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Something's Gotta Give: Minnesota Must Revise Its Procedures for Determining Eligibility for Appointment of Public Defenders

William L. Bernard

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SOMETHING’S GOTTA GIVE: 
MINNESOTA MUST REVISE ITS PROCEDURES FOR 
DETERMINING ELIGIBILITY FOR APPOINTMENT OF 
PUBLIC DEFENDERS

William L. Bernard†

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I. INTRODUCTION

As the great recession of 2008 continues, Minnesota’s courts 
are faced with an increasing number of criminal defendants 
requesting representation by publicly paid counsel and decreasing

† B.A., University of North Carolina at Chapel Hill, 1989; J.D., Hamline 
University School of Law, 1995; Shareholder, Grannis & Hauge, P.A., Eagan, 
Minnesota. I am grateful to my father, Lawrence J. Bernard, Jr., Esq., and my wife, 
Rebecca Ann Bernard, for their suggestions and encouragement.
funding for the state’s Board of Public Defense. If the State is to avoid a constitutional crisis\(^1\) of dismissed criminal charges or reversed convictions, the acceleration of these starkly conflicting trends must be stopped as soon as possible. Given the necessity to balance the state’s budget in these difficult economic times, increasing the funding for the Board of Public Defense, while desirable, does not appear to be possible. However, an examination of the existing statutory scheme and the procedures that local courts use to determine the eligibility of defendants for public defender representation reveals that substantial efficiencies could be realized by implementing relatively modest changes to the existing system. Such changes could also deal with undecided issues of fairness in the implementation of the present system for appointing public defenders.\(^2\)

This article will attempt to describe the nature of some existing problems in the present system and suggest several changes that should at a minimum reduce the severity of the situation until the State can restore full funding for the Board of Public Defense. Part II will outline the current procedures for appointing public defenders following Minnesota’s statutory scheme and rules of

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2. See also State v. Hawanchak, 669 N.W.2d 912 (Minn. Ct. App. 2003) (holding that absent a written waiver of counsel signed by defendant or evidence in the record that defendant refused counsel, requiring defendant to represent himself at trial after concluding that defendant was not eligible for a public defender and denying defendant’s request for continuance to prepare his case violated defendant’s right to counsel). Compare State v. Jones, 772 N.W.2d 496, 503 (Minn. 2009) (holding that the district court did not abuse its discretion in denying defendant’s multiple applications for a public defender), with id. at 509 (Page, J., dissenting) (arguing that based on the district court’s limited findings related to its denial of defendant’s applications for a public defender, a determination that the court abused its discretion is impossible).
criminal procedure. Part III will examine one case by the Minnesota Supreme Court and one case by the Minnesota Court of Appeals that show several recurring problems within the current eligibility scheme. Part IV will show the public defender system in a literal state of crisis with overworked staff attorneys, statewide layoffs, increasing case loads, and impending budget cuts. Part V will outline a new pilot program one Minnesota county has implemented to eliminate potential abuses in the eligibility procedure. And Part VI will recommend one proposal Minnesota must consider to reform the current scheme of determining public defender eligibility.

II. MINNESOTA PROCEDURES FOR PROVIDING REPRESENTATION TO INDIGENT DEFENDANTS

A. The Statutory Scheme and Rules of Criminal Procedure

The right to counsel in criminal proceedings is guaranteed by the Sixth Amendment to the U.S. Constitution and article I, section VI, of the Minnesota Constitution. In order to ensure that this right is extended to indigent persons accused of crimes, the Minnesota legislature and supreme court have adopted Minnesota Statutes, sections 611.20 to 611.26 and the Minnesota Rules of Criminal Procedure 5.03 and 5.04. These provisions provide the framework under which a public defender will be appointed to represent an indigent defendant accused of crimes punishable by incarceration. Rule of Criminal Procedure 5.04 assigns the trial

3. See also Peter Erlinder, Muting Gideon’s Trumpet: Pricing the “Right to Counsel” in Minnesota Courts, BENCH & B. MINN., Dec. 2003, at 16, 20, available at http://www.mnbar.org/benchandbar/2003/dec03/gideon.htm (arguing that “[t]he failure to adequately fund criminal defense for indigents has long undermined the promise of . . . Gideon, . . . both in Minnesota and elsewhere”); David Simon, Equal Before the Law: Toward a Restoration of Gideon’s Promise, 43 HARV. C.R.-C.L. L. REV. 581, 588 (2008) (examining the problem of financing Gideon’s mandate at state and local levels). Compare State v. Borst, 278 Minn. 388, 397, 154 N.W.2d 888, 894 (1967) (holding indigents charged with misdemeanors and facing imprisonment have a right to counsel), with Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that the Sixth Amendment requires that “no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial”). See also Peter Erlinder, Muting Gideon’s Trumpet: Pricing the “Right to Counsel” in Minnesota Courts, BENCH & B. MINN., Dec. 2003, at 16, 20, available at http://www.mnbar.org/benchandbar/2003/dec03/gideon.htm (arguing that “[t]he failure to adequately fund criminal defense for indigents has long undermined the promise of . . . Gideon, . . . both in
courts the duty of making public defender appointments to those defendants who requested representation, defendants who are not represented by counsel, and those who are financially unable to obtain counsel. Rule 5.04 also forbids trial courts to make such appointments to those applicants who are financially able to retain private counsel but refuse to do so.

The trial courts are required to review and act on requests for public defender representation. The Board of Public Defense is charged with preparing and furnishing “appropriate forms” for an applicant’s sworn and confidential financial statement. This statement sets forth the applicant’s assets and liabilities, including values of any owned real property and any encumbrances thereto, sources of any income, and any other information as required by the court.

The application form also must contain “conspicuous” notice of the applicant’s continuing duty to disclose changes in the applicant’s financial circumstances and of the applicant’s obligation to make a $75 copayment for the services of the district public defender, though such obligation may be waived by the trial court. Moreover, the eligibility statute requires the application to inquire about the following financial indicators: (1) the liquidity of real estate assets, including the applicant’s homestead; (2) the

ready convertibility of assets into cash or debt security;\textsuperscript{14} (3) the fraudulence, and thus voidability, of any asserted asset transfers;\textsuperscript{15} and (4) the value of all property transferred on or after the date of the alleged offense.\textsuperscript{16}

The burden is on the accused to demonstrate eligibility for public defender representation.\textsuperscript{17} The statutes direct trial courts to conclude that a defendant is financially unable to obtain counsel and therefore eligible for a public defender if

(1) the defendant, or any dependