Oklahoma Law Review

Volume 66 | Number 3

2014

Oklahoma's Indigency Determination Scheme: A Call for Uniformity

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I. Introduction

Consider the following scenario:[1] Ann and Bob, two friends with very similar financial situations, are arrested at the same time, in the same jurisdiction, on identical charges. A computer randomly assigns them to different judges; Ann appears before Judge Evans and Bob appears before Judge Oxford.

Ann and Bob have suffered similar financial struggles. As a result, neither one is able to hire an attorney. Both request that the court appoint attorneys to defend them. Despite Ann and Bob's similar financial circumstances, Judge Evans grants Ann's request for a court-appointed attorney, while Judge Oxford denies Bob's request. Apparently, Judge Evans grants court-appointed attorneys more freely than Judge Oxford. Their fate came down to computer randomization. If Bob had been assigned to Judge Evans's docket, he would have presumably received a court-appointed attorney.

This scenario demonstrates a flaw in Oklahoma's current method of determining whether a criminal defendant is indigent and therefore entitled to court-appointed counsel. Oklahoma grants trial judges broad discretion in determining indigency status.[2] And two different judges faced with the same set of facts may reach different conclusions. Thus, as the above scenario demonstrates, whether a criminal defendant receives a court-appointed attorney may depend on which judge is assigned to hear the case. That decision is often made by computer randomization.[3] Considering that the right to counsel is constitutionally protected,[4] should court appointment be so discretionary? What other options exist?

This Comment explores the problems inherent in such a discretionary system and proposes a solution. Part II begins by offering a history of the right to counsel, focusing on the appointment of counsel for indigent defendants. Part III analyzes Oklahoma's current method of determining indigency and offers a critique. Part IV explores alternative methods for indigency determination. Part V argues that Oklahoma should alter its

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1. The following names are fictional and are not intended to describe or refer to any particular criminal defendants or judges.

2. *See infra* text accompanying notes 50-54.

3. *See, e.g.*, Okla. Reg. 7 Dist. Ct. R. 6(A)(1) (2010); Okla. Reg. 14 Dist. Ct. Cr. R. 3 (2003).

4. U.S. CONST. amend. VI; OKLA. CONST. art. II, § 20.

current system to promote greater uniformity among criminal defendants. This Comment will explain why the best way to achieve uniformity is to shift the decision-making power from trial judges to the Oklahoma Indigent Defense System (OIDS) and apply a new test that limits discretion.

II. Background of Indigency Standards and the Right to Counsel

The Sixth Amendment to the United States Constitution grants all criminal defendants the right to counsel to assist them in mounting defenses.[5] In *Powell v. Alabama*, the Supreme Court declared that the Sixth Amendment requires the federal government to provide legal counsel to criminal defendants who cannot afford to hire attorneys on their own.[6] The Court explained that if it did not appoint counsel to indigents, it would be ignoring the "fundamental postulate . . . 'that there are certain immutable principles of justice which inhere in the very idea of free government.'"[7] Yet one decade later, in *Betts v. Brady*, the Court turned away from these principles when it refused to extend this mandate to the states.[8] In reaching that conclusion, the *Brady* Court insisted that assistance of counsel was not "essential to a fair trial."[9] Because assistance of counsel was not considered essential, the right to that assistance was not fundamental.[10] Rather, the Court viewed the decision to provide assistance of counsel to indigent defendants as a matter of state legislative policy.[11] In an effort to uphold the principles of federalism, the Court determined that furnishing attorneys for the poor was a matter that must be left to the independent discretion of state legislatures.[12]

The Court overruled *Betts v. Brady* in the 1963 landmark case of *Gideon v. Wainwright*.[13] This decision extended the Sixth Amendment to the states via the Fourteenth Amendment.[14] In deciding to overturn *Brady*, the *Gideon* Court focused on the fundamental nature of the right to counsel.[15] The Court explained that failing to provide court-appointed attorneys to those

5. U.S. CONST. amend. VI.
6. 287 U.S. 45, 71 (1932).
7. *Id.* (quoting Holden v. Hardy, 169 U.S. 366, 389 (1898)).
8. Betts v. Brady, 316 U.S. 455, 471 (1942).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. 372 U.S. 335 (1963).
14. *Id.*
15. *Id.* at 344.

who cannot afford representation intrudes on that right.[16] Justice Black stated that it was "an obvious truth" that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[17] He further noted:

> That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[18]

Gideon is rightly praised for extending the Sixth Amendment's right to counsel to all criminal prosecutions, regardless of forum.[19] But it has been critiqued for failing to articulate precisely how states should determine who qualifies for court appointment, thus leaving each state to develop its own system.[20] One critic has argued for a federal framework for determining indigency.[21] Another has argued for the Supreme Court to set forth clearer standards to be applied by the states.[22] An alternative view might praise the current system based on the "states as laboratories" theory, which suggests that states serve an important role by functioning "as laboratories for experimentation to devise various solutions where the best solution is far

16. *Id.*

17. *Id.*

18. *Id.*

19. Adam M. Gershowitz, *The Invisible Pillar of* Gideon, 80 IND. L.J. 571, 572 (2005); Amanda Myra Hornung, Note, *The Paper Tiger of* Gideon v. Wainwright *and the Evisceration of the Right to Appointment of Legal Counsel for Indigent Defendants*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 495, 496 (2005).

20. *See* Gershowitz, *supra* note 19, at 572; Hornung, *supra* note 19, at 495; Allison D. Kuhns, *If You Cannot Afford an Attorney, Will One Be Appointed for You?: How (Some) States Force Criminal Defendants to Choose Between Posting Bond and Getting a Court-Appointed Attorney*, 97 IOWA L. REV. 1787, 1787 (2012).

21. *See* Gershowitz, *supra* note 19, at 571.

22. Hornung, *supra* note 19, at 498.

from clear."[23] Even if one adopts this view, after nearly fifty years of experimentation, perhaps now is the time for academics and state legislators to review the states' various methods and determine which solution is best.

III. Oklahoma's Indigency Determination Scheme

A. Overview of Oklahoma's Indigency System

Oklahoma's constitution contains a provision similar to that of the Sixth Amendment of the U.S. Constitution, guaranteeing criminal defendants the right to counsel.[24] Recognizing the need to provide these services for those who cannot afford them, the state began compensating private attorneys for defending indigents.[25] The original appointment scheme set a maximum limit on the amount that lawyers could receive.[26] In *State v. Lynch*, however, the Oklahoma Supreme Court determined that the cap on fees deprived attorneys of their right to receive adequate compensation for their services.[27]

The *Lynch* decision spurred the Oklahoma legislature to reform the system by which indigents receive representation.[28] It did so by passing the Indigent Defense Act,[29] which created the Oklahoma Indigent Defense System (OIDS) to provide representation for indigent criminal defendants.[30] The Act also sets forth the process for determining indigency, which begins when a criminal defendant completes an application.[31] The trial judge then considers a list of factors promulgated by the Court of Criminal Appeals and renders a decision about the applicant's indigency status.[32] If the judge determines that the applicant is indigent, OIDS is appointed to the case.[33] OIDS then makes arrangements for representation.[34]

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23. United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

24. OKLA. CONST. art. II, § 20 ("In all criminal prosecutions . . . the accused shall have the right to be heard by himself and counsel . . . .").

25. *See* State v. Lynch, 1990 OK 82, ¶¶ 5-6, 796 P.2d 1150, 1155 (1990).

26. *Id.* ¶ 5, 796 P.2d at 1155-56.

27. *Id.* ¶ 7, 796 P.2d at 1156.

28. *2012 Annual Report*, OKLA. INDIGENT DEF. SYS., 2 (Sept. 28, 2012), http://www.ok.gov/OIDS/documents/2012%20Annual%20Report.pdf.

29. 22 OKLA. STAT. §§ 1355-1369 (2011).

30. *Id.* §§ 1355.1, 1355.6.

31. *Id.* § 1355A.

32. *See id*. The factors that were promulgated pursuant to this Act are reviewed *infra* in the text accompanying notes 48-49.

33. *See id.*

34. *See 2012 Annual Report*, *supra* note 28, at 2.

