

The Rising Cost of Indigent Defense in Arizona



**ARIZONA CRIMINAL JUSTICE COMMISSION
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THE RISING COST OF INDIGENT DEFENSE IN ARIZONA

An Arizona Criminal Justice Commission Study

Introduction

Over the past number of years, there has been tremendous growth in the costs of indigent defense nationwide and in Arizona in particular. In 1994, the Arizona Criminal Justice Commission released the initial publication on *The Rising Cost of Indigent Defense in Arizona*. This publication is intended to update the information from this publication and provide an overview of current events pertaining to costs relative to indigent defense.

The Bill of Rights, adopted December 15, 1791, established that persons accused of committing a crime have the right to be represented by counsel. Specifically, the Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." (National Legal Aid and Defense Association (NLADA), 2003). The U.S. Supreme Court has since interpreted this right to assure that if a defendant cannot afford an attorney, one will be appointed at the state's expense to represent the defendant.

The most notable cases regarding the right to counsel in the Supreme Court are the decisions in *Gideon*, *Gault* and *Argersinger*. Each decision further defined specific aspects of the "right to counsel." Possibly the most significant decision regarding the right to counsel in the Supreme Court history is the 1963 U.S. Supreme Court decision in *Gideon vs. Wainwright*. In overruling a previous decision, *Betts vs. Brady*, the Supreme Court unanimously held that an indigent person accused of a serious crime was entitled to the appointment of defense counsel at state expense. The *Gault* decision extended the right to counsel to an indigent child charged in a juvenile delinquency proceeding. The *Argersinger* decision extended the right to counsel interpretation to all misdemeanor state proceedings where there is a potential loss of liberty.

In addition, numerous cases heard by the Supreme Court have resulted in decisions supporting and protecting the right to counsel for people who cannot afford to hire an attorney. The following decisions have contributed to expanding and further defining the concept of "right to counsel" as provided in the Sixth Amendment:

- Post-arrest interrogation, in *Miranda v. Arizona* in 1966, and *Brewer v. Williams* in 1977;
- Line-ups, in *United States v. Wade* in 1967;
- Other identification procedures, in *Moore v. Illinois* in 1977 (one-person showups);

- Preliminary hearings, in *Coleman v. Alabama* in 1970;
- Arraignments, in *Hamilton v. Alabama* in 1961; and
- Plea negotiations, in *Brady v. United States* and *McMann v. Richardson*, both in 1970.

Once a conviction has transpired, the indigent defendant is still constitutionally guaranteed the right to counsel in some post-conviction proceedings including:

- Sentencing proceedings, per *Townsend v. Burke* in 1948, and *United States v. Tucker* in 1972;
- Appeals of right, per *Douglas v. California* in 1963; and
- In some cases, probation and parole proceedings, per *Mempa v. Rhay* in 1967 (NLADA, 2003).

An important court decision in Arizona is *Joe U. Smith* (1987), in which the Arizona Supreme Court ruled that excessive caseloads by court appointed counsel might deprive defendants of their constitutional right to legal counsel. The Court noted that appointed counsel should not carry caseloads exceeding those recommended by the National Advisory Commission on Criminal Justice Standards.

On June 24, 2002, the United States Supreme Court ruled on the *Ring v. Arizona* death penalty case. The *Ring* case, in part, dealt with the constitutionality of a judge, rather than a jury, deciding the critical sentencing issues in a death penalty case. The Court held that the failure to require a jury to determine whether aggravating factors exist to warrant a death sentence violates a defendant's constitutional right to a trial by jury.

As a result of the ruling in *Ring*, Arizona was required to change its sentencing policies. Currently, nine states including Arizona, utilize some form of Judge sentencing. Under the ruling in *Ring*, Arizona will be required to change sentencing policies for future cases and to review the cases of those capital defendants currently on death row. The entire impact of the *Ring* Case will not be known for some time to come, but what is clear is that the *Ring* Case will have a significant impact on indigent defense costs in Arizona. Many death penalty cases receive the benefit of indigent defense representation and will require extensive and costly resources as the review process unfolds.

The court decisions outlined above have resulted in the creation of many standards which are designed to protect the right of an indigent individual to an effective defense when accused of a criminal offense. The American Bar Association has established minimum standards. Others have articulated general standards for public defense systems, including James Neuhard, Director of the Michigan Appellate Defender Office, and Scott Wallace, Director of the Defender Legal Services for the National Legal Aid and Defender Association. With the advice of other public defense leaders, they have written *The Ten Commandments of Public Defense Delivery Systems*, which provides guidance for creating

standards that define quality in defense systems. These standards bring into being funding concerns as they place additional requirements on the types and methods for providing indigent defense (Legal Information Institute, 2003).

