Bespeaking Justice: A History of Indigent Defense in Montana

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ARTICLES

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I. INTRODUCTION

In 2005, the Montana Legislature enacted the Montana Public Defender Act (the Act), groundbreaking legislation that put Montana in the forefront of a nationwide movement to reform indigent defense. The Act comprehensively altered how indigent defense services are provided in every state court in Montana; no other state has ever enacted an indigent defense system of such breadth and scope. The Act went into effect in 2006, 142 years after Montana became a territory.

The history of indigent criminal defense in Montana over those 142 years is not one story, but many. It is the story of statutory and constitutional provisions and the case law that developed construing those provisions; it is the story of the systems we have developed to implement our indigent defense policies; and it is the human story of how we treat those accused of a crime. This Article will tell part of all of these stories, offering a history of how Montana has provided counsel to indigent adults accused of

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II. CONSTITUTIONS, STATUTES, AND CASE LAW

A. Montana Law

Montana became a territory on May 26, 1864. Until December 12, 1864, Montana functioned under the Organic Act and the Idaho Territorial Statutes. Montana's Organic Act did not address the right to counsel except to state "[t]hat the constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said Territory of Montana as elsewhere within the United States."

The first Montana Territorial Legislature met in Bannack beginning on December 12, 1864, and enacted a Penal Code. An indigent accused person arrested in Montana in 1865 and charged with a felony crime was entitled to counsel at the public's expense, even though the U.S. Constitution did not require a state or territory to appoint counsel for the indigent defendant and even

2. The history of juvenile defense in Montana deserves separate treatment, as does the history of the defense of those involuntarily committed.
4. Jesse B. Roote, The Courts and Lawyers of Montana, in Helen Fitzgerald Sanders, A History of Montana vol. 1, 579, 582 (Lewis Pubig. Co. 1913). Prior to the enactment of Montana's Organic Act there had been both criminal and civil trials in Montana. The first criminal trial occurred over two hundred years ago in what is now Missoula County, when the Lewis and Clark expedition held a trial by military tribunal. A soldier accompanying them was charged with insubordination, "found guilty and whipped." Id. at 584. The first civil trial also took place in Missoula County.

The first lawsuit ever commenced in Missoula County, or in fact in Montana, was commenced and tried at Hell's Gate, in the month of March 1862, before Henry Brooks, justice of the peace. The proceedings were under the laws of the Washington Territory. A Frenchman called "Tin Cup Joe"—other name forgotten—accused Baron O'Keefe with beating one of his horses with a fork handle and then pushing him into a hole, thereby causing his death, and claimed damages in the sum of $40, and sued O'Keefe to recover that amount. The place of trial was in Bolte's saloon. A jury of six was empanelled and sworn to try the cause.... As the trial progressed the proceedings became less harmonious until it ultimately culminated in a lot of unpleasantness between the defendant and the writer, who was acting as attorney for the plaintiff. During the unpleasantness the friends of the respective parties lent a hand, and it was far from being a select or private affair. While the unpleasantness was in progress the court and a portion of the jury had fled for dear life, and when harmony was restored they were nowhere to be found. After considerable search the court and the jury were captured and the trial proceeded. Id. (quoting Frank H. Woody, A History of Missoula County and City 4 (W.E. Ellsworth ed., Democrat-Messenger 1877)). The jury held for the plaintiff. Id.
5. 13 Stat. at 86.

https://scholarship.law.umt.edu/mlr/vol68/iss2/8
though Montana would not have a constitution for another twenty-five years.

A defendant going to court in 1865 would have had the benefit of section 132 of the Penal Code:

If any person about to be arraigned upon an indictment for a felony, be without counsel to conduct his defence, and he be unable to employ any, it shall be the duty of the court to assign him counsel, at his request, not exceeding two, who shall have free access to the prisoner, at all reasonable hours.\(^6\)

The accused was allowed to take depositions in the same manner as in civil cases in the event that a witness would be unavailable at trial.\(^7\) Change of venue was allowed if “the prosecutor has an undue influence over the minds of the inhabitants of the county where the indictment or information shall be pending” among other reasons.\(^8\) The accused was allowed twice the number of challenges during \textit{voir dire} as was the prosecution.\(^9\) If the prosecutor sought an indictment by grand jury, but “not a true bill” was returned on a misdemeanor charge, the grand jury had the option of requiring that the prosecutor pay the costs of the proceedings.\(^10\) The prosecutor also had to pay costs if he brought a misdemeanor prosecution that was later found by the magistrate not to be supported by probable cause.\(^11\) Finally, if the accused was acquitted at a jury trial, the jury then met to decide whether the costs of the trial would be borne by the county or paid directly by the prosecutor.\(^12\)

After the First Territorial Legislature met, Montana’s Territorial statutes continued to require the appointment of counsel for the accused in felony prosecutions. Territorial statutes relating to indigent defense can be broken down into several parts. There were statutes designed to enumerate the rights of the accused,\(^13\) statutes designed to ensure the accused was made aware of his right to counsel,\(^14\) statutes designed to ensure that counsel was

\(^6\) 1864 Laws of Mont. Territory 237.  
\(^7\) \textit{Id.} at 238.  
\(^8\) \textit{Id.} 238–39.  
\(^9\) \textit{Id.} at 240.  
\(^10\) \textit{Id.} at 255–56.  
\(^11\) \textit{Id.} at 256.  
\(^12\) 1864 Laws of Mont. Territory 256.  
\(^13\) 1872 Laws of Mont. Territory 204.  
\(^14\) \textit{Id.}
appointed for the indigent accused, and eventually statutes to determine compensation for counsel.

In 1871, Montana's Seventh Legislative Session enacted the Criminal Practice Act that again provided for counsel at public expense for those accused of serious crimes.

If any person about to be arraigned upon an indictment for felony, be without counsel to conduct his defence, and he be unable to employ any, it shall be the duty of the court to assign him counsel, at his request, not exceeding two, who shall have free access to the prisoner, at all reasonable hours.

During preliminary examination, a magistrate was required to inform the accused of his right to the assistance of counsel, to reasonable time to obtain counsel, and to the assistance of court-appointed counsel if he was without funds to hire an attorney. The right to counsel was an enumerated right of the accused. The Territorial Legislature reenacted these statutes without change in 1879 and 1887.

In 1881, the Territorial Legislature adopted the first statute relating to the compensation of court-appointed counsel. Counsel was entitled to reasonable payment for his services by the county, "not to exceed in any capital case the sum of fifty dollars; in other cases of felony a sum not exceeding twenty-five dollars; and in other cases a sum not exceeding ten dollars." The Territorial Legislature also reenacted this statute without change in 1887. The amount of compensation was left unchanged by the Territorial Legislature in 1895; however, the Legislature increased the maximum fees in 1903 to $100 for a capital case, $50

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15. Id. at 220.
17. See Andrew P. Morriss, "This State Will Soon Have Plenty of Laws"—Lessons from One Hundred Years of Codification in Montana, 56 Mont. L. Rev. 359 (1995) (discussing the trials and tribulations of the Montana Territorial Legislature and its enactment and reenactment of statutes).
18. 1872 Laws of Mont. Territory 220.
19. Id. at 204, 220. The law required magistrates to appoint counsel for the indigent, such as at a preliminary examination. The law also required appointment of counsel for individuals facing arraignment on felony charges. Id.
20. Id. at 190.
23. Id.
24. 1887 Laws of Mont. Territory 441.
for a felony, and $25 for all other cases. These statutory maximums remained the law of the land for another forty-six years, until the Montana Legislature removed the dollar limitations in 1949.

The Territory of Montana first attempted to adopt a constitution in 1866. No one knows where that document went, nor do we know its contents. Another unsuccessful attempt to adopt a Montana constitution occurred in 1884. The text of the proposed 1884 Constitution included a constitutional provision guaranteeing the right to counsel: Article I, section 16 provided "[t]hat in criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel..."

Montana eventually adopted a constitution in 1889. The 1889 Constitution included the same “right to counsel” language found in the proposed 1884 Constitution, with the addition of one word, “all”: “That in all criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel...”

There was very little debate in the 1889 Constitutional Convention directly about the right to counsel; however, the matter was discussed in a debate about the use of depositions in criminal cases. Delegate Joseph K. Toole of Helena, quoting Judge Frank H. Woody, had this to say:

How often shall the accused have counsel, and where? If he once have counsel, is the constitution satisfied? If he has counsel before the examining court, may counsel be denied him before the jury? If once before a jury he have counsel, may he be deprived of counsel on the second trial? How often may the accused have the right of trial by jury, [sic] If once a jury be impaneled in his case, is the constitutional guaranty at an end? May he be denied that tribunal afterwards? If the jury bring no verdict and are discharged, or if the verdict be set aside, may that constitutional “bulwark” be from that time abandoned as having done its office, and the State proceed to judgment by a simpler and more summary process? How often shall the accused have the right to compulsory process to force the attend-

29. Id. at 2-3.
30. Mont. Const. art. I, § 16 (1884) (not ratified). Of course, the Preamble also acknowledged, “the goodness of the Great Legislator of the Universe.” Id. at Preamble.
31. Constitutional Convention of 1889 at 167, 181, 254 (State Publg. Co. 1921) (emphasis added). According to the transcripts of the 1889 Convention, the amendment was offered by Delegate Joseph K. Toole, an attorney from Helena, so that “it will conform to the language used in the amendment to the Constitution of the United States.” Id. at 167.
ance of his witnesses? May the process be denied him if once invoked? These questions answer themselves. No power in the Government can rob him of counsel in a "criminal prosecution" at any one of a hundred trials of the same cause. The jury must come a hundred times; if there be as many trials; and in all of them the compulsory process must go for his witnesses; and at every trial the witnesses against him must meet him "face to face", that he may look for the hundredth time upon the witness while he swears, and every jury may see the manner of the swearing.\footnote{32}

Some minor stylistic changes were made to the right to counsel statutes by the 1895 Territorial Legislature,\footnote{33} and additional language was added to bolster the rights of the accused. If the accused was arrested and unable to inform his counsel, the court had to order a local peace officer to immediately take a message to counsel for the accused.\footnote{34} The right to have counsel notified by a peace officer continued until its repeal in 1967 with the enactment of the new Criminal Procedure Code.\footnote{35} Montana's right to counsel statutes were reenacted without change in 1907, 1921, 1935, and 1947.\footnote{36}

The first significant revision of Montana's right to counsel statutes occurred in 1967, with the adoption of the Criminal Procedure Code.\footnote{37} This Code was a product of the Montana Criminal Law Commission, created by the 1963 Legislature, and chaired by Associate Justice Wesley Castles of the Montana Supreme Court.\footnote{38}

The 1967 Code attempted to comprehensively address the issue of the right to counsel. The 1967 Code required that a defendant charged with a felony be informed of his right to counsel at his initial appearance instead of at arraignment as had been the practice since the Bannack Code of 1864. The 1967 Code required at initial appearance that a magistrate inform the accused of not

\footnotesize{32. Id. at 257.
34. Id. § 1671, at 978.
only his right to counsel, but also of his right to court-appointed counsel if charged with a felony. The indigent accused was told that he had a right to court-appointed counsel; however, it was only a court of record that had statutory authority to appoint counsel. The idea behind requiring the appointment of counsel by a court of record was to ensure both that competent counsel was appointed and that counsel was adequately compensated.

At the time the 1967 Code was adopted, neither the U.S. Supreme Court nor the Montana Supreme Court required that counsel be appointed for misdemeanor offenses. The 1967 Code allowed defendants to waive counsel, except for persons under the age of eighteen charged with a felony. Once counsel was appointed, the appointment continued through direct appeal. The 1967 Code required that court-appointed counsel be paid "such sum as a district court or justice of the state supreme court certifies to be a reasonable compensation therefore and shall be reimbursed for reasonable costs incurred in the criminal proceeding." Payment was made by the county where the prosecution took place.