The Indigent Defense Act requires criminal defendants seeking indigency status to complete an application, which is commonly referred to as a Pauper's Affidavit.[35] The application requests information about the applicant's assets and liabilities, the possibility of family assistance, and the applicant's bond status.[36] If the applicant has posted bond, he must include an additional writing naming at least three licensed attorneys he has contacted, and must declare that he was unable to obtain counsel.[37] The application must be signed under oath, which carries the penalty of perjury.[38] The statute further requires payment of a forty dollar application fee, which may be waived depending on the applicant's financial status.[39]

The Indigent Defense Act delegates the responsibility of promulgating "rules governing the determination of indigency" to the Court of Criminal Appeals.[40] This delegation of authority is subject to one limitation—the posting of bond creates a rebuttable presumption that the applicant is not indigent.[41] The only exception is when the bond is posted by the defendant's personal recognizance rather than by money.[42] Oklahoma views payment of bail as "prima facie evidence that said defendant has funds to employ his own attorney."[43]

The Court of Criminal Appeals responded to the Indigent Defense Act by promulgating Rule 1.14 of the Oklahoma Rules of the Court of Criminal Appeals.[44] The court chose to codify the standards it previously set forth in *Cleek v. State*,[45] *Petition of Humphrey*,[46] and *Bruner v. State*.[47] These standards include consideration of the applicant's:

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35. 22 OKLA. STAT. § 1355A; OKLA. CT. CRIM. APP. FORM 13.3.
36. OKLA. CT. CRIM. APP. FORM 13.3.
37. 22 OKLA. STAT. § 1355A.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* Recognizance is "[a] bond or obligation, made in court, by which a person promises to perform some act or observe some condition, such as to appear when called, to pay a debt, or to keep the peace." BLACK'S LAW DICTIONARY 1386 (9th ed. 2009).
43. 20 OKLA. STAT. § 55 (2011). Whether or not the posting of bond should carry this much weight is beyond the scope of this Comment, but one critic suggests that this type of system unfairly forces defendants to stay in jail if they wish to keep their court-appointed attorney. Kuhns, *supra* note 20, at 1787.
44. *See* OKLA. CT. CRIM. APP. R. 1.14.
45. 1987 OK CR 278, ¶ 5, 748 P.2d 39, 40.
46. 1979 OK CR 97, ¶ 14, 601 P.2d 103, 108.
47. 1978 OK CR 65, ¶¶ 6-9, 581 P.2d 1314, 1317 .

1. ability and decision to post an appeal bond;[48]
2. assets and their liquidity;
3. debts and liabilities;
4. financial history;
5. earning capacity;
6. living expenses;
7. credit standing;
8. family size;
9. number of dependents; and
10. ability and willingness of family members to assist financially.[49]

By simply adopting guidelines that were already established by judicial precedent, the Court of Criminal Appeals essentially told district judges to keep up the good work.

The text of Rule 1.14 reveals the intent of the Court of Criminal Appeals to grant broad discretion to trial judges in determining indigency.[50] First, the Rule codifies standards adopted in three different cases, two of which specifically held that the trial court has discretion in making its determination.[51] Second, the Rule clearly expresses that the list of guidelines is illustrative, allowing trial courts to add to that list if they deem it necessary and appropriate to do so.[52] Thus, trial judges have discretion in determining exactly what factors to consider and how much weight to place on each one. The only check on the trial judge's discretion is appellate review.[53] But even during review of the lower court's decision, appellate courts give great deference to trial judges.[54]

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48. An appeal bond allows for a defendant's sentence to be postponed until after he has appealed the trial court's ruling. 22 OKLA. STAT. § 1058 (2011). In most criminal cases, a fee is required to stay execution of the sentence. *Id.* Appeal bonds are used to ensure that the defendant continues to adhere to court orders while the case is waiting for or undergoing appeal. Gibson v. State, 1982 OK 151, ¶ 5, 655 P.2d 1028, 1029.

49. OKLA. CT. CRIM. APP. R. 1.14.

50. *Id.*

51. *Id.*; Cleek v. State, 1987 OK CR 278, ¶ 4, 748 P.2d 39, 40 (overruled in part by Norton v. State, 2002 OK CR 10, ¶ 12, 43 P.3d 404, 408); *Bruner*, ¶ 7, 581 P.2d at 1316.

52. OKLA. CT. CRIM. APP. R. 1.14 (stating that the "guidelines include, but are not limited to" the factors enumerated above).

53. *See, e.g.*, Brewer v. State, 1975 OK CR 52, ¶ 8, 533 P.2d 645, 646-47 (declaring that the trial court had abused its discretion in refusing to appoint counsel).

54. *See* Parks v. Lindley, 1990 OK CR 18, ¶ 4, 789 P.2d 248, 250-51 (upholding the "general principle" that trial judges maintain discretion in determining a criminal defendant's financial status).

If the trial judge determines that an applicant is indigent, the defendant will be appointed counsel. Oklahoma's two largest counties, Oklahoma and Tulsa, maintain their own indigent defense systems.[55] OIDS is appointed in the remaining seventy-five counties.[56] In fifty-six of the latter counties, OIDS always contracts out its noncapital appointments to private attorneys, essentially maintaining the pre-Indigent Defense Act system of providing representation but without capping attorney's fees.[57] OIDS staff attorneys handle most of the appointments in the remaining nineteen counties.[58] Yet, even in these counties, OIDS contracts out to private attorneys to represent conflict and overload cases, so long as those cases are trial hearings that do not involve capital punishment.[59]

B. Most Jurisdictions Take a Similar Approach

Most state and federal jurisdictions adopt an approach similar to Oklahoma.[60] The federal government grants nearly unfettered discretion to district judges in determining indigency.[61] And at least thirty-one states and the District of Columbia grant discretion to trial judges in determining indigency, although nearly every jurisdiction varies the exact breadth of discretion permitted.[62]

Although these jurisdictions take the same general approach as Oklahoma, some require or encourage judges to consider different or additional factors. For example, Alabama considers "the nature of the offense" as well as "the effort and skill required to gather pertinent information and the length and complexity of the proceedings."[63] Kansas takes into account the amount "which must be incurred to support the defendant and the defendant's immediate family."[64] Washington looks to

55. 19 OKLA. STAT. § 138.1a(A) (2011); *Frequently Asked Questions*, OKLA. INDIGENT DEF. SYS., http://www.ok.gov/OIDS/faqs.html (last visited Sept. 16, 2013).

56. *Frequently Asked Questions*, *supra* note 55.

57. *2012 Annual Report*, *supra* note 28, at 2.

58. *Id.*

59. *Id.*

60. *See infra* Appendix A.

61. 28 U.S.C. § 1915(e)(1)(2006) ("The court may request an attorney to represent any person unable to afford counsel."). The statute neither offers guidance nor limits discretion.

62. *See infra* Appendix A.

63. ALA. CODE § 15-12-5 (LexisNexis 1975).

64. KAN. STAT. ANN. § 22-4504 (2007).

whether or not the applicant receives public assistance.[65] And Louisiana considers "job training history" and "level of education."[66]

Additionally, some of these jurisdictions delegate promulgating guidelines to entities other than the criminal appellate court. In Tennessee, for example, the state legislature created the list of factors that the judge is to consider.[67] Some jurisdictions employ additional measures to determine indigency. A trial judge in Kansas will often interrogate the defendant as to his financial status and direct county officers to launch an investigation into the defendant's financial condition.[68] Yet in spite of these minor variations, these jurisdictions have all adopted the general approach of allowing judges to exercise discretion in determining indigency status.

C. A Critique of Oklahoma's Approach

The guidelines set by the Oklahoma Court of Criminal Appeals allow trial judges to exercise broad discretion in determining indigency status.[69] Although discretion permits flexibility, which allows judges to evaluate each case based on its unique facts, it also tends to cause a lack of uniformity in decisions and undermines one of our nation's most fundamental principles—equality before the law.

1. The Benefit of Discretion: Flexibility

Consider the following scenarios: Two applicants appear before a judge to request a court-appointed attorney. One applicant has a very low income level, which initially suggests that the applicant ought to be provided a court-appointed attorney. Yet after some digging, the judge learns that the applicant is bright, healthy, and able to obtain higher income. The defendant simply prefers not to.

Alternatively, consider an applicant with a slightly higher income. The higher income alone suggests that he can likely afford his own attorney. But this applicant's higher income is insufficient to pay the vast amount of medical bills that have resulted from an unfortunate accident. Moreover, the accident left the applicant disabled, so he is unable to obtain any additional income.

In this hypothetical, flexibility would allow the judge to weigh each applicant's unique circumstances to determine who genuinely needs the

65. WASH. REV. CODE ANN. § 10.101.020 (LexisNexis 2012).
66. LA. REV. STAT. ANN. § 15:175 (Supp. 2012).
67. TENN. CODE ANN. § 8-14-205 (2011).
68. KAN. STAT. ANN. § 22-4504.
69. *See supra* text accompanying notes 48-54.

assistance. Although both applicants lack resources now, one has the physical and mental means of obtaining additional resources, while the other has a cumulating stack of debt that consumes the few resources he is physically able to obtain. In a system of rigid standards, a judge perhaps would be forced into appointing an attorney to the former applicant but not the latter one, based solely on their respective incomes. Should taxpayer money be spent on funding the legal defense of one who has voluntarily selected a low-income lifestyle, but not one who has, through no choice of his own, been plagued by hardship? Such an outcome contradicts the *Gideon* Court's view that the state has an obligation to assist those who *cannot* obtain counsel solely on their own means.

2. The Downside of Discretion: Lack of Uniformity

Although flexibility may at times uphold the spirit of *Gideon*, it does so at a cost. While judges are highly capable of setting aside their personal opinions and beliefs to render decisions based solely on the law, discretionary determinations encourage—perhaps even require—judges to incorporate their own unique views in rendering a decision. An approach that encourages varying decision makers to incorporate their own personal beliefs naturally results in a lack of uniformity among the decisions rendered.

Equal treatment, uniformity, and predictability are all valued principles in our society and, consequently, our legal system.[70] Justice Antonin Scalia illustrates the importance of equality in our society by describing a hypothetical wherein a young child (one who often has the keenest sense of fairness) reacts very strongly toward unequal treatment: If you tell a child that no one can have ice cream, she will eventually get over it.[71] However, if you tell that same child that everyone else can have ice cream, but do not provide her with a clear, objective reason for denying her ice cream, the child will articulate an instinctive sense of unfairness.[72] The fact that young children are quick to identify and speak out against unequal treatment is demonstrative of how important equality is to our society.[73] This spirit has found its way into our legal system—most notably into our nation's most fundamental law, the Constitution, via the Fourteenth Amendment.[74]

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70. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989).

71. *Id.*

72. *See id.*

73. *Id.*

74. *Id.*

Unfortunately, there are times when the principles of equality, uniformity, and predictability conflict with finding the "perfect" answer in a particular case.[75] In certain circumstances, such as the above hypothetical involving the two applicants with different income levels, flexibility may allow a court to uphold the spirit of *Gideon*. However, forsaking the broader principles of equality, uniformity, and predictability in order to achieve this outcome undercuts the overall value of our legal system by removing the appearance of equal treatment under the law. As the introductory scenario suggests, discretion often leads to individuals with similar financial circumstances getting different results—or unequal treatment—simply because they were appointed different judges. These differences not only occur among different states, counties, or municipalities, but often occur even within the same county or municipal court.

3. The Stakes

The discrepancy in outcomes is particularly troubling when viewed in light of the importance of having counsel to assist in mounting a defense against the state's overwhelming power. In *Powell v. Alabama*, the hallmark case wherein the Court recognized the need to provide representation to those who cannot afford it, Justice Sutherland articulated how the appointment of counsel may affect the merits of a case.[76] He highlighted the unique knowledge and skills that lawyers possess, such as an understanding of the rules of evidence, which are essential to the mounting of a proper defense.[77] Without these skills and knowledge, even a bright, innocent man may be unable to prepare an adequate defense.[78] Because a proper defense requires the application of these unique skills, an unrepresented criminal defendant "faces the danger of conviction because he does not know how to establish his innocence."[79]

If, as Justice Sutherland suggested, an innocent man can easily be convicted simply because he did not defend himself the "right" way, it follows that those who are unable to get assistance in launching the "right" defense may be more prone to wrongful conviction than those who can afford representation. Of course, court-appointed attorneys are intended to

75. *Id.*
76. 287 U.S. 45, 69 (1932).
77. *Id.*
78. *See id.*
79. *Id.*

fill this gap. Otherwise, there would be a socioeconomic inequality under the law.

The severity of this discrepancy between classes deepens further when viewed in light of the repercussions of incarceration. The most obvious losses are also perhaps the most important—lost time and liberty, which the incarcerated are never able to get back. Additionally, incarcerated individuals suffer deplorable conditions while in confinement. For example, in 2008, the U.S. Department of Justice investigated the conditions of the Oklahoma County Jail and found numerous issues that threatened the health, safety, and constitutional rights of the inmates.[80] These issues included, but were not limited to, the following:

- Overcrowding: Although the jail was only built to house 1,250 inmates, there were more than 2,500 inmates held there in April of 2007.[81] Due to the overcrowding, inmates were forced to sleep "under tables, next to toilets, and underneath bunk beds."[82]

- Inmate-on-inmate violence: During a two-month period in early 2007, there were seventy reported inmate-on-inmate assaults, which resulted in numerous serious injuries and two inmate deaths.[83]

- Staff-on-inmate force: "[B]etween January 2006 and March 2007, there were 1,337 reported uses of force" by staff, including physical force and four-point restrictions.[84]

- Inadequate treatment and management of communicable diseases: There were twenty-one cases of tuberculosis at the jail in 2006, sixteen of which broke out in a single month.[85]

80. Letter from Grace Chung Becker, Acting Assistant Attorney Gen., to Willa Johnson et al., Comm'rs of Oklahoma County Jail (July 31, 2008), *available at* http://www.justice.gov/crt/about/spl/documents/OKCounty_Jail_findlet_073108.pdf.

81. *Id.* at 2.

82. *Id.* at 17.

83. *Id.* at 6.

84. *Id.* at 8.

85. *Id.* at 16.

- Inadequate access to medical care during emergencies: In 2005, a pregnant inmate gave birth while handcuffed to a handrail.[86] The inmate insisted that her water had broken and requested to lie down.[87] Detention officers dismissed the woman's cries, forcing her to birth her child alone.[88] The baby was soon pronounced dead.[89]

The consequences continue far beyond time served. Prison records lead to disadvantages in the labor market, including increased unemployment and slow wage growth.[90] Moreover, there is a social stigma of incarceration, which, when combined with the time spent serving his sentence, strains the inmate's present relationships and affects his ability to acquire new ones.[91] As one court rightly stated, "Any incarceration of over thirty days, more or less, will usually result in loss of employment, with a consequent substantial detriment to the defendant and his family."[92]

Not only does incarceration have serious costs for those convicted, but it is also very expensive for taxpayers. During the fiscal year of 2012, the state of Oklahoma expended between $13,647 and $28,652 per incarcerated individual.[93] Moreover, the average sentence length is seven years.[94] Thus, it would cost Oklahoma taxpayers approximately $148,046.50 to incarcerate an innocent person who was accused of an average crime.[95] In

86. *Id.* at 14.

87. *Id.*

88. *Id.*

89. *Id.*

90. Jason Schnittker & Andrea John, *Enduring Stigma: The Long-term Effects of Incarceration on Health*, 48 J. HEALTH & SOC. BEHAV. 115, 115-16 (2007) (citing ROBERT J. SAMPSON & JOHN H. LAUB, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE (1993)).

91. *See* Bruce Western & Christopher Wildeman, *Punishment, Inequality, and the Future of Mass Incarceration*, 57 U. KAN. L. REV. 851, 873-74 (2009).

92. Marston v. Oliver, 324 F. Supp. 691, 696 (E.D. Va. 1971), *rev'd*, 485 F.2d 705 (4th Cir. 1973).

93. *Facts at a Glance April 2013*, OKLA. DEP'T OF CORRECTIONS (Apr. 30, 2013), http://www.ok.gov/doc/documents/DOC_Facts_At_A_Glance_April_2013.pdf.

94. *Fiscal Year 2010 Receptions, Incarcerations, and Releases*, OKLA. DEP'T OF CORRECTIONS, http://www.ok.gov/doc/documents/FY10_Report.txt (last visited Sept. 13, 2013). This calculation excludes sentences with abnormally short or long terms, such as delayed, life, and death sentences. *Id.*

95. This number was calculated by the following means: First, the average cost of incarceration is $21,149.50, which is the average of $13,647 and $28,652. *See Facts at a Glance April 2013*, *supra* note 93. Second, multiplying this annual average by the average

contrast, OIDS only expends an estimated $355 per year per indigent defendant.[96] Without a doubt, it is in the economic interest of the state to provide representation for those who cannot afford it themselves, as it is dramatically more costly to incarcerate an innocent defendant than it is to provide her with representation.

For those applicants who are neither clearly "indigent" nor clearly "able to afford an attorney," freedom may lie in the hands of the one who determines whether they are appointed attorneys. When those decisions are made by judges who are left to make the determinations based on their own discretion, the outcome may not be uniform. As a result, it is possible that two applicants with identical financial means may not experience equality before the law; one may be appointed counsel, who knows how to render a proper defense, while the other is forced to go it alone. Given the severity of incarceration and the injustice that results from unequal treatment, a system that yields more uniform outcomes is highly preferable to one that varies upon the individual views of the decision maker.

IV. Alternatives to Oklahoma's Approach

There are three notable alternatives to Oklahoma's current indigency determination scheme that would promote greater uniformity. The first alternative would apply a bright-line test, as is used in Florida to determine indigency and in Oklahoma to determine eligibility for other government assistance programs. The second alternative would create a new grid-like framework similar to the one that was originally created by Congress for use in federal sentencing. The third alternative, which could be combined with either of the first two, would transfer the decision-making power to the public defender program, OIDS. The following sections explore each of these options.

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number of years sentenced, seven, results in a $148,046.50 cost to taxpayers over the course of the incarceration. *See Fiscal Year 2010 Receptions, Incarcerations, and Releases*, *supra* note 94.

96. Telephone Interview with Joe Robertson, Exec. Dir., OIDS (June 24, 2013). OIDS has an annual budget of $16,000,000 and they represent approximately 45,000 indigent defendants per year. *Id.* Of course, the exact amount spent on a particular case varies with its complexity. *Id.*

A. Option 1: Applying Bright-Line Rules

1. Current Uses of Bright-Line Tests

Justice Powell once stated that "[t]he line between indigency and assumed capacity to pay for counsel is necessarily somewhat arbitrary."[97] Perhaps this does not have to be true. At least one state, Florida, disagrees with Justice Powell and believes that indigency can be more clearly defined, in a more objective and measurable way, through a bright-line test.[98] In Florida, the court clerk makes the determination after "comparing the information provided in the application to the criteria prescribed" by statute.[99] The legislature views this criteria as so determinative that it characterizes the clerk's role as "a ministerial act" rather than as an "exercise of independent judgment by the clerk."[100] The clerk is to declare an applicant indigent if her income is below a prescribed level or if she receives benefits from an enumerated list of assistance programs, unless she has assets valued at more than a prescribed amount.[101] The statute authorizes the clerk to conduct further review of the applicant's public financial records, so long as the clerk drafts a memo setting forth her findings.[102] In case this ministerial act results in a seeming injustice, the statute allows for judicial review of the clerk's determination.[103]

Oklahoma applies bright-line tests in determining eligibility for many other state-funded assistance programs. For example, the Oklahoma Higher Learning Access Program assists qualifying students in paying for postsecondary education.[104] One of the requirements is that students "establish[] financial need,"[105] which is determined based on parental (or in some circumstances student) income at the time of application.[106]

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97. Argersinger v. Hamlin, 407 U.S. 25, 50 (1972) (Powell, J., concurring in the result).

