defendant Act (IDA).²⁴
- A study of the IDA estimated that during the period 1965-1970, 50-75% of all defendants accused of felonies were covered by the act.²⁵
- NLADA's National Defender Survey of 1971 estimated

²⁴See n.24 38 Tennessee Law Review, 33.48 (1970).

²⁵Hannel, William G., The Poor Man Before the Bar of Justice in Tennessee - Legal Aid Services, Public Defenders, and the Criminal Indigent Defendant Act. 38 Tennessee Law Review 33 (1970).

the national indigency rate for felony defendants to be 65% and misdemeanors to be 47%; for rural counties, the rates were 61% for felony defendants and 36% for misdemeanor defendants. The survey estimates that juvenile indigency rate was approximately 75%.²⁶

- The docket study administered in Montgomery County by the NCDM study team failed to disclose an indigency rate for misdemeanor defendants in General Sessions Court. The docket study of Criminal Court during the period 1973-1975, however, disclosed that the indigency rate among felony defendants was approximately 44%.

Based on the interviews conducted during the site visit, the docket study of the Montgomery County Criminal Court and General Sessions Court, and the various state and national studies cited, the study team has attempted to estimate the indigency rate for the period 1976-1980 in the Montgomery County Criminal Court System. Although the docket study disclosed a 44% indigency rate among felony defendants during 1973-1975, the opinions of those interviewed during the site visit and the conclusions of other Tennessee studies demand a realistic projection of a 50% indigency rate among felony defendants during the next five years. The projected indigency rate of 38% for misdemeanor defendants is a conservative estimate based on the NLADA survey results of a 36% indigency rate for misdemeanors in rural counties. Table 5.6 displays the estimated indigency rates for Montgomery County Criminal Court, General Sessions Court, and Juvenile Court.

²⁶

NLADA, The Other Face of Justice, 70-72, 82-83 (1971).

TABLE 5.6 PROJECTED INDIGENCY RATE IN MONTGOMERY COUNTY CRIMINAL COURT SYSTEM, 1976-1980

<u>Court</u>	<u>Indigency Rate</u>
Criminal Court--felonies	50%
--misdemeanors	38%
General Sessions Court	
--misdemeanors	38%
Juvenile Court	75%
Court of Criminal Appeals (Appeals)	75%

Applying the indigency rate projections displayed in the above table with the criminal caseload projections displayed earlier produce the projected yearly indigent criminal caseload in Montgomery County during the period 1976-1980.

TABLE 5.7 PROJECTED YEARLY INDIGENT CRIMINAL CASE LOAD
MONTGOMERY COUNTY, 1976-1980

<u>COURT</u>	<u>CASE LOAD</u>	<u>INDIGENCY RATE</u>	<u>INDIGENT CASELOAD</u>
Criminal Court--felonies	375	50%	188
--misdemeanors	100	38%	38
General Sessions Court			
--misdemeanors	1000	38%	380
Juvenile Court	525	75%	394
Court of Criminal Appeals	16	75%	12

The estimates in Table 5.7 are the study team's best forecast of the indigent caseload in Montgomery County for the near future, given the data concerning the present system and local and national trends in public defense.

In the following sections of this report these estimates are used in determining the cost of providing defense services to the indigent criminally accused.

VI .

COST OF THE PRESENT ASSIGNED COUNSEL SYSTEM

Attorneys appointed to represent indigent criminally accused in Tennessee receive compensation from a fund set up under the Indigent Defense Act. Tennessee Supreme Court Rule 44, effective since July 1, 1975, provides for compensation of \$30/hour for attorney time spent in court, not to exceed the statutory maximum of \$100 per day; \$20 per hour for preliminary hearings, trial preparations, etc., with a cost of \$500 per case. Few attorneys, however, actually receive compensation according to this rule because insufficient resources are appropriated for the IDA fund.²⁷

In 1975, only \$8,000 was allocated to Montgomery County to compensate attorneys for their time in representing indigent felony defendants. No funds were appropriated for time spent on misdemeanor cases. Because so little money is appropriated, many vouchers for compensation submitted by attorneys are rejected and unpaid; in the case of other vouchers, the amount of compensation is reduced from the amount requested and in many cases attorneys do not even bother to submit vouchers. As a result of this practice it is impossible to determine the real cost of the assigned counsel system.

It is to the credit of the Montgomery County Bar that they have continued to provide competent representation to indigent criminally accused despite the lack of compensation. Tennessee, however, cannot expect this situation to continue. Recently, attorneys across the nation have challenged this practice of placing the entire burden of providing defense services to the indigent criminally accused on the private bar. Court decisions have

²⁷See Stewart, Gary V., Indigent Defense, Appendix C.

begun to recognize the attorneys' constitutional right to compensation for services rendered. The most noteworthy of these is the Kentucky high court's decision in Bradshaw v. Ball. The Court explained:

"It is in the public interest that the administration of criminal justice proceed fairly, impartially, expeditiously and efficiently. Therefore it appears elemental that the public interest in the enforcement of criminal laws and the constitutional right of the indigent defendant to counsel can be satisfied only by requiring the state to furnish the indigent a competent attorney whose service does not unconstitutionally deprive him of his property without just compensation.²⁸

Consequently, the Court held that assigned counsel would no longer be required to take court appointment without compensation beginning 90 days after the issuance of the Court's mandate.

The New Jersey Supreme Court in State v. Rush recognized that the heavy burdens placed on defense attorneys compel compensation. The Court stated:

"A criminal case used to be a fairly simple affair. . . Today, with rapidly changing concepts relating to sundry matters, such as confessions, search and seizure, joinder of defendants, right to counsel, etc., the defense of counsel consumes far more time than when we came to the bar. . . Further, the total demand will likely increase, for while criminal proceedings now dominate the stage, in the wings are other matters -- minor offenses, juvenile delinquency, and civil commitments. . . We are satisfied that the burden is more than the profession alone should shoulder. . ."²⁹

If the Tennessee Supreme Court were to follow the reasoning of the Kentucky Supreme Court or the New Jersey Supreme Court, it is sufficient to note that the cost of the present assigned counsel system would skyrocket from the \$8,000 spent in Montgomery County in 1975.

²⁸487 SW2d 294, 298 (Ky. 1972).
²⁹217 A2d 441, 448 (N.J. 1966).

VII

ALTERNATIVE OPTIONS

The study team considered three alternative options for improving the existing system of Montgomery County for providing legal defense services to indigent criminally accused. The three options, the Coordinated Assigned Counsel System, Defender System and Mixed System, are variations of the basic defense systems employed throughout the country.

The structure of each alternative option is described in Section A. This is followed by a discussion of the projected costs for each system in Section B. Alternative options are subsequently analyzed as to their capability of providing competent defense services in Section C.

A. Description

1. Coordinated Assigned Counsel (CAC) System.

The term "assigned counsel system" is used here to describe the current practice in Montgomery County where attorneys are appointed by the court to represent indigent defendants on a case-by-case basis. The innovation proposed under the CAC system is the appointment of an administrator whose function it would be to coordinate the activities of the court and the private bar with respect to such appointments.

In Montgomery County, this administrator would be responsible for (1) compiling a comprehensive list of qualified attorneys for appointments; (2) adopting an equitable rotation system to ensure equal distribution of cases; (3) coordinating the immediate appointment of counsel to indigent criminally accused; and (4) assisting in the development and administration of a fee distribution plan which equitably compensates attorneys for actual time

expended in the disposition of appointed cases.

Ideally, a CAC program with sufficient staff and financial resources could be responsible for (1) establishing certification standards and co-counseling arrangements for new attorneys seeking appointments and, in that connection, arrange for an appropriate training program. Additionally, ongoing training programs could be developed to ensure continued effectiveness of counsel; (2) developing and implementing a system of monitoring the performance of appointed counsel; (3) developing a uniform procedure for effective determination of indigency to be applied consistently to all defendants; and (4) providing investigation, expert witnesses and other support to appointed counsel.

The Administrator of the CAC program should be appointed by an independent board or commission. This would insulate the appointment of counsel from unwarranted judicial or political influence. It is suggested that such a board or commission include representatives of local government, the judiciary, the bar and the community served, especially low-income and minority groups.

2. Defender System

The term "Defender System" describes a method of providing indigent defense services where an attorney or group of attorneys, through a contractual arrangement or as public employees, provide legal representation for indigent criminal defendants on a regular basis.

Under this plan, qualified defense lawyers are hired to represent all criminally accused persons who are determined to be indigent and who request legal representation. The representation should include the handling of felonies, misdemeanors, juvenile cases, post-conviction remedies, appeals,

extraordinary appearances and advice relating to all of these. Necessary support facilities, including adequate office space, equipment, investigatory capability and access to expert witnesses are absolute prerequisites to ensure the indigent defendant both equal justice under the law and effective assistance of counsel. It would be expected, from time to time, that conflicts of interest will arise, particularly in connection with co-defendants. When such conflicts arise, the private bar would be called upon for appointments.

Staff attorneys would be assigned to different courts on a rotating basis, in order to equalize their experience. This would also tend to prevent a relationship or accommodation which often develops when one attorney routinely appears before the same judge.

It would be the responsibility of the defender office to (1) arrange for a method that assures immediate representation; (2) develop the mechanism whereby the determination of indigency can in the first instance be made by the defender staff or other non-judicial personnel; and (3) develop an obligatory in-service and advanced training program for staff attorneys dealing with tactics, techniques and new laws which affect day-to-day criminal practice.

3. Mixed System

A mixed system would include the establishment of a Coordinated Assigned Counsel program and a Defender Office. Each component of this system would handle and be responsible for a certain percentage of the indigent criminal caseload. While the division of cases should be left to the respective components, it is suggested that the division not be based solely on the type of case; for example, all felonies to assigned

counsel and all misdemeanors to defenders: It is preferable, instead, to have each component involved in the full range of criminal cases.

Under the Mixed System, many of the functions of a CAC program could be performed by and through the Defender Office. Accordingly, the Defender Office, in addition to the duties directly incident to the day-to-day representation of indigent defendants, should be responsible for the following:

- Conducting an in-service and advanced training program for its attorneys as well as for assigned counsel;
- Implementing the process of determining indigency for all defendants at or near the time of arrest;
- Providing for immediate access to counsel for all those primarily determined to be indigent;
- Providing for investigative and other support resources for itself and for assigned counsel.

B. Projected Costs

Earlier in this report, it was explained that court-appointed counsel in Montgomery County do not always receive compensation for their services in representing the indigent criminally accused. Because of this, the study team was unable to derive a projected cost of the present assigned counsel system which would be valid for analytical purposes in making cost-comparisons with the various alternative defense systems. Rather than projecting detailed budgets for each system, therefore, only the major start-up and yearly operating expenses have been identified.

1. Start-Up Costs

In establishing any new office or system, there are certain expenses which must initially be expended. These start-up costs, however, are a one-time expense and should not be considered as part of the yearly operating budget of a system. The equipment requirements were determined by the study team's judgment and law office management standards. The cost per item of various equipment is given in Table 6.1.

Table 6.1. Cost of Office Equipment	
Item	Per Unit Cost
desk	\$200
executive chair	125
desk chair	75
sec. chair	55
side chair	75
file cabinets	130
bookcases	50
dictaphones	500
projector	130
screen	55
typewriter	700
photo. equipment*	560
tape recorder**	140

*Olympus, Model OM-135 camera (\$325), f 1.4, 35 mm lens (\$100), strobelight (\$70), tripod (\$25); Polaroid Super-Shooter (\$40).

**With shoulder strap and carrying case.

Additionally, a law library is an essential requirement to any defense system. It is the study team's judgment that approximately \$11,000 is required to set up a complete law library with new publications. It is possible that used sets of reporters can be obtained at a substantially lower cost. Some of the necessary publications and their approximate costs are listed in Table 6.2.

Table 6.2. Law Library	
Publication	Approximate Cost
Complete Set of Supreme Court Reporters (West)	1,400
Complete Set of Federal Reporter 2d	6,000
Complete Set of Official State Reporter	2,500
Complete Set of Tennessee Code Annotated	250
Tennessee Digest (West)	350
Criminal Law Reporter (per year)	210
Complete Set of ABA Standards for Criminal Justice	42
Weinstein, <u>Evidence</u> (7 vols.)	150
Ginger, <u>Jury Selections in Criminal Trials</u>	30
Kamisar, LaFave, et al., <u>Modern Criminal Procedure</u>	25
Content of Current Legal Periodicals (per year)	35
Tennessee Law Review (per year)	15
TOTAL	\$11,007

A final start-up expense is for recruitment of staff personnel. Approximately \$1,000 to \$2,000 should be allocated for this expense.

2. Yearly Operating Expenses

A yearly operating budget for any defense system can be broken into five major categories: Personnel, Travel & Subsistence, Supplies & Operating Expenses, Contract Services and Professional Services.

a. Personnel

The personnel under the described Coordinated Assigned Counsel System would include an Attorney-Manager as administrator and an executive secretary. A Defender System in Montgomery County would require a Chief Defender, who would be an attorney with at least five years experience in the criminal practice, a senior staff attorney with approximately 3 years experience in the criminal practice and a junior staff attorney with approximately 1 year experience in the criminal practice.³⁰ Also, a Defender Office would require an investigator, an executive secretary and one additional secretary. A

³⁰ See Appendix E for a description of how the number of attorneys needed was arrived at.

Mixed System with a Defender Office handling 75% of the indigent criminal caseload would have the same staffing requirements as the Defender System, except that it might not require the junior staff attorney. Additionally, the Mixed System would require only a part-time Administrator of the CAC Program and a part-time secretary. Possibly, the position of part-time Administrator could be filled by the Montgomery County Bar Association. Table 6.3 below lists the approximate salaries for these positions. The figure of \$30,000 for the CAC Administrator and the Chief Defender on a full-time basis is suggested in order to assure the hiring of a competent, experienced attorney. Also, the adversarial counterpart, the District Attorney General, has a salary of \$32,000 per year. The amounts for staff attorneys are adjusted accordingly. Additionally, a percentage of the total salaries for each system (approximately 15%) should be included in a budget, to cover fringe benefits.