A.R.S. § 11-581 states, "In any county the board of supervisors may establish the office of public defender and appoint a suitable person to hold that office." In general the services of the public defender or court appointed counsel are without expense to the defendant, however A.R.S. § 11-584 (B) does provide three instances by which the court may make an assessment. They include:

1. At the time of the defendant's initial appearance, order an indigent administrative assessment of not more than twenty-five dollars.
2. At the time of the juvenile's advisory hearing, order an administrative assessment fee of not more than twenty-five dollars to be paid by the juvenile or the juvenile's parent or guardian.
3. Require that the defendant, including a defendant who is placed on probation, repay to the county a reasonable amount to reimburse the county for the cost of the defendant's legal defense. Reimbursement for legal services provided to a juvenile shall be ordered pursuant to ARS § 8-221.

The other notable statute reference to funding regarding indigent defense is found in A.R.S. § 11-588 which describes the State Aid to Indigent Defense Fund. The State Aid to Indigent Defense Fund is comprised of monies appropriated to the fund and monies allocated to the fund pursuant to § 41-2421, subsection (B) and (J). The purpose of the fund is to provide state aid to the county public defender, legal defender and contract indigent defense counsel for the processing of criminal cases. The fund is administered by the Arizona Criminal Justice Commission which allocates monies in the fund to each county pursuant to § 41-2409, subsection (C).

The State Aid to Indigent Defense Fund is a subset of legislation commonly referred to as "Fill the Gap" which was passed to correct imbalances created when earlier criminal justice funding efforts emphasized the "front-end" of the system, i.e. police. Those earlier efforts resulted in an increase in arrests and court filings, which in turn, placed an increased burden on the middle of the system: courts, prosecutors and public defenders (indigent defense). These increased workloads created a longer time between arrest and convictions and along with the Arizona Supreme Court promulgated standards requiring that 90 percent of criminal cases be disposed of within 100 days and 99 percent within 180 days, spawned efforts calling for the "re-engineering" of the criminal justice system in Arizona (National Association of Criminal Defense Lawyers, 2001).

As noted previously, any county in Arizona may create a public defender's office as authorized by statute. The counties which have a public defender's office are Cochise, Coconino, La Paz, Maricopa, Mohave, Navajo, Pima, Pinal and Yavapai.

Besides public defenders per se, there are three scenarios in which other attorneys represent indigent clients.

- In some counties which have a public defender, there is a county office which is an alternative to the public defender's office. In Navajo county, this other office is called an "alternate" defender, while in Pima County it is called the "legal" defender. These county-salaried attorneys are employed in cases where there might be a conflict of interest, such as in a case with multiple defendants. In such a case, the public defender represents the first defendant, and the "legal" or "alternate" defender represents the second defendant. For more than two defendants, private attorneys would be contracted to represent the other defendants. Private attorneys may also be utilized if the public defender's office's workload exceeds that allowable under current guidelines. In lieu of a Legal Defender's Office, Pinal County appoints private counsel through the Court Administration Office and are designated as "other" in this report.
- Other counties with a public defender (such as Maricopa) hire private attorneys on a contract basis for those defendants who cannot be represented by the public defender's office due to a conflict of interest problem or when the public defender's office's workload exceeds that allowable under current guidelines.
- Finally, counties without a public defender, generally the smaller rural counties, utilize private attorneys for all indigent defendants. These counties usually hire attorneys on a contract basis, which may save on overhead costs.

The purpose of this study was to ascertain the financial costs associated with indigent defense in Arizona. A description of the methods used to collect information for the study will be presented, followed by the results and conclusions.

Method

In order to assess the costs associated with indigent defense in criminal cases in Arizona, the staff of the Statistical Analysis Center of the Arizona Criminal Justice Commission conducted a study in 2002-2003. The initial data collection was obtained from county budgets reviewed from July 1, 1998 through June 30, 2002. A survey form was constructed containing the general fund budget data obtained through the review of county budgets and was sent to each county agency for review and when necessary, modification. This included the Public Defender's Office, the Legal Defender's Office and Contract Attorney's Office where appropriate. Each office was requested to provide the actual amount spent by their office to provide indigent defense services over the requested period rather than the amount requested or budgeted.