98. FLA. STAT. § 27.52 (2012).

99. *Id.*

100. *Id.* An act is ministerial if it is "[o]f or relating to an act that involves obedience to instructions or laws instead of discretion, judgment, or skill." BLACK'S LAW DICTIONARY 1086 (9th ed. 2009).

101. *Id.*

102. *Id.*

103. *Id.*

104. Also known as "Oklahoma's Promise." 70 OKLA. STAT. § 2602 (2009).

105. *Id.* § 2603.

106. *Id.* § 2605. The general standard imposes a strict income level cutoff of $50,000 to qualify for this program. *Id.* Slightly different standards apply for children who have been adopted out of the foster system. *See id.* § 2603.

2. The Benefits and Costs of Using a Bright-Line Test

A bright-line approach has some appealing features. First, it is efficient. Rather than requiring judges to expend time reviewing a theoretically endless set of factors, one could simply hire someone to determine whether or not the applicant's income is less than, equal to, or greater than the cutoff amount.[107] More importantly, such an approach would establish near perfect uniformity, at least among those with similar income levels. The introductory scenario would likely no longer occur. Ann and Bob would either both be deemed indigent, and consequently given court-appointed attorneys, or neither of them would.

But at what cost should this approach be taken? All bright-line rules tend to oversimplify complex situations and fail to consider unusual or unforeseen applications. For example, a clerk using income as a bright-line cutoff, as Oklahoma does with other assistance programs, considers only the amount of an applicant's income, not what they are able to do with it. Strict income cutoffs do not consider the quantity, quality, or liquidity of assets. Nor do such cutoffs consider the debts, liabilities, or other obligations that limit the ability of the applicant to hire an attorney. Finally, these systems consider only the ability to hire an attorney generally, without considering the complexity of the case and the unique needs of the particular defendant. There are many important considerations that are simply not encompassed in strict income cutoffs.

Bright-line tests tend to focus on one (or few) consideration(s), while disregarding other factors that Oklahoma lawmakers have repeatedly deemed important. The Oklahoma Supreme Court first enumerated the list of relevant factors in *Cleek v. State*.[108] In finding that these factors are relevant in determining indigency status, the court relied on a case from the Washington Supreme Court, *Morgan v. Rhay*.[109] The latter court articulated the need for an evaluation of factors to shed light on the applicant's entire financial situation:

> To qualify for appointed counsel, it is not necessary that an accused person be utterly destitute or totally insolvent. Indigence

107. In order to take into consideration the variances in the cost of living among cities or counties in Oklahoma, the income cutoffs would need to vary depending on the particular applicant's city or county of residence.

108. *See* Cleek v. State, 1987 OK CR 278, ¶ 5, 748 P.2d 39, 40 (overruled in part by Norton v. State, 2002 OK CR 10, ¶ 12, 43 P.3d 404, 408); *see also* OKLA. CT. CRIM. APP. R. 1.14. To review the list of factors again, see *supra* text accompanying notes 48-49.

109. *Cleek*, ¶ 5, 748 P.2d at 40.

> is a relative term, and must be considered and measured in each case by reference to the need or service to be met or furnished. In connection with the constitutional right to counsel, it properly connotes a state of impoverishment or lack of resources which, when realistically viewed in the light of everyday practicalities, effectually impairs or prevents the employment and retention of competent counsel.[110]

The legislature later adopted this view when it passed the Indigent Defense Act, which allowed the Court of Criminal Appeals to promulgate factors to be considered in the trial judge's determination.[111] Had the Oklahoma legislature not approved of the approach taken in *Cleek*, it could have altered it when it passed the Indigent Defense Act. Moreover, the judiciary has maintained this view, as evidenced by the decision of the Court of Criminal Appeals to adopt the *Cleek* factors in exercising its power to determine the standards for indigency.[112] The evolution of Oklahoma's current system seems to reflect state lawmakers' shared belief that indigency is a complex equation that cannot be calculated with a simple comparison of two numbers.

B. Option 2: Mimicking the Federal Sentencing Guidelines

1. Overview of the Original Federal Sentencing Guidelines

In the past several decades, the federal government has struggled with weighing the pros and cons of judicial discretion in criminal sentencing. Prior to 1987, federal judges were given broad discretion in sentencing.[113] The only hard limitation on their discretion was the statutory maximums.[114] So long as they stayed within the statutory maximums, judges were allowed to "consider any factors they deemed relevant" and impose any punishment they thought proper, including fines, probation, incarceration, or any combination thereof.[115] Moreover, these decisions were not subject to review by appellate courts.[116]

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110. Morgan v. Rhay, 470 P.2d 180, 182 (Wash. 1970).

111. 22 OKLA. STAT. § 1355A (2011).

112. OKLA. CT. CRIM. APP. R. 1.14.

113. Rebecca S. Henry, *The Virtue in Discretion: Ethics, Justice, and Why Judges Must Be 'Students of the Soul'*, 25 N.Y.U. REV. L. & SOC. CHANGE 65, 89-90 & n.87 (1999) (citing Mistretta v. United States, 488 U.S. 361, 363 (1989)).

114. *Id.* at 89.

115. *Id.*

116. *Id.* (citing Koon v. United States, 518 U.S. 81, 97 (1996) ("We agree that Congress was concerned about sentencing disparities [in enacting the Guidelines], but we are just as

Granting federal judges such broad discretion had its benefits—the resulting "flexibility and individual attention" promoted the incorporation of rehabilitation in sentencing.[117] Yet, the discretion also led to vast disparities in sentencing.[118] These disparities "rais[ed] concerns about equality, proportionality, and improper discrimination."[119] In response to these concerns, Congress passed the Sentencing Reform Act (Sentencing Act), which took effect in April of 1987.[120]

The Sentencing Act attempted to promote greater uniformity among federal criminal sentencing, while still allowing federal judges to impose individualized sentences when warranted.[121] Congress attempted to meet these competing objectives by creating a system with two distinct features.[122] The first primary feature, which is intended to promote uniformity, is a sentencing grid that lists forty-three types of offenses on the vertical axis and six classifications of criminal history on the horizontal axis.[123] Once federal judges have categorized both the offense and the defender's criminal history, they are instructed to find the intersection between these two numbers.[124] That point of intersection contains a sentencing range, in which the high end of the range is no more than twenty-five percent greater than the lower end of the range.[125] Judges are instructed to impose a sentence within the designated range.[126]

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convinced that Congress did not intend, by establishing appellate review, to vest in appellate courts wide-ranging authority over district court sentencing decisions.")).

117. *Id.* at 90.

118. *Id.*

119. *Id.* (citing Karen Bornstein, *5K2.0 Departures for 5H Individual Characteristics: A Backdoor Out of the Federal Sentencing Guidelines*, 24 COLUM. HUM. RTS. L. REV. 135, 139 (1993), Michael S. Gelacak, Ilene H. Nagel & Barry L. Johnson, *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 305, 306 (1996), Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 4 (1991), John M. Walker, Jr., *Loosening the Administrative Handcuffs: Discretion and Responsibility Under the Guidelines*, 59 BROOK. L. REV. 551, 551 (1993)); *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5 (1988).

120. *Id.* at 90-91.

121. *Id.* at 91 (citing 28 U.S.C.A. § 991(b)(1)(B) (West 1999)).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* The Sentencing Act originally made the guidelines mandatory. 18 U.S.C. § 3553(b)(1) (2006). In *United States v. Booker*, the Supreme Court severed the mandatory provision in order for the Act to comply with the Sixth Amendment's jury trial requirements.

The second characteristic of the Sentencing Act is that it provides two escape hatches for federal judges to use when the application of the grid would be inappropriate.[127] These escape hatches are intended to promote sentences that are proportional to the specific facts of the crime.[128] The first escape hatch gives the judge the opportunity to alter the base offense before finding the point of intersection.[129] If certain specific facts exist, such as the use of a gun in the commission of the crime, the judge can bump the base offense up or down as he sees fit.[130] Altering the input (types of offenses) consequently alters the outcome (resulting point of intersection), allowing the judge to slightly change the sentencing he is instructed to impose.[131] The second escape hatch allows federal judges to wholly depart from the guidelines.[132] This latter mechanism is only permitted "[w]hen a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm."[133]

2. Creating a Similar Test for Use in Indigency Determination

Like the federal criminal sentencing guidelines, indigency determination methods must strike a balance between flexibility and uniformity. As such, Oklahoma could adopt a system for determining indigency that is similar to the Sentencing Act's method of setting sentences. Although different factors would need to be considered, the same general principles could be incorporated into a system for determining indigency. The state legislature, the Court of Criminal Appeals, or even OIDS could develop set outcomes depending on variations in the factors listed in Rule 1.14.[134] Judges would then need to follow this set system unless unique circumstances justify departure from that outcome.

