

LEGISLATIVE BILL 1463

Approved by the Governor April 8, 1972

Introduced by Harold T. Moylan, 6th District

AN ACT to amend section 29-1804, Revised Statutes Supplement, 1969, relating to criminal procedure; to provide for the office of the public defender in certain counties, his election, term, duties, and qualifications; to define terms; to provide for furnishing court-appointed counsel for indigent felony defendants as prescribed; to provide severability; and to repeal the original section, and also sections 29-1803.01, 29-1803.02, 29-1803.03, 29-1804.01, 29-1804.02, and 29-1805, Revised Statutes Supplement, 1969.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 29-1804, Revised Statutes Supplement, 1969, be amended to read as follows:

29-1804. There is hereby created in counties that now have or that shall hereafter attain a population in excess of two hundred thousand inhabitants, and in other counties upon approval by the county board, the office of public defender, who, in counties having a population in excess of two hundred thousand inhabitants, shall be elected at the general election in the year 1944, and who, in other counties, shall be elected at the first general election of county officers following approval by the county board, and every four years thereafter, ~~and whose duty it shall be to defend all persons before the magistrate wherein a felony complaint has been filed and in the district court for any offense which is capital or punishable by imprisonment in the Nebraska Penitentiary and Correctional Complex; if the prisoner has not the ability to procure counsel; He shall also represent before the Supreme Court any person convicted of an offense for which the punishment adjudged is capital when such person is not otherwise represented by counsel; He shall also represent all persons who shall be complained against before the county board of mental health; if the person against whom the complaint is filed has not the ability to procure counsel; He shall also, upon request, defend such persons in all civil litigations in which, in his judgment, they are being persecuted or unjustly harassed; Such~~ The public defender shall be a lawyer in good standing at the bar of

the court in such county and licensed to practice law in this state. He shall take office after his election and qualification at the same time that other county officers take office; Provided, that upon the creation of such office in any county, a qualified person may be appointed by the county board to serve as public defender until such office can be filled by an election in accordance with the provisions of this section.

Commencing January 1, 1973, in counties having a population of more than two hundred thousand inhabitants, the public defender shall devote his full time to the legal work of the office of the public defender and shall not engage in the private practice of law. All assistant public defenders in such counties shall devote their full time to the legal work of such office of the public defender and shall not engage in the private practice of law so long as each assistant public defender shall receive the same annual salary as each deputy county attorney of comparable ability and experience shall receive in such counties.

Sec. 2. It shall be the duty of the public defender to represent all indigent persons who are charged by complaint, information or indictment with, or under arrest for investigation or on suspicion that they may have committed, any criminal offense within the county having a public defender, which may be punishable by imprisonment in the Nebraska Penal and Correctional Complex, referred to in sections 2 to 11 of this act as indigent felony defendants. The public defender shall represent indigent felony defendants at all critical stages of felony proceedings against them through the stage of sentencing. Sentencing shall include hearings on charges of violation of felony probation. Following the sentencing of any indigent defendant represented by him, the public defender may take any direct, collateral, or post-conviction appeals to state or federal courts which he considers to be meritorious and in the interest of justice, and shall file a notice of appeal and proceed with one direct appeal to the Supreme Court of Nebraska upon a timely request after sentencing from any such convicted felony defendant, subject to the public defender's right to apply to the court to withdraw from representation in any appeal which he deems to be wholly frivolous.

It shall also be the duty of the public defender to represent all indigent persons against whom informations of mental illness have been filed with the county boards of mental health, to the extent required by sections 83-325.01 to 83-325.04.

Sec. 3. Indigent as used in sections 2 to 11 of this act shall mean the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family. Before a felony defendant's initial court appearance, the determination of his indigency shall be made by the public defender, but thereafter it shall be made by the court.

Sec. 4. At a felony defendant's first appearance before a magistrate without retained counsel, the magistrate shall advise him of his right to court-appointed counsel if he is indigent. If he asserts his indigency, the court shall make a reasonable inquiry to determine his financial condition, and may require him to execute an affidavit of his indigency. If the court determines him to be indigent, it shall formally appoint the public defender to represent him in all proceedings before the magistrate, and shall make a notation of such appointment and appearances of the public defender upon the felony complaint.