The survey requested that each of the agencies review the budget data for accuracy and completeness. Additionally, the survey requested feedback regarding events that have significantly impacted their budgets and/or their ability to provide and maintain services.

Results

All 15 counties responded to the survey, although in some instances complete data for some years were not available. Several agencies experienced difficulties in breaking out data between the Public Defender's and Legal Defender's Office. When available, this information was presented as provided by each individual agency.

Nine counties have a public defender: Cochise, Coconino, La Paz, Maricopa, Mohave, Navajo, Pima, Pinal and Yavapai. The only missing data was for the Indigent Defense in Greenlee County, which did not have data for FY1998 available. Therefore, a conservative estimate was made in replacing this year of data with 1999 budget information.

All respondents were requested to report actual amounts spent in providing indigent defense services as opposed to approved budgets. The request to focus on actual vs. approved was made because there may be a remarkable difference between the budgeted amount and the actual amount spent. To demonstrate the possible differences, Tables 1 and 2 on the following page present a comparison of Approved/Final Budget vs. Actual Expenditures for the period from 1998-2002.

Table 1 (Maricopa)

Year	Adopted Budget	Actual Expenditures	Approved vs. Actual Difference
1998	\$27,003,696	\$29,027,351	(\$2,023,655)
1999	\$30,484,755	\$29,142,609	\$1,342,146
2000	\$38,436,245	\$37,538,632	\$897,613
2001	\$40,314,730	\$40,650,038	(\$335,308)
2002	\$41,089,646	\$43,947,968	(\$2,858,322)

The budget and expenditure data presented in Table 1 reflects the differences in the past five years between budgeted and actual expenditures for Maricopa County Indigent Defense. The indigent defense in Maricopa County consists of the Public Defender, Legal Defense, Contract Counsel and Legal Advocate. Over this period, expenditures were greater than budgeted funding in FY1998, FY2001 and FY2002. The greatest differences were in 1998 and 2002 with a difference of \$2.0 million and \$2.8 million respectively. Maricopa County noted that the adopted budget often changes through the course of a given year. Based upon a change in the status of the budget, (either an increase or a decrease) there could be a contingency adjustment to the adopted budget.

Table 2 (Pima)

Year	Adopted Budget	Actual Expenditures	Approved vs. Actual Difference
1998	\$11,485,967	\$12,897,192	(\$1,411,225)
1999	\$12,809,593	\$15,542,359	(\$2,732,766)
2000	\$13,575,028	\$15,495,791	(\$1,920,763)
2001	\$13,793,697	\$15,893,154	(\$2,099,457)
2002	\$14,363,577	\$18,231,615	(\$3,868,038)

For each of the past five years, actual expenditures have been greater than the adopted budget in Pima County. In FY2002 there was a 21 percent difference between the actual and budgeted dollars in the amount of \$3.8 million.

The complete picture of expenses is displayed in Table 3. For counties with a legal or contract attorney, Table 3 presents the costs for indigent defense separately. The table also includes totals within counties and for the state as a whole.

Table 3

County	FY	1998	1999	2000	2001	2002
Apache	Public Defender	290,000	290,000	314,000	314,000	314,000
Cochise	Public Defender	691,464	718,467	700,528	778,080	843,408
	Legal Defender	458,774	469,240	506,188	529,177	598,194
	Indigent Defense	537,429	565,039	567,531	639,281	752,522
Coconino	Public Defender	1,192,823	1,355,120	1,397,226	1,442,287	1,516,056
	Legal Defender	***504,001	461,949	572,685	590,211	620,361
Gila	Public Defender	717,392	788,584	932,000	936,043	979,507
Graham	Public Defender	230,000	300,000	300,000	350,000	350,000
Greenlee	Public Defender	*83,555	83,555	79,412	107,906	140,386
La Paz	Public Defender	235,396	289,751	317,859	342,443	336,349
	Court Appointed Council	**	**	66,750	81,400	61,500
Maricopa	Indigent Defense	29,027,351	29,142,609	37,538,632	40,650,038	43,947,968
Mohave	Public Defender	1,123,215	1,227,087	1,238,504	1,336,280	1,440,266
	Legal Defender	486,703	537,007	555,441	516,982	502,894
Navajo	PD	506,020	548,115	549,340	578,655	639,670
	Legal Defender	226,345	248,470	262,825	244,870	263,835
Pima	Indigent Defense	12,897,192	15,542,359	15,495,791	15,893,154	18,231,615
Pinal	Public Defender	816,764	974,396	1,067,982	1,121,433	1,192,151
	Other	1,530,200	1,802,619	1,845,543	2,225,300	2,425,908
Santa Cruz	Public Defender	250,275	263,910	321,039	300,113	314,421
Yavapai	Public Defender	1,676,686	1,859,927	1,874,450	2,035,163	2,280,000
Yuma	Public Defender	1,053,016	859,671	847,652	948,941	1,144,615
	Legal Defender	818,869	753,939	482,874	490,590	586,990
	Contract	**	**	607,500	959,501	861,110
State	Total	\$55,353,470	\$59,081,814	\$68,441,752	\$73,411,848	\$80,343,726