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543 U.S. 220, 222 (2005). This severance stemmed from the Court's prior holding that any fact, other than the defendant's prior conviction, that enhances the defendant's sentence beyond the "statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," in order to comply with the Sixth Amendment. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

127. *Id.* at 92-93.

128. *Id.*

129. *Id.* (citing U.S. SENTENCING COMM'N, GUIDELINES MANUAL ch. 2, 3 (1998)).

130. *Id.* at 92.

131. *Id.*

132. *Id.* at 93.

133. *Id.* at 94 (quoting U.S. SENTENCING COMM'N, *supra* note 129, at ch. 1, pt. A.4(b), introductory cmt.).

134. *See supra* text accompanying notes 48-49.

As discussed above, Oklahoma lawmakers have enumerated a list of factors that they deem relevant in determining indigency. These factors were set forth in earlier cases and adopted in Rule 1.14 of the Oklahoma Rules of the Court of Criminal Appeals.[135] The consistent reaffirmation of these factors demonstrates that lawmakers believe they are crucial in determining indigency. As such, all ten factors should be incorporated into a system of predetermined outcomes. Furthermore, Oklahoma lawmakers have determined that great weight should be placed on whether an applicant is able to post bond.[136] As such, that factor should be given greater weight than the other factors. An applicant's posting of bond could raise a presumption that he is not indigent, which would require a higher showing of need in the subsequent analysis.[137]

The following weighted point system, which I have created for purposes of this Comment, could be used to determine indigency based on an evaluation of the remaining factors in Rule 1.14. For every factor that reflects an ability to hire an attorney, at least one point would be added to the applicant's running total. The more that factor demonstrates ability to pay, the more points would be added. Likewise, for every factor that would prevent an applicant from being able to afford an attorney, at least one point would be deducted from the running total. The more that factor would prevent hiring an attorney, the more points would be deducted.

For example, an applicant could be assigned a point for every $10,000 he earns annually. An applicant making less than $10,000 per year would receive zero points, an applicant making between $10,000 and $20,000 per year would receive one point, and so forth. Similarly, an applicant could have one point deducted for every $10,000 of debt owed. An applicant with less than $10,000 worth of debt would have one point deducted, an applicant with $10,000 to $20,000 worth of debt would have two points deducted, and so forth.[138] Points could be added as assets, earning capacity, willingness of family to assist, credit standing, and financial history increase. Similarly, points could be deducted as debts or liabilities, living expenses, family size, and number of dependents increase.

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135. *See supra* text accompanying notes 44-54.

136. 22 OKLA. STAT. § 1355A (2011); 20 OKLA. STAT. § 55 (2011).

137. This Comment does not seek to endorse the legislature's decision to create this presumption. It simply attempts to develop a test that reflects what Oklahoma lawmakers have demonstrated to be important in the analysis. For a criticism on this approach, see Kuhns, *supra* note 20, at 1787.

138. These numbers are intended only to serve as examples. Different increments and allocation of points could be determined. These numbers were selected for simplicity.

Once all nine of these factors are given point allocations, the total points would be summed. The number of points tallied at the end would then determine whether or not the applicant receives a court-appointed attorney. The higher the number, the more likely the applicant can afford an attorney. A particular sum could be designated as a cut-off for those who posted bond, while a higher sum is set for those who did not post bond.

Of course, relying solely on the tallying of points may focus too much on uniformity, thus restricting the flexibility that may be necessary to reach the right outcome in atypical cases. To mitigate this danger, the test should be supplemented by the second part of the Sentencing Act's original format, thus allowing judges to either adjust the analysis slightly or wholly depart from the point system, if necessary.[139]

3. The Benefits and Costs of Mimicking the Federal Sentencing Guidelines

The value of selecting this type of indigency determination scheme is threefold. First, it incorporates a more thorough analysis than a simple one-factor bright-line test and thus more accurately reflects one's financial status. As such, it honors the decision of Oklahoma lawmakers to consider numerous factors in rendering a decision on indigency status. Second, it promotes greater uniformity by focusing the decision on an objective, quantitative analysis rather than on the varying discretion of judges. Third, it still retains an escape hatch that would allow judges to intervene in those instances where the interests of justice are promoted more by straying from the grid than by deferring to it. In sum, the benefit of this scheme is that it does more to find a comfortable middle ground—the judge is not granted unfettered discretion and no single factor is dispositive. Rather, this scheme requires a more comprehensive analysis, while still promoting uniformity.

The downfalls of this scheme are also threefold. First, the escape hatch would have to be ambiguous, which thwarts the ability to fully resolve issues of uniformity, predictability, and equality by making it unclear when departure is appropriate. For example, it would be unclear what facts make

139. The Sixth Amendment's requirement of a jury trial does not affect indigency determination like it does federal sentencing. As discussed in note 126, *supra*, the Supreme Court made the Sentencing Act advisory in order to comply with the Sixth Amendment's requirement that facts used to enhance a defendant's sentence be submitted to a jury and proven beyond a reasonable doubt. United States v. Booker, 543 U.S. 220, 222 (2005); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). The facts that influence a determination of indigency do not require a finding by a jury. Therefore, the initial framework set forth by Congress can appropriately be applied to an indigency determination scheme.

a case so unusual as to justify a different outcome, what interests of justice should be considered, and how much weight those considerations should carry. Despite these concerns, the escape hatch must be ambiguous in order for it to function properly. After all, a major benefit of having an escape hatch is to allow judges to respond to unforeseen circumstances.

Second, this scheme is similar to the federal sentencing guidelines, which have been critiqued by one federal judge as being "so cruelly delusive as to make those who have to apply the guidelines to human beings, families, and the community want to weep."[140] Unfortunately, systems that promote uniformity over judicial discretion tend to have this effect because they conform to a set scale designed to render a predetermined outcome. Such schemes do not allow the judge to make a decision based on what he believes would be best for the individual applicant. However, such a system is required to promote uniformity. Allowing judges to determine outcomes on a case-by-case, applicant-by-applicant analysis, guided by their personal observations and intuitions, is what creates a lack of uniformity. The trade-off between flexibility and uniformity persists throughout all systems. Given that a lack of uniformity often leads to unpredictability and inequality before the law, the detriment that results to flexibility is simply a consequence that must be accepted.

Third, applying a sentence based on a predetermined point system means that "the judge's task is largely ministerial," which one might argue could be accomplished just as competently by a preprogrammed computer.[141] This is another critique commonly attributed to the federal sentencing guidelines that also applies to indigency determination schemes. If that critique is true, then it would follow that retaining the judge as the decision maker is a waste of judicial resources. If the judge imparts no special expertise in the decision-making process, then it would be more resourceful to have a clerk, a bureaucrat, or a computer program make the decision.

This critique is even more appropriate for indigency determination schemes than for federal criminal sentencing. Sentencing decisions require a comprehensive knowledge of the law and the facts. A judge is uniquely specialized to make this decision for two reasons. First, he possesses a greater understanding of the law as a result of his education and experience. Second, he possesses a greater understanding of the facts of the case because he has overseen the entire trial process and scrutinized all of the

140. Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 COLUM. J. GENDER & L. 169, 169 (1996).

141. Fred A. Bernstein, *Discretion Redux—Mandatory Minimums, Federal Judges, and the "Safety Valve" Provision of the 1994 Crime Act*, 20 U. DAYTON L. REV. 765, 770 (1995).

evidence. Thus, a judge plays a vital, irreplaceable role in sentencing decisions.

The same is not true, however, for determining indigency. Although the determination does require some comprehension of the legal system, such as knowing how much legal work will be required to mount a defense in a particular case, a thorough understanding of the law is not necessary to determine the applicant's financial standing. Moreover, deciding one's indigency status requires the decision maker to understand and be familiar with an entirely different set of facts. In deciding an appropriate sentence, one must understand the facts of the crime. In contrast, deciding indigency status requires an understanding of the applicant's financial situation. Although some facts may overlap at times, they generally will not. Thus, the judge gains no unique insight by presiding over the case. Even if he did, determining indigency is a preliminary decision that is made before the facts of the case are determined. Because the judge's education, experience, and positioning offer no unique insight into the determination of indigency status, the decision may be made more efficiently by someone else.

The bottom line is that judicial discretion creates concerns of inequality, unpredictability, and a lack of uniformity for both federal sentencing and indigency determination. The original framework of the Sentencing Act mitigates these concerns by creating a system that promotes uniform results, while still allowing for proportionality in unusual circumstances. A similar system could be used to determine indigency status in Oklahoma. Unfortunately, the competing values of uniformity, equality, and predictability will continue to be in tension with ideas of individualized decision-making and flexibility, regardless of what test Oklahoma uses to determine indigency. But if uniformity is viewed as paramount, then a system that mimics the original framework of the Sentencing Act would be highly beneficial because it would promote uniformity while still incorporating a thorough analysis. Moreover, many of the downfalls that exist in federal criminal sentencing are not applicable to indigency determination.