Table 6.3. Personnel Salaries							
Position							Salary
CAC Administrator	\$30,000
Chief Defender	30,000
Senior Staff Attorney	18,000
Junior Staff Attorney	15,000
Investigator	13,000
Executive Secretary	9,500
Secretary	9,000

b7 Travel, Transportation & Subsistence

Funds should be allocated to cover the cost of staff participation in training conferences and seminars. Additionally, investigators will be required to travel throughout Montgomery County and the surrounding area to thoroughly investigate cases. Approximately \$5,000 should be budgeted for this expense in each of the alternative defense systems.

c. Supplies & Operating Expenses

This section of a budget would include rental of office space, office supplies, postage, telephone and duplicating costs. NCDM uses the following calculation to determine cost of office space:

150 square feet per person @ \$7/square foot; per year.

Table 6.4 displays an approximation of these expenses.

Table 6.4. Supplies & Operating Expenses	
Item	Cost
Office Space	\$1,050 x N*
Office Supplies	1,800
Telephone	2,400
Postage	1,300
Duplicating	1,200

*N equals
number of staff
personnel

d. Contract Services

In a Defender Office or a CAC program, it may be necessary at times to obtain the services of an expert witness (e.g., psychiatrist) in order to provide competent defense services. Also, there may be times when an investigator will be unable to handle the entire case-load. On these occasions, such additional services as required can be obtained by contracting for same, regardless of which system is in use. Therefore, a budget for any defense system should include some funds--at least \$5,000--to meet this requirement.

e. Professional Services

"Professional Services" here refers to attorney fees. In a Coordinated Assigned Counsel System, the major cost of the system would be the amount of compensation appointed attorneys receive for representing indigent defendants. As discussed previously, the

study team was unable to accurately derive this figure. In a Mixed System with a defender office handling 75% of the caseload, the cost of professional services would be one-fourth that of the CAC System. Even in a full defender office, some funds should be allocated to professional services to pay private attorneys who would be appointed in conflict of interest cases.

* * *

A total yearly operating budget for any defense system is derived by totalling each of the five categories described above.

C. Capability of Providing Effective Defense Services

In order to provide quality representation to criminally accused indigents, an effective defense system should meet several basic criteria, as follows:

- Provide counsel having expertise in the criminal practice;
- Assure defendants immediate access to counsel;
- Provide counsel with investigative and other support capabilities;
- Provide equitable compensation for attorney time;
- Develop and apply fair standards for determining indigency;
- Assure professional independence of defense counsel;
- Monitor attorney performance;
- Provide continuity of representation;
- Assure widespread involvement of the private bar; and
- Resolve conflict of interest situations.

Each of these basic criteria is analyzed and discussed below in the context of the alternative defense systems presented previously. The objective of this procedure is to determine the capability of each alternative

for meeting each criterion. Following the discussion of each criterion is a table which displays each alternative defense system's capability of meeting that criterion. Rating is on a 1-to-5 scale (1 reflects least capability, 5 reflects greatest capability).

While all of these criteria are important for providing effective defense services, in the context of Montgomery County, some of them require greater consideration. For example, presently there is a greater need in Montgomery County to assure defendants immediate access to counsel than there is to resolve conflict of interest situations. Therefore, the study team has weighted each criterion on a 1-to-5 scale (1 being least important, 5 being most important). At the conclusion of these nine analyses is a summary table (exhibit 1) which displays the design used to arrive at the weighted value of each criterion by type of defense system and the total net value allocated to each system. Column A describes each criterion, column B identifies the weighted value of each criterion and columns C through F identify the rating for each criterion within each system and the net score for each (weighted value X rating = score). The total net scores are displayed at the bottom of each column.

1. Provide Counsel Having Expertise in the Criminal Practice

Providing indigents with counsel has often meant simply providing the accused with a lawyer, no matter how lacking in experience or competence. In today's complex legal world, a license to practice law alone does not qualify a person to be a criminal defense attorney. Courtroom procedure is highly technical. Legal experts in trial practice have written volumes on the complexities of the rules of evidence, techniques for cross-examination and the manner and strategy of selecting jurors, just to mention a few areas. Such

expertise is an essential component of effective representation in the criminal court arena.

Unlike the civil lawyer, who generally engages in little litigation practice, the criminal lawyer needs to have recent decisions of the U. S. Supreme Court, lower federal courts and state appellate courts on the tip of his tongue in order to argue frequently and persuasively before the court. The criminal defense attorney must be a specialist in a number of areas. An excellent review of the role of the criminal lawyer in our adversary system is provided by Professor L. Ingraham:

"Based on the presumption of innocence, the adversary model seeks to force the state to establish the defendant's guilt only by the introduction of competent evidence fairly obtained through constitutional procedures. . . What is at issue, as much as the factual question of whether defendant committed the acts charged, is whether he has been fairly arrested, investigated and charged and whether he ought to be punished. The ideal role of defense counsel in the adversary process, therefore, is not merely that of investigator and presenter of facts in court; his role includes the function of challenging the constitutionality of law and proceedings which have brought his client before the bar. Even when the "facts" are not in dispute, he is also supposed to present facts in mitigation of the crime, to persuade the adjudicator that, though his client may technically be guilty, he ought not to be punished."³¹

The Supreme Court of Tennessee has recognized the need for expertise in the criminal practice of law. The court, in McKeldin v. State, held that Tennessee is required to provide indigent defendants with counsel "competent in the field of criminal law, irrespective of expertise in other fields."³² In Baxter v. Rose, the court held that the standard to follow in determining whether a criminal defendant received "effective assistance of counsel" "is simply whether the advice given, or the services rendered by the attorney, are within the range of competence demanded of attorneys in criminal cases."³³

³¹ Ingraham, The Impact of Argersinger--One Year Later, 8 Law & Society Review 615, 635 (1974).

³² 16 S.W. 2d 82, 86 (1974).

³³ 1 S.W. 2d (1976).

Although the Supreme Court of Tennessee requires the State to provide indigent defendants with counsel competent in the field of criminal law, few of the attorneys in Montgomery County who are given appointments consider themselves expert in the criminal practice. In Montgomery County, as it is in many other localities in the country, many of the attorneys handling indigent cases receive their first training by "practicing" on actual defendants in criminal trials. Chief Justice Warren Burger, one of the most out-spoken critics of this practice, has stated:

"defenders often learn advocacy skills by being thrown into trial. Valuable as this may be as a learning experience, there is a real risk that it may be at the expense of the hapless clients they represent--public or private. The trial of an important case is no place for on-the-job training of amateurs except under the guidance of a skilled advocate."³⁴

In addressing the matter of criminal expertise, the National Advisory Commission proposed that intensive entry-level programs be established to ensure that defenders and assigned counsel have the basic defense skills necessary to provide effective assistance of counsel before representing indigent clients.³⁵ They stress the point that such training be "systematic and comprehensive."

An ideal entry-level training program should consist of a four-to-six week curriculum, during which time trainees are not assigned to courts or to cases. Instruction should include lectures, seminars and reading assignments covering statutory and case law materials, practice and procedure. Field visits and court observation should be included. New attorneys should be involved in simulated client and witness interviews and simulated trial situations. Roleplaying exercises should be videotaped and discussed.

The NAC also recommends that "in-service training and legal education

³⁴Burger, Advocacy on Trial: A Challenging Proposal, 1 Learning and the Law 26, 30 (1974).

³⁵NAC Standards 13.16.

programs should be established on a systematic basis..."³⁶ for both defenders and assigned counsel. Defense attorneys need to keep abreast of developments in criminal law and procedure and in the forensic sciences. Defender offices or assigned counsel programs must maintain adequate law libraries and pleading banks. Copies of slip opinions of the U. S. Supreme Court and the state's appellate courts and national publications, such as the Criminal Law Reporter, should be readily available to all defense attorneys. Periodic lectures by senior attorneys, forensic science experts and community agency personnel should be utilized.

Presently, Montgomery County lacks the resources to institute such training programs. While an ideal Coordinated Assigned Counsel program could establish such programs, the CAC system described for Montgomery County would be deficient in meeting this criteria. One way in which the CAC system might be able to meet this criteria is to seek additional funds for scholarships to assist attorneys in attending national or regional training programs and seminars such as the National College of Criminal Defense Lawyers and Public Defenders.

The Defender System would be particularly well suited for providing the indigent criminally accused with counsel competent in the field of criminal law. Full-time defenders devote their entire working day to the criminal practice and quickly develop the requisite expertise. In the Mixed System, the Defender Office component is ideally suited to satisfy the training needs for itself as well as for the Assigned Counsel panel, thereby eliminating duplication of effort. Also, the Defender Office could develop brief and motion banks for the use of both defenders and assigned counsel; they can exchange information and consult with one another. In sum, the Defender and

³⁶ Ibid.

Mixed Systems have inherent within them the atmosphere and capability of providing counsel with expertise in the criminal practice so long as their budgets allow for it.

Figure 1 displays the rated capability of each system to meet the criterion "Providing Counsel Having Expertise in the Criminal Practice" (1 reflects least capability; 5 reflects greatest capability).

Figure 1: PROVIDING COUNSEL HAVING EXPERTISE IN THE CRIMINAL PRACTICE (5)

	1	2	3	4	5
Coordinated Assigned Counsel System		X			
Defender System					X
Mixed System					X

2. Assuring Defendants Immediate Access to Counsel

The National Advisory Commission recommends that

"...representation should be made available to eligible defendants...beginning at the time the individual either is arrested or is requested to participate in an investigation that has focused upon him as a likely suspect."³⁷

They recognize four benefits of early representation:

- "1. The presence of counsel at the critical stages of the proceedings will help safeguard constitutional rights and will help reduce court congestion.
2. The defense will be able to undertake a complete investigation.
3. The necessary plea bargaining and negotiating can take place.
4. Defense counsel will be better prepared at the initial appearances."

³⁷NAC, Courts Section 13.1.

The current study reveals that in Montgomery County it is rare for an attorney to be appointed immediately after the arrest of a defendant. It is generally the practice that an indigent defendant wait until his first appearance in the General Sessions Court before he is appointed counsel. The court only meets once a week; it is therefore not uncommon for an indigent accused criminal to have to wait six days after his arrest before obtaining counsel.

Early contact by the attorney with the accused can mean the difference between effective and ineffective legal assistance. A prompt determination of all relevant facts enables the attorney to initiate investigation, secure a release of the accused from custody and provide legal advice for the protection of the accused's constitutional and legal rights. The American Bar Association, in its Standards for Criminal Justice, points out that:

"(m)any important rights of the accused can be protected and preserved only by prompt legal action. The lawyer should inform the accused of his rights forthwith and take all necessary action to vindicate such rights. He should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for a change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, or seeking dismissal of the charges."³⁸

The need for early appointment is strengthened by the fact that a great percentage of cases are disposed of without trial. These dispositions often come about through guilty plea negotiations or non-negotiated pleas of guilty. At the initial stages, the presence of defense counsel could be decisive in helping the prosecutor decide whether he will make a formal charge. In its Task Force Report, The Courts, the President's Commission on Law Enforcement

³⁸ ABA Standards, Defense Function, Section 3.6, Approved Draft, 1971.

and the Administration of Justice summed up the arguments for early representation when it said,

"Early provision of defense counsel is essential to satisfy the concerns of the accused and of the system for the fairness and accuracy of the guilty plea process. Counsel can provide the defendant with a reasoned basis for considering the advantages and disadvantages of the negotiated disposition. He can enlist the acceptance and support of the defendant's family, employer, or other persons whose cooperation may be imperative. He can help the defendant to understand the rightness and fairness of what is happening and thereby help to avoid the destructive sense with which many uncounseled or ill-counseled defendants are left after. . . they have either 'conned' the system or been treated unfairly by it."³⁹

The ABA Standards further state,

"It is the duty of the lawyer to conduct a prompt investigation of the circumstances and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. . . .
The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty."

Under the best of circumstances, the actual posture of defense counsel in Montgomery County, from the standpoint of the adversary, is that he is already behind when he begins his efforts in behalf of his clients. The police have made an arrest based on either an on-the-scene view of the alleged criminal activity or they have conducted an investigation leading to the arrest of the accused. Time has had its effect on the scene of the alleged crime and on the memories of the witnesses for and against the accused. More often than not, the names of prosecution witnesses are preserved but witnesses that could be favorable to the defendant are either not interviewed by the police or the names not preserved, as they are not perceived as valuable to the prosecution's case against the defendant. Additionally, Montgomery County has a high level of transients due to Fort Campbell. A soldier who may be a

³⁹Task Force Report: The Courts, p. 53.

valuable witness might be transferred to a distant base before defense counsel is appointed.

The non-indigent criminally accused is able and free to call in private counsel for immediate consultation. The defendant, under these circumstances, can discuss the nature of the charge and evaluate with counsel the implications that the charge may have on all the concerns that prey on his mind, such as family consideration, employment status, health factors and so on. It is fair to say that many of these considerations bear directly on the chances for quick rehabilitation and consequent favorable disposition; they are, therefore, crucial to the process of effective representation and should be given immediate attention. The indigent counterpart should be afforded similar treatment and should be assured immediate access to counsel.

Experience has shown that a defender office is best capable of providing immediate access to counsel. It is a matter of assigning one or more staff attorneys to the jail on a 24-hour on-call basis. The practice in most defender jurisdictions is that the staff attorney will visit the jail facility prior to arraignments each day for the purpose of counseling those who appear to be in need of counsel. To ensure immediate counsel to those arrested during weekends and to others who have perhaps not yet been formally arrested, phone facilities are made readily available allowing for initial contact and immediate follow-up. Additionally, the defender office could respond to inquiries from eligible persons who believe that they are "under suspicion of a crime, or (believe) that a process will commence resulting in a loss of liberty or the imposition of a legal disability."⁴⁰

The Coordinated Assigned Counsel System can develop a method for early representation, but it must rely on private attorneys who are willing or

⁴⁰National Study Commission on Defense Services, Draft Report, p. 105.

imposed upon to serve on a rotation basis. It is difficult at best to monitor the effectiveness of providing immediate representation in this manner, but it can be done.