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40. Id. at -902(c).
43. Chapter 196, 1967 Montana Laws 379 provided discretionary authority for a court to appoint counsel "in the interests of justice" for those charged with misdemeanors. Any court of record had similar discretionary authority to appoint counsel in a post-conviction matter. Id. at 380.
44. Id. at 379.
45. Id. at 380.
46. Id.
47. Id. The Legislature shifted responsibility for the costs of paying court-appointed counsel quite often. The 1973 Legislature made exceptions for proceedings involving only city ordinance violations, requiring the city to pay for those public defender expenses. Ch. 186, 1973 Mont. Laws 329. The 1974 Legislature made another exception for arrests made by fish and game officers and agents of the Montana Department of Justice, requiring those agencies to pay for related public defender expenses. Ch. 15, 1974 Mont. Laws 16. The 1985 Legislature made the general rule that the costs of court-appointed counsel went either to the county bringing the prosecution, or the Montana Department of Commerce, and modified the other exceptions. Ch. 680, 1985 Mont. Laws 1505-10. The 1991 Legislature deleted the reference to the Department of Commerce, and replaced it with a reference to the State. Ch. 704, 1991 Mont. Laws 2509. The 1993 Legislature removed the reference to the district court, allowing a justice of the peace, city court judge, or municipal court judge
ity to appoint counsel for any defendant in a post-conviction proceeding who was unable to retain counsel. Finally, the 1967 Code authorized counties to establish a public defender office and to staff it with a "salaried public defender and such assistant public defenders as may be necessary to satisfy the legal requirements in providing counsel for defendants unable to employ counsel." Any county that took advantage of this provision also got to pay for the new office. Not surprisingly it was almost twenty years after the 1967 Code until the first full-time public defender office was established.

Montana’s 1972 Constitution made no substantive changes to the provisions governing the right to counsel. Article II, section 24 provides: “In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel.” At the 1972 Constitutional Convention, only one proposal on the right to counsel came out of the Bill of Rights Committee, and that proposal was to readopt the provisions of the 1889 Constitution. The Bill of Rights Committee’s comments were brief.

The committee voted unanimously to retain the former Article II, Section 16 unchanged. The committee felt it was an admirable statement of the fundamental procedural rights of an accused. No delegate proposals were received on this provision.


50. The 1985 Legislature shifted part of the costs of a county public defender office to the state as part of the state assumption of district court costs. Ch. 680, 1985 Mont. Laws 1505, 1509. The 2001 and 2003 Legislatures made similar changes. Ch. 585, 2001 Mont. Laws 3063; Ch. 583, 2003 Mont. Laws 2442. The 2005 Legislature repealed the authority for counties to establish public defender offices with the enactment of the Public Defender Act, Ch. 449, 2005 Mont. Laws 1564. At the time the statewide public defender system was enacted in 2005, there were six county public defender systems in Montana: Missoula County, Lewis and Clark County, Gallatin County, Yellowstone County, Cascade County, and Deer Lodge County.

51. Delegate proposal 18, submitted by Delegates Jerome J. Cate, Bob Campbell, and Richard J. Champoux, also discussed the right to counsel. Montana Constitutional Convention, 1971–1972 vol. 1, 105 (Mary Worden et al. eds., Mont. Legis. 1979). Delegate proposal 18 would have significantly expanded the right to counsel for indigent Montanans: “Right to Counsel. An indigent person shall have the right to counsel in administrative or court proceedings in which the State, or any subdivision thereof, is an adverse party.” Id. The proposal died in the Bill of Rights Committee on a vote of 11-0. Id. at vol. 2, 647, 658–59.

52. Id. at 641.

53. Id.
There was virtually no floor debate over the right to counsel at the 1972 Constitutional Convention.54

It was 1981 before the next significant changes occurred to Montana’s right to counsel statutes. The 1981 Legislature enacted a system requiring indigent defendants to repay the costs of court-appointed counsel.55 This statute excluded consideration of the assets of friends and relatives of the accused, and consideration of whether the accused had sufficient resources to post bond. The standard was whether he was “financially unable to obtain representation without substantial hardship in providing necessities to himself or his family.”56 The accused was required to submit a financial statement, subject to the penalties of false swearing for any misstatements.57

If the accused was convicted, the sentencing court had discretion to require that he repay the costs of his appointed counsel. The compensation and costs had to be reasonable, and the defendant had to be able to pay the costs.58 The accused could not be charged with “expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of the law.”59 The defendant had the right to petition the court to forego repayment of fees and costs as long as he was not in “contumacious” default.60 A failure to repay attorney fees and costs could subject the defendant to proceedings for civil contempt.61 It could also cause a revocation of a suspended or deferred sentence.62

The 1985 Legislature amended the statute to require that any payments received from a defendant for attorney fees and costs be disbursed to the entity that initially incurred the costs of providing the attorney.63 The 1987 Legislature further amended the statute, and required that a minor charged with a crime, and his

56. Id.
57. Id. at 722.
58. Id.
59. Id.
60. Id.
62. Id. at 723.
parents, had to submit verified financial statements demonstrat-
ing their collective inability to retain counsel.\textsuperscript{64}

1991 again brought widespread change to Montana's statu-
tory scheme to implement the right to counsel. The 1991 Legis-
lature made a number of stylistic and substantive changes. Until
1991, counsel had to be appointed for an indigent individual
charged with a felony. This was somewhat inconsistent with fed-
eral case law, as the U.S. Supreme Court had ruled in 1972 that
counsel was to be provided for any indigent person charged with a
felony or misdemeanor punishable by jail time.\textsuperscript{65} The 1991 Legis-
lature expanded the statutory right to counsel to extend to any
indigent individual accused of any crime, as long as the court re-
tained the possibility of imprisonment as a sentencing option.\textsuperscript{66}

The 1991 Legislature allowed persons under the age of eigh-
teen to waive counsel.\textsuperscript{67} The new language stated that the right to
counsel could be waived, provided the court "ascertain[] that the
waiver is made knowingly, voluntarily, and intelligently."\textsuperscript{68}

The 1991 Legislature also codified the U.S. Supreme Court's
Anders v. California\textsuperscript{69} decision regarding the duty of a court-ap-
pointed attorney who wants to withdraw from an appeal.\textsuperscript{70} The
statute was again amended in 2003 to further detail counsel's
duty under those circumstances.\textsuperscript{71}

The 1991 Legislature made the accused's financial eligibility
statement inadmissible in all civil and criminal matters, except
for impeachment purposes or in a subsequent case for perjury or
false swearing.\textsuperscript{72} The 1991 Legislature repealed language stating
that a defendant could not be charged with the costs of providing a
constitutionally required jury trial or costs of incarceration.\textsuperscript{73}

The 1991 Legislature also created the first criminal defense
office with statewide impact: the Office of the Appellate De-
fender.\textsuperscript{74} The Office of the Appellate Defender was designed to
assume responsibility for petitions for post-conviction relief for in-

\begin{footnotes}
\footnote{64. Ch. 479, 1987 Mont. Laws 1181–82.}
\footnote{66. Ch. 800, 1991 Mont. Laws 3035.}
\footnote{67. Id.}
\footnote{68. Id.}
\footnote{69. Anders v. Cal., 386 U.S. 738 (1967).}
\footnote{70. Id. at 744; Mont. Code Ann. § 46-8-103 (2001).}
\footnote{71. Mont. Code Ann. § 46-8-103 (2003).}
\footnote{72. Ch. 800, 1991 Mont. Laws 3035.}
\footnote{73. Id. at 3036.}
\footnote{74. Id. at 2891.}
\end{footnotes}
indigent individuals alleging ineffective assistance of counsel. The office was supervised by the Appellate Defender Commission.\textsuperscript{75} The Governor appointed the commission's five members, and "charged [them] with developing a system of indigent appellate defense services, proposing minimum standards for all trial and appellate public defenders, keeping a roster of attorneys eligible for appointment as trial and appellate defense counsel for indigent defendants, and establishing the qualifications, duties, and priorities for the appellant defender."\textsuperscript{76} Although originally designed to be in existence for only two years, the commission was in existence for fifteen years, until the 2005 Legislature repealed the Appellate Defender Act, effective July 1, 2006.\textsuperscript{77}

In 2001, as part of the state assumption of district court costs, the Legislature redirected funds paid by the defendant for his court-appointed attorney. Instead of going to the entity responsible for the prosecution, the monies went to the state general fund.\textsuperscript{78}

The Montana Legislature has provided counsel to indigent criminal defendants in two other instances: extradition proceedings, and, more recently, in post-conviction relief matters. The 1973 Legislature enacted the Uniform Criminal Extradition Act (UCEA).\textsuperscript{79} Under the UCEA, any person arrested on an extradition warrant must be taken "forthwith" before a court of record and informed of the charge and of his right to "demand and procure legal counsel."\textsuperscript{80}

As part of the Criminal Procedure Code adopted in 1967, Montana adopted a version of the Uniform Post Conviction Act.\textsuperscript{81} At that time, however, there was no statutory right to counsel in post-conviction proceedings. It was not until 1991 that language was included to require appointed counsel in any case in which a hearing was necessary, or when "the interests of justice" required the appointment of counsel and the petitioner qualified as indi-

\textsuperscript{75} Id. at 2892.
\textsuperscript{77} Ch. 323, 1993 Mont. Laws 991–92 (repealing the termination date of the Appellate Defender Act); Ch. 449, 2005 Mont. Laws 1564 (repealing the Appellate Defender Act and transferring those functions into a branch of the Office of the Public Defender).
\textsuperscript{78} Ch. 257, 2001 Mont. Laws 258; Ch. 585, 2001 Mont. Laws 3081.
\textsuperscript{80} Ch. 513, 1971 Mont. Laws 1408 (codified as Rev. Code Mont. § 95-3110 (1947); recodified as Mont. Code Ann. § 46-30-217(1) (2005)).
\textsuperscript{81} Ch. 196, 1967 Mont. Laws 379–80.
gent. In 1997 the statutes were amended again to require the appointment of counsel for the indigent post-conviction petitioner if a sentence of death had been imposed, regardless of whether a hearing was required. The post-conviction statutes were again amended in 2005 to reflect the adoption of the new statewide public defender system.

B. The Federal Right to Counsel

The Sixth Amendment to the U.S. Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." In the federal system, however, this has not always meant the accused had a right to counsel paid by the government in a criminal prosecution. Instead, for almost 180 years, the right to counsel was considered a "fielder's choice": if the accused could secure and pay for an attorney, then he had the "right" to counsel.

Even in capital cases, it was not until 1932 that the U.S. Supreme Court ruled in *Powell v. Alabama* that there was a right to counsel "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense." *Powell*, a state prosecution, was not based on the Sixth Amendment, but was premised on the right to due process. In the context of the facts of *Powell*, a fair hearing could not be obtained without court-appointed counsel.

[W]e are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is

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82. Ch. 800, 1981 Mont. Laws 3035.
85. U.S. Const. amend. VI.
88. *Id. Powell*, one of the Scottsboro cases, involved the trials of several African-Americans charged with the rape of two white girls. *Id.* at 51, 49. No trial counsel was appointed for the *Powell* defendants until the morning of their one-day trial. *Id.* at 49. At the conclusion of the trial, the Scottsboro Boys were, predictably, convicted and sentenced to death. *Id.* at 57.
incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, "that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." In a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel. 89

In federal cases, the right to counsel was expanded in 1938 when the Court decided Johnson v. Zerbst. 90 In Johnson, the Court held that indigent defendants in federal court were entitled to court-appointed counsel in any felony prosecution. 91 Johnson was based on the Sixth Amendment right to counsel. 92 Six years after deciding Powell, the Court significantly limited its impact when it issued Avery v. Alabama. 93 In Avery, the defendant was arrested on March 21, 1938, and charged with capital murder. 94 He had two attorneys appointed for him that morning, and went to trial three days later on March 24, 1938. 95 His attorneys moved for a continuance, alleging that they did not have sufficient time to prepare for the case: one of the defendant's attorneys was in trial on March 21, had to attend court on another matter on March 22, and was unable to meet with his client until March 23, one day before trial. 96 The circuit court made no ruling on the motion for continuance, and the trial began as scheduled on March 24. 97 The defendant was convicted and sentenced to death. 98

Distinguishing Powell v. Alabama on its facts, the Court affirmed the death sentence, holding that three days to prepare for

89. Id. at 71–72 (citation omitted).
91. Id. at 468.
92. Id. at 467–68.
94. Id. at 447.
95. Id.
96. Id. at 447–48.
97. Id. at 448.
98. Id. at 448–49.
trial did not create a lack of effective assistance of counsel.\textsuperscript{99} Powell did not mandate a particular amount of time to prepare for trial, only that counsel for the accused cannot be appointed on the morning of the trial in a complex death penalty case. The Montana Supreme Court would not reach the same conclusion under Montana’s constitutional and statutory rights to counsel.\textsuperscript{100}

The U.S. Supreme Court backed even farther away from Johnson just a few years later in Betts v. Brady.\textsuperscript{101} Betts, a non-capital case, made it clear that the Johnson v. Zerbst rationale did not apply to felony state court proceedings in the absence of exceptional factual circumstances such as those found in Powell v. Alabama.\textsuperscript{102}

In 1963, the Court extended defendants’ right to court-appointed counsel under the Sixth Amendment to all state court felony prosecutions in Gideon v. Wainwright.\textsuperscript{103} The same year, the Court decided White v. Maryland.\textsuperscript{104} In White, the Court ruled that the right to counsel under Gideon attached no later than the preliminary hearing stage.\textsuperscript{105}

Gideon did not require the appointment of counsel in all cases, however, only in felony prosecutions.\textsuperscript{106} A Sixth Amendment right to counsel for indigents accused of misdemeanors in state court was not recognized until Argersinger v. Hamlin in

\textsuperscript{99} Avery, 308 U.S. at 445-46, 453. Avery has not been overruled. In fact, the U.S. Supreme Court cited Avery with approval as recently as 1984 in U.S. v. Cronic, 466 U.S. 648, 654 n. 9 (1984).