C. Option 3: Transferring the Decision-Making Power to OIDS

Eighteen states use a test that grants broad discretion in determining indigency but places the decision-making power in the hands of someone other than the trial judge assigned to the case.[142] Fourteen of these states

142. *See infra* Appendix A.

give the decision-making power to the public defender program.[143] Although public defender programs vary among states—and possibly even among counties[144]—they are generally organizations that employ local attorneys to provide representation to indigent defendants in the jurisdiction for which they are responsible.[145] Oklahoma has three public defender programs—Oklahoma and Tulsa counties each have their own programs, while OIDS represents the remaining seventy-five counties.[146]

OIDS is structured as a bureaucratic agency. It is headed by a Board of Directors, consisting of five members who are appointed by the governor and confirmed by the state senate.[147] The Board selects an executive director to manage the operations of the agency and implement the mission.[148] The executive director oversees all five subdivisions of the agency—operations, trial representation, appellate representation, noncapital contracts, and forensic testing services—each of which has a division chief that supervises his or her subordinates and reports back to the executive director.[149] This organizational structure, which has a hierarchy of authority and specialization of tasks, is a common bureaucratic one.[150]

Bureaucracies have distinct characteristics that affect whether such an institution is the proper place for indigency determination. Max Weber, the German social science scholar, studied the concept of bureaucracies.[151] Some of his most notable studies have been consolidated by Peter M. Blau and Marshall W. Meyer, both modern American sociologists, into a convenient list of bureaucratic characteristics.[152] The full list includes:

- clear-cut division of labor;
- organization according to the principles of hierarchy;

143. *Id.*

144. 19 OKLA. STAT. § 138.1a(A) (2011); *Frequently Asked Questions*, *supra* note 55.

145. Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 36 (1995).

146. *Frequently Asked Questions*, *supra* note 55.

147. *2012 Annual Report*, *supra* note 28, at 3.

148. *Id.*

149. *Id.* at 15; Telephone Interview with Joe Robertson, *supra* note 96.

150. *See* PETER M. BLAU & MARSHALL W. MEYER, BUREAUCRACY IN MODERN SOCIETY 9 (3d ed. 1987).

151. His works include FROM MAX WEBER: ESSAYS IN SOCIOLOGY (H.H. Gerth & C. Wright Mills trans. & eds., 1946) [hereinafter WEBER, ESSAYS], and MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 330 (A. M. Henderson & Talcott Parsons trans., Talcott Parsons ed., 1947) [hereinafter WEBER, THEORY].

152. BLAU & MEYER, *supra* note 150, at 19-24.

- operations governed by a consistent application of abstract rules;
- environment that promotes formalistic impersonality;
- meritorious employment and job security;
- capability of being highly efficient;
- tendency to monopolize information;
- resistance to change; and
- ambivalence toward democracy.[153]

It is difficult to determine precisely how these factors would manifest themselves if OIDS were to make the determination of indigency, as doing so would require the creation of an entirely new division to handle this unique task. The following analysis reviews the traits that would be applicable to transferring the decision-making power of indigency status to OIDS and assumes that these traits would manifest themselves in the manner predicted by Weber.

1. The Upside of Bureaucracies

Bureaucracies distribute regularly conducted activities "in a fixed way as official duties," which promotes a clear-cut division of labor.[154] This generally leads to the employment of experts with specialized knowledge of their particular task.[155] OIDS is composed of workers who specialize in the representation of indigents.[156] Trial judges, on the other hand, review a variety of cases, only some of which deal with indigent criminal defendants. The specialized training, knowledge, and experience that OIDS employees have as a result of the clear division of labor mean that they are more familiar with the issues that indigents face and the factors that influence indigents' ability to mount a successful defense. Given their unique perspective, OIDS staff may be able to make better decisions concerning the qualifications and representation of indigents than trial judges.

As evidenced by their structure, bureaucracies are organized in a way that "follows the principle of hierarchy . . . [where] each lower office is under the control and supervision of a higher one."[157] Thus, every bureaucratic official is accountable to her supervisor for the work done and

153. *Id.*

154. *Id.* at 19 (quoting HOWARD ALDRICH, ORGANIZATIONS AND ENVIRONMENTS 6-14 (1979)).

155. *Id.*

156. Telephone Interview with Joe Robertson, *supra* note 96.

157. WEBER, ESSAYS, *supra* note 151, at 331.

the decisions rendered.[158] This system of accountability is beneficial because it creates an internal check on decision-making processes.[159] Although the decisions of trial judges are reviewed by appellate courts, great deference is generally given to trial judges.[160] Moreover, appellate review is rarely ever as immediate as that which occurs within bureaucracies.[161] Consistent accountability is preferable when delegating the decision to a single person who may be influenced by personal bias or other motives.

The operations of bureaucracies are characteristically governed by the application of a "consistent system of abstract rules" to particular facts for the sole purpose of "assur[ing] uniformity in the performance of every task, regardless of the number of persons engaged in it."[162] Emphasizing the abstract set of rules that dictate the decisions of all members in a bureaucracy assists in removing bias from the decisions of each individual member and promotes equality before the law.[163] Although the judiciary also seeks to apply a "consistent system of abstract rules," it does not always do so with the objective of uniformity in mind. If the goal of a test is to promote uniformity, then it is preferable to seek a decision maker known for demanding uniformity.

The personnel policies of bureaucracies, such as the "protect[ion] against arbitrary dismissal," tend to promote organizational loyalty and personal identification with the agency's objectives.[164] Conformity to group values is a beneficial trait when uniformity is the objective. If all applications for indigency determination are submitted to a small group of like-minded people, who all personally identify with the overall mission of the organization, then the decisions will presumably be more uniform. For example, in the introductory scenario, Ann and Bob were assigned to separate judges, who made different decisions. Because each judge's decision was based on his personal assessment of the applicant's financial standing, they rendered contradictory decisions. This discrepancy likely would not have occurred if the determinations were made by a small group of like-minded coworkers.

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158. BLAU & MEYER, *supra* note 150, at 19.

159. *Id.* at 21.

160. *See* Brewer v. State, 1975 OK CR 52, ¶ 8, 533 P.2d 645, 646-47 (declaring that the trial court had abused its discretion in refusing to appoint counsel).

161. *See* BLAU & MEYER, *supra* note 150, at 19.

162. *Id.* at 20.

163. *Id.* at 24.

164. *Id.* at 21.

2. The Downside of Bureaucracies

In theory, bureaucracies are "capable of attaining the highest degree of efficiency" because they are more likely to work like a well-greased machine than other forms of organizations.[165] Although there are likely beneficial economies of scale to be recognized in consolidating wide-spread decision making into one organized unit, reality does not always support that general theory.[166] In contrast, bureaucratic agencies are notorious for being inefficient, especially with time.[167] Even relatively minimal delays may be consequential when the timing of a decision may affect the merits of a case. For example, criminal defendants in Oklahoma have only "ninety (90) days from the date of the pronouncement of the judgment and sentence" to perfect appeal.[168] Thus, a prolonged decision on whether or not a criminal defendant will have court-appointed representation to assist in his appeal could seriously affect his ability to seek post-judgment relief. Of course, the legislature could impose a statutory deadline on determining whether an applicant qualifies for court-appointed representation to hedge the risk that a decision may be delayed, consequently affecting the merits of the case.

Unfortunately, bureaucracies tend to monopolize information.[169] In an attempt to "increase the superiority of the professionally informed," bureaucrats often keep their information and intentions from the general public.[170] Refusal to disclose acquired information and the reasons for making decisions limits the external accountability of a bureaucracy. Although bureaucracies maintain a system of accountability within the

165. WEBER, THEORY, *supra* note 151, at 337; *see also* WEBER, ESSAYS, *supra* note 151, at 214. Weber's analysis was based on how an "ideal" bureaucracy would function, which would generally work for defining common characteristics, but may be flawed in reality. BLAU & MEYER, *supra* note 150, at 25.

166. CAMPBELL R. MCCONNELL ET AL., ECONOMICS: PRINCIPLES, PROBLEMS, AND POLICIES 153-54 (19th ed. 2012). "Economies of scale" is defined as the "reductions in the average total cost of producing a product as the firm expands the size of plant (its output) in the long run; the economies of mass production." *Id.* at G7. As wide-spread decision making becomes consolidated into a large bureaucracy, those decisions are likely to become more easily made and more consistent. *Id.* at 153-54. The average cost, of time and money, reduces as these decisions become more concentrated. *Id.*

167. Allan Brownfield, *The Inherent Inefficiency of Government Bureaucracy*, FOUND. FOR ECON. EDUC. (FEE) (June 1, 1977), *available at* http://www.fee.org/the_freeman/detail/the-inherent-inefficiency-of-government-bureaucracy/#ixzz2Eybrlrmh.

168. 22 OKLA. STAT. § 1054 (2011).