The Mixed System would turn over the function of providing immediate access to counsel to the Defender Office component. Appropriate distribution of cases to defender and assigned counsel would take place at the initial contact. The Chief Defender and the CAC administrator should develop "systematic procedures for early case assignment and for informing the client of the name of the attorney who will represent him after the initial period."⁴¹

Figure 2 displays the rated capability of each system to meet the criterion "Assuring Defendants Immediate Access to Counsel" (1 reflects least capability, 5 reflects greatest capability).

Figure 2: ASSURING DEFENDANTS IMMEDIATE ACCESS TO COUNSEL (5)

	1	2	3	4	5
Coordinated Assigned Counsel System			X		
Defender System					X
Mixed System				X	

⁴¹ Ibid., p. 106.

3. Providing Counsel with Investigative and Other Support Capabilities

The appointment of even the most skilled trial attorney to defend an indigent accused is no more than a token gesture if the defense hinges upon the location of a missing witness or the testimony of a ballistics expert and such assistance is not available. The importance of adequate investigation and the specialized assistance of psychiatrists, forensic pathologists and other scientific experts is universally recognized as an essential component of an effective defense capability. Yet, in most instances, the indigent accused goes into court without this assistance. Rarely will he have the benefit of an independent investigation conducted in his behalf to challenge the investigative machinery available to the prosecutor, which can include the local police department, the sheriff's office, the state police and the FBI.

Both the American Bar Association and the National Advisory Commission call for a defense system to provide adequate support services.⁴² The NAC Standard 13.14 specifically provides that the support services for a defense system "should be substantially equivalent to, and certainly not less than, that provided for other components of the justice system."⁴³

The National Study Commission on Defense Services recommends that

"... (s)ocial workers, investigators, paralegal and paraprofessional staff should be employed to assist attorneys in performing tasks not requiring attorney credentials or experience and for tasks that support staff bring special skills and experience to performing."⁴⁴

Given the caseload demands on defense attorneys, the use of support specialists is essential to providing effective assistance of counsel.

Investigators are a fundamental staff resource because investigations are

⁴² See ABA Standards for Providing Defense Services, Subsection 15.

⁴³ NAC Standards, 13.14.

⁴⁴ National Study Commission on Defense Services, Draft Report, p. 577.

required in every case where there is a factual question not subject to objective determination. Proper trial preparation demands verification of evidence and information developed by the prosecutor and other law enforcement personnel, as well as interviewing potential defense witnesses. An attorney can use both investigative and social work talent to help him advise the defendant regarding diversion programs. Social workers, also, can develop sentencing alternative programs for the clients.

The failure to provide supporting services for defense counsel is also wasteful in terms of the efficient allocation of resources, since it is simply uneconomical for attorneys to carry out supportive functions. The above standards recognize both the cost-savings accomplished by having para-professionals handle functions for which lawyers are not necessary. The crime-reducing potential of having a defense system coordinated with community social service agencies is important in working toward the rehabilitation of the offender as early as possible.

Under the present appointed counsel system there are absolutely no provisions for investigation. An appointed attorney must investigate on his own and at his own expense. Despite this defect many diligent attorneys in Clarksville thoroughly investigate their cases; but when a lawyer conducts his own investigations and interviews it frequently leads to difficulty.

"...The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.⁴⁵ A lawyer who finds that his own investigation has forced him to become a witness may be ethically bound to withdraw in the middle of a trial, very much to the disadvantage of his client.⁴⁶

⁴⁵Code of Professional Responsibility, Ethical Consideration 5-9.

⁴⁶D.R. 5-102.

The CAC System, described earlier, lacks the resources to provide counsel with the necessary investigative support. At best, the CAC System could maintain lists of investigators, expert witnesses and others. Without available funds to compensate such experts, however, it is unlikely that court appointed attorneys will obtain such valuable assistance.

The Defender and Mixed Systems are more capable of meeting the demands for investigation and support services since their respective budgets provide for a full-time investigator and additional money for consultant services as needed.

Figure 3 displays the rated capability of each system to meet the criterion "Providing Counsel with Investigative and Other Support Capabilities" (1 reflects least capability, 5 reflects greatest capability).

Figure 3: PROVIDING COUNSEL WITH INVESTIGATIVE AND OTHER SUPPORT CAPABILITIES (5)

	1	2	3	4	5
Coordinated Assigned Counsel System		X			
Defender System					X
Mixed System					X

4. Equitable Compensation for Attorney Time

An indigent criminal defense delivery system should provide for a method that adequately compensates attorneys for their services, and in the case of assigned counsel, facilitates the prompt payment of such compensation. The commentary to the National Study Commission's recommendation on this point identifies several compelling reasons:

Requiring counsel to provide services without sufficient compensation may be a taking of property without due process of law in violation of the Fifth Amendment. In any event, whether unconstitutional on this basis or not, such a scheme works an inequity on counsel which may violate the Fourteenth Amendment's due process clause. Such an unfairness is the result of two current realities. First, with the expansion of the right to counsel and the higher effective assistance standards, attorneys are required to perform in a much greater capacity than ever before. Secondly, since the provision of counsel to the legally indigent is a societal burden, taxpayers should bear enough of the cost to fairly compensate counsel for their performance of necessary services, instead of requiring counsel to shoulder all of or a disproportionate share of the burden. . .

Finally, and perhaps most significantly, counsel should be adequately compensated to ensure that eligible persons receive quality representation. Regardless of counsel's moral or professional obligation, it is too much to expect that the adequacy of compensation will not affect an attorney's performance. Practically speaking, even very capable attorneys lack the incentive to take cases to their necessary conclusions. Too many cases will be disposed of by guilty pleas, including those where trial would have been the more strategic move. Adequate compensation, indeed, seems a matter of constitutional proportion and should be reflected in the amount of assigned counsel fees.⁴⁷

The National Study Commission further recommends that

"(t)he amount of assigned counsel fees should be related to the prevailing rates among the private bar for similar services. These rates should be periodically reviewed and adjusted accordingly."⁴⁸

⁴⁷ National Study Commission on Defense Services, Draft Report, pp. 305-306.
⁴⁸ ibid., p. 311.

Similarly, the President's Commission on Law Enforcement and Administration of Justice recommended:

Assigned counsel should be paid a fee comparable to that which an average lawyer would receive from a paying client for performing similar services. Most presently proposed standards for compensation of assigned counsel call for a fee which is less than could be commanded in private practice. It has been argued that these standards are sufficient, because it is part of a lawyer's obligation as a member of the Bar to contribute his services to the defense of the poor. But these standards unavoidably impose a stigma of inferiority on the defense of the accused. If the status of the Defense Bar is to be upgraded, and if able lawyers are to be attracted into criminal practice, it is undesirable to perpetuate a system in which representation for the poor seems to be obtained at a discount.⁴⁹

The American Bar Association Standards Relating to Providing Defense Services add the following comment:

The legal profession has carried for many years the major part of the burden of representation in criminal cases. In so doing, many individual lawyers have suffered personal hardship because of their loyalty to the tradition that no one should lack counsel because of indigency. Many private practitioners have devoted vast amounts of time which required them to neglect their paying clients and other responsibilities in order to perform needed services for indigent defendants. Society cannot justly impose this heavy demand on one segment of the population.⁵⁰

Such adequate compensation is necessary in order to consistently attract competent private attorneys to represent indigent criminal defendants. Similarly, it is important to offer attractive salaries to defenders in order to assure competent staff and equally important, to minimize the turnover problem that otherwise would set in. In this connection, NAC stated,

The financial rewards of private law practice can be large. In order to attract qualified people, public office should hold reasonable financial rewards as well. Where defenders devote their full energies and resources to their office, they should receive adequate compensation. The public defender is an important component of the criminal justice system, comparable to the prosecutor

⁴⁹President's Commission on Law Enforcement and the Administration of Justice, The Courts, p. 61.

⁵⁰ABA Standards Relating to Providing Defense Services, Standard 2.4, Comment C.

and the chief judge of the highest trial court of the jurisdiction. For purposes of salary, therefore, he should be treated in a similar manner.⁵¹

Earlier in this report it was shown that the compensation of attorneys for providing legal services to indigent criminally accused in Tennessee is a serious problem. Although the Supreme Court of Tennessee has adopted Rule 44 setting certain statutory rate maximums, the funds to implement such a fee structure remain totally inadequate. Last year only about \$8,000 was allocated to Montgomery County under the Tennessee Indigent Defense Act for compensation of attorney fees. Regardless of which system of providing indigent defense services Montgomery County chooses to use, significant measures must be taken to obtain necessary funds for adequate compensation of attorneys if the county hopes to meet the Supreme Court of Tennessee's requirement to provide counsel "competent in the field of criminal law."

On this issue of compensation, it appears best to have a greater involvement of the private bar. Their participation would ensure an awareness of and appreciation for the problem, and surely, they would support any effort to upgrade the compensation level for their own work. Accordingly, the Coordinated Assigned Counsel System would do well in this category. The Defender System would have the greatest difficulty in this regard, for without the participation of the bar, the tendency would be to underestimate the worth of a defender. The Mixed System probably offers the best balance with respect to the development of a fair compensation base for both appointed attorneys and defenders. The active involvement of the private bar provides an effective lobby for the adequate financing of a defender office, and would enable the defender to work effectively with the CAC administrator in develop-

⁵¹NAC Courts, p. 267.

ing a fair and equitable fee structure for assigned counsel.⁵²

Figure 4 displays the rated capability of each system to meet the criterion "Providing Equitable Compensation for Attorney Time" (1 reflects least capability, 5 reflects greatest capability).

Figure 4: PROVIDING EQUITABLE COMPENSATION FOR ATTORNEY TIME (4)

	1	2	3	4	5
Coordinated Assigned Counsel System					X
Defender System				X	
Mixed System					X

5. Developing and Applying Fair Standards for Determining Indigency

No indigent defense system can be effective unless it in fact serves all those who require such services. The Tennessee statutes, in theory, make all persons who are unable to employ counsel eligible for appointed counsel.⁵³ The Tennessee Code defines "(I)ndigent person" as "any person who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney."⁵⁴ This broad standard appears to be, in theory, a fair one and is similar to the "substantial hardship" standard proposed by the American Bar Association:

"Counsel should be provided to any person who is financially unable to obtain adequate representation without substantial hardship to himself or his family."⁵⁵

⁵² Included at Appendix D is a sample fee schedule used by the Coordinated Assigned Counsel System in San Mateo, California. San Mateo County expended \$939,700.00 for that system's operation during fiscal year 1974-75. Of that amount, \$678,028.45 was paid in attorney fees for representation in 12,324 cases. Under that system, even with their equitable fee schedule, the average cost per case was only \$76.25.

⁵³ TCA § 40-2003 (1974)

⁵⁴ TCA § 40-2014(a) (1974)

⁵⁵ ABA Standards, Providing Defense Services § 6.1 (1968)

The practice in Montgomery County, however, indicates that many persons who realistically cannot retain a "competent attorney" are not receiving the services of appointed counsel. Persons who can post a money bond are frequently denied indigent status, regardless of the fact that after posting bond they can no longer afford to retain counsel. Also, low ranking soldiers at Fort Campbell, although many lack the resources to afford private counsel, generally are not considered indigent.

Judges in Montgomery County are given little guidance in applying the broad standard of the Tennessee code. Tennessee Supreme Court Rule 44 merely leaves it up to the trial judge to make a proper finding.

"Whenever the party states that he is financially unable to obtain counsel and desires the appointment of counsel it shall be the duty of the judge to conduct an inquiry and to make a proper finding as to the indigency of the accused. Upon a finding of indigency, counsel shall be appointed. All statements made by the defendant or petitioner in such an inquiry shall be by affidavit sworn to before the judge."

Rule 44 also leaves the determination of a defendant's eligibility for appointed counsel in the hands of the trial judge. This is not a favorable procedure since the pressure of court calendars often causes judges to make hurried decisions of indigency which are rarely reviewed. Additionally, judicial neutrality and objectivity may be undermined by making the judge an interrogator to determine assets and income.

The National Study Commission on Defense Services made the following recommendations concerning financial eligibility of defendants for counsel to the National Colloquium on the Future of Defender Services in January, 1976:

"4. FINANCIAL ELIGIBILITY

a. Eligibility Criteria

Effective representation shall be provided to anyone who is financially unable, without substantial hardship to himself or to his family, to obtain such representation.

This determination shall be made by ascertaining the liquid assets of the person which exceed the amount needed for the payment of current obligations and which are not needed for the support of the person or his family. Liquid assets include cash in hand, stocks and bonds, bank accounts and any other property which can be readily converted to cash. The person's home, car, household furnishings, clothing and any property declared exempt from attachment or execution by law, shall not be considered. The eligibility determiner shall not consider whether or not the person has been released on bond, or the resources of a spouse, parent or other person. If the person's liquid assets are not sufficient to cover the anticipated cost of effective representation, the person shall be eligible for public representation. The cost of representation, for purposes of determining eligibility, shall include investigation, expert testimony, and/or other costs which may be related to providing effective representation.

b. Method of Determination

The financial eligibility of a client for public representation shall be made initially by a defender subject to review by a court on a finding of ineligibility. Eligibility shall be determined by means of an affidavit which shall be considered privileged under the attorney-client relationship. The client shall be notified that he may be required to reimburse the state or county for all or part of the cost of representation. A decision of ineligibility which is affirmed by a judge shall be reviewable by an expedited interlocutory appeal. The defendant shall be informed of this right to appeal and if he desires to exercise it, the clerk of the court shall perfect the appeal. The record on appeal shall include all evidence presented to the court on the issue of eligibility and the judge's findings of fact and conclusions of law denying eligibility."

The advantage of the Commission's recommendation is that it considers both the realistic ability of the accused to pay for his defense and the estimated cost of that defense if private counsel has to be retained. The comments to these recommendations cite three considerations which lead to the conclusion that a public defender (or, in a Mixed System, the defender or private lawyer to whom the case is assigned) should be the initial arbiter of eligibility.