\textsuperscript{100} In a non-capital case, the Montana Supreme Court reached an entirely different conclusion on remarkably similar facts. In State v. Blakeslee, the defendant was charged with statutory rape of his step-daughter. State v. Blakeslee, 306 P.2d 1103, 1104 (Mont. 1957). On March 21, 1957, three days before trial, Blakeslee’s retained counsel withdrew from the case and the court appointed local attorney M.K. Daniels to represent him. \textit{Id.} Daniels immediately moved to continue the trial as he had a trial already scheduled for March 22, 1957. \textit{Id.} The presiding judge, William Taylor, denied the motion, and the case proceeded to trial on March 24, resulting in Blakeslee’s conviction. \textit{Id.} at 1103-04. On appeal, Justice Davis ruled that forcing Blakeslee and his counsel to trial with only three days to prepare denied Blakeslee the right to counsel under Article III, section 16 of the Montana Constitution of 1889. \textit{Id.} at 1104-05. “Mr. Daniels’ appointment was made purposeless by compelling him to go to trial on March 24, 1957, and that in fact the defendant was denied the aid of counsel upon that trial which took up on only the third day after Mr. Daniels was appointed to defend him.” \textit{Id.} at 1105. The Montana Supreme Court did not discuss the Avery v. Alabama decision.

\textsuperscript{101} Betts v. Brady, 316 U.S. 455 (1942).

\textsuperscript{102} \textit{Id.} at 463-64.


\textsuperscript{104} White v. Md., 373 U.S. 59 (1963). For a discussion of the White decision in Montana, see Haddon, \textit{supra} n. 41.

\textsuperscript{105} White, 373 U.S. at 60.

\textsuperscript{106} Gideon, 372 U.S. at 339.
In 1984, the Court ruled that the right to counsel meant the right to "effective assistance of counsel" in *Strickland v. Washington*. 

Most recently, in 2002, the Supreme Court held in *Alabama v. Shelton* that, in a state misdemeanor prosecution, the indigent accused was entitled to court-appointed counsel even if the sentence imposed was suspended. Up until *Shelton*, several states, including Montana, refused to provide counsel to a defendant in that situation.

### III. Identifying Indigent Defense Problems in Montana Courts

The overall state of indigent defense in the U.S. has been one of high hopes and poor performance. Performance issues are linked directly to funding issues. When the U.S. Supreme Court decided *Powell v. Alabama*, *Gideon v. Wainwright*, *Argersinger v. Hamlin*, *Ake v. Oklahoma*, and *Alabama v. Shelton*, the Court announced its opinions on facets of the right to counsel for those charged with crimes. The Court did not address, however, the source of funding for these attorneys, investigators, expert witnesses, training, support staff, and everything.
else necessary to fulfill the promise of *Gideon*.118 Therein lies the rub.

Historically, there has been little opposition in Montana's criminal justice system to the accused being represented by counsel. The issue is, and always has been, who will pay for that representation. From the beginning in Montana, the burden was ostensibly on the county in which the prosecution took place, but in reality, much of the burden fell on the private bar. From 1864 until 1903, the maximum fee that an appointed attorney could collect for the defense of a capital crime in state court in Montana was $50. From 1903 until 1949, the maximum fee appointed defense counsel could charge in a capital case was $100.119

It has been no secret that the quality of indigent defense in Montana has varied widely from one jurisdiction to another, and has even varied widely over time within the same jurisdiction. The first published study of indigent defense in Montana was a cursory one, prepared in 1965 by the American Bar Association as part of a study of the indigent systems in all fifty states.120

Recognizing problems with the system, in 1976 the Montana Board of Crime Control awarded a grant to the National Center for Defense Management to prepare the Montana Statewide Defender Systems Development Study (NCDM Study). The NCDM Study was initiated at the behest of the Montana Legal Services Corporation,121 and reviewed the delivery of indigent criminal defense services in five areas, Yellowstone, Missoula, Lake, and

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119. *Huntington v. Yellowstone Co.*, 257 P. 1041, 1042–43 (Mont. 1927). The court had the authority, of course, to appoint more than one attorney on a capital case and pay each $100 for the defense. *Id.* at 1043.
Flathead Counties, and the southeastern counties within the Sixteenth Judicial District.\textsuperscript{122}

Yellowstone County was the largest area studied, with a population of 97,300.\textsuperscript{123} Indigent defense in Yellowstone County was conducted at the time by five part-time public defenders.\textsuperscript{124} Three of the attorneys handled all the appointed felony work for a flat fee of $1,500 each per month, one attorney handled the juvenile cases for a flat fee of $1,200 per month, and the final attorney handled all the mental health commitments for a flat fee of $800 per month.\textsuperscript{125} There was no additional compensation for costs or investigation.\textsuperscript{126} No additional fees were paid in the event of a trial or appeal.\textsuperscript{127} In the event of a conflict that could not be handled by the contract attorneys, a private attorney was appointed at an hourly rate of between $25 and $50.\textsuperscript{128} The NCDM Study characterized the local consensus about the Yellowstone County system as, "[it] works well enough to avoid embarrassing mistakes or deficiencies but does not meet the standards of private practice."\textsuperscript{129}

Flathead County had a system developed by the local district court judges, also using part-time contract attorneys.\textsuperscript{130} One of the three attorneys was named chief defender and received an annual salary of $15,000, while the other two were paid $12,000 per year.\textsuperscript{131} During 1975, their compensation averaged approximately $11 per hour for time spent on indigent defense work.\textsuperscript{132} Some additional monies were also available to them for expenses, and they received an additional flat sum of $500 in the event of an appeal.\textsuperscript{133}

Indigent defense in the Sixteenth Judicial District in 1976 was done exclusively by appointed attorneys.\textsuperscript{134} All private attor-
neys in the district, with the exception of prosecutors, were on the list.\textsuperscript{135} The district judges at the time agreed that most of the attorneys they appointed had "little or no experience in criminal law."\textsuperscript{136} The attorneys were very reluctant to take cases since their practices did not include a significant amount of criminal law, the appointed cases interfered with their private practice, and most cases typically involved a fee dispute.\textsuperscript{137}

The NCDM Study identified numerous deficiencies in how Montana's indigent defense services were delivered, and made the following recommendations:

- That the Legislature create "The Montana Defender Corporation";
- That the Montana Public Defender Corporation enter into full-time contracts with attorneys in each of the Districts for handling cases;
- That a central office be established to handle indigent criminal appeals and supportive research;
- That one or more specialized trial attorneys be maintained by the State for complicated cases;
- That a list of available assigned counsel be maintained to draw from in case of co-defendant conflicts or overload;
- That community support be mobilized by circuit defenders;
- That sufficient support services be provided; and
- That orientation, training and continued legal education be provided to defenders and panel attorneys.\textsuperscript{138}

The 1977 Montana Legislature failed to implement any of the study's recommendations.

The Montana Legislature's Joint Sub-Committee on Judiciary conducted another study on indigent defense in 1982.\textsuperscript{139} The 1982 Report considered two alternatives to improve indigent defense services.\textsuperscript{140} The first was to create a statewide public defender system that divided the entire state into districts, with full-time

\begin{itemize}
\item \textsuperscript{135} NCDM Study, supra n. 121, at 11.
\item \textsuperscript{136} Id. at 12.
\item \textsuperscript{137} Id. at 12–14.
\item \textsuperscript{138} Id. at 1.
\item \textsuperscript{140} Id. at 19.
\end{itemize}
deputy public defenders in each. The statewide system would have been overseen by a nine-member public defender commission. The 1982 Report rejected this option as being too costly to implement.

The second option considered in the 1982 Report was to create the position of "Public Defense Coordinator." The duties of the Coordinator would have been to conduct indigent criminal defense training, to help plan how defense services would be provided in the future, to act as a clearinghouse for criminal defense information, to collect information on indigent defense costs and caseloads, and to apply for federal grants to advance the cause for indigent defense in Montana. The Public Defense Coordinator program had a projected cost of less than 6% of the cost of a statewide system. Senate Bill 5 incorporating the Public Defense Coordinator option was introduced in the 1983 Legislature by Senator Joe Mazurek. The bill received a "do not pass" recommendation from the Senate Judiciary Committee, and failed on first reading.

In 2003, a legislative effort was made to create a statewide public defender system with the introduction of Senate Bill 218. As drafted, however, the bill only addressed district court criminal matters, and therefore only a portion of the problem. Both the local jurisdictions and the larger reform interests wanted a comprehensive solution to the ongoing problems with Montana's system, and no one could agree on a funding mechanism for the bill. The bill ultimately died in committee.

The landscape changed, however, when the American Civil Liberties Union's class action civil rights lawsuit gathered steam

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141. Id.
142. Id.
143. Id. The 1982 Report estimated the cost of the system for FY 1984 and 1985 to be $4.4 million. Id.
144. 1982 Report, supra n. 139, at 19.
145. Id. at 19-20.
146. Id. at 20. The Fiscal Note for the proposed bill estimated the cost of the program over two fiscal years at $248,907. Id.
in Lewis and Clark County.\textsuperscript{151} \textit{White v. Martz} initially named Governor Martz, the Supreme Court Administrator, the members of the Appellate Defender Commission, and seven counties as defendants, alleging violations of the Sixth and Fourteenth amendments to the U.S. Constitution, as well as violations of sections 4, 17, and 24 of Article II of the Montana Constitution.\textsuperscript{152} The suit focused on the State’s failure to set and enforce standards for indigent defense practice, failure to adequately fund indigent defense, failure to adequately train indigent defense counsel, failure to set and monitor caseload standards, and failure to adopt and implement conflict of interest policies.\textsuperscript{153}

In the summer of 2004, as part of the \textit{White v. Martz} litigation, the National Legal Aid and Defender Association (NLADA) undertook a study.\textsuperscript{154} The NLADA report was prepared at a time when the national legal community was coming to a stark realization about how poorly Montana’s indigent defense systems were working. The report identified numerous deficiencies in the defense system that mirrored the ACLU’s allegations in \textit{White v. Martz}.\textsuperscript{155} In addition, the NLADA Report criticized the system for not being “sufficiently independent and free from undue political interference.”\textsuperscript{156}

The NLADA report focused on the state’s failure to comply with the American Bar Association’s (ABA) Ten Principles of a

\begin{itemize}
\item \textsuperscript{152} Pl.’s Amend. Compl. at 1-2, \textit{White}, CDV-2002-133.
\item \textsuperscript{153} Id. at 2-4.
\item \textsuperscript{155} NLADA Expert Report, supra n. 154, at 1-2.
\item \textsuperscript{156} Id. at 1.
\end{itemize}
Public Defense Delivery System. These ten principles were adopted by the ABA as a guideline for how indigent defense services should be delivered.\footnote{ABA, \textit{Ten Principles of a Public Defense Delivery System}, “Introduction,” http://www.abanet.org/legal-services/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf (accessed Mar. 3, 2007).} The ten principles are,

1. “The public defense function, including the selection, funding and payment of defense counsel is independent” from other agencies in the criminal justice system and free from undue political interference. The public defense system should be overseen by a nonpartisan board, not the judicial system, and public defenders should be hired on the basis of merit.