169. BLAU & MEYER, *supra* note 150, at 23.

170. *Id.*

organization, an ideal accountability system would reach beyond the bounds of the organization, rendering bureaucratic decision makers accountable not only to their supervisors but also to other governmental actors and the public at large. Because bureaucracies tend to monopolize information, a check would need to be placed on OIDS to ensure that it shares information and makes appropriate decisions.

Some states that place the decision in the hands of the public defender's office explicitly authorize the courts to review the decision when necessary.[171] One court justified such a system by emphasizing the importance of the court functioning as the "ultimate protector" of an indigent's right to counsel.[172] If Oklahoma transfers the decision of indigency status to OIDS, it too can mitigate the shortcomings of bureaucracies by placing a check in the judiciary.

Assigning decision-making power to bureaucratic agencies carries risks, such as monopolization of information, a lack of external accountability, and possible inefficiency. But so long as proper checks are established to mitigate these risks, such as judicial review and statutory deadlines, many benefits can be realized by allowing OIDS to make the determination of indigency. Compared to trial judges, bureaucrats are subject to more frequent and immediate accountability. Moreover, the specialized knowledge gained from working exclusively in indigent criminal defense provides OIDS workers with greater insight into the needs and realities of indigent defendants. Finally, the structure and environment of a bureaucratic agency tends to promote uniformity in decision making. It appears that OIDS can contribute greatly to the determination of indigency due to its bureaucratic structure.

It is important to note that to yield the benefits of uniformity and efficiency that the public defender's office has to offer, the decision should be made on a state level. If each county's public defender system appointed a single person to determine indigency status, then it would promote uniformity only at the county level. There would still likely be a lack of uniformity between counties. Thus, promoting uniformity requires that the state public defender's office be the one to make the determination.

171. *See, e.g.*, HAW. REV. STAT. § 802-4 (West 2007); MONT. CODE ANN. § 47-1-111 (2011).

172. Office of Pub. Defender v. State, 993 A.2d 55, 67 (Md. 2010) (quoting Baldwin v. State, 444 A.2d 1058, 1067 (Md. Ct. Spec. App. 1982)).

V. The Suggested Approach

The introductory scenario reveals a major downfall in Oklahoma's current approach to determining indigency. Granting judges broad discretion in determining indigency may result in a lack of uniformity—even in very similar situations—both within and among different counties across the state. To assist in promoting greater uniformity while maintaining focus on the factors enumerated by Oklahoma lawmakers, the state public defender's office, OIDS, should make the determination of indigency by applying a test that mimics the initial federal sentencing framework that Congress created under the Sentencing Act.

A. The Decision Maker: Why OIDS Is the Best Option

The authority to determine indigency is generally granted in one of three persons or institutions.[173] Most states follow Oklahoma's approach and leave the decision to the trial judge assigned to the case.[174] A large minority of states allow public defender's offices to decide who qualifies for their services.[175] At least one state classifies the decision as a ministerial task assigned to the court clerk.[176] Oklahoma should follow the large minority's approach and transfer the decision to OIDS because of its unique structure, insight, and expertise.

There are numerous benefits to be realized by transferring indigency determinations to OIDS.[177] The bureaucratic environment tends to promote impersonal application of established standards to every situation, which promotes greater uniformity. Moreover, a system of internal accountability would facilitate more frequent and quicker review of the decisions made, which would further ensure uniformity, equality, and predictability. Of course, there are certain downfalls associated with the bureaucratic agency, including a lack of external accountability, monopolization of information, and possible inefficiency. But, these risks can be mitigated by statutorily regulating the determination process and by retaining the judiciary as a check on OIDS.[178]

Because OIDS coordinates the defense of most of Oklahoma's indigents, either by providing the defense itself or at least by handling the contracts

173. *See infra* Appendix A.
174. *See infra* Appendix A.
175. *See infra* Appendix A.
176. FLA. STAT. § 27.52 (2012).
177. *See supra* Part IV.C.1.
178. *See supra* Part IV.C.2.

when the defense is delegated to private attorneys,[179] its staff possesses a better understanding of what is required to mount an adequate defense. As such, OIDS staff members are uniquely positioned to understand what resources are needed in order to make that defense. They are just as competent as the courts to investigate and understand the financial status of applicants. But their unique position allows them to better understand whether or not the applicant's financial status will be adequate in mounting a proper defense.

With most decisions that are left to judges, such as criminal sentencing, the judge possesses unique expertise as a result of his education, experience and positioning throughout the trial. The same is not true in determining indigency.[180] The determination is made prior to trial and is generally made upon review of facts different from those presented at trial. Moreover, no legal training or experience is required to determine the financial standing of an applicant, although some understanding of the criminal justice system and judicial process is necessary. As such, the determination of indigency is different than those decisions that are properly left to judges because the judge retains no unique insight in the former.

Finally, categorizing the determination of indigency status as a "ministerial act" rather than an "exercise of independent judgment," as is done in Florida,[181] oversimplifies the process and prohibits any exercise of discretion. As mentioned throughout this Comment, the exercise of discretion is a beneficial escape hatch because predetermined laws do not always render the intended outcome. Some element of discretion should be retained in the determination scheme to provide for those situations in which application of the test would result in a clearly unjust outcome. The determination should not be left to a clerk for the same reasons that it should not left to a judge—that is, because they possess no unique and beneficial insight, gained through their education, experience, or positioning, that adds value to their decision. On the other hand, OIDS does possess a beneficial viewpoint. Additionally, it maintains an environment that promotes greater uniformity, even when discretion is utilized. As such, OIDS is the best institution to make the determination of indigency.

179. *See supra* Part III.A.
180. *See supra* Part IV.B.3.
181. FLA. STAT. § 27.52.

B. The Test That Should Be Applied: Why a Predetermined Point System Supplemented with a Discretionary Escape Hatch Is Best

To further increase uniformity among indigency determinations, Oklahoma should transfer the decision-making power for every county, including Tulsa and Oklahoma counties, to OIDS. In making that decision, OIDS should exercise limited discretion and apply a test similar to that originally used in federal criminal sentencing under the Sentencing Act. Although some level of discretion should be retained, the primary focus of the new test should be to promote uniformity, predictability, and equality among applicants throughout the state of Oklahoma.

The discretion given to OIDS should be narrower than that currently granted to the judiciary. The state legislature should develop a system that determines indigency based on a point system that reflects the factors that Oklahoma lawmakers have repeatedly confirmed as important in determining indigency.[182] An applicant's total points would increase with the factors that suggest an ability to obtain counsel and decrease with those factors that reduce the ability to do so. Such a test would constrain the discretion of OIDS by ensuring which factors are considered and what weight is assigned to each. It further controls the interaction of those factors and ensures that each one is considered in the analysis. Because OIDS would be limited in deciding what factors to consider, what weight to apply to them, and how they should interact—all decisions that judges are currently allowed to make on their own—OIDS would have less discretion in making the determination than judges currently have. This constrained discretion would further promote uniformity among decisions.

Yet some level of discretion is necessary because unforeseen circumstances arise that make the test inapplicable, or at least less applicable. In order for OIDS to respond to these unusual circumstances, the reviewers must retain limited discretion. Therefore, the test should include an escape hatch, as was done in the Sentencing Act.[183] This escape hatch should allow OIDS to depart from the predetermined analysis when circumstances warrant it. The language needs to be ambiguous to provide opportunity to respond to unforeseen circumstances, but it should be made clear that departures are the exception to the rule. Discretion to respond in unusual cases should be given to OIDS, as opposed to the trial judge or a court clerk.

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182. *See supra* Part IV.B.2.
183. *See supra* Part IV.B.

Adopting a predetermined point system with a discretionary escape hatch is far superior to applying a bright-line test. Although bright-line tests promote uniformity, they merely trade one potential injustice for another. A bright-line rule makes certain predetermined, measurable factors the only things that matter. Moreover, such a test would remove from the determination several important factors that Oklahoma lawmakers have repeatedly considered relevant in making that decision. Thus, although people with similar situations may get the same result, the outcomes may still lack fairness because of the limited way in which indigency would be determined.

The recommended approach is also superior to retaining a discretionary test but placing the decision-making power in the hands of OIDS.[184] Unlike the bright-line test, which bases the entire decision on one or few dispositive factors, the current discretionary test facilitates a more thorough consideration by incorporating more relevant factors into the decision-making process. Moreover, for the reasons stated above, transferring the decision-making authority to OIDS would likely increase the uniformity among decisions, even if the same test were applied.[185] However, granting broad discretion creates an increased risk that the resulting decisions will lack uniformity, predictability, and equality, regardless of who the decision maker is.[186] Although transferring the decision to OIDS would improve the uniformity of decisions, it will only do so to a degree unless a change is also made to the decision-making process.

The recommendation to transfer the decision to OIDS and apply a new test is not intended to suggest that OIDS should go unchecked. Those within OIDS who make the determination of indigency should be subject to two layers of accountability: one within the bureaucratic agency and one outside of it. The public defender system should include in its current annual report a section that tracks the uniformity of decisions rendered and searches for any disparate treatment. Moreover, trial judges should not be completely stripped of their involvement. Rather, the judiciary should maintain its role as the "ultimate protector" of the right to counsel and remain as an external check on OIDS.[187] In pre-trial proceedings, the judge should ensure that OIDS has not abused its decision-making authority and limited discretion in determining the indigency status of the criminal defendant.