"First is the need to establish a lawyer-client relationship at an early time. Second is the desirability of creating that relationship in a direct manner which most closely resembles the private lawyer-client model. Thirdly, it is believed that the public defender is in the best position to determine eligibility. The system here proposed calls for determination by the defender subject to review by the court on a finding of ineligibility and subject to inspection by the court at the close of the proceedings. As proposed, the system thus includes checks and balances."⁵⁶

New forms and interview techniques consistent with the above must be developed allowing for an initial determination of indigency at the earliest possible moment after arrest, reviewable by the Court at the time of arraignment. In order to expedite this process, defense counsel should be authorized to make such initial determination and proceed with the rendering of legal service to those who qualify.

Developing fair standards for determining indigency requires the full cooperation of bench and bar. Raising the indigency rate has the actual or illusory effect of suggesting that the private bar will suffer a financial loss. For that reason, the Coordinated Assigned Counsel System would appear best capable of developing new standards for the determination of indigency. The large involvement of the private bar in the CAC System will ensure the support necessary to make such a modification workable. The CAC System, however, would have the most difficulty in applying such standards since it would require private attorneys making themselves available to interview criminally accused upon arrest.

The Defender System is ideally capable of applying fair standards at the earliest possible stage of the criminal justice process. The full-time defenders could be available for interviewing defendants immediately upon

⁵⁶National Study Commission on Defense Services, Draft Report, p. 160

arrest. The Defender System, when first established, on the other hand, may have some difficulty in developing new standards for the determination of indigency because they may lack the support and involvement of the private bar. In time, however, as the defender office becomes more established and as its adversary role on behalf of indigent clients becomes better known and understood, systematic changes recommended by that office will be given more credibility and acceptance.

The Mixed System combines the best of both worlds. The CAC component offers the means for the private bar's participation in developing new procedures for determining indigency. The defender component has the full-time staff to assist in the efficient application of new procedures at the earliest possible stage of the criminal justice process.

Figure 5 (next page) displays the rated capability of each system to meet the criterion "Developing and Applying Fair Standards for Determining Indigency" (1 reflects least capability, 5 reflects greatest capability.)

Figure 5: DEVELOPING AND APPLYING FAIR STANDARDS FOR DETERMINING INDIGENCY (4)

	1	2	3	4	5
Coordinated Assigned Counsel System			X		
Defender System				X	
Mixed System					X

6. Professional Independence of Counsel

Every defense attorney has a high legal and ethical duty to provide effective assistance of counsel to his client. This obligation exists even where the attorney is compensated by public funds instead of by his client. Where public funds are used to provide defense counsel, a basic dilemma arises: While selection, policy recommendations and monitoring of the defense function is necessary to ensure that the highest quality of representation capable will be provided, such necessities must never operate to inhibit the defense attorney's loyalty to his clients or his zealous advocacy of and dedication to their legal causes.

The National Advisory Commission has commented that:

"(a)adequate defense services can be provided only by an independent attorney who is free to defend his client without threat to his position because of popular or political pressures. Appointment of the defender by a judge may impair the impartiality of the defender, because the defender becomes an employee of the judge. Moreover, such a system will create a potentially dangerous conflict, because the defender will be placed in a position where occasionally he must urge the error of his employer on behalf of his client. Such dual allegiance, to judge and client, will cripple seriously any system providing defender services.⁵⁷

A drafter of wills or a civil litigator can afford to rely on diplomacy, decorum and accommodation. Deference to the court and to opposition counsel is in accord with local traditions of gentlemanly conduct. A criminal defense attorney, on the other hand, often must abandon such gentlemanly conduct to protect the interests of his client. Courts have recognized that counsel for the accused "...have a right to be persistent, vociferous, conscientious and imposing, even to the point of appearing obnoxious, when

⁵⁷NAC, Courts, Standard 13.8, Commentary

acting in the clients' behalf. An attorney may, with impunity, take full advantage of the range of conduct that our adversary system allows."⁵⁸ Such zeal is not merely an optional defense tactic, it can be an ethical obligation and may well decide whether or not effective assistance of counsel has been provided.

Zealous advocacy by defense counsel may arouse hostility. Those challenged or offended by such conduct might impose sanctions, even if unintentional, on the zealous advocate. Prosecutors may become less cooperative. Funding sources may exert pressures by cutting vouchers of appointed attorneys or reducing appropriations for defender offices. Courts may avoid appointing attorneys who are imposing, or may allow antagonisms arising from one case to spill into another case.

While the study team observed no evidence of such practices, the potential exists. Even the potential of a defense attorney being sanctioned for giving a criminally-accused effective assistance of counsel is destructive of the adversary system, jeopardizing the constitutional rights of the defendant. For these reasons, the American Bar Association stresses that:

"(c)ounsel should have professional independence from the court, the prosecuting arm, and the funding source, as well as any political influence in his jurisdiction."⁵⁹

To insure professional independence, the National Legal Aid and Defender Association concluded that:

"(t)he most appropriate method of assuring independence modified with a proper mixture of supervision is to create a board of directors representing various segments of the community. . . . Moreover, a strong argument can be made for the proposition that a defender office should not be a governmental agency, but a private, not for profit corporation."⁶⁰

⁵⁸In Re Dellinger, 461 F2d 389, 400 (7th Cir. 1972)

⁵⁹ABA Standards, Providing Defense Services §1.4.

⁶⁰NLADA, Proposed Standards for Defender Services, Standard 3.1, Commentary to Standards 1.8 to 16.

In describing the various defense systems, it was suggested in each that the respective head person be appointed by an independent board or commission composed of representatives of the courts, the bar, the client community and the funding source. Such an approach should virtually eliminate even the appearance of external subtle pressures.

Despite this, the Coordinated Assigned Counsel System may always remain vulnerable to the charge that the private clientele is a strong competing influence upon the private attorney; that between the two, the paying client will receive the most favorable attention. By contrast, the full-time defender has no private clients and, therefore, is able to devote his entire professional life to indigent clients. Suffice it to say that no system is perfect, and as presented, each of the alternatives should be capable of assuring the requisite professional independence.

Figure 6 displays the rated capability of each system to meet the criterion "Assuring Professional Independence of Counsel" (1 reflects least capability, 5 reflects greatest capability).

Figure 6: ASSURING PROFESSIONAL INDEPENDENCE OF DEFENSE COUNSEL (3)

	1	2	3	4	5
Coordinated Assigned Counsel System					X
Defender System					X
Mixed System					X

7. Monitoring Attorney Performance

In addition to providing counsel with expertise in the criminal practice, an effective defense system should provide a systematic procedure for monitoring the performance of defense counsel. This continual review of the work performance of attorneys handling indigent cases ensures that only the qualified and most industrious attorneys remain actively involved. Those who do not maintain minimum standards of defense representation should be removed from indigent criminal practice work. Further, the review procedure should encompass a method for dealing with complaints and grievances by clients.

The monitoring of attorney performance requires the attention of a full-time staff to keep adequate administrative records. Court appearances must be audited and the opinions of judges and other court officials solicited regarding the performance of the attorneys being monitored. The court files should be spot-checked to determine whether attorneys are doing quality work in their pleadings and brief material.

The National Study Commission on Defense Services has recommended that systematic procedures be developed to monitor and evaluate the performance of assigned counsel and staff defenders.⁶¹ With a Coordinated Assigned Counsel System, the Commission recommends that the administrator, who should be an attorney with experience in criminal defense practice and administration, make "performance evaluations based on personal monitoring, augmented by regular inputs from judges, prosecutors, other defense lawyers and clients. . . and periodic review of case files. The feedback of those directly involved with the attorney is essential to get appropriate and effective

⁶¹ National Study Commission on Defense Services, Draft Report, p. 289, 750

measurements of the attorney's performance.

The very fact that regular evaluations are being made should serve as an incentive for attorneys to constantly upgrade their quality of representation. The evaluation, which must be made confidentially, should. . .

"consider the attorney's preparation, legal and factual, his knowledge of criminal law, procedure, and evidence, his ability to make pre-trial motions and to discuss the case with the prosecutor prior to trial, his ability to conceive trial strategy, the actual case disposition, the person's knowledge of sentencing procedures and sentence alternatives, his ability to relate to clients, and his zeal, demonstrated motivation for self-improvement and interest in the field."⁶²

In a defender office, the chief defender periodically should make similar evaluations of all staff attorneys. In addition, procedures for individualized supervision on a systematic basis should be developed. These procedures are necessary to facilitate more effective representation and merit promotions. An additional function of a program of supervision in a defender office is the monitoring of workload so that no person has either an excessive or an insufficient amount of work.

The Defender System is, without a doubt, best capable of monitoring attorney performance. The Chief Defender has full control over the staff he hires and by virtue of his authority (to fire personnel), he can monitor performance and deal with deficiencies in a very effective manner.

The Coordinated Assigned Counsel System could conceivably develop a monitoring system. The limitation of staff, however, would curtail the charges for effectiveness in carrying out such a plan. At best, this system would be capable of dealing with complaints and grievances by clients, as well as monitoring attorney performance, on a reactive rather than a proactive basis.

⁶² Ibid., p. 90-91.

In a Mixed System, the assigned counsel panel would be reduced by about one-half that of the CAC System, which would improve the chance for effective monitoring. The defender component would do well in this area as pointed out above.

Figure 7 displays the rated capability of each system to meet the criterion "Monitoring Attorney Performance" (1 reflects least capability, 5 reflects greatest capability).

Figure 7: MONITORING ATTORNEY PERFORMANCE (3)

	1	2	3	4	5
Coordinated Assigned Counsel System		X			
Defender System					X
Mixed System				X	

8. Provide Continuity of Representation

The American Bar Association recommends that

"Counsel should be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review. Counsel initially appointed should continue to represent the defendant through all stages of the proceedings unless a new appointment is made because geographical considerations or other factors make it necessary."⁶³

⁶³ABA Standards Relating to Providing Defense Services §5.2.

The Tennessee Supreme Court appears to follow this standard in Rule 44, which provides:

"Counsel appointed shall, unless excused by order of the Court continue to act for the party throughout the proceedings of the trial and of any appeal."

Also, the relevant state statute provides that in felony cases:

"(A)ny attorney appointed to represent any person. . . shall proceed to counsel with and represent such person at all stages of the proceedings before the court which appointed him, and also upon any appeal from the judgment of such court which imposes a prison sentence."⁶⁴

The difficulty in Montgomery County concerning continuity of representation arises because of the technique for implementation of the above underlined language. All cases other than those that proceed directly from the grand jury commence in the General Sessions Court. In this court, if appropriate, an appointment of counsel is made. Most of the serious cases proceed to the Criminal Court where a new appointment is made. The Criminal Court Judge told the study team that the Court attempts and usually succeeds in appointing the attorney that appeared in General Sessions Court. Despite such efforts, there is no certainty that the same attorney will be appointed. The result is that a defendant may be in legal limbo for several months from the time he has been held over for the grand jury until the time there is a proceeding in the Criminal Court. The General Sessions attorney may believe that he has fulfilled his obligation by appearing at the preliminary hearing. The defendant may be confused as to who is his counsel.

Clearcut representation is needed without confusion for the indigent client. This is particularly true in view of the holding that a preliminary hearing is a "critical stage" in the Tennessee criminal justice system.⁶⁵

⁶⁴T.C.A. § 40-2018 (1974).

⁶⁵McKeldin v. State, 516 S.W. 2d 82 (1974), see also Coleman v. Alabama, 399 U.S. 1 (1970).

Part of the rationale of the decision is that valuable information useful at trial will be lost if an attorney does not fulfill his/her function at a preliminary hearing. It is best to have the same attorney handle the preliminary hearing and the trial. A prominent criminal defense attorney in Clarksville pointed out that a defendant has a right to a preliminary hearing.⁶⁶ He suggested that in the future more attorneys would be reluctant to waive a preliminary hearing in General Sessions Court.

The local courts could assist in ending this confusion by establishing a rule providing that the counsel appointed in General Sessions Court will continue to represent the indigent criminally accused throughout the criminal justice process, unless excused by the court, even if the case proceeds to a higher court. Attorneys handling cases must be aware that their responsibility to represent their client continues in all courts, including "any appeal."⁶⁷ The Supreme Court of Tennessee has ruled that this language even includes "discretionary appeals."⁶⁸

All of the presented alternative defense systems could easily fulfill this requirement. The Administrator of the Coordinated Assigned Counsel System could be responsible for ensuring that appointed counsel continue their representation throughout the criminal justice process. In the case of full-time defenders, this responsibility lies with the Chief Defender.

Figure 8 displays the rated capability of each to meet the criterion "Provide Continuity of Representation" (1 reflects the least capability, 5 reflects the greatest capability).

⁶⁶Gevin v. State, 523 S.W. 2d 636 (1975).

⁶⁷TCA § 40-2018.

⁶⁸Hutchins v. State, 504 S.W. 2d 758 (Tenn, 1974); see also State v. Williams, 529 S.W. 2d 714 (Tenn, 1975).

Figure 8: PROVIDE CONTINUITY OF REPRESENTATION (2)

	1	2	3	4	5
Coordinated Assigned Counsel System					X
Defender System					X
Mixed System					X

9. Assuring Widespread Involvement of the Private Bar

The National Advisory Commission has concluded that, "(A)n indispensable condition to the fundamental improvement of the defense system is the active and knowledgeable support of the bar as a whole."⁶⁹ The private bar, because of its prestige and influence in a community, can be an effective force in protecting the rights of the criminally accused. The bar can assist in achieving reforms in the criminal justice system and obtaining funds to implement such reforms. To do this, however, they must be knowledgeable of the problems existing in the system. This requires either their active involvement in the criminal justice system or, in the case of a full defender system, a close relationship between the bar and defenders.

Presently, the private bar of Montgomery County are actively involved in the criminal justice system as appointed counsel. It is a result of their involvement in the criminal justice system that they became knowledgeable of the need for reforms and have taken the initiative in seeking this technical assistance. Regardless of what system Montgomery County chooses to provide counsel to the indigent criminally accused, the active involvement of the local

⁶⁹NAC, Courts, p. 264.

bar must be maintained.