2. “Where the caseload is sufficiently high, the public defense delivery system consists of both a public defender office and the active participation of the private bar.” Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure to ensure uniform quality statewide.

3. “Clients are screened for eligibility” and assigned a public defender as soon as possible after client’s arrest, detention or request for a lawyer, usually within 24 hours.

4. Defense counsel must be allowed adequate time and a confidential meeting space to meet with the client.

5. Defense counsel’s workload is limited to allow for ethical, quality representation. National standards should never be exceeded, and limited support staff or a defender’s nonrepresentational duties may further reduce the caseload limits.

6. “Defense counsel’s ability, training and experience match the complexity of the case.”

7. “The same attorney continuously represents the client” through all stages of the proceeding. Effective lawyering is impossible in an assembly line system of indigent defense.

8. “There is parity between defense counsel and the prosecution with respect to resources . . . . There should be parity of workload, salaries and other resources (such as benefits, technology, facilities . . . support staff . . . investigators and access to forensic services and experts).”
Further, defense counsel is included and treated as an equal partner in the criminal justice system.

9. "Defense counsel is provided with and required to attend continuing legal education."

10. "Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted performance standards."\(^{158}\)

The NLADA report concluded that Montana did not effectively meet any of the ten principles, citing numerous issues with both organized and appointed indigent defense systems.\(^{159}\)

In response to the *White v. Martz* litigation, Attorney General Mike McGrath signed a stipulation staying the litigation pending the 2005 Montana Legislative Session.\(^{160}\) The matter was taken under study by the Montana Legislature’s Law and Justice Interim Committee (LJIC).\(^{161}\) The LJIC, and a subcommittee that focused exclusively on indigent defense, studied the matter over ten months, and, on September 8, 2004, unanimously recommended that the Legislature adopt a comprehensive statewide public defender system that incorporated all of the ABA’s Ten Principles of a Public Defense Delivery System.\(^{162}\)

Marking the fortieth anniversary of the *Gideon* decision, the ABA also issued a report in 2004 about the state of indigent defense in the United States, entitled *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice*.\(^{163}\) The ABA Report made a number of findings about the state of indigent defense services:

- Forty years after *Gideon v. Wainwright*, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.
- Funding for indigent defense services is shamefully inadequate.
- Lawyers who provide representation in indigent defense systems sometimes violate their professional duties by failing to furnish competent representation.

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158. *Id.* at 1–3.
159. *NLADA Report*, supra n. 154, at 68 (citations omitted).
160. *Id.* at 7.
161. *LJIC Public Defender Report*, supra n. 149 (Sen. Duane Grimes (R-Clancy), LJIC chair; Rep. John Parker (D-Great Falls), LJIC vice-chair; Sheri S. Heffelfinger, LJIC research analyst; Valencia Lane, LJIC staff attorney; and Sen. Daniel McGee (R-Laurel), chair of the subcommittee on the public defender issue).
162. *Id.* at pt. 1.
Lawyers are not provided in numerous proceedings in which a right to counsel exists in accordance with the Constitution and/or state law. Too often, prosecutors seek to obtain waivers of counsel and guilty pleas from unrepresented accused persons, while judges accept and sometimes even encourage waivers of counsel that are not knowing, voluntary, intelligent, and on the record.

Judges and elected officials often exercise undue influence over indigent defense attorneys, threatening the professional independence of the defense function.

Indigent defense systems frequently lack basic oversight and accountability, impairing the provision of uniform, quality services.

Efforts to reform indigent defense systems have been most successful when they involve multi-faceted approaches and representatives from a broad spectrum of interests.

The organized bar too often has failed to provide the requisite leadership in the indigent defense area.

Model approaches to providing quality indigent defense services exist in this country, but these models are not adequately funded and cannot be replicated elsewhere absent sufficient financial support.  

IV. CRAFTING A RESPONSE

The bill proposed by LJIC was introduced in Montana's 2005 Legislature. Given the scope of the bill, its legislative history is remarkable. It received a unanimous "do pass" recommendation from the Senate Judiciary Committee on February 14, 2005. On second reading in the Senate, an attempt was made to amend the bill to require that the new Office of the Public Defender be located in Butte. The motion failed on a vote of 24-26, but would return again before the end of the session. The bill then passed second reading on a unanimous vote and was referred to the Senate Finance and Claims Committee.

The bill passed the Finance and Claims Committee with some amendments on a vote of 17-2. The full Senate unanimously approved the amended bill on second reading, and passed it on third reading on a vote of 48-0. After some amendments in the House, the bill went to a Free Conference Committee, and in the

164. Id. at v.
166. Id.
167. Id.
168. Id.
169. Id.
Free Conference Committee the idea resurfaced to mandate that the Office of the Public Defender be located in Butte.170 The Free Conference Committee amended the bill to require the Office to be located in Butte, and the final bill passed the Senate on a vote of 50–0 and the House on a vote of 89–11.171

The Montana Public Defender Act was enacted in 2005.172 The Act is a radical departure from Montana’s past, and is the most forward-looking piece of indigent defense legislation passed to-date in the United States. The stated purposes of the Act are to

1. establish a statewide public defender system to provide effective assistance of counsel to indigent criminal defendants and other persons in civil cases who are entitled by law to assistance of counsel at public expense;
2. ensure that the system is free from undue political interference and conflicts of interest;
3. provide that public defender services are delivered by qualified and competent counsel in a manner that is fair and consistent throughout the state;
4. establish a system that utilizes state employees, contracted services, or other methods of providing services in a manner that is responsive to and respective of regional and community needs and interests; and
5. ensure that adequate public funding of the statewide public defender system is provided and managed in a fiscally responsible manner.173

The Act is comprehensive. It creates a unitary system of indigent defense for all Montana courts: justice courts, city courts, municipal courts, district courts, and the Montana Supreme Court.174 Not only does the system comprehensively cover all Montana courts,175 it also covers virtually all areas in which an attorney may be appointed and is not limited to criminal cases.176

172. Id.
174. Id. at -104.
176. Mont. Code Ann. § 47-1-104(4) provides:
(4) Beginning July 1, 2006, a court may order the office to assign counsel under this chapter in the following cases:
The only appointed work not being done by the new Office of the

(a) in cases in which a person is entitled to assistance of counsel at public expense because of financial inability to retain private counsel, subject to a determination of indigence pursuant to 47-1-111, as follows:

(i) for a person charged with a felony or charged with a misdemeanor for which there is a possibility of incarceration, as provided in 46-8-101;

(ii) for a party in a proceeding to determine parentage under the Uniform Parentage Act, as provided in 40-6-119;

(iii) for a parent, guardian, or other person with physical or legal custody of a child or youth in any removal, placement, or termination proceeding pursuant 41-3-422 and as required under the federal Indian Child Welfare Act, as provided in 41-3-425;

(iv) for an applicant for sentence review pursuant to Title 46, chapter 18, part 9;

(v) for a petitioner in a proceeding for postconviction relief, as provided in 46-21-201;

(vi) for a petitioner in a habeas corpus proceeding pursuant to Title 46, chapter 22;

(vii) for a parent or guardian in a proceeding for the involuntary commitment of a developmentally disabled person to a residential facility, as provided in 53-20-112;

(viii) for a respondent in a proceeding for involuntary commitment for a mental disorder, as provided in 53-21-116;

(ix) for a respondent in a proceeding for the involuntary commitment of a person for alcoholism, as provided in 53-24-302; and

(x) for a witness in a criminal grand jury proceeding, as provided in 46-4-304.

(b) in cases in which a person is entitled by law to the assistance of counsel at public expense regardless of the person's financial ability to retain private counsel, as follows:

(i) as provided for in 41-3-425;

(ii) for a youth in a proceeding under the Montana Youth Court Act alleging a youth is delinquent or in need of intervention, as provided in 41-5-1413, and in a prosecution under the Extended Jurisdiction Prosecution Act, as provided in 41-5-1607;

(iii) for a juvenile entitled to assigned counsel in a proceeding under the Interstate Compact on Juveniles, as provided in 41-6-101;

(iv) for a minor who petitions for a waiver of parental notification requirements under the Parental Notice of Abortion Act, as provided in 50-20-212;

(v) for a respondent in a proceeding for the involuntary commitment of a developmentally disabled person to a residential facility, as provided in 53-20-112;

(vi) for a minor voluntarily committed to a mental health facility, as provided in 53-21-112;

(vii) for a person who is the subject of a petition for the appointment of a guardian or conservator in a proceeding under the provisions of the Uniform Probate Code in Title 72, chapter 5;

(viii) for a ward when the ward's guardian has filed a petition to require medical treatment for a mental disorder of the ward, as provided in 72-5-322; and

(c) for an eligible appellant in an appeal of a proceeding listed in this subsection (4).
State Public Defender (OSPD) is that public defenders may not be appointed as special advocates or guardians ad litem either under the Youth Court Act or in an abuse and neglect proceeding.\textsuperscript{177}

OSPD is run by the Chief Public Defender,\textsuperscript{178} and overseen by an eleven-member Public Defender Commission. The Governor appointed the commission members based on specified areas of expertise and nomination by the State Bar of Montana, the Montana Supreme Court, the House Speaker, the Senate President, or the general public.\textsuperscript{179} The commission is charged with approving a strategic plan for the delivery of indigent defense services, and developing practice and training standards for public defenders.\textsuperscript{180}

\textsuperscript{177} Id. at -104(5)(a). This proscription only applies to full-time public defenders and not to contract attorneys. Id. at -104(5)(b).


\textsuperscript{179} The commission members are
2. Stephen Nardi, Vice-Chair (Kalispell), (reappointed) appointed July 1, 2006, term ends July 1, 2009. Qualification: attorney nominated by State Bar, experienced in felony defense with one year as full-time public defender.
3. Daniel Donovan (Great Falls), appointed July 1, 2005, term ends July 1, 2008. Qualification: attorney nominated by the Montana Supreme Court.
8. Tara Veazey (Helena), appointed July 1, 2005, term ends July 1, 2007. Qualification: member of organization advocating on behalf of indigent persons.
10. Jennifer Hensley (Butte), appointed July 1, 2005, term ends July 1, 2008. Qualification: member of organization advocating on behalf of people with mental illness and developmental disabilities.

\textsuperscript{180} Mont. Code Ann. § 47-1-105.

https://scholarship.law.umt.edu/mlr/vol68/iss2/8
The approved strategic plan separates the State into eleven regions that combine existing judicial districts.\textsuperscript{181} The commission has already adopted the Standards for Counsel Representing Individuals pursuant to the Montana Public Defender Act (Standards),\textsuperscript{182} and is currently training its employees and contract attorneys on their implementation. The Standards call for parity in resources and compensation between the defense and prosecution,\textsuperscript{183} and are intended to be a guide for full-time public defenders and contract attorneys providing indigent defense services. They are not intended to establish a specific standard of care for either a claim of ineffective assistance of counsel or a claim for legal malpractice.\textsuperscript{184} The Standards are derived from numerous sources. As a baseline, the commission looked to the standards developed by the Montana’s Appellate Defender Commission. Working from that framework, the commission adopted a number of standards from those developed by the Georgia Public Defender Standards Council,\textsuperscript{185} as well as from North Carolina\textsuperscript{186} and Iowa.\textsuperscript{187} In addition, the commission drafted and adopted a number of original standards.

\textsuperscript{181} The regions break down as follows:
Region 1: The Eleventh, Nineteenth, and Twentieth Judicial Districts
Region 2: The Fourth and Twenty-first Judicial Districts
Region 3: The Eighth and the Ninth Judicial Districts
Region 4: The First and a portion of the Fifth Judicial Districts
Region 5: The Second, Third, and a portion of the Fifth Judicial Districts
Region 6: The Twelfth and the Seventeenth Judicial Districts
Region 7: The Tenth and the Fourteenth Judicial Districts
Region 8: The Sixth and the Eighteenth Judicial Districts
Region 9: The Thirteenth and Twenty-second Judicial Districts
Region 10: The Seventh and the Fifteenth Judicial Districts
Region 11: The Sixteenth Judicial District

The only regions that split judicial districts are Regions 4 and 5. Region 4 includes the First Judicial District and part of the Fifth Judicial District. Region 5 includes the Second and Third Judicial Districts, and a portion of the Fifth Judicial District. Regions were divided this way to follow how the public defender services for those areas had traditionally been provided. Mont. Off. St. Pub. Defender, Strategic Plan, http://www.publicdefender.mt.gov/forms/pdf/proposed_districting_plan_revised.pdf (accessed Apr. 29, 2007).