* Estimate taken from FY1999 as data not available for this period.

** Program or agency did not begin until year 2000.

***Estimate for 1998 costs for appointed attorneys prior to start of Legal Defender's Office.

The total state expenditure for Indigent Defense rose from \$55,353,470 in FY1998 to \$80,343,726 in FY2002, reflecting a 45.1 percent increase over the five year period and 9.4 percent increase over the past year. In the previous study conducted in 1994, there was an increase of 50 percent over the five year time span from FY1989 to FY1993.

Figure 1 graphically displays the growth in indigent defense expenses for Arizona as a whole from FY1998 through FY2002.

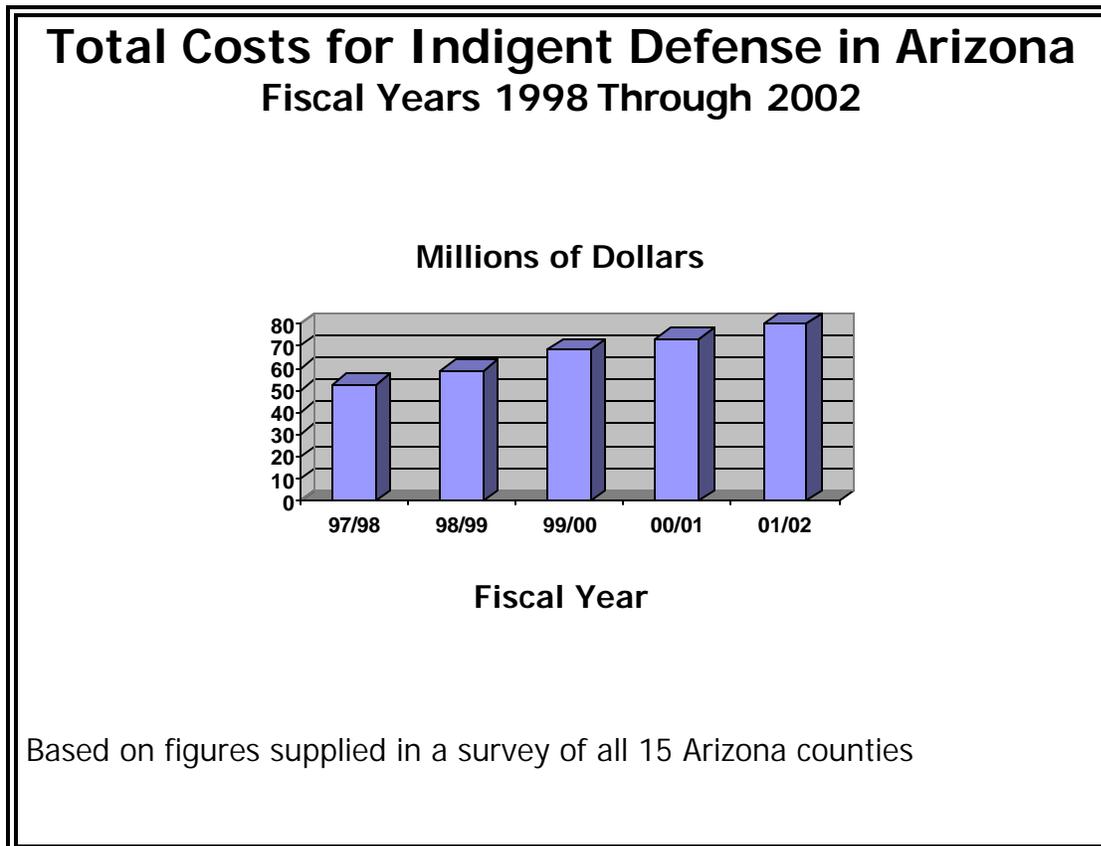


Figure 1

Some individual county increases were even more dramatic. For example, Greenlee and Graham County's rose, 68.0 percent and 52.2 percent respectively. Each of the two larger counties in Arizona, Maricopa and Pima, experienced a large growth in their respective budgets over the five year study period. The costs for indigent defense in Maricopa rose from \$29,027,351 in FY1998 to \$43,947,968 in FY2002 resulting in a 51.4 percent increase over the five year period. Pima experienced a smaller, but similar, increase over the same time span with a 41.4 percent increase from FY1998 to FY2002.

Table 4 provides a representation of the one year and five year percentage change for each of the 15 counties. Those counties reporting multiple indigent defense functions are listed individually as well as in aggregate. La Paz County, with a one year decline of

6.1 percent was the only county that experienced an aggregate decline in either the one year or the five year periods.

Table 4

County	1 Year % Change	5 Year % Change
Apache	0.0%	8.3%
Cochise	12.7%	30.0%
Public Defender	8.4%	22.0%
Legal Defense	13.0%	30.4%
Indigent Defense	17.7%	40.0%
Coconino	5.1%	25.9%
Public Defender	5.1%	27.1%
Legal Defense	5.1%	23.1%
Gila	4.6%	36.5%