The CAC system offers the capability of assuring the greatest involvement of the private bar. There is probably no better way of developing an interest and awareness of the criminal justice system and its problems than providing wide opportunities for attorneys to participate in criminal litigation at reasonable rates of compensation. By coordinating the appointment of cases, the CAC program can equitably assign cases to the entire panel of attorneys. Additionally, it can assist in obtaining reasonable compensation for appointed counsel.

The major drawback of the full Defender System is that it usually fails to involve the private bar in the defense of the criminally accused indigent. This often results in the inability of the defender office to achieve reforms in the system or to obtain sufficient funding to adequately meet the demands of the system. The Mixed System, however, provides the best of both worlds. It ensures the involvement of the private bar while providing the benefits derived from the defender component as well.

Figure 9 displays the rated capability of each system to meet the criterion "Assuring Widespread Involvement of the Private Bar" (1 reflects least capability, 5 reflects greatest capability).

Figure 9: ASSURING WIDESPREAD INVOLVEMENT OF THE PRIVATE BAR (1)

	1	2	3	4	5
Coordinated Assigned Counsel System					X
Defender System	X				
Mixed System					X

10. Resolving Conflict of Interest Situations

"The term 'conflict of interest' bespeaks a situation in which regard for one duty tends to disregard another."⁷⁰ Attorneys have an ethical obligation to avoid conflict of interest situations.⁷¹

"One of the cardinal principles confronting every attorney in the representation of a client is the requirement of complete loyalty and service in good faith to the best of his ability. In a criminal case the client is entitled to a fair trial, but not a perfect one. These are fundamental requirements under the Fourteenth Amendment. . . . The same principles are applicable in Sixth Amendment cases and suggest that an attorney should have no conflict of interest and that he must devote his full and faithful efforts toward the defense of his client."⁷²

The U. S. Supreme Court has stated that it is

"...clear the assistance of counsel guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests."⁷³

In the criminal justice system, the most common situation where a conflict of interest may arise for an attorney is where he would be representing co-defendants charged with crimes involving the same factual circumstances. This conflict might be expressed by either of the co-defendants or by the attorney himself.

"...The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations. . . ."⁷⁴

Another aspect to this discussion relates to the conflict that may exist in relation to the establishment of good rapport between counsel and

⁷⁰United States v. Miller, 463 F 2d 600, 602 (1st Cir., 1972).

⁷¹See Code of Professional Responsibility, Cannon 5.

⁷²Johns v. Smyth, 176 F. Supp. 949, 952 (E.D.Va. 1959).

⁷³Glasser v. United States, 315 U.S. 60, 70 (1941).

⁷⁴ABA Standards Relative to the Prosecution and Defense Function 3.5(b).

client. It is not unusual for a defendant, for whatever reason, to take a dislike to his attorney or vice-versa. Under these circumstances, although there may be insufficient reason at law to move for withdrawal of counsel, still it makes sense to free-up the relationship and attempt a better one whenever possible.

In either situation, a defense system should have the flexibility to allow for the immediate substitution of qualified attorneys whenever the need arises. The Defender System is the least flexible in handling this particular problem. The defender staff works out of one office and is considered as part of one law firm. Conflicts would have to be resolved out of the system and the court would have to seek the assistance of private attorneys. The defender office could prearrange for these conflicts and coordinate a list of attorneys with the court. It is not, however, an ideal solution.

The Coordinated Assigned Counsel and Mixed Systems have equal capability in resolving conflict of interest matters. With the CAC System, it is merely a matter of drawing upon the next attorney on the assigned counsel panel. In the Mixed System, the assigned counsel component can cover any conflict matter that arises with the defender office.

Figure 10 displays the rated capability of each system to meet the criterion "Resolving Conflict of Interest Situations" (1 reflects least capability, 5 reflects greatest capability).

Figure 10: RESOLVING CONFLICT OF INTEREST SITUATIONS (1)

	1	2	3	4	5
Coordinated Assigned Counsel System					X
Defender System		X			
Mixed System					X

EXHIBIT 1: CAPABILITY OF PROVIDING COMPETENT DEFENSE SERVICES

A	B	C	D	E
CRITERION	Weighted Value	COORDINATED ASSIGNED COUNSEL SYSTEM	DEFENDER SYSTEM	MIXED SYSTEM
		Rating/System	Rating/System	Rating/System
1) Provide counsel having expertise in the criminal practice	5	2 / 10	5 / 25	5 / 25
2) Assure defendants immediate access to counsel	5	3 / 15	5 / 25	4 / 20
3) Provide counsel with investigative and other support capabilities	5	2 / 10	5 / 25	5 / 25
4) Provide equitable compensation for attorney time	4	5 / 20	4 / 16	5 / 20
5) Develop and apply fair standards for determining indigency	4	3 / 12	4 / 16	5 / 20
6) Assure professional independence of defense counsel	3	5 / 15	5 / 15	5 / 15
7) Monitor attorney performance	3	2 / 6	5 / 15	4 / 12
8) Provide continuity of representation	2	5 / 10	5 / 10	5 / 10
9) Assure widespread involvement of private bar	1	5 / 5	1 / 1	5 / 5
10) Resolve conflict of interest situations	1	5 / 5	2 / 2	5 / 5
TOTAL SCORE		99	150	157

VIII

RECOMMENDATIONS

The National Center for Defense Management recommends the following:

- I. THAT THE MONTGOMERY COUNTY BAR ASSOCIATION ESTABLISH A NOT-FOR-PROFIT CORPORATION RESPONSIBLE FOR THE CREATION OF A MIXED DEFENSE SYSTEM, CONSISTING OF A DEFENDER OFFICE AND A COORDINATED ASSIGNED COUNSEL PROGRAM, TO PROVIDE DEFENSE SERVICES TO INDIGENT CRIMINALLY ACCUSED.

Any one of the alternative defense systems presented in this report would improve the provision of defense services to indigent criminally accused in Montgomery County. The study has demonstrated, however, that the Mixed System has the greatest capability for providing competent defense services. The study team felt that although the Defender System might cost less than the Mixed System if appointed counsel receive the equitable compensation they are entitled to, the benefit derived from the involvement of private bar in the criminal justice system justified the possible additional expense. The structure and budget for this recommended system are presented earlier in this report.

- II. THAT THE NOT-FOR-PROFIT CORPORATION BE HEADED BY A BOARD OF DIRECTORS COMPOSED OF REPRESENTATIVES FROM THE PRIVATE BAR, THE JUDICIARY, THE FUNDING SOURCE, AND THE CLIENT COMMUNITY. THE BOARD OF DIRECTORS' PRINCIPAL FUNCTION WILL BE TO APPOINT THE CHIEF DEFENDER AND THE ADMINISTRATOR OF THE COORDINATED ASSIGNED COUNSEL PROGRAM, AND PROVIDE GENERAL SUPERVISION OF THE SYSTEM.

The Corporation and its Board of Directors should be an independent body in order to assure that the required professional independence of attorneys

is maintained. While its primary function will be to select and appoint the directors of the two components of the Mixed System, the Board of Directors will continue to monitor the performance of the defense system and advise the Chief Defender and the CAC Administrator on improving the quality of defense services. (The Chief Defender would be responsible for hiring the balance of the staff.)

III. THAT THE BOARD OF DIRECTORS DELEGATE 75% OF THE INDIGENT CASELOAD TO THE DEFENDER OFFICE AND 25% OF THE INDIGENT CASELOAD TO THE COORDINATED ASSIGNED COUNSEL PROGRAM.

The study indicates that a 75%-25% distribution of the caseload would be realistic at this time. Also, it appears to reflect the wishes of the Montgomery County private bar. This pilot program could be initiated with this distribution of cases and evaluated in the future to see if the percentage should be modified.

IV. THAT THE BOARD OF DIRECTORS MAKE APPLICATION TO THE JUDGE ADVOCATE, FORT CAMPBELL KENTUCKY FOR THE CREATION OF AN ARMY EXPANDED LEGAL ASSISTANCE PROGRAM (ELAP) AT FORT CAMPBELL TO ASSIST IN PROVIDING DEFENSE SERVICES TO INDIGENT MILITARY PERSONNEL AND THEIR DEPENDENTS IN MONTGOMERY COUNTY.

The study indicated that a significant part of the criminal caseload in the Montgomery County court system involved military personnel and their dependents stationed at Fort Campbell. Establishment of ELAP at Fort Campbell could assist in providing defense services to this large segment of the Montgomery County population. The Board of Directors and ELAP officials could make arrangements with the Montgomery County courts for military lawyers

in ELAP to represent clients in the Montgomery County courts although the lawyers might not be members of the Tennessee Bar.

V. THAT THE DEFENDER OFFICE DEVELOP AND IMPLEMENT INTENSIVE ENTRY-LEVEL TRAINING, INSERVICE TRAINING AND CONTINUING LEGAL EDUCATION PROGRAMS FOR ALL STAFF ATTORNEYS AND PRIVATE ATTORNEYS INTERESTED IN HANDLING ASSIGNED CASES.

The study indicates that training programs could be extremely useful in attempting to upgrade the quality of defense services in Montgomery County. The defender office would be the most appropriate body to develop and supervise such training programs. (NCDM has prepared a report on this subject for the State of Vermont entitled "Development of an In-Service Training Program for the Office of the Defender General, State of Vermont."; copy is available on request.)

VI. THAT THE CHIEF DEFENDER AND THE CAC ADMINISTRATOR DEVELOP COORDINATED PROCEDURES WHICH WILL ASSURE THAT ALL INDIGENT CRIMINALLY ACCUSED HAVE IMMEDIATE ACCESS TO COUNSEL.

Such procedures should call for a defender staff attorney to be detailed to the jail to provide initial interview of all defendants. Appropriate distribution of cases to defenders and assigned counsel should follow.

VII. THAT THE DEFENDER OFFICE SHOULD PROVIDE FULLTIME INVESTIGATION AND OTHER SUPPORT CAPABILITIES TO BOTH STAFF ATTORNEYS AND ASSIGNED COUNSEL.

The discussion on projected budget of the Mixed System presented earlier in this report identified the need for such funds and gave an approximate cost of investigators, equipment and combat services that would be required in Montgomery County.

VIII. THAT DEFENDERS AND ASSIGNED COUNSEL RECEIVE ADEQUATE COMPENSATION FOR THEIR SERVICES.

It is suggested that the defender salaries identified in the section on projected cost for the Mixed System be followed. The CAC Administrator should develop a fee schedule for assigned counsel which equitably compensates for their time.

IX. THAT THE DEFENDER OFFICE BE RESPONSIBLE FOR THE CONSISTENT APPLICATION OF FAIR STANDARDS FOR DETERMINATION OF INDIGENCY TO ALL DEFENDENTS.

The defender office, with its fulltime staff, is best suited for making the initial determination of indigency of all defendants. The court could review the decision of the defender office at the conclusion of the criminal process for the defendant.

X. THAT MONTGOMERY COUNTY BAR ASSOCIATION MAKE APPLICATION TO THE TENNESSEE LAW ENFORCEMENT PLANNING AGENCY (STATE PLANNING AGENCY) FOR A GRANT TO ASSIST IN THE IMPLEMENTATION OF THIS RECOMMENDED PILOT PROGRAM.

IX

STATEMENT OF TRANSFERABILITY

PROACTIVE IMPLICATIONS FOR TECHNOLOGY TRANSFER

The techniques used in the analysis of the basic criteria which assist in the derivation of the comparative values of alternative legal defense services systems have been comprehensively displayed and explained in this report. Communities could, following this procedure, engage in comparative analyses for possible alternatives available to them and derive similar value judgments.

APPENDIX A

Request for Technical Assistance and Related Correspondence

DANIEL, HARVILL, BATSON & NOLAN

ATTORNEYS AT LAW

CLARKSVILLE, TENNESSEE 37040

W. M. DANIEL
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15 August 1975

(7) 121 - 310 Street (B.)

TELEPHONE
647-1501

NLADA

2100 M Street, N.W.
Washington, D. C. 20037

Re: Public Defender Program

Gentlemen:

This office has been advised by Mr. Melvin T. Axilbund, Project Director of Resource Center on Correctional Law and Legal Services, that you would be able to give us some information concerning the establishment of a Public Defender Program in our local area.

Montgomery County, Tennessee, has a population of about 65,000 to 70,000 people, and is the site of a major military institution, Fort Campbell, Kentucky.

We have approximately 35 practicing attorneys in Clarksville, Montgomery County, Tennessee.

The State of Tennessee has no Public Defender Bill, and has a very inadequate system of compensation on appointed attorneys. Under the Rules of Court and State Law, the only compensation for appointed counsel is with regard to felony charges or juvenile delinquents charged with acts which, if committed by an adult, would be a felony, or in regard to post-conviction habeas corpus provisions.

The maximum rate shall not exceed \$30.00 per hour for actual court time, with a maximum of \$100.00 for each day of trial. For time reasonably expended for preliminary hearing or trial preparation, the maximum hourly rate shall not exceed \$20.00 per hour. The total maximum compensation for all services in a trial or proceeding shall not exceed the statutory maximum of \$500.00. Out of pocket expenses incurred in the nature of long distance phone calls, copying charges, and the like, could be reimbursed, but travel cannot be reimbursed without prior authorization of the trial Judge.

The Tennessee Bar Association has sponsored a Public Defender Act for several terms of the legislature, but to no avail.

NATIONAL CENTER FOR DEFENSE MANAGEMENT	
AUG 18 1975	
ROUTE TO:	FOR:
THEN TO:	FOR:
COPIES TO:	FOR:

NLADA
Washington, D. C.

15 August 1975
Page Two

We are in the process of accumulating statistics from our local Bar in an effort to secure a local Public Defender which would require certain local funding through our local government agency. These statistics are not fully available, but the current status of cases pending in our local Criminal Court are a total of approximately 290, of which in excess of 70 are indigent cases. This does not include the juvenile cases nor does it include the matters currently in our Court of General Sessions and awaiting Grand Jury action. We have just completed a term of Criminal Court and the Grand Jury has not yet met. Thus, once the Grand Jury meets, we will have a considerable higher load of cases and the same proportion, if not greater, of appointed cases.