\textsuperscript{183} Id. at 41–42.

\textsuperscript{184} Id. at 3.


The Standards make a number of radical changes to how indigent defense services are provided in Montana. The changes begin with initial contact with the client. For clients in custody prior to initial appearance, the Standards require that attorneys meet with clients for at least fifteen minutes prior to their first court appearance.\textsuperscript{188} This does not mean that counsel will appear on all cases at initial appearance, but it does mean that everyone in custody should have the opportunity to briefly talk to a lawyer before going to court.

The next significant change is in the appointment process. If a request is made for counsel, the court will appoint OSPD to represent the client. This is done before a determination of indigency is made.\textsuperscript{189} OSPD determines indigence, not the court. The client’s indigency questionnaire is not admissible in court except “when offered for impeachment purposes or in a subsequent prosecution of the applicant for perjury or false swearing.”\textsuperscript{190} In fact, the court cannot challenge OSPD’s determination of indigence. Only OSPD or the prosecution can contest the issue.\textsuperscript{191}

OSPD can determine that the client is indigent under either of two alternative bases. First, a client is indigent if his gross household income is at or below 133\% of the current federal poverty guidelines.\textsuperscript{192} Second, regardless of the client’s household income, a client is indigent if “the disposable income and assets of the applicant and the members of the applicant’s household are insufficient to retain competent private counsel without substantial hardship to the applicant or the members of the applicant’s household.”\textsuperscript{193} OSPD cannot require public defenders or contract attorneys to perform the indigence determination, but must use other employees or methods.\textsuperscript{194} If OSPD determines that the client is not indigent, the client has a right to appeal the decision to the appointing court.\textsuperscript{195}

The Standards mandate that counsel does not let the client languish in jail. If the client appears for initial appearance and is incarcerated, counsel from OSPD is to make contact with the cli-
Counsel is required to maintain regular contact with clients, "at least weekly unless otherwise agreed between the client and counsel." Counsel [is to] provide continuous and uninterrupted representation of the client through the trial court level; however, absent exceptional circumstances, all appeals are now handled by the Office of the Appellate Defender. The Office of the Appellate Defender is responsible for investigating and pursuing claims of ineffective assistance of counsel.

Initial specific caseload standards have been adopted, and workload standards are currently under review. The Standards provide a detailed methodology for identifying and determining conflicts of interest in an effort to avoid conflicts. The Standards cover most aspects of criminal defense practice, including client interviews, pretrial release, preliminary hearings, investigation, discovery, "develop[ing] a theory of the case," pretrial motions, plea negotiations, trial preparation, all phases of trial, and sentencing. The Standards also address counsel's responsibilities when acting as standby counsel.

The Standards have been adopted and are currently undergoing codification for the following: appellate advocacy, sentence review, post-conviction proceedings, representation in Youth Court,

197. Id. at 17.
198. Id. at 7.
201. Id. at 8–16.
202. Id. at 23–26.
203. Id. at 26–27.
204. Id. at 27.
205. Id. at 27–28.
207. Id. at 29.
208. Id. at 29–30.
209. Id. at 30–34.
210. Id. at 34–35.
211. Id. at 36–41.
213. Id. at "Standards for Standby Counsel in Criminal Cases."
representation in an involuntary mental health commitment,\textsuperscript{214} representation in an involuntary commitment based on serious developmental disability, representation of a minor voluntarily committed to a mental health facility, representation of parents in dependent and neglect proceedings,\textsuperscript{215} representation of a respondent in a guardianship or conservatorship proceeding, representation in proceedings under the Uniform Parentage Act, representation of parents or a guardian for the involuntary commitment of a developmentally disabled person, and representation of a respondent in a proceeding for involuntary commitment for alcoholism.\textsuperscript{216}

Training is a critical component of the new system. The Act mandates that the Chief Public Defender appoint a statewide training coordinator.\textsuperscript{217} The training coordinator will:

a) coordinate training to public defenders in current aspects of criminal and civil law involving public defense;

b) assist in the development and dissemination of standards, procedures, and policies that will ensure that public defender services are provided consistently throughout the state;

c) consolidate information on important aspects of public defense and provide for a collection of official opinions, legal briefs, and other relevant information;

d) provide assistance with research or briefs and provide other technical assistance requested by a public defender;

e) apply for and assist in the disbursement of federal funds or other grant money to aid the statewide public defender system; and

f) perform other duties assigned by the chief public defender.\textsuperscript{218}

In the first six months of the new public defender system, OSPD has conducted a leadership conference for the newly hired regional public defenders, a statewide seminar for all new OSPD employees and contract attorneys, a statewide seminar for all OSPD investigators, a "boot camp" for new criminal defense attorneys, training for juvenile defenders, and training for mental

\textsuperscript{214} See generally \textit{In re Mental Health of K.G.F.}, 29 P.3d 485 (Mont. 2001) (ruling incorporated in the Standards discussing government representation in involuntary mental health commitments).

\textsuperscript{215} See generally \textit{In re A.S.}, 87 P.3d 408 (Mont. 2004) (ruling incorporated in the Standards governing representation in dependency and neglect proceedings).

\textsuperscript{216} Complete Standards, \textit{supra} n. 196, at “Representation of a Person Who is the Subject of a Petition for the Appointment of a Guardian or Conservator”—“Representation of Persons in a Proceeding to Determine Parentage under the Uniform Parentage Act.”


\textsuperscript{218} Mont. Code Ann. § 47-1-210(3) (2005).
health commitments. Training will be ongoing, and will be delivered through a variety of methods including in-person seminars, videoconferencing, and various media available for dissemination to the regional offices. Recognizing that there have been cultural issues in the past between non-Native American attorneys and Native American clients, OSPD's first statewide training included a presentation on increasing cultural competencies in representing Native American clients.

Finally, the Public Defender Commission and the Chief Public Defender continue to solicit public comment on an ongoing basis, seeking dialogue with the general public and with all segments of the criminal justice system. For Montana's new system to survive, broad-based support is critical.

V. INDIGENT DEFENSE IN MONTANA'S FEDERAL COURTS

In 1964, Congress enacted the Criminal Justice Act, providing federal funds to pay attorneys representing indigent criminal defendants in federal court. Two years before (in 1962) NLADA created the National Defender Project using a Ford Foundation grant. The National Defender Project helped fund some of the first organized federal defender systems in several cities around the United States. In 1971 Congress authorized districts to create federal public defender systems.
Until 1991, all indigent defendants in federal courts in Montana were appointed attorneys from the private bar. The first statewide indigent criminal defense system for federal courts in Montana had its genesis in 1991 when then Chief Judge for the District of Montana, Paul G. Hatfield, directed U.S. Magistrate Robert M. Holter to investigate the idea of an organized federal defender system for the District of Montana. Montana's federal judges chose to establish a Community Defender Organization, a private not-for-profit corporation which became the Federal Defenders of Montana.

The newly formed organization began accepting appointments in 1993, establishing offices in Great Falls and Billings, and later that same year in Helena. A Missoula office was added in 1998. The Federal Defenders of Montana currently employs ten full-time attorneys to handle approximately two-thirds of the appointed criminal cases in the District of Montana.

Criminal Justice Act panel attorneys are responsible for the remaining one-third of the indigent defense cases. These cases involve conflicts of interest, or are cases over and above what can reasonably be handled by staff attorneys. In 1993, the Federal Defenders of Montana closed sixty cases. In 2005, they closed 682 cases, an increase of over 1000% in twelve years.

VI. THE MONTANA DEFENDER PROJECT

No discussion of indigent defense in Montana would be complete without mentioning the Montana Defender Project. Montana, with its vast spaces and small population was an unlikely candidate to obtain funding for a Defender Project. A number of circumstances, however, created a synchronicity that allowed the Defender Project to begin. In 1962, NLADA received a $2.6 million grant from the Ford Foundation to create the National Defender Project.

that receives federal monies through grants to provide indigent criminal defense services.

Id.


228. Id. at 1–2.

229. Id. at 5.


231. 1982 Report, supra n. 139.

232. Id.

233. Id.
fender Project to "create offices for the defense of indigent clients." A year later, the U.S. Supreme Court, in Gideon v. Wainwright, guaranteed the right to counsel to indigent citizens accused of a felony. William J. Jameson, U.S. District Judge for the District of Montana, joined the Advisory Council of the NLADA in 1964. It was Judge Jameson who first had the idea of the Defender Project for Montana.

Judge Jameson contacted then Dean Robert E. Sullivan at The University of Montana School of Law, and encouraged him to apply for an NLADA Defender Project grant in 1965. The Montana Defender Project was designed to provide a variety of legal assistance, including,

1) Direct assistance by law students in the defense of indigents who are accused of felonies or misdemeanors;
2) Direct assistance by law students in the defense of indigent Indian defendants and a study in depth of the mechanics of reform of procedure in Indian tribal courts;
3) Direct assistance to inmates of correctional institutions and post-conviction remedies;
4) The inauguration of a state-wide program of legal aid in criminal matters at all levels of jurisdiction and the coordination of efforts by local bar associations to establish similar programs in the larger metropolitan areas of the state.
5) The gathering of statistical information for the purpose of securing reform in criminal law and procedure and the education of those involved in the process of criminal administration in order to provide adequacy of representation.

The application placed a significant emphasis on the seven Indian reservations in Montana and enrolled tribal members residing off reservation. Based in large part on the impact of the grant on the legal needs of Montana's tribal members, the Director of

234. Ford Found., Early History, http://www.fordfound.org/elibrary/documents/5020/008.cfm (accessed Nov. 22, 2006); Small, supra n. 224 (stating the initial grant amount as $2.3 million and indicating the amount of the grant was later increased to $4.3 million).
236. Small, supra n. 224, at 149.
237. App. from Dean Robert E. Sullivan, U. of Mont. Sch. of Law, Application to the National. Defender Project of the National Legal Aid and Defender Association for a Grant-in-Aid to Establish the Montana Defender Project (Sept. 27, 1965) (copy on file with Montana Law Review).
238. Id. at 2–3.
239. The main reason we were able to get under this umbrella was that the Ford Foundation hadn't really sponsored anything having to do with the defense of the indigent Native Americans both in tribal courts, in federal courts, and in state courts. So that factor of the proposal probably was the thing that brought the whole thing through. The other wing of it was more of an educational thing. Actually the Ford
NLADA recommended that the grant be approved.240 The three-year grant was awarded, and in 1966 Dean Sullivan hired William F. Crowley, a deputy prosecutor from Lewis and Clark County, to be the first Director of the Project.241

A year after the Defender Project began operations, the Director of NLADA visited Montana to see how the Project was working. He gave the Defender Project a glowing assessment.242 The Defender Project used law student interns to achieve its goals and objectives. Interns conducted interviews with inmates at the Montana State Prison, investigated cases, offered direct assistance in the tribal courts and, eventually, in the state and federal courts in Montana.

Ron Waterman was one of the first student directors of the Defender Project.243 He remembers his first visit to the state hospital at Warm Springs to visit a client who had been sent there from the state prison:

There's one case that stands out in my mind. This fellow right now would probably have been defined as someone suffering from bipolar disease. He was incapable of modifying his conduct to a degree that was acceptable in society. And so he would act out in one way or another, small petty thefts, but mostly it was just simply acting out, get arrested, get charged with a crime, and go to Deer Lodge. In Deer Lodge they recognized that this fellow really wasn't,
if you will, "a criminal": he was mentally ill. They would bounce him out of Deer Lodge at that time and they would send him over to Warm Springs. And actually in the Defender Project, I was the second attorney to do the same thing for him. He'd go over to Warm Springs, and in Warm Springs they didn't have any defined forensic unit to deal with an individual who was not sent there on a commitment but had been sent over from the prison. So as a consequence they put him in pretty much a lockdown status. This was in the late 60s when Warm Springs was as close to a snake pit as you could ever get to . . . . They'd put him in a padded cell.