Graham	0.0%	52.2%
Greenlee	30.1%	68.0%
La Paz	-6.1%	NA
Public Defender	-1.8%	42.9%
Court Appointed Counsel	-24.4%	NA
Maricopa	8.1%	51.4%
Mohave	4.9%	20.7%
Public Defender	7.8%	28.2%
Legal Defense	-2.7%	3.3%
Navajo	9.7%	23.4%
Public Defender	10.5%	26.4%
Legal Defense	7.7%	16.6%
Pima	14.7%	41.4%
Pinal	8.1%	54.2%
Public Defender	6.3%	46.0%
Other	9.0%	58.5%
Santa Cruz	4.8%	25.6%
Yavapai	12.0%	36.0%
Yuma	8.1%	NA
Public Defender	20.6%	28.3%
Legal	19.6%	45.9%
Contract	-10.3%	NA

Figure 2 shows the proportion of the total state expenses paid by each county for indigent defense for FY2003. Clearly, Maricopa and Pima counties dominate the spending on the Indigent Defense, which accounts for more than three-quarters of the costs for the entire state.

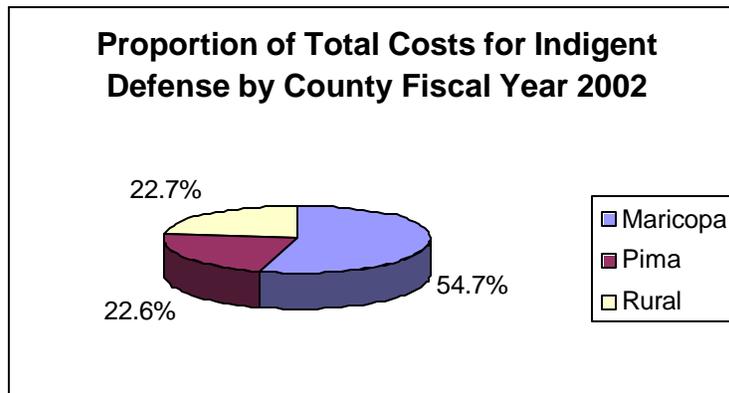


Figure 2

In 1999 the U.S. Department of Justice Office, of Justice Programs assembled a conference to address the critical issue of equal justice for all those charged with a criminal offense, especially those who cannot afford to pay the cost of representation. Themes, which surfaced from the Symposium on Indigent Defense, included Forging Consensus, Independence, Statewide Structure, Equitable Allocation of Resources, Juvenile Justice, Indigent Defense Standards and Technology.

The emphasis placed on Statewide Structure is one of the most consistently discussed and debated topics at both the National and Arizona level. The trend, supported by national standards that were referenced earlier in this document, has been towards statewide indigent defense structures. Those that support statewide structures note that organizing defense services through a centrally administered program promotes quality and uniformity of defense services, as well as cost-efficiencies, cohesive planning and accountability. The move to statewide structure is generally driven by funding concerns (BJA-Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations, 1999).