We, at this time, do not have a record of any of the misdemeanor cases which require counsel in our Court of General Sessions, pre-Grand Jury level, and matters which are handled without Grand Jury intervention. Also, it is the policy of our Judges to appoint counsel for all, whether felony or misdemeanors. In addition, there are a certain number of civil indigent cases requiring appointments.

Mr. Axilbund has advised us that your organization would have pertinent material and the ability to provide technical assistance regarding the establishment and funding of a new Public Defender Fund for our county.

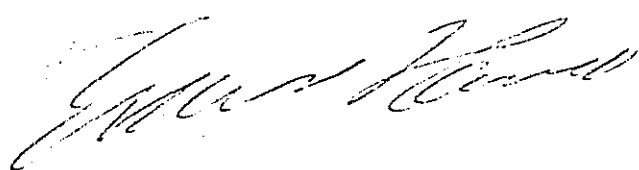
We are giving you this overview of our problem so that you may better evaluate the type of program that would be needed and what might be available.

Any information which you could furnish us in this regard would be greatly appreciated.

Yours very truly,

DANIEL, HARVILL, BATSON & NOLAN

By:



FEH:mw

September 9, 1975

RECEIVED	SEP 19 1975
TO →	375
FROM	File

Court's Specialist
Tennessee Law Enforcement Planning Agency
Suite 205, Capitol Hill Building
301 7th Avenue North
Nashville, Tennessee 37219

Dear Sirs:

I am serving as President of the Montgomery County Bar Association during the current year. I have been directed by the Association, pursuant to a resolution unanimously adopted September 4, 1975, to write you to request technical assistance through your agency from the National Legal Aid and Defender Association regarding a study of the effectiveness of the appointed counsel system in Montgomery County and the feasibility of a public defender program.

We have had considerable discussion about the use of appointed counsel in criminal cases among the members of our Association. As a result of this, a committee was appointed to study our present system and to investigate the possibility of a public defender system in our county. A Mr. William R. Higham, Director of the National Center for Defense Management in Washington, visited our Association two weeks ago and explained services of his office which we feel would be extremely helpful to us in determining our needs. As a result of this committee's deliberations, the Bar Association has authorized me to request the services of Mr. Higham's office and has authorized an expenditure of up to \$300.00 from Bar Association funds in order to provide the ten per cent hard match required to obtain this technical assistance.

Therefore, we request technical assistance from this office and request that you approve our application and forward it through the necessary channels in order to enable us to obtain this technical assistance. Specifically, the desired objectives of such technical assistance would be as follows:

(1) The compilation of statistical data with reference to the number of indigents now coming through the General Sessions, Juvenile and Criminal Court systems of Montgomery County.

(2) A study as to the number of man hours spent by appointed counsel in order to effectively represent indigents in the court system.

(3) A projection as to the number of indigents who will be coming through the court system in the future and as to the number of man hours required to effectively represent them.

(4) A study of the effectiveness of the present system of indigent representation with a projection as to its continued effectiveness.

(5) A listing of the alternative methods available and feasible for handling the representation of indigents in the Criminal Court system and a recommendation as to the most feasible method among the alternatives.

(6) In the event a public defender system is recommended, a study of staffing requirements, possible sources of funding, a system of governance and other related matters.

We trust your office will act favorably on our request and expedite this request as quickly as possible. If you require any further information, please do not hesitate to call on me. By carbon copy of this letter, I am advising the National Legal Aid and Defender Association of our request.

Yours very truly,



John Richardson

JR/ph

CC: National Legal Aid and Defender Association
Suite 601
2100 M Street, N. W.
Washington, D. C. 20037

CC: Mr. William R. Higham, Director
National Center for Defense Management
2100 M Street, N. W.
Washington, D. C. 20037



*5 Subs - FYI
Ret. to me for reference
to A.C. 9-75-75*

STATE OF TENNESSEE
LAW ENFORCEMENT PLANNING AGENCY

SUITE 208, CAPITOL HILL BUILDING
301 SEVENTH AVENUE, NORTH
NASHVILLE, TENNESSEE 37219

(615) 741-3521

JOHN H. LOWE
DOYLE WOOD
ASSISTANT DIRECTORS

IS W. NORWOOD
DIRECTOR

Sept. 23, 1975

Bill Herndon
Law Enforcement Assistance
Administration
730 Peachtree St., NE
Atlanta, GA 30308

Dear Mr. Herndon:

Enclosed is a request for technical assistance from the Montgomery County Bar Association, Clarksville, Tennessee. This request is for a study of the appointed counsel system in that county and an opinion as to whether a public defender office in the county would provide better service. Assistance is requested from the National Legal Aid and Defender Association.

I would like to pass this request to you as well as place my endorsement on this study. We are in a position in this state whereby we are interested in whether a public defender system or court appointed counsel would be best statewide. It is further requested that this study be done in such a way that the same format might be adopted for a statewide study or in certain designated areas.

Your prompt attention will be appreciated.

Sincerely,

Gary V. Stewart

Gary V. Stewart
Criminal Justice Planner

tm
encl.



STATE OF TENNESSEE
LAW ENFORCEMENT PLANNING AGENCY

SUITE 208, CAPITOL HILL BUILDING
301 SEVENTH AVENUE, NORTH
NASHVILLE, TENNESSEE 37219

(615) 741-3521

JOHN H. LOWE
DOYLE WOOD
ASSISTANT DIRECTORS

NCIS W. NORWOOD
DIRECTOR

Sept. 23, 1975

National Legal Aid & Defender
Assn.
Suite 601
2100 M Street, NW
Washington, D.C. 20037

RECEIVED SEP 26 1975

ATTN: William Higham

Dear Mr. Higham:

In reference to our conversation 9-21-75 concerning the Montgomery County Tennessee technical assistance request, enclosed is correspondence pertinent to that request.

Sincerely,

Gary V. Stewart

Gary V. Stewart
Criminal Justice Planner

tm
encl.

NATIONAL CENTER FOR DEFENCE MANAGEMENT	
SEP 29 1975	
ROUTE TO: 275	FOR: t.c.
THRU TO:	FOR:
COPIES TO:	FOR:

DEPARTMENT OF JUSTICE
LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

ROUTING SLIP

TO:	NAME	DIVISION	BUILDING	ROOM
1.	Bill Higham	NCDM		
2.			DATE: 10/13/75	FOR
3.			DEFENSE MANAGEMENT	
4.			OCT 13 1975	

5. RECOMMENDED ACTION:

<input type="checkbox"/> PER CONVERSATION	<input type="checkbox"/> COMMENT	ROUTE TO: <i>with 10/13/75</i>
<input checked="" type="checkbox"/> NECESSARY ACTION	<input type="checkbox"/> AS REQUESTED	SIGNATURE: <i>[Signature]</i>
<input type="checkbox"/> NOTE AND RETURN	<input type="checkbox"/> NOTE AND FILE	APPROVAL: <i>[Signature]</i>
<input type="checkbox"/> RECOMMENDATION	<input type="checkbox"/> CALL ME	CONCURRENCE: <i>[Signature]</i>
<input type="checkbox"/> ANSWER OR ACKNOWLEDGE ON OR BEFORE	<input type="checkbox"/> YOUR INFORMATION	

☐ PREPARE REPLY FOR THE SIGNATURE OF _____

6. STATEMENT OF WHY ACTION IS NECESSARY:

Bill:
I spoke to Bill Henson today and he advised me that regional office endorsement of this TFA request is in the mail. Consequently, consider this request approved and resubmit TFA as soon as your schedule permits. Thank you,
Greg

1st week Dec 3 d us

7. FROM	BUILDING/ROOM	EXT.	DATE
<i>Greg Brady</i>			<i>10/14</i>

APPENDIX B
Study Team Resumes

PERSONAL RESUME

William R. Higham

I EDUCATION

Law School: Hastings College of Law (University of California) 1949-1952 (Bachelor of Laws degree).
College: Oregon State University, 1945-1949.
(Bachelor of Science degree in General Science).
High School: Diocesan College, Capetown, South Africa.
Graduated in 1944.

II EMPLOYMENT AND SELF EMPLOYMENT (1956-1975)

December 1974
to present
Director, National Center for Defense Management, 2100 M Street, N.W., Suite 601 Washington, D.C. 20037
As director of this National Legal Aid and Defender Association (hereafter referred to as NLADA)-sponsored, LEAA-funded program, duties are to achieve the fulfillment of stated project goals. These include the furnishing of management assistance to defender organizations, the conducting of feasibility studies and evaluations, the sponsorship of management training programs for defender managers, the development of management systems for defender offices, and related functions. Supervise two professional staff, two clerical staff, numerous consultants.

November, 1966
to November, 1974
Public Defender of Contra Costa County California, 901 Pine Street, Martinez, California 94553
As first public defender of this 570,000 population county, was responsible for bringing the office into being and managing it from its initial size (one office location, eleven employees) to its size in the fiscal year 1974-75 (four branches, over sixty employees, \$1.3 million budget).

April, 1966
to November, 1966
Private Practice of Law, 423 Cumberland Street, Pittsburg, California
General practice of law, with emphasis on criminal defense practice.

February, 1958
to March, 1966

Deputy District Attorney for Contra Costa
County, California, 100 -37th Street,
Richmond, California

At time of leaving, was Deputy-in-Charge of
Richmond Branch Office, supervising a staff
of about seventeen persons.

October, 1956
to February, 1958

Private Practice of Law, 1766 Locust Street,
Walnut Creek, California
General practice of law.

III PRIOR CONSULTANCIES

1972

To Courts Task Force of National Advisory
Commission on Criminal Justice Standards
and Goals (through NLADA).

Co-authored a draft of proposed defense standards
for the U.S., many of which were incorporated
in the final text adopted.

1973

To Alaska Public Defender Agency (through
NLADA and Criminal Courts Technical Assistance
Project of American University).

Conducted evaluation and engaged in management
consultation.

1973

To Massachusetts Defenders Committee (private
consultation).

Subject matter dealt with forensic photography
and use of visual aids in trial, and systems
to resources necessary to effectuate such use.

1974

To Vermont Defender General's Office (through
NLADA and Criminal Courts Technical Assistance
Project of American University).

Conducted evaluation and engaged in management
consultation.

1974

To Seattle-King County Public Defender
Association (through NLADA and Criminal Courts
Technical Assistance Project of American
University).

Developed a request for proposals to conduct
an evaluation of indigent defense services
in Seattle-King County, Washington.

IV RELEVANT ACTIVITIES

Chairman, Defender Committee, NLADA, from November, 1973 to November, 1974. Member of Defender Committee from 1971-1974; served on and/or chaired various defender subcommittees before and after that time, including subcommittees on NLADA dues structure, NLADA bylaws, defender standards, defender membership, and death penalty.

Member, Board of Directors, NLADA, November, 1974 to present.

President, California Public Defenders Association, from September, 1972 to May, 1974. Previously served terms as First Vice President, Second Vice President and Secretary Treasurer. As President, personally supervised the Association's legislative program during the months that the legislative chairman was heavily engaged in representation in a major case. Testified as the Association's representative before both the California State Senate Judiciary Committee and Assembly Criminal Justice Committee in hearings on restoration of the death penalty.

As the Association's first Secretary-Treasurer (two terms), was responsible for drafting its bylaws and articles of incorporation, incorporating it, and doing all things necessary to place it on a sound financial footing.

Member, Board of Directors, Western Regional Defender Association, 1972-1974. Was responsible for drafting the bylaws and articles of incorporation of this association and incorporating it.

Chairman, Judicial Process Committee, and Member, Board of Directors, of the Criminal Justice Agency of Contra Costa County, from 1971 to 1974. This agency was responsible for reviewing grant applications for funding of projects in the county out of such county's allocation of LEAA money received through California's state block grants.

Delegate to and Discussion Leader at the National Conference on Criminal Justice, Washington, D.C., in January, 1973. Chaired panel discussions on National Advisory Commission Standards for the defense.

Member, Board of Directors, Contra Costa County Mental Health Association, (1971-1973).

V AWARDS

Reginald Heber Smith Award (Defender)
By NLADA, November 16, 1974

VI ARTICLES AND PAPERS

"The Defender Office: Making Managers Out of Lawyers"; paper given at American Association for Advancement of Science meeting, New York, N.Y. January 31, 1975.

VII BAR ADMISSIONS

Admitted to practice in California on June 16, 1955, including admission to practice in United States District Court for Northern California and Ninth Circuit Court of Appeals. U.S. Supreme Court admission on October 23, 1967.

Certified in California as Criminal Law Specialist.