And I can remember going over and meeting with my client on the first occasion to get some of the essential facts to complete the application for the writ of habeas corpus that we were going to file in federal court. They brought him in to a padded cell, literally a room with padded walls, a padded ceiling, and padded floor. And he was in a straight jacket. His arms were locked behind his back in a long sleeved jacket, and because this was a confinement room there were no tables or chairs, we sat on the floor. I completed the interview of him sitting on the floor. And that sort of always stuck with me . . . . It was eye-opening to say the least. I can remember sitting there and interviewing this fellow, this client. He seemed at that time to be perfectly lucid one way or another and was very, very competent. He had been through this system, this sort of revolving door before, it was familiar to him. He simply wanted out. And so we prepared and filed a petition for habeas corpus, and as I recall we never even had to go to hearing . . . . With the filing of the petition saying it was inappropriate to hold him in this type of confinement, the county basically rolled over and agreed that he could be released, and he was released. He went through that revolving door. I think I handled him through the second of three times through the revolving door. Ultimately his conduct got him in trouble with somebody up in Great Falls and he was killed, which was sort of predictable as well. It underscored, and left with me, a tremendous impression about the inadequacies of the prison system.244

During its first three years, while operating under the NLADA grant, the Defender Project focused much of its efforts on assistance to tribal members.245

The Montana Defender Project's primary efforts toward guaranteeing the rights of the indigent Indian defendant in courts other than the tribal courts have been centered in a full-time summer program in the federal district court for the eastern district of Montana. Of the seven Indian Reservations in Montana, five are located in this judicial district, and the overwhelming majority of Indian offenses are committed there.246

244. Waterman Interview, supra n. 243.
246. Id. at 8.
During the summer of 1967, one Defender Project law student worked at the Fort Peck Reservation, two students worked at the Blackfeet Reservation, and two worked at the Crow Reservation. Some of the procedures developed by the Defender Project became national models.

Crowley had only been at the Law School for two years when Governor Forest Anderson requested that Crowley act as his counsel in Helena during the 1969 Legislative Session. Professor David J. Patterson took over the Defender Project in his absence. After the session, Crowley was again asked by Governor Anderson to assist with the reorganization of state government, and due to other academic commitments, was never able to return full-time to the Defender Project.

After the NLADA three-year grant expired, the Defender Project was kept running for several years with a variety of funding sources. Under the tutelage of Professors Crowley and Patterson, the Defender Project was very active, pursuing post-conviction matters, actions to remove detainers, representation of inmates at sentence review, and trial and appellate work. From 1966 until 1978, the Defender Project filed and argued no fewer than eleven cases before the Montana Supreme Court.

In structure, the Defender Project had two or more student interns during the summer, who then became student directors during the school year. For many years, all third-year students had at least a few cases through the Defender Project. The De-

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249. Crowley Interview, supra n. 239.
250. Interview with David J. Patterson, Prof., U. of Mont. Sch. of Law (Sept. 28, 2006) (recording on file with Author) [hereinafter Patterson Interview].
251. Crowley Interview, supra n. 239. Crowley became the Evidence professor when Russell Smith took the federal bench. According to Crowley, when he took over the course, Russell Smith had been teaching Evidence “since the mind of man remembered not to the contrary.” Id.
252. Id.
253. Patterson Interview, supra n. 250. The Montana Defender Project appeared in most of the district courts in Montana, the Montana Supreme Court, federal district courts in Montana, the Ninth Circuit Court of Appeals, and the U.S. Supreme Court.
255. Crowley Interview, supra n. 239.
fender Project was responsible for the first student practice rule in 1966, which allowed third-year law students to assist inmates in preparing post-conviction petitions.\footnote{256. Or. at 1, In the Matter of Furnishing Leg. Assist. to Indigent Prisoners (Mont. June 23, 1966) (copy on file with Montana Law Review).} A 1969 student practice rule allowed third-year law students to prosecute in justice court and police courts with attorney supervision.\footnote{257. Or. at 1-2, In the Matter of Furnishing Leg. Assist. to L. Enforcement Agencies (Mont. May 9, 1969) (copy on file with Montana Law Review).} Finally, the 1975 practice rule allowed students to practice in all Montana courts under the supervision of a licensed attorney.\footnote{258. Or. at 1-8, In the Matter of the Establish. of a Mont. Student Practice Rule, No. 12982 (Mont. Apr. 30, 1975). The Montana Supreme Court amended the Montana Student Practice Rule in 1991. Or. at 1-2, In the Matter of the Amend. of the Mont. Student Practice Rule, No. 12982 (Mont. Aug. 31, 1991).} The Defender Project was the forerunner of the clinical program at The University of Montana School of Law.\footnote{259. Margaret A. (Peggy) Tonon, Beauty and the Beast—Hybrid Prosecution Externships in a Non-Urban Setting, 74 Miss. L.J. 1043, 1049-50 (2005).}

The first Defender Project student to benefit from the 1975 Student Practice Rule was Donald W. Molloy, a third-year law student at the time, and now Chief Judge for the District of Montana. As a law student, Molloy did initial appearances and felony sentencings in the Third Judicial District Court before Judge Boyd.\footnote{260. Interview with Donald W. Molloy, C.J., U.S. Dist. Ct., Dist. of Mont. (Sept. 18, 2006) (recording on file with Author) [hereinafter Molloy Interview].} Molloy was also the first law student to argue before the Montana Supreme Court in \textit{State v. McElveen}.\footnote{261. \textit{State v. McElveen}, 544 P.2d 820 (Mont. 1975).} McElveen was arrested in February 1978. The Defender Project investigated his felony-theft conviction.

His claim was ineffective assistance of counsel both for failure to investigate and for the attorney's trial conduct. A petition for post-conviction relief was filed directly in the Montana Supreme Court.\footnote{262. Molloy Interview, supra n. 260.} The case was argued in November 1975 and the Court reversed McElveen's conviction on December 30, 1975.\footnote{263. \textit{Id.}.}

Molloy learned several lessons from McElveen, including an appreciation for Shakespeare:

He was a very interesting guy because he quoted Shakespeare all the time. His favorite Shakespearian drama was \textit{The Merchant of Venice}, and he would always be quoting and ask me if I had read about Portia, and if I had read about this, that or the other thing. And frankly I hadn't and wasn't much interested in it. Since then...
over the years I have read particularly *The Merchant of Venice*, and understand what he was saying, that sometimes it's not only the letter of the law but also the spirit of the law that has to be taken into account. It's been something that's struck me, particularly in the sentencing regime before *Booker* when I was forced to follow the literal letter of the law in sentencing people. In so doing I was not even close to what my understanding of justice was. It was funny how that play has come to mean much more to me now than it ever did when I was at the Defenders.264

Molloy also learned the lesson familiar to all practitioners of indigent criminal defense: "No good deed goes unpunished." After McElveen's conviction was overturned, the case was sent back to Lake County for retrial. On investigation, it was learned that the property at issue was worth less than the felony limit of $150. McElveen had already served more than six months. He chose to plead guilty to a misdemeanor charge and receive a sentence of time served.265 When McElveen was released from the Lake County Jail, he contacted Molloy's wife:

> He called my wife and threatened her. He wanted money, because he didn't have any money to live on. He called looking for me and she said I was over at the Law School. He threatened her, scared her so bad, she packed up my kids and drove over to the flag football field. She isn't that kind of person, and she was scared out of her wits. And so I got a hold of him and explained to him that he wouldn't exactly want to have me on the other side of him. And that was the end of our relationship.266

One case from the Defender Project followed Molloy into his law practice:

One of the criminal cases that I handled when I was practicing criminal law was a direct consequence of my involvement with the Montana Defender Project. And in fact I represented that guy longer than the period I've been on the federal bench: Harold "Chico" Armstrong. Harold "Chico" Armstrong was convicted down in Billings of murder and said he didn't do it. I represented him on his appeal as a law student, and we wrote a way-too-long brief... and his conviction was affirmed.

I graduate, go down to work for Judge Battin and the next thing you know there's a habeas corpus petition... and its Chico Armstrong. It was Rusty Smith that had that case, and I was aware of it because Judge Battin asked me about it. There's a lawyer down in Hamilton, Gail Goheen, who took the case and got an emergency room doctor from Hamilton to review the case and have the habeas

264. Id. (discussing *U.S. v. Booker*, 543 U.S. 220 (2005)).
266. Molloy Interview, *supra* n. 260.
corpus petition in front of Judge Smith. And this doctor was able to take the autopsy that had been done in Billings and basically tear it apart to the point that there was a serious question of whether or not, according to Judge Smith, that he was guilty. So Judge Smith ordered him retried.

By that time I'm finished working at Battin's and I'm over with Judge Anderson at Anderson, Berger, Sinclair and Murphy. And lo and behold its Judge Wilson, "Chico Armstrong wants you to represent him." . . . I represented him along with Mike Whelan and that case went to trial and then he was convicted.

Chuck Bradley tried the case for the county attorney's office. We had gone through all of the evidence, all the FBI evidence, there was something like 164 items of evidence, and if you looked at the reports, and I went through and just laboriously looked at every report, it would say "spot of blood." Now Bradley was saying that was blood from the victim. This was before DNA. The FBI report would say "could be human, could be animal." But when you piled all this stuff up it looked pretty awful.

But we were making, I thought, pretty good headway until one thing happened in the course of the trial. When Armstrong was playing poker with these guys he checked his gun at the bar. And so Bradley has the gun that he says was the one that was checked at the bar. And Armstrong's on the stand and Bradley brings the gun out and says "Is this your gun?" Now instead of saying yes or no, Armstrong says "Can I see it?" And of course the jury's all sitting there, he's on the witness stand, and up to this point I thought things were going OK for us. So Judge Wilson says yes he can see the gun. Bradley hands it to him, and it's a six shooter and he holds it up and looks at it, and then spins the cylinder and listens up to his ear, and he says "That's my gun." And after that I think he was toast. He was convicted. 267

Molloy continued to represent Chico Armstrong for many years as the case went back up to the Montana Supreme Court on appeal, and then into the federal courts on a petition for habeas corpus. 268

The 1975 U.S. Supreme Court decision, Bounds v. Smith, 269 changed the direction of the Defender Project. In Bounds, the Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." 270 In response to the Bounds decision, Ratzlaff v. Zanto was filed before Judge Battin in the federal

267. Id.
268. Id.
270. Id. at 828.
district court in Billings. The plaintiffs alleged that the State of Montana had not complied with the requirement of *Bounds.* *Ratzlaff* was resolved in 1977 when the State of Montana agreed to provide a law library at the state prison, and entered into a contract with The University of Montana School of Law, through the Defender Project, to provide legal services to inmates in civil rights claims. 272

John McDonald became Director of the Montana Defender Project in 1977. 273 Jeff Renz replaced him in 1993. 274 The beginning of the end of the Defender Project occurred in 1996, when the U.S. Supreme Court decided *Lewis v. Casey.* 275 In *Lewis,* the Court significantly restricted its ruling in *Bounds.* In an opinion written by Justice Scalia, the Court held “*Bounds* did not create an abstract, freestanding right to a law library or legal assistance,” and “an inmate cannot establish relevant actual injury simply by establishing that his prison’s law library or legal assistance is subpar in some theoretical sense.” 276 The Court required a showing that the prisoner “go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.” 277

Once the State of Montana understood the import of *Lewis,* it chose not to renew the contract with The University of Montana School of Law concerning the Defender Project. The last contract expired in 1998, and with the loss of the contract the School of

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273. McDonald Appointed as Civil Rights Director, 11 Mont. L. Forum 1, 8 (1977). During Professor McDonald's tenure, the Montana Defender Project appeared as attorney of record in two cases before the Montana Supreme Court: *Parker v. Crist,* 621 P.2d 484 (Mont. 1980); *In re Brown,* 605 P.2d 185 (Mont. 1980).


276. *Id.* at 343, 351.

277. *Id.* at 351.
Law disbanded the Defender Project. Molloy expressed his regrets over the demise of the Montana Defender Project.

I think it was a mistake for the Legislature to take away the funding for the Montana Defender Project. I think [the students] served a great public service in screening and explaining and working with people who have legitimate claims. 30% of our work here, 30% of the filings in the federal court in Montana are *pro se* litigation, and most of that comes out of the Montana State Prison. That was not the case when the Defender Project was around.