184. *See supra* Part IV.C.
185. *See supra* Part V.A.
186. *See supra* Part III.C.2.
187. Baldwin v. State, 444 A.2d 1058, 1067 (Md. Ct. Spec. App. 1982).

VI. Conclusion

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."[188] Those words, written a half century ago by Illinois Supreme Court Justice Walter Schaefer, reveal the importance of ensuring that those who cannot obtain counsel by their own means are appointed counsel.[189] To preserve this right and to ensure that all criminal defendants have equal access to adequate counsel, Oklahoma should alter its current indigency determination scheme to promote greater uniformity.

The power to determine indigency should be transferred to the state public defender program, the Oklahoma Indigent Defense System. This transfer of authority will utilize the unique strengths that result from a bureaucratic structure and the specialized expertise that comes from working with indigent defendants on a daily basis. Moreover, the special insight that judges generally bring to decision-making processes as a result of their legal training, experience, and unique positioning at trial are not necessary for determining indigency.

To further maximize uniformity, Oklahoma should alter the test used to determine indigency status. This Comment proposes a new test, which mimics the initial framework established by Congress for use in federal criminal sentencing. The new test would determine indigency based on a point system that considers the ten factors repeatedly deemed important by Oklahoma lawmakers. This system would promote greater uniformity by guiding OIDS to a predetermined outcome. Yet, it would also incorporate escape hatches to allow for adjustments to or departures from the predetermined outcomes in atypical cases, where the point system results in an unforeseen injustice.

These two changes, taken together, would promote greater uniformity in Oklahoma's indigency determination scheme. If these recommendations are effectuated, it is likely that Ann and Bob, or any other two people with similar financial means, will receive an equal opportunity to succeed in Oklahoma's criminal defense system.

Carrie Savage Phillips

188. United States v. Cronic, 466 U.S. 648, 654 (1984) (quoting Walter Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

189. *Id.*

APPENDIX A: INDIGENCY DETERMINATION SCHEMES CHART

APPROACHES TO DETERMINING INDIGENCY: BY STATE			
State	*Decision Maker*	*Test*[190]	*Source*
Alabama	Judge	Discretionary factors[191]	ALA. CODE § 15-12-5 (LexisNexis 2011)
Alaska	Judge	Discretionary factors	ALASKA STAT. § 18.85.120 (2012)
Arizona	Judge	Discretionary factors	ARIZ. R. CRIM. P. Rule 6.4 cmt. (2007)
Arkansas	Judge	Discretionary factors	ARK. CODE ANN. § 16-87-213 (2005)
California	Judge	Discretionary[192]	CAL. GOV'T CODE § 27707 (Deering 2010)
Colorado	Public Defender	Discretionary	COLO. REV. STAT. § 21-1-103 (2012)
Connecticut	Public Defender	Discretionary	CONN. GEN. STAT. § 51-296 (2013)
Delaware	Public Defender makes determination pre-arraignment; Judge makes determination post-arraignment	Discretionary	DEL. CODE ANN. tit. 29, § 4602 (2003)
District of Columbia	Judge	Discretionary	D.C. CODE § 11-2602 (2012)

190. The standards applied to indigency determination schemes have not been reduced to categorically defined tests prior to this Comment. For definitions to these tests, *see infra* notes 191-194.

191. "Discretionary factors" tests grant the decision maker discretion, but require consideration of an enumerated list of factors when exercising that discretion.

192. "Discretionary" tests neither impose requirements nor offer guidance to the decision maker in exercising discretion.

Florida	Court Clerk	Bright line[193]	FLA. STAT. § 27.52 (2012)
Federal Government	District Judge	Discretionary	28 U.S.C. § 1915(e)(1)(2006)
Georgia	Public Defender	Discretionary	GA. CODE ANN. § 17-12-24 (West Supp. 2012)
Hawaii	Public Defender	Discretionary	HAW. REV. STAT. § 802-4 (West 2008)
Idaho	Judge	Discretionary factors	IDAHO CODE ANN. § 19-854 (2004)
Illinois	Judge	Discretionary	725 ILL. COMP STAT. ANN. 5/113-3 (Lexis Nexis 2000)
Indiana	Judge	Discretionary	IND. CODE ANN. § 35-33-7-6 (LexisNexis 2012)
Iowa	Judge	Discretionary factors	IOWA CODE ANN. § 815.9 (West Supp. 2012)
Kansas	Judge	Discretionary factors	KAN. STAT. ANN. § 22-4504 (2007)
Kentucky	Judge	Discretionary factors	KY. REV. STAT. ANN. § 31.120 (LexisNexis Supp. 2012)

193. "Bright-line" tests set measurable standards for determining indigency, allowing for no discretion.

Louisiana	Judge makes preliminary determination; Public Defender makes final determination	Presumptive thresholds & discretionary factors[194]	LA. REV. STAT. ANN. § 15:175 (Supp. 2012)
Maine	Judge	Discretionary factors	ME. R. CRIM. P. 44
Maryland	Public Defender	Presumptive thresholds & discretionary factors	MD. CODE ANN., CRIM. PROC. § 16-210 (Lexis Nexis Supp. 2012)
Massachusetts	Chief probation officer	Presumptive thresholds & discretionary factors	MASS. GEN. LAWS ch. 211D, § 2A (2012)
Michigan	Judge	Discretionary	MICH. COMP. LAWS ANN. § 775.16 (West 2006)
Minnesota	Judge	Presumptive threshold & discretionary factors	MINN. STAT. § 611.17 (2012)
Mississippi	Judge	Discretionary	MISS. CODE ANN. § 99-15-15 (West 2006)
Missouri	Public Defender	Discretionary factors	MO. ANN. STAT. § 600.086 (West 2011)

194. "Presumptive thresholds & discretionary factors" tests combine the "bright line" and "discretionary factors tests." These tests set forth measurable presumptions for indigency, such as income levels and receipt of government assistance. This presumption may be rebutted if other facts reveal that the applicant can afford an attorney, despite having met the threshold. Moreover, applicants who do not meet the threshold may still be appointed counsel if, upon review of an enumerated list of relevant factors, the decision maker determines that the applicant is unable to afford an attorney.

Montana	Public Defender	Presumptive threshold & discretionary factors	MONT. CODE ANN. § 47-1-111 (2011)
Nebraska	Public Defender	Discretionary	NEB. REV. STAT. § 29-3902 (2008)
Nevada	Judge	Discretionary factors	NEV. REV. STAT. ANN. § 34.750 (West 2000)
New Hampshire	Commissioner of administrative services	Discretionary	N.H. REV. STAT. ANN. § 604-A:2 (Lexis Nexis Supp. 2012)
New Jersey	Judge	Discretionary factors	N.J. STAT. ANN. § 2A:158A-14 (West 2011)
New Mexico	Judge	Discretionary factors	N.M. STAT. ANN. § 31-16-5 (West 2013)
New York	Judge	Discretionary	N.Y. JUD. LAW § 35 (Consol. 2006)
North Carolina	Judge	Discretionary	N.C. GEN. STAT. ANN. § 7A-450 (West 2004)
North Dakota	Judge	Discretionary	N.D. CENT. CODE § 29-32.1-05 (Supp. 2011)
Ohio	Public Defender	Discretionary factors	OHIO REV. CODE ANN. § 120.03 (Lexis Nexis 2007)
Oklahoma	Judge	Discretionary factors	22 OKLA. STAT. § 1355A (2011)

Oregon	Public Defender	Discretionary factors	OR. REV. STAT. § 151.485 (2011)
Pennsylvania	Judge	Discretionary factors	PA. R. CRIM. P. 122
Rhode Island	Public Defender	Discretionary factors	R.I. GEN. LAWS ANN. § 12-15-8 (West 2006)
South Carolina	Officer	Discretionary	S.C. APP. CT. R. 602
South Dakota	Judge	Discretionary	S.D. CODIFIED LAWS § 23A-40-6 (2004)
Tennessee	Judge	Discretionary factors	TENN. CODE ANN. § 8-14-205 (2011)
Texas	Judge	Discretionary	TEX. CODE CRIM. PROC. ANN. art. 1.051 (West Supp. 2012)
Utah	Judge	Discretionary factors	UTAH CODE ANN. § 77-32-202 (West Supp. 2013)
Vermont	Court clerk makes initial determination; judge reviews decision	Discretionary factors	VT. STAT. ANN. tit. 13, § 5236 (2009)
Virginia	Judge	Presumptive threshold & discretionary factors	VA. CODE ANN. § 19.2-159 (2008)

Washington	Judge	Discretionary factors	WASH. REV. CODE ANN. § 10.101.020 (LexisNexis 2012)
West Virginia	Public Defender (if none exists in that circuit, the judge makes the determination)	Discretionary factors	W. VA. CODE ANN. § 29-21-16 (Lexis Nexis 2008)
Wisconsin	Public Defender	Discretionary factors	WIS. STAT. ANN. § 977.06 (West Supp. 2012)
Wyoming	Judge	Discretionary factors	WYO. STAT. ANN. § 7-6-106 (2013)