VIII ORGANIZATIONAL MEMBERSHIPS

National Legal Aid and Defender Association

California State Bar Association

California Public Defenders Association (Honorary Life Member)

California Attorneys for Criminal Justice

IX MILITARY SERVICE

U.S. Navy, World War II

GUSTAV GOLDBERGER
1401 Highland Drive
Silver Spring, Md. 20910
(301) 585-7177

/76

CATIONAL DATA

Elementary Schools: Public Schools

Copenhagen, Denmark 1940-43
Gothenburg, Sweden 1943-45
Montreal, Canada 1946-47

Secondary Schools: Matriculated High School
McGill University - Montreal, Canada

Attended Private School - Montreal, Canada

Colleges: McGill University
Montreal, Canada 1951-53

Sir George Williams University
Montreal, Canada
B.A. 1957

Post Graduate: Rutgers - The State University
School of Law
New Jersey 1957-61
J.D. Degree

Northwestern University
School of Law
Short Course for Prosecutors 1965

PROFESSIONAL EXPERIENCE

City of Akron: Assistant Law Director 1963-64

City of Akron: Chief Prosecutor 1964-66

Summit County Ohio: Assistant County Prosecutor 1966-67

Private Practice: Erickson, Sheppard, Goldberger & Wheeler
Akron, Ohio 1966-67

Goldberger, Thomasson, Lane & Rosenblithe
Akron, Ohio 1970-75

Project Director: O.E.O. Legal Services
Summit County, Ohio
September 1967-70

Deputy Director: Summit County Public Defender Office
Akron, Ohio 1974-75

ime of Gustav Goldberger
: Two
'76

Associate Director: National Center for Defense Management
National Legal Aid and Defender
Association
Washington, D.C. 1975 to present

BERSHIP

American Bar Association
Ohio Bar Association
Akron Bar Association
A.T.L.A.
Judicature Society
District of Columbia Bar Association

MITTED TO PRACTICE

Ohio Bar 1963
U.S. District Court
(Northern District of Ohio) 1964
U.S. Supreme Court 1968
D.C. Court of Appeals October 8, 1975

ARD

Public Service Award: Summit County Prosecutor 1968

BLICATIONS

Legal Aid Divorces - A Practical Approach
American University Law Review
Volume 20, Number 1; August 1970

Book Review
Insanity Defense, by Richard Arens
University of Akron Law Review
Volume 7, Number 3; Spring 1974

SSIGNMENTS

Reactor: National Colloquium on the Future of Defender
Services, January 1976

Study Team • El Paso, Texas Defense Development Study
Captain: • Iowa Defense Development Study
• Evaluation of Omaha Alternative to Incar-
ceration Project
• State of Oklahoma Indigent Defense Feasibility
Study
• Evaluation, Public Defender Office,
New Hampshire

PERSONAL RESUME

PRESCOTT EATON

6/18/75

Personal Biography

Born January 29, 1930, in Seattle Washington. Lived in Seattle, Washington to age 23. Entered U.S. Army October 2, 1953 and served until voluntary retirement June 1, 1975 as a Lieutenant Colonel. Served in positions of responsibility at military installations throughout the United States, in Greenland, Europe, Vietnam and Laos.

Education

High School: Shawnigan Lake, British Columbia (graduated 1949)

College: Washington State College (1949-1951)
University of Washington (1951-1953)
Bachelor of Arts in Anthropology
Eastern Washington State College (1965-1967)
Master of Science in Psychology

Relevant Positions Held

Associate Director, Management Programs, National Center for Defense Management, 2100 M Street, N.W., Washington, D.C. (4/21/75 to present)

Assistant Comptroller, Military District of Washington, Washington, D.C. (June 7, 1974 to April 20, 1975)

Executive Officer, Support Element, Defense Attache Office, Vientiane, Laos (January 16, 1974 to June 6, 1974)

Executive Assistant (Secretary of the General Staff), Commander, U.S. Army Criminal Investigation Command (April 15, 1973 to December 15, 1973)

Graduate Faculty Member, U.S. Army Command and General Staff College, Fort Leavenworth, Kansas (June 6, 1970 to May 15, 1972)

Professional Training

Automatic Data Processing Theory/Applications (Jan-June, 1970/October, 1970)

Operations Research/Systems Analysis Executive Course (November - December, 1970)

Personal Resume
Prescott Eaton
6/18/75
page two

Professional Training cont'd.

Application of Behavioral Science Models for Management, U.S. Department
of Agriculture Graduate School (October, 1974)

Organizational Memberships

American Psychological Association (APA)
Division of Industrial - Organizational Psychology (Division 14), APA
American Society of Military Comptrollers
Association of Legal Administrators
Psi Chi (Psychology Honorary)
American Society of Association Executives
Association for Systems Management

Awards

Legion of Merit, Bronze Star
Meritorious Service Medal, Air
Medal, Army Commendation Medal (three awards)

MALVINE NATHANSON
3 Spruce Street
Boston, Massachusetts 02108
617-723-1681

EDUCATION: Duke University, B.A. 1962. Major in history.
Columbia Law School, J.D. 1965.

ADMITTED TO BARS OF: Commonwealth of Massachusetts, New York State,
United States District Courts for the Southern District of New
York, Eastern District of New York and District of Massachusetts,
United States Courts of Appeals for the First and Second Circuits,
United States Supreme Court.

EMPLOYMENT EXPERIENCE:

January 1973 to present: Chief Appellate Attorney, Massachusetts
Defenders Committee.

In this position, I have responsibility for the appellate, post-conviction and law reform cases handled by the Massachusetts Defenders Committee, a state-wide public defender agency. The Appeals Division staff has at present twelve attorneys and the staff is generally supplemented by three or four students at any one time. As Chief Appellate Attorney, I have primary responsibility for hiring, firing and staff evaluations, coordination with law student programs, quality and quantity control of all work done, and training and continuing education.

January 1969 to December 1972: Attorney with Criminal Appeals Bureau of the Legal Aid Society of the City of New York. (In January 1972, I was appointed Assistant Attorney-in-Charge of the Criminal Appeals Bureau.)

In addition to carrying an appellate caseload, I supervised the appeals handled by the approximately 25 attorneys in the office and in addition handled case assignment and oversaw procedural progress of each case. I also assisted in the training of new staff.

January 1968 to December 1968: Law Clerk to Honorable Charles D. Breitell, then Associate Justice, New York State Court of Appeals.

January 1966 to December 1967: Attorney with Criminal Appeals Bureau of the Legal Aid Society of the City of New York.

Briefing and arguing appeals from criminal convictions and post-conviction applications in New York State appellate courts; habeas corpus applications in federal courts.

PROFESSIONAL ASSOCIATIONS: Massachusetts Bar Association
Boston Bar Association
American Bar Association
National Legal Aid and Defender Association

OTHER EXPERIENCE:

During the fall of 1974, the Appeals Division was the subject of a management study by the firm of Touche, Ross, Inc. With the management consultants, I analyzed the operations of the office, and prepared and implemented new management and statistical systems.

APPENDIX C

Indigent Defense

by Gary V. Stewart
Criminal Justice Planner

INDIGENT DEFENSE

The law in the state of Tennessee states that in all criminal justice prosecutions, the accused is entitled to representation by counsel. If the accused is unable to employ counsel, he is entitled to have counsel appointed to the court. Tennessee uses a number of different methods in order to provide counsel to indigent clients. Since Tennessee does not have a statewide public defender system, counsel is provided by appointment of an attorney or through public defender program.

The majority of indigent clients in the state, especially in rural areas, are represented by court appointed personnel (see Tables , , and for the various methods of selecting indigent defense counsel). This satisfies the constitutional requirement of the right to counsel, but at the same time strong criticism is voiced contending that this type of representation is not adequate due to lack of trial preparation time and the unwillingness of many attorneys to do not feel they have the time for such. Payment of court appointed personnel is made out of an indigent defense fund provided by the state. During the fiscal year 1974 \$500,000 was appropriated for payment for counsel for indigent defendants. This money was depleted before the end of the fiscal year and many court appointed counsels went unpaid. During fiscal year 1975 there has been over 700,000 appropriated and it is expected to be extinguished before this fiscal year reaches its mid-point. In fiscal year 1975, court appointed counsel are to be paid for out-of-court time and in-court time, whereas in 1974 and the first half of 1975 they were paid for in-court time only. This, coupled with the fact that demands seem to be greater in 1975, will certainly cause the indigent defense fund to become extinguished far earlier than in 1974. Table shows the breakdown of the money into judicial circuits and also how many cases for which reimbursement was requested. These figures create some confusion as to actual money spent in 1974 and 1975. The indigent defense fund is paid out on a fiscal year basis and these figures show the breakdown of money for calendar years. Records were kept in such a way in which it was impossible to present figures and B on a fiscal year basis. These statistics show that an average of 77.45 per case was expended in 1974, and in 1975 the amount per case has risen to \$117.55. Beginning July 1, 1975 attorneys will be paid for out-of-court work time and this will cause the money per case statistic to go even higher. The statistics also show that the larger metropolitan areas receive more than half of what all the other counties combined receive. Again it should be mentioned that there are an indeterminable amount of cases whereby attorneys represent indigent clients and fail to file a claim for reimbursement because so little of the attorney's time was required to represent the client or because the attorney just doesn't care to take the time and trouble to request reimbursement.

Some areas of the state have established public defender programs. This has been done because of the large number of indigent cases requiring representation and the strain that this demand has made on the local bar association. Another reason is that a program employing a full-time public defender gains competency through experience and training. Public defender programs are in operation in Anderson County, Washington County, Metro Nashville, Memphis/Shelby County, and in Knoxville through the Legal Clinic at the University of Tennessee. The office in Memphis currently employs four full-time assistant public defenders, seventeen part-time assistant public defenders, and four criminal investigators. During 1974 this program defended 1,369 indigents in criminal courts, 329 indigents in general sessions courts, 799 in juvenile court, and 2,841 in

city court. For just the first 6 months of 1975 the program has defended 1,338 indigents in criminal courts, 239 in general sessions courts, 2,413 in city courts and 400 in juvenile courts.

In Metro-Nashville the public defender program is staffed by 10 full-time assistants and 4 criminal investigators. Table illustrates the breakdown and caseload of the office and shows how the work has become more demanding each year.

	<u>1971</u>	<u>1972</u>	<u>1973</u>	<u>1974</u>
CRIMINAL COURT	900	905	1,162	1,450
GENERAL SESSIONS COURT	726	1,542	5,502	7,717
TOTAL	<u>1,626</u>	<u>2,447</u>	<u>6,664</u>	<u>9,167</u>

The indigent defense program in Knoxville conducted by the Legal Clinic of the University of Tennessee College of Law provides defense services to about 90% of all indigent defendants in the lower criminal courts not of record, and to about 30% of all indigent cases in the criminal courts; most of these being felony cases. Assigned counsel handle the remaining cases in the criminal courts and lower courts. The following table shows the caseloads for the past four years.

<u>YEAR</u>	<u># OF CASES</u>
1971	765
1972	1,181
1973	1,444
1974	1,270

It is felt by the director of this program that adequate representation is provided and that the program has speeded up the trial. Another important feature of this program is the continued rise in the number of people steered into rehabilitation by the program.

In Anderson County the public defender program is staffed by one part-time defender, and he is not aided by a criminal investigator. The following table shows a breakdown of the caseload for this defender for the last three years.

	<u>1972</u>	<u>1973</u>	<u>1974</u>
GENERAL SESSIONS COURT	100	103	112
CRIMINAL COURT	40	45	50

The public defender office in Washington County is staffed by one full-time public defender and no criminal investigator. The caseload for this office is reported to be about 174 cases in 1973 and 182 cases in 1974.

The Metropolitan-Nashville Juvenile Court has representation by a public defender in connection with their block grant from the Tennessee Law Enforcement Training Commission. All of the above mentioned public defender programs are supported by grants from TLEPC except the Memphis-Shelby County program.

Attorneys appointed by the court are allowed payment from the state according to TCA 40-2023 which states that attorneys so appointed, other than public defenders, shall be entitled to reasonable compensation for their services, both prior to and at the trial of the cause and shall be entitled to reimbursement for their reasonable expenses in accordance with the rules of the Supreme Court. The reimbursement shall not exceed \$100 for each day of trial with a maximum compensation for any one trial or proceeding in the trial court of \$500.00.

During the past few years, statewide public defender programs have been proposed to the Legislature, although until 1975 all proposals had been rejected. The 1975 proposal received little support but did receive enough whereby it has been placed in a committee in order to do further study and develop a better program. The proposed legislation supports the start of a statewide system and allows for pilot programs to begin in fifteen areas. Support is building and possibly by the legislative session in 1976 passage of an acceptable bill establishing a statewide public defender system will be accomplished. The staff of the Tennessee Law Enforcement Planning Commission are providing research, data, and any other needed assistance in the study presently being conducted.

STATE INDIGENT DEFENSE FUND

REPRESENTS MONEY PAID OUT TO COURT
APPOINTED ATTORNEYS AND IS BASED ON
THE CALENDER YEAR

1974 FIGURES REPRESENT MONEY PAID OUT
FOR A 12 MONTH PERIOD

1975 FIGURES REPRESENT MONEY PAID OUT
FOR A 6 MONTH PERIOD

<u>JUDICIAL CIRCUIT</u>	<u>FIGURE A</u> <u># OF CASES</u>	<u>MONEY EXPENDED</u>
1	92	\$ 10,800
2	36	3,625
3	1,383	20,890
4	102	13,094
5	131	15,855
6	666	71,062
7	47	4,345
8	29	3,088
9	141	14,638
10	45	8,400
11	77	12,800
12	70	6,165
13	110	6,865

<u>JUDICIAL CIRCUITS</u>	<u>FIGURE B</u> <u># OF CASES</u>	<u>MONEY EXPENDED</u>
1	25	\$ 5,030
2	10	1,000
3	133	11,950
4	70	7,570
5	74	9,720
6	346	38,468
7	27	4,245
8	22	1,779
9	80	6,425
10	26	5,309
11	55	9,885
12	45	3,760
13	51	8,275

(cont.)

TABLE

(cont.)

1974 FIGURES REPRESENT MONEY PAID OUT
FOR A 12 MONTH PERIOD

JUDICIAL CIRCUIT	FIGURE A # OF CASES	MONEY EXPENDED
14	94	\$ 5,600
15	19	1,400
16	138	9,450
17	127	17,850
18	66	10,133
19	21	2,894
20	105	9,600
21	30	3,550
22	45	3,116
23	109	11,754
24	190	16,180
26	92	6,310
Supreme Court	<u>132</u>	<u>27,667</u>
Criminal Court		
of Appeals		
SUBTOTAL	4,097	\$ 317,131

1975 FIGURES REPRESENT MONEY PAID OUT
FOR A 6 MONTH PERIOD

JUDICIAL CIRCUITS	FIGURE B # OF CASES	MONEY EXPENDED
14	43	\$ 2,200
15	10	2,250
16	52	4,711
17	99	12,896
18	31	3,375
19	8	1,025
20	77	9,208
21	21	1,935
22	22	1,725
23	47	3,900
24	37	2,960
26	41	3,440
28	5	1,071
29	42	3,550
Supreme Court	<u>69</u>	<u>16,676</u>
CCA		
SUBTOTAL	1,568	\$ 184,338

MONEY PAID TO PUBLIC DEFENDER PROGRAMS

WASHINGTON COUNTY	3,200
ANDERSON COUNTY	556
METRO - NASHVILLE	43,950
MEMPHIS-SHELBY CO.	<u>196,450</u>
SUBTOTAL	\$ 244,156
TOTAL	\$ 561,287

MONEY PAID TO PUBLIC DEFENDED PROGRAMS

METRO - NASHVILLE	36,050
MEMPHIS-SHELBY CO.	<u>156,150</u>
SUBTOTAL	\$ 192,200
TOTAL	\$ 376,538

TABLE

SELECTION METHOD FOR INDIGENT DEFENSE--CIRCUIT COURT--1974

<u>METHOD</u>	<u>NUMBER OF COURTS USING</u>
At Random From All Attorneys in County	60
From Prepared List of Volunteer Attorneys	12
From Legal Aid Agency or Voluntary Defender's Office	0
Public Defender	4
Other	1

* These categories are not discreet, as some courts may use more than one method to select defenders.