The same statistic holds true at the Ninth Circuit. Almost a third of the work there is *pro se* litigation. Now there’s a lot more of theirs that does not involve prisoners, but there’s a lot that does involve prisoners. So when you relegate the importance of the criminal justice system you get to the point, and I’m not saying this in a totally pejorative sense, but it’s like Hannah Arendt and her writings about the banality of evil. You just become oblivious about the consequences of processing and locking up and not actually focusing on what are the underlying issues that give rise to these problems. . . . I thought that the Montana Defender Project served a really, really legitimate purpose, and I benefited greatly from being a part of it.

The Defender Project had an enormous impact on all facets of Montana’s criminal justice system. Many prominent members of Montana’s legal community were student directors of the Defender Project, including Molloy, Hon. Greg Todd (district court judge for the Thirteenth Judicial District), Hon. Diane Barz (former district court judge for the Thirteenth Judicial District), Glacier County Attorney Larry Epstein, Neil Ugrin (partner in the firm of Ugrin, Alexander, Zadick and Higgins), Stuart Kellner (partner in the firm of Hughes, Kellner, Sullivan and Alke), John

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278. Many of the Defender Project’s activities, on a significantly smaller scale, are now conducted by the Criminal Defense Clinic at the School of Law. Professor Jeff Renz is the Clinical Supervisor for the Criminal Defense Clinic. U. of Mont. School of L., *Criminal Defense Clinic*, http://www.umt.edu/law/clinics/crim_defense.htm (accessed Jan. 8, 2007).

279. Molloy Interview, *supra* n. 260.

280. Two of the most significant pieces of civil litigation in the past fifteen years about Montana’s criminal justice system prominently featured attorneys with connections to the Defender Project. Ron Waterman, a former student director of the Defender Project, was the lead plaintiff’s attorney in the civil litigation that ensued over the 1991 riot at the Montana State Prison. Waterman Interview, *supra* n. 243. Among the lead defense attorneys in that case was John Maynard, a former student director of the Defender Project. *Id.*

Ron Waterman was also the lead attorney for the ACLU in the *White v. Martz* litigation that led to the passage of the Montana Public Defender Act. Compl. at 1, *White v. Martz*, 2006 Mont. Dist. Lexis 136 (Mont. 1st Jud. Dist. Jan. 25, 2006). Among the defense attorneys in *White v. Martz* was Larry Epstein (Glacier County Attorney and student director of the Defender Project the same year as Donald Molloy), and Fred VanValkenberg (Missoula County Attorney, former Missoula County Public Defender, one of the attorneys in the *Ratzlaff* litigation, and longtime legislative proponent of indigent defense reform). *Id.*
Maynard (partner in the firm of Crowley, Haughey, Hanson, Toole, and Dietrich), and Ron Waterman (partner in the firm of Gough, Shanahan, Johnson and Waterman). The history of indigent defense in Montana is intertwined with the history of the Defender Project.

VII. "Change Is the Law of Life" 281

A. The Past

Montana has always had impressive statutes and constitutional provisions that textually mandate effective assistance of counsel for indigent defendants. The issue has been resource allocation to those tasks. Montana has had tremendous successes with indigent defense, and it has had shameful failures.

One case that illustrates the critical importance of resources is State v. Spotted Hawk. 282 Spotted Hawk, decided 107 years ago, is still good law in Montana. Spotted Hawk, Little Whirlwind, and Whirlwind (David Stanley), all members of the Northern Cheyenne Tribe, were convicted of the murder of John Hoover. John Hoover was a sheepherder working on a ranch near what was then the Tongue River Indian Reservation. Stanley was arrested for the murder of Hoover, and confessed that he alone had killed Hoover. Unsatisfied with the arrest of a single individual, the authorities pressed the issue until Stanley implicated Spotted Hawk and Little Whirlwind as his accomplices. Spotted Hawk was arrested and tried in 1897. 283

Spotted Hawk's attorneys, C.L. Merrill and George W. Farr, put up a vigorous defense, beginning with a motion for a change of venue. 284 They introduced evidence that Stanley had confessed multiple times to being solely responsible for Hoover's death, introduced credible alibi evidence, and offered testimony indicating that Stanley was not worthy of belief, all to no avail. 285 Spotted Hawk's attorneys, C.L. Merrill and George W. Farr, put up a vigorous defense, beginning with a motion for a change of venue. 284 They introduced evidence that Stanley had confessed multiple times to being solely responsible for Hoover's death, introduced credible alibi evidence, and offered testimony indicating that Stanley was not worthy of belief, all to no avail. 285 Spotted Hawk's attorneys, C.L. Merrill and George W. Farr, put up a vigorous defense, beginning with a motion for a change of venue. 284 They introduced evidence that Stanley had confessed multiple times to being solely responsible for Hoover's death, introduced credible alibi evidence, and offered testimony indicating that Stanley was not worthy of belief, all to no avail. 285

281. "For time and the world do not stand still. Change is the law of life. And those who look only to the past or the present are certain to miss the future." John F. Kennedy, Speech, Address in the Assembly Hall at the Paulskirche in Frankfurt (Frankfurt, Germany, June 25, 1963) (transcript available at http://www.presidency.ucsb.edu/ws/print.php?pid=9303).

282. State v. Spotted Hawk, 55 P. 1026 (Mont. 1899).


284. The motion was denied. Id. at 289–90.

285. Spotted Hawk, 55 P. at 1031.
Hawk was arrested, tried, and convicted in 1897; a successful appeal followed that concluded in 1899.\textsuperscript{286}

Spotted Hawk's appeal was argued by former U.S. Senator Wilbur F. Sanders, and the conviction was reversed based on a failure to grant a motion to change venue. The facts recited by the court clearly establish why it was incumbent on the trial judge to grant the change of venue.\textsuperscript{287}

\textsuperscript{286} Id. As is the custom for those who inform on others, David Stanley was only convicted of manslaughter, and received a five-year sentence. Stanley was never released from prison, however, as he died of tuberculosis on October 19, 1899. Svingen, supra n. 283, at 294.

\textsuperscript{287} That the people were greatly excited in all parts of the county; that cowboys and ranchmen to the number of 200 had left their homes, and gathered at a ranch, near the Cheyenne Indian agency; that these men were armed; that they had gathered together to force the Indian agent to surrender the murderer of Hoover, claiming that the murderer was a member of this tribe; that it was their intention, if the murderer was not surrendered, to go upon the reservation, and exterminate the tribe; that they, in furtherance of this object, gathered ammunition and rifles from Miles City and Eastern cities; that cartridges and rifles were sent to them from other parts of the county; that they were only persuaded from attacking the Indians by the civil authorities of the county; that the sheriff was compelled to leave deputies in charge of them to restrain them; that this condition arose from the fact that the people believed that the Cheyenne Indians killed Hoover; that bitterness against the Indians extended to all parts of the county, and existed at the time of the trial; that, at the time of the burial of Hoover, a large number of men took an oath that they would be present at the trial of Hoover's murderers, and, if they were acquitted, they would take the law into their own hands, and not allow them to leave the court room; that they would be avenged upon the court and counsel in case of acquittal; and that the excitement was so great that the military authorities sent several companies of soldiers to prevent an outbreak. It further recites that the papers in Custer county, all of general circulation, denounced the Indians, unduly exciting the inhabitants, and prejudicing them against the Indians, including the defendant; that about 40 families removed from the agency to Miles City, to get protection from the threatened danger, and remained there several weeks; and that, since the finding of the body of Hoover, there had been unfriendly talk against him, the people of Custer county holding him in utter contempt. In many respects these statements are strongly corroborated by the evidence of Huffman and Gibb, set out above; and there is nothing to contradict them except the affidavit of the county attorney, Porter, made upon information and belief, and that of Sheriff Gibb. The former specifically denies only one fact, even upon information and belief. It denies that any number of men took any vow or oath to be present at the trial and take the law into their own hands, or threatened to hang or do any injury to the court or counsel of the defendant. Sheriff Gibb states that it was never at any time necessary to put any cowboys or settlers in charge of deputies to keep them from attacking the Indians. Huffman found excitement in almost all parts of the county he visited. The people were talking of the murder and the Indian excitement wherever he stopped, with a few exceptions. There was strong prejudice in the minds of the people, and they were ready to stop work and go upon a movement against the Cheyennes if further trouble occurred. The settlers were generally arming themselves and getting ammunition. He saw
On remand, the trial court had the option to retry Spotted Hawk or dismiss the charges. On his deathbed, Stanley recanted his statements implicating Spotted Hawk and Little Whirlwind. Stanley's wife came forward and acknowledged that he had also confessed to her his sole responsibility for the death of Hoover. All charges were dismissed, and Spotted Hawk was freed.\footnote{288}

One may question how three court-appointed attorneys (two in Miles City and one in Helena), operating on an eventual payment of $50 to be split three ways,\footnote{289} were able to accomplish such a task. The answer is simple; they were not all court-appointed attorneys. The two local attorneys, C.L. Merrill and George W. Farr, were court-appointed. The appellate attorney, Wilbur F. Sanders, was hired through the financial assistance of the Indian Rights Association of Philadelphia.\footnote{290} For the appeal alone, Sand-
ers was paid an amount ten times that paid to Merrill and Farr for defending the case through sentencing.\textsuperscript{291}

It was the infusion of funds at the right time that allowed justice to prevail in that case.\textsuperscript{292} Resources almost always tell the tale in indigent defense. Contrast the result for Spotted Hawk’s co-defendant, Little Whirlwind, who was represented at trial by George R. Milburn.\textsuperscript{293} Millburn, a Miles City attorney, was court-appointed. He had previously “spearheaded an effort by citizens of southeastern Montana Territory to remove the Northern Cheyennes from their reservation and to reopen its valuable grazing lands to the public domain.”\textsuperscript{294} Millburn did not file a bill of exceptions, and failed to perfect and appeal the venue issue that resulted in Spotted Hawk’s exoneration. Little Whirlwind’s appeal failed and his conviction was affirmed.\textsuperscript{295}

\textbf{B. The Present}

Resources again tell the tale in the recent case of Jimmy Ray Bromgard. Bromgard was released after spending over fifteen years in the Montana State Prison for sexual offenses he did not commit. Bromgard’s court-appointed counsel did not conduct sufficient pre-trial investigation, file pre-trial motions, challenge the State’s flimsy forensic evidence, try to suppress Bromgard’s identification, give an opening statement at trial, prepare a closing statement for trial, or properly pursue or preserve Bromgard’s appellate rights.\textsuperscript{296}

Bromgard was freed due to the tireless effort of his court-appointed appellate counsel, William Hooks of Helena. Hooks took

\begin{footnotes}
\item[291] Id. at 295; Ch. 33, 1903 Mont. Laws 46–47.
\item[292] It was the infusion of funds that led to the reversal of the convictions in \textit{Powell v. Alabama}, 287 U.S. 45 (1932). It was not the indigent defense system that provided Powell with an adequate appeal and argument before the Court. The indigent defense system had given Powell over. It was the International Labor Defense (the legal arm of the Communist Party) that paid for Powell’s appeal and subsequent retrials. Michael J. Klarman, \textit{Powell v. Alabama: The Supreme Court Confronts “Legal Lynchings” in Criminal Procedure Stories} 1, 5–8 (Carol S. Steiker ed., Found. Press 2006).
\item[293] Svingen, supra n. 283, at 292.
\item[294] Id. at 292 n. 16.
\item[295] State v. Little Whirlwind, 56 P. 820 (Mont. 1899). Little Whirlwind was eventually pardoned in 1901, due in large part to the efforts of the Indian Rights Association. Svingen, supra n. 283, at 294–95.
\end{footnotes}
Bromgard's case to the Montana Supreme Court three times. Even though he lost all three times, he never gave up the case or his client's cause. He was able to associate the Innocence Project with the defense, and ultimately, with its assistance and resources, exonerate Jimmy Ray Bromgard. The legal history of Jimmy Ray Bromgard includes both the worst and the best of Montana's former system of indigent defense.