In 1999, county governments in nine states entirely funded indigent criminal defense services. In the remaining 41 states, indigent defense received partial funding (20) or virtually all funding (21) from State governments. (OJP State-Funded Indigent Defense Services, 1999) In Arizona, indigent defense is funded predominantly at the county level. Table 3 illustrates that \$80,343,726 was expended on indigent defense in Arizona in 2002. In that same year, State Aid for Indigent Defense Funding contributed \$615,900 in appropriated funds and \$631,282 in fine revenue for a total of \$1,247,182. Figure 3 provides a comparison of state to county funding for Arizona in 2002 (ACJC Fill the Gap 2002 Report, 2002).

Indigent Defense Funding in Arizona Fiscal Year 2002

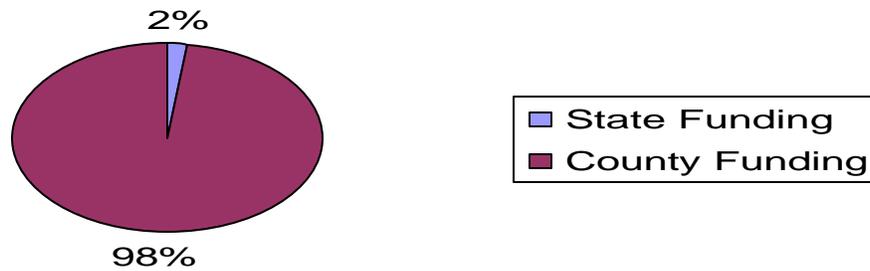


Figure 3

Proponents of state funded indigent defense systems point out that in states such as Arizona that rely heavily on county funding the heaviest stress is placed on rural counties, which do not have the tax base to generate sufficient revenues to cover the costs of indigent defense.

The survey requested feedback regarding events that have significantly impacted their budgets and/or their ability to provide and maintain services. The following comments are a summary of those commentaries:

- Local County Attorney's Policy of charge bargaining rather than sentence bargaining creates additional costs and problems.
- Cases are filed as felonies, which are subsequently pled as misdemeanors. Therefore, increased funds are required for the payment of a felony attorney at felony prices for cases, which could have been filed at the Justice Court level.
- The rising cost of dependencies compromises funds, which would otherwise be used for criminal defense services. The new rules governing dependencies and Model Court have had an enormous negative impact on our budget. Every case requires the services of at least three attorneys, often five or six attorneys.
- Annual caseloads of Public Defenders have increased significantly.
- Examination of the Adopted budget is only part of the picture. For example, a budget in which monies are moved from a general fund account at year-end to cover shortages.
- Calculations for total cost may not be how other counties calculate total cost so comparisons to other counties may also be faulty.

- Increasing caseloads necessitated increases in employees and equipment. Additionally, recent technological advances were needed to keep pace with the demands of our judicial system. Those advances resulted in large expenditures for upgrades to antiquated equipment.
- Increased caseloads are due to: 1) changes in laws and public policy towards mandatory and lengthier sentences; and 2) loss of residential, behavioral health treatment centers.
- Public defenders do not have the time or staff to screen effectively defendants to determine if they appropriately qualify for indigent status. Therefore, there may be some inappropriate appointments of the Public Defenders Office.
- The refusal of the Board of Supervisor's to increase salaries for attorneys has made it difficult to retain qualified and experienced attorneys.
- The new Ring legislation will leave many small counties with additional financial burdens.
- The fiscal and practical impact of legislation on all sides of the criminal justice system needs to be emphasized when considering adoption or support of new legislation.

Conclusions

As Attorney General Janet Reno stated, "The lack of competent, vigorous legal representation for indigent defendant's calls into question the legitimacy of criminal convictions and the integrity of the criminal justice system as a whole." (BJA-Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations, 1999). Because of the data reported by the counties, it is evident that there has been a tremendous increase in costs for indigent defense in Arizona over the past five fiscal years. Counties appear to be quite concerned about these costs. When one considers the ramifications associated with Attorney General Reno's aforementioned concern and the ramifications on indigent defense costs associated with the recent ruling of the United States Supreme Court in *Ring vs. Arizona*, it is clear that costs associated with providing indigent defense will be under pressure in the coming years. Adequate indigent defense is critical to the smooth flow of cases through the criminal justice system. Reasonable projections suggest further increases in both caseloads and the cost of providing indigent defense in Arizona.

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