TABLE

METHOD OF SELECTING INDIGENT DEFENSE
COUNSEL-GENERAL SESSIONS COURTS-1974*

METHOD OF SELECTION	NUMBER OF COURTS USING
At random from all attorneys in county	73
From a prepared list of volunteer attorneys	23
From a legal aid agency or voluntary defenders office	1
Public defender	5
Other	2
TOTAL RESPONSES	104

* These categories may not be discreet as some courts may use more than one method of selecting indigent counsel.

TABLE

SELECTION METHOD FOR INDIGENT DEFENSE-JUVENILE COURT
1974

METHOD	# OF COURTS USING
At Random From all Attorneys in Co.	67
From Prepared List of Volunteer Attorneys	21
From Legal Aid Agency or Voluntary Defender's Office	3
Public Defender	2
Other	0

*These categories are not discreet, as some courts may use more than one method to select defenders.

APPENDIX D

Fee Schedule for

San Mateo County, California

MUNICIPAL COURT

1. APPEARANCE AS ASSIGNED COUNSEL ON ARRAIGNMENT CALENDAR

- A. Arraignment calendar (two hours or less) \$40.00

Should a case be assigned and closed on the same day, the assigned attorney is entitled to bill \$40.00 per closed case in addition to the arraignment calendar fee up to a maximum of two closed cases per arraignment calendar. Please submit bills for cases closed at arraignment calendars even if the number of closed cases is in excess of two.

Bills for closed cases are to be submitted separate from the bill for the arraignment calendar.

- B. Appearance on arraignment calendars in all municipal courts may be billed at \$65.00 if the assigned attorney is required to spend more than two hours on said calendars and if said attorney is unable to bill for closing an assigned case on the same day as the arraignment calendar. 65.00

2. NON-TRIAL, NON-PRELIMINARY HEARING FEES

In the event a case is disposed of without trial, preliminary hearing or motions. 40.00

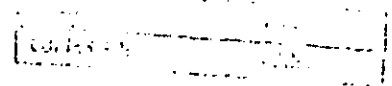
NOTE

Only those attorneys specifically assigned to arraignment calendars are entitled to receive arraignment calendar fees.

NO ADDITIONAL FEES WILL BE ALLOWED WHERE FELONIES ARE REDUCED TO MISDEMEANORS.

All attorneys are again advised that fees on closed cases should be billed promptly.

"NO PAYMENT WILL BE MADE FOR ATTORNEY'S BILLS SUBMITTED AFTER SIXTY DAYS AFTER PROFESSIONAL SERVICES ARE CONCLUDED UNDER THE ASSIGNED COUNSEL PROGRAM." (Board of Directors Resolution - August 8, 1969)



3. 1538.5 P.C. MOTION

Separate hearings on 1538.5 motions (i.e. not combined with a preliminary hearing) during which a witness is sworn and testifies can be billed as follows:

A. Hearing requiring two hours or less	60.00
B. Hearing requiring more than two hours	
Half Day	75.00
Full Day	110.00
C. 1538.5 motion, written points and authorities only	50.00
D. 1538.5 motion, with points and authorities, combined with Preliminary Hearing, plus preliminary hearing fee	25.00

4. PRELIMINARY HEARING

A. Hearings requiring two hours or less	60.00
B. Hearings requiring more than two hours	
Half Day	75.00
Full Day	110.00

5. PRE-TRIALS

Appearance at a pre-trial or setting conference may be compensated at the rate of \$25.00 under the following circumstances:

A. The appearance consumes in excess of an hour, <u>AND</u>	
B. A further appearance or appearances are required subsequent to the day of the conference to conclude the case (e.g. sentence, dismissal)	25.00

6. TRIAL FEES

A. One-half day of court trial	75.00
B. One day of court trial (not to exceed total of \$330.00 per case without prior approval by the Private Defender Office)	110.00

- C. One-half day of jury trial 75.00
- D. Jury trials are payable at the rate of \$130.00 per day for trial for the first five full days. (Not to exceed a total of \$600.00 per case without the prior approval by the Private Defender Office) 130.00
- E. Separate appearance for sentence following trial 25.00

When a case originating in the municipal court is certified to the superior court (e.g. mental competency, MDSO, juvenile) for further proceedings, it is not in a condition to be billed as a muni matter until one of the following occurs:

- A. It is finally disposed of in the superior court;
- B. It is remanded to the municipal court, and thereafter finally disposed of in said court;
- C. It remains under superior court jurisdiction for in excess of 30 days after a commitment is effected.

7. MISCELLANEOUS

- A. Return for alleged violation of probation or diversion conditions:
 - Within 91 days 25.00
 - After 91 days 40.00
- B. Miscellaneous motions supported by written points and authorities 25.00

Extended hearings will be at the same rate as provided for 1538.5 motions in lieu of above fee.

NUMBER OF APPEARANCES

In those instances in which an attorney must make more than three appearances in addition to the arraignment appearance, to dispose of a case, he may bill the additional total sum of \$25.00 for the subsequent appearances in excess of three, providing the appearances in excess of three are not in themselves billable under other provisions of this schedule. The application of this section relates to cases in which the attorney could not reasonably avoid the repeated appearances.

The recommended maximum fee to be billable for any one case, in the event a case is closed without trial (court or jury) including all motions and appearances

125.00

The administrator is authorized to approve fees exceeding the maximum up to \$50.00 where circumstances warrant; fee beyond the maximum allowed by this schedule must be approved by the Special Fee Committee.

A further suggestion is that assigned counsel remember that their fellow assigned attorneys are appearing in all courts in the county and would be able to make special appearances on behalf of their fellow assigned attorneys if the client, district attorney, and the court have been properly advised, and if the matter entails nothing more than a routine continuance.

SUPERIOR COURT

1. NON-TRIAL APPEARANCE FEES

A. All arraignments will be handled by the office of the Administrator. Routine continuances will also be covered by this office provided ample notice is given to this office and the defendant. All first appearances for PC 1367-68 (appointment of doctors) and WI 3050-51 will be covered by this office, as will PC 859a only when the P.O. advises his report is not available and must request a continuance. In all instances a Superior Court Memo must be provided to this office with instructions. All attorneys are expected in Superior Court at the time a plea of guilty is entered and at the time of sentence.

B. 995 P.C. MOTION

Separate appearances on 995 motions supported by written points and authorities

50.00

C. 1538.5 P.C. MOTION

Separate hearings on 1538.5 motions during which a witness is sworn and testifies may be billed as follows:

- | | |
|--|--------|
| 1. Hearing requiring two hours or less | 60.00 |
| 2. Hearing requiring more than two hours | |
| Half Day | 75.00 |
| Full Day | 110.00 |
| 3. 1538.5 motion, written points and
authorities only | 50.00 |

2. PRE-TRIALS

A fee of \$25.00 is allowable to attorneys who must attend pre-trial conferences in superior court. The \$25.00 fee is the maximum allowed for pre-trial conferences regardless if the attorney has to attend one or more pre-trial conferences. (If combined with another proceeding, e.g. 1538.5 P.C., 995 P.C. motions, which itself is compensated, the pre-trial fee is not payable unless additional separate pre-trial appearance or appearances are necessary. 25.00

3. TRIAL FEES

- | | |
|---|--------|
| A. One-half day of court trial | 75.00 |
| B. One day of court trial. (Not to exceed total of \$330.00 per case without prior approval of the Private Defender Office) | 110.00 |
| C. One-half day of jury trial | 75.00 |
| D. Jury trials are payable at the rate of \$130.00 per day for trial for the first five full days. (Not to exceed a total of \$650.00 per case without the prior approval of the Private Defender Office) | 130.00 |
| E. Separate appearances for sentence following trial. | 25.00 |
| F. <u>Only</u> in those instances when a case <u>goes to trial</u> , a fee of \$25.00 is payable to an attorney if through <u>no fault</u> of his own, he is forced to trail and must appear on a date, or dates, other than the date originally set for trial. | 25.00 |

4. MISCELLANEOUS

- A. Return of defendant to court following suspension of proceedings under 1203.03, 1367-68, 3050-51 and 1158 PC, 6300 et. seq W&I Code, revocation of probation, revocation of diversion:

If more than 91 days after commitment requiring new appointment 40.00

If less than 91 days after commitment, not requiring new appointment 25.00

- B. Miscellaneous motions supported by written points and authorities 25.00

Extended hearings will be at the same rate as provided for 1538.5 motions in lieu of above fee.

NUMBER OF APPEARANCES

In those instances in which an attorney must make more than three appearances in addition to the arraignment appearances to dispose of a case, he may bill the additional total sum of \$25.00 for the subsequent appearances in excess of three, providing the appearances in excess of three are not in themselves billable under other provisions of this schedule. The application of this section relates to cases in which the attorney could not reasonably avoid the repeated appearances. 25.00

The recommended maximum fee to be billable for any one case, in the event a case is closed without trial (court or jury) including all motions and appearances is: 150.00

The administrator is authorized to approve fees exceeding the maximum up to \$50.00 when circumstances warrant; fees beyond the maximum allowed by this schedule must be approved by the Special Fee Committee.

5. MISCELLANEOUS SPECIAL APPEARANCES

Special appearance for line-up or interrogation (when not an assigned case) 40.00

Special appearance, counseling and appearance for testimony for a witness	40.00
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Special assignments by direct designation from Private Defender Office (when not assigned case) including consultation with prisoners and prospective clients, investigation hold, etc.:

A. Less than one hour	20.00
B. One hour or more	40.00

MENTAL-INEBRIACY PROCEEDINGS

1. Attorneys scheduled to appear on the Mental Calendar may bill as follows:

A. Two hours	50.00
B. More than two hours	75.00
C. Return appearance on one or more specific cases	25.00
D. Trials: Same rate as in criminal matters.	

JUVENILE

CASES CANNOT BE BILLED UNTIL CASE IS CLOSED

1. JURISDICTIONAL HEARINGS

A. Two hours or less	50.00
B. More than two hours	
Half Day	75.00
Full Day	110.00
C. Return for dispositional hearing on one or more specific cases	25.00
D. Return for review after dependency hearing, if necessary	25.00

2. DETENTION CALENDAR

A. Detention calendar only, regardless of number of cases. (May be billed in addition to jurisdictional and dispositional hearings on same day):

1. Two hours or less	50.00
2. More than two hours	75.00

3. FITNESS HEARINGS

- A. Fitness hearings may be handled by the Assistant Administrator at Hillcrest unless the assigned attorney feels his presence is necessary due to complicated facts, etc. Fitness hearings should be reported to this office. Assistant Administrator can be reached at 573-2127. 25.00

MAXIMUM allowance on any one juvenile case regardless of number of companion cases or appearances (without multiple day hearing) 125.00

EXTRAORDINARY SERVICES

- A. WRITS (\$15.00 per hour, up to maximum of \$125.00)
- B. APPEALS from muni. court to appellate department \$15.00 per hour to maximum of \$150.00
- C. EXPUNGEMENT and sealing of record 40.00
- D. CIVIL CONTEMPTS and petitions to declare minor free from parental custody and control:
1. Basic Fee 50.00
 2. More than two appearances required 75.00
 3. Motion supported by declaration, points and authorities, add 25.00
 4. Extended hearing (In excess of two hours)
 - Half Day 75.00
 - Full Day 110.00
 5. Maximum Fee 200.00

APPENDIX E

Estimate of the Number of Public Defenders Needed in Montgomery County

ESTIMATION OF THE NUMBER OF DEFENDERS
NEEDED IN MONTGOMERY COUNTY

One of the objectives of the study was to determine the staffing requirements of a defender office. A straightforward method of estimating the number of attorneys required is to use the recommendations of the National Advisory Commission* that an attorney limit his/her caseload as follows:

Felonies - - - - - No more than 150 cases per year
Misdemeanors - - - No more than 400 cases per year
Juvenile cases - - No more than 200 cases per year

If these standards are applied to the projected workload for indigent defense developed in this study, the estimated number of attorneys required is four. The requirement is derived as follows:

188 felonies	divided by 150 cases per year requires	1
418 misdemeanors	divided by 400 cases per year requires	1
394 juvenile cases	divided by 200 cases per year requires	<u>2</u>
TOTAL NUMBER OF ATTORNEYS REQUIRED		4

The study team felt that merely using the NAC standards did not take into consideration the particular situation in Montgomery County. The consultants, after having conducted the site visit, felt that due to the court process in Montgomery and the fact that the District Attorney General only has two additional attorneys on his staff that recommending a defender office with four attorneys was unrealistic. The study team concluded that when the local practice was analyzed in conjunction with the NAC standards, three full time attorneys would be sufficient to staff a defender office under the previously described Defender System.

*NAC Standard 13.12.

A Mixed System handling 75% of the indigent caseload in Montgomery County would require at least two attorneys. Depending on how much time the Chief Defender would have to spend performing management and supervisory functions as well as coordinating defense efforts with the Coordinated Assigned Counsel program, a defender office under the Mixed system may still require two full time staff attorneys in addition to the Chief Defender. NCDM would suggest that, initially, Montgomery County attempt to set up a defender office under a Mixed System with two additional full time staff attorneys because a great amount of the Chief Defender's time will initially be spent setting up the office, training assigned counsel as well as staff defenders, and trying to assist the Fort Campbell JAG in establishing an ELAP program that could help provide indigent defense services in Montgomery County.