Although indigent defense in Montana has come a long way since 1864, other issues remain, including the continuing lack of resources. There is also the issue of how Montana's Indian citizens fare in Montana's criminal justice system. Native Americans comprise approximately 6.4% of Montana's population. In Montana's state prisons, however, they comprise 16.7% of the male population and 25.9% of the female population. As significant as these racial disparities appear, in reality they underrepresent the problem. Most crimes prosecuted against Native Americans in Montana are not prosecuted in state courts; they are either prosecuted in tribal courts or in federal courts. Native Americans convicted in tribal and federal courts are often sentenced to tribal or federal prisons, not the state prison system.

298. Innocence Project, About the Innocence Project, http://www.innocenceproject.org/about (accessed Jan. 8, 2007). The Innocence Project is a non-profit legal clinic at the Benjamin N. Cardozo School of Law. It only takes cases in which post-conviction DNA testing of evidence may conclusively prove innocence. There is an extensive screening process to determine eligibility of a claim of innocence. Id.
299. Id.
301. For the period of time between 1997 and 2006, Native American males admitted to Montana's prison system comprised between 15.1% and 18.4% of Montana's male prisoners. Brian Schweitzer & Mike Ferriter, Montana Department of Corrections Biennial Report H-5 (Dept. of Corrects. 2007) (copy on file with Montana Law Review). During that same period of time Native American females admitted comprised between 24.9% and 30% of Montana's female prisoners. Id. at I-5.
302. All misdemeanors committed on the seven reservations by enrolled tribal members are prosecuted in the tribal courts. "The tribe has exclusive jurisdiction over non-major crimes committed by Indians against Indians in Indian Country. Such crimes are specifically excepted from the jurisdiction conferred upon the federal courts by the General Crimes Act." William C. Canby, American Indian Law in a Nutshell 170 (4th ed., West Group 2004) (referring to 18 U.S.C. § 1152 (2000)).
303. All felonies committed on six of the seven reservations by enrolled tribal members are prosecuted in Federal court. The one exception is the Flathead Reservation where felony crimes committed by enrolled tribal members are prosecuted in state court under the auspices of Public Law 280. Mickale Carter, Regulatory Jurisdiction on Indian Reservations in Montana, 5 Pub. Land L. Rev. 147, 157–58 (1984) (providing explanation of jurisdictional authority created under Pub. L. No. 83–280, 67 Stat. 588 (1953)).
Tribal courts in Montana provide a unique blend of traditional Native practices filtered through Anglo concepts of due process. The protections of the Bill of Rights, including the Sixth Amendment to the Constitution, do not apply in tribal courts.\textsuperscript{304} The Indian Civil Rights Act determines the rights of tribal members prosecuted in a tribal court.\textsuperscript{305}

There are also problems with taking tribal court criminal proceedings and recognizing them for other purposes outside the tribal setting. As a result, in the tribal courts there is no right to court-appointed counsel under the Indian Civil Rights Act for those indigent individuals charged with crimes. In the seven tribal court systems in Montana, only the Flathead Tribal Court provides counsel.\textsuperscript{306} Some of the other tribal jurisdictions offer lay advocates, but some cannot afford even lay advocates.

Tribes have the right to establish their court systems, and provide counsel or not as they deem appropriate. If the consequences of uncounseled convictions were only tribal consequences then this may be equitable. The reality is, however, that there are now both state and federal consequences to uncounseled tribal court convictions, and most tribal governments simply do not have the resources to provide counsel to those charged with crimes.

Under \textit{State v. Spotted Eagle},\textsuperscript{307} uncounseled tribal court convictions for driving under the influence of alcohol (DUI) can be used as a basis to file a subsequent felony DUI prosecution in state court in Montana.\textsuperscript{308} Uncounseled tribal court convictions can now also be used in federal court as a basis to file several federal felony charges.\textsuperscript{309} In 2005, Senator John McCain introduced an amendment to the Violence against Women Act that allows uncounseled tribal court convictions to be the basis of a subsequent federal felony prosecution.\textsuperscript{310}


\textsuperscript{307} \textit{State v. Spotted Eagle}, 71 P.3d 1239 (Mont. 2003).

\textsuperscript{308} Id. at 1245–46.

\textsuperscript{309} Id. at 1244–45.


(a) In general.—Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal,
Congress has also recently passed the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act).\textsuperscript{311} The Adam Walsh Act creates a federal sex offender registry that, in part, requires registration for those convicted in tribal court of specified sexual offenses; failing to register is a federal felony offense. The Adam Walsh Act requires registration even if the tribal court conviction was obtained without the assistance of counsel.

\textbf{C. The Future}

Where indigent defense will go in the future in Montana is an open question. Many of the leaders in Montana’s criminal justice community are optimistic, while others are skeptical.

Although complimentary of the indigent defense systems now in place in Montana, Molloy expressed his regrets that many members of the local bar no longer participate in indigent criminal defense and therefore do not see what is occurring in the criminal justice system.

First of all, they don't know what's going on with the policy of our law. And secondly, particularly when the sentencing guidelines were mandatory, it would astound you how unfair occasionally the application of that was. I think that only when you have people who are leaders in the community, the country club people, who understand the unfairness of it, are you ever going to get a reasoned debate about what is the purpose of the criminal justice system.

What are we trying to do? Are we going to be enlightened like the nineteenth century and at least try to make some effort at rehabilitation of people, or are we going to continue to lock people up? And since I've been on the bench, as you know, there were 68,000 people in the federal prison system in 1996. There are over 200,000 now. We lock up more people than any nation in the world. We've

\begin{itemize}
\item \textbf{State, or Indian tribal court proceedings} for offenses that would be, if subject to Federal jurisdiction—
\begin{enumerate}
\item any assault, sexual abuse, or serious violent felony against a spouse or intimate partner; or
\item an offense under chapter 110A, shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.
\end{enumerate}
\item \textbf{Domestic assault defined.}—In this section, the term “domestic assault” means an assault committed by a current or former spouse, parent, child, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabited with the victim as a spouse, parent, child, or guardian, or by a person similarly situated to a spouse, parent, child, or guardian of the victim.
\end{itemize}

got over two million people in state, federal and local jails. And our schools are running out of money. We have more problems because we don't have the kinds of things we need for education. For at least my perspective, there's a cause and effect relationship. When you don't have opportunity you resort to other things. When you resort to other things, generally, the quick buck means you're going to get involved in criminal activity and it just becomes a vicious cycle.”

Randi Hood, Montana's first Chief Public Defender, has already faced numerous obstacles in setting up a statewide indigent defense system. She remains optimistic given what she has seen in her thirty-plus years as a public defender.

In 1977 you were totally on your own. When I got asked to be a public defender I had no idea what I was doing. There were older attorneys that made themselves available to question, but it was almost like learning how to do it by doing it. We were totally on our own; there was nobody else to rely upon. There was nobody to say “Here's what you ought to do,” or “Here's standards for what ought to be done.” And that's been true all the way through. Now it's different. There are people to rely upon, there's more resources, there's standards that say “Here's how you do this.” Those are the big differences.

The first day I showed up at Administration [to start as Montana's first Chief Public Defender] all I had was a desk. I didn't have a telephone or a computer. And I sort of sat there thinking, “What now?” There were some nay-sayers around me who would say “You're never going to find the attorneys to populate the system the way you want to do it,” or “You're never going to be able to get this system up and running in a mere eight months.” There were times I had a couple of doubts about those things, but it's worked.

I think that we will be even better off in five years. We will have shown that this system can really fight for people, we will have made prosecutors more honest. I don't mean that they lie, but that they really look at their cases before they file them because they know that they are going to be up against somebody who's going to question what's been done, if it should be questioned. We really consider this a new day for criminal defense work in Montana.

James B. Wheelis, Chief Appellate Defender, has been a private attorney, a district judge, a legal services attorney, a prosecutor, and an appellate attorney in the Attorney General's office. From his perspective, indigent defense reforms have been central to the progressive evolution of our legal system.

312. Molloy Interview, supra n. 260.
Now there's more of a demand that there be coherent standards, more money, everything's being pushed towards a standard that really replicates what a person with an ample bank account would be able to purchase as far as representation. There are still real limits on money and time and all the rest of it, but the difference is incredible.

If it weren't for the public defender system then really significant rights in the culture would go untended. When you look at the major cases that have defined personal rights, they're not brought on behalf of exemplary people. Gideon v. Wainwright, for instance, who was the petitioner in that case? It wasn't someone who was a Boy Scout leader. . . . What I have seen is that if the [public defenders] weren't there then the system basically went to hell because there was no back pressure. The inherent bullying that the system has, that is, the pressure to get things done, the irritation with the people who are obstacles, goes unchecked and it tends to get worse and worse. . . . I think Gideon v. Wainwright, Miranda, and so on have saved the legal system. It's a bitter pill for people in power often, but it's basically made them perform.314

Chief Justice of the Montana Supreme Court, Karla Gray, shares Ms. Hood's optimism about the future of indigent defense in Montana:

I'm very hopeful. I'm very optimistic. The only caution that I concern myself with is appropriate resourcing from the Legislature. Having gone through a "not terrific" couple of sessions on those when indigent defense was ostensibly under the Court after State assumption, I know the rigors of trying to get adequate resourcing and that's my only caution. I think that the new system is visionary. I think the legislators that were the chief architects were visionary. I think it is a model that, as you know, is being looked at in other states as something they could take and then re-tweak in other jurisdictions. I think the Montana system is sort of state of the art at the moment, and the resourcing and the funding will be the making or breaking of it as is true of all these kinds of major sea changes. But I'm very optimistic. . . . We're going to have a system of indigent defense that will not only provide for the needs of those entitled to court-appointed counsel in those categories of cases, but a system to really be proud of. . . . The Legislature should be very proud of what they did with that bill. The Commission ended up being constituted of an extraordinarily talented group of people in my view, really interested in this area. The selection of Randi [Hood] and then Jim [Wheelis] were just outstanding choices. So I just keep wishing it well and knowing that it will be well.315

Anthony Gallagher, Executive Director of the Federal Defenders of Montana, shares both Chief Justice Gray's fiscal concerns and her optimism about indigent defense in Montana:

I think that the future of indigent defense is always subject to our funding source. . . . It's always a fight to make sure that we are adequately funded and that our panel attorneys are adequately paid and that there are resources available to panel attorneys that protect the rights of our clients. That's the one fear I have with the Montana state system. I think that in theory it's excellent, in theory it's going to work out very well. But if decisions have to be made because of money, because of the lack of money, or because of pressure from the Legislature that certain expenditures should not be made, then I think that the promise of Gideon will not be fulfilled.

Whether it be state, federal, or tribal, the attorneys who accept court appointments are not there because they're going to become famous, and they're certainly not going to become rich. Those folks seek a higher level of professional satisfaction, representing the people who most need legal representation. They have a core desire to protect the poor, and these lawyers shield against the infringement of our protections. And in reality they protect everybody.

I think there was an early 1990s study by the Center for State Courts that found the emergence of a corps of attorneys dedicated to indigent defense is the most important contemporary development in the American legal system, and I think that's true for Montana. Despite a common perception that government-funded criminal lawyers are an obstacle to the path of law enforcement efforts, in truth what we do is make the police and the prosecution do it right. We fight daily to uphold the Constitution—I think that is what we really do even though the public doesn't see it. People who are dedicated to this function maintain the public's confidence and the nation's commitment to equal justice under the law. In some small way, we, those who do this on a regular basis, act as the conscience of the nation. We ensure the successful operation of the constitutionally-based adversary system of justice by which both criminal laws and the fundamental rights of all are enforced.316

VIII. DA CAPO AL FINE

One hundred forty-two years of the history of indigent defense in Montana have been written since Montana became a territory. Significant progress has been made, and many challenges remain to be resolved. Policy decisions need to be made on an ongoing basis about the funding of Montana's system of indigent defense. The new system must now implement the practice standards that have been promulgated and build a larger support base. The indi-

316. Gallagher Interview, supra n. 230.
gent defense system, the State Bar, the Montana Legislature, and the courts must consider the cause of the disproportionate incarceration of Montana's Native American citizens. Both the Montana Legislature and Congress must consider the propriety of continuing to use uncounseled tribal court convictions to enhance state and federal prosecutions. These issues and more remain.

The cause of indigent defense is not a struggle that can be fought once and won; it is the continuing struggle to seek justice. Delegate Joseph K. Toole at Montana's 1889 Constitutional Convention understood the ongoing nature of the task. To his question, "How often shall the accused have counsel, and where?" it is hoped that we will continue to respond, "This question answers itself."

317. Supra n. 32.