Sec. 5. In counties not having public defenders, when a magistrate has determined at a felony defendant's first appearance before him without retained counsel that such defendant is indigent, the magistrate shall forthwith certify that fact to the district court in which the case is pending by causing to be delivered to the clerk of that court a certificate for appointment of counsel. Upon the receipt from the magistrate of a certificate for appointment of counsel, the clerk of the district court shall notify a judge for the district, or if no judge for that district is available, any district judge in the state, of the receipt of such certificate. Such district judge shall forthwith appoint an attorney or attorneys licensed to practice law in this state, not exceeding two, to represent the indigent felony defendant in all proceedings before the magistrate, including ancillary matters appropriate to the proceedings, whereupon the clerk shall enter upon the certificate the name or names of the attorney or attorneys appointed, and deliver the certificate of appointment of counsel to the magistrate. The magistrate shall file the same with the original papers in the cause. The clerk of the district court shall also keep and maintain a record of all such appointments. All appointments of counsel provided for in this section may be made at any time or place in the State of Nebraska.

Sec. 6. At a felony defendant's first appearance before a district judge without retained counsel, the district judge shall advise him of his right to court-appointed counsel if he is indigent. If he

asserts his indigency, the court shall make a reasonable inquiry to determine his financial condition, and shall require him to execute an affidavit of his indigency for filing with the clerk of the district court. If the court determines him to be indigent, it shall formally appoint the public defender, or in counties not having a public defender, an attorney or attorneys licensed to practice law in this state, not exceeding two, to represent the indigent felony defendant at all future critical stages of the criminal proceedings against him, consistent with the provisions of section 2 of this act, but appointed counsel other than the public defender must obtain leave of court before being authorized to proceed beyond an initial direct appeal to the Supreme Court of Nebraska, to any further direct, collateral or post-conviction appeals to state or federal courts. A felony defendant who is not indigent at the time of his first appearance before a district judge may nevertheless assert his indigency at any subsequent stage of felony proceedings, at which time the district judge shall consider appointing counsel as otherwise provided in this section. The district judge shall make a notation of such appointment and all appearances of appointed counsel upon his court's docket. If at the time of appointment of counsel the indigent felony defendant and appointed counsel have not had a reasonable opportunity to consult concerning the prosecution, the district judge shall continue the arraignment, trial, or other next stage of the felony proceedings for a reasonable period of time to allow for such consultation.

Sec. 7. Nothing provided in sections 2, 4, 5 and 6 of this act shall prevent any judge from appointing counsel other than the public defender or other substitute counsel when the public defender or counsel initially appointed might otherwise be required to represent conflicting interests, or for other good cause shown, from not appointing any counsel for any indigent felony defendant who expressly waives his right to such counsel at any stage of felony proceedings, or from appointing the public defender or other counsel as may be required or permitted by other applicable law.

Sec. 8. Any public defender, his assistants, or other attorney representing an indigent felony defendant who is incarcerated by law enforcement officers or other government officials without bond or in lieu of bond shall have full access to and the right to consult privately with such defendant at all reasonable hours.

Sec. 9. Whenever any court finds subsequent to its appointment of the public defender or other counsel to represent a felony defendant that its initial

determination of indigency was incorrect, or that during the course of representation by appointed counsel the felony defendant has become no longer indigent, the court may order such felony defendant to reimburse the county for all or part of the reasonable cost of providing such representation.

Sec. 10. The public defender may appoint as many assistant public defenders, who shall be attorneys licensed to practice law in this state, secretaries, law clerks, investigators, and other employees as are reasonably necessary to permit him to effectively and competently represent the clients of his office, subject to the approval and consent of the county board, which shall fix the compensation of all such persons, as well as the budget for office space, furniture, furnishings, fixtures, supplies, law books, court costs, brief-printing, investigative, expert, travel and other miscellaneous expenses reasonably necessary to enable the public defender to effectively and competently represent the clients of his office.

Sec. 11. Appointed counsel for an indigent felony defendant other than the public defender shall apply to the district court which appointed him for all expenses reasonably necessary to permit him to effectively and competently represent his client and for fees for services performed pursuant to his appointment. The court, upon hearing the application, shall fix reasonable expenses and fees, and the county board shall allow payment to counsel in the full amount determined by the court.

Sec. 12. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration of invalidity shall not affect the validity of the remaining portions thereof.

Sec. 13. That original section 29-1804, Revised Statutes Supplement, 1969, and also sections 29-1803.01, 29-1803.02, 29-1803.03, 29-1804.01, 29-1804.02, and 29-1805, Revised Statutes Supplement, 1969, are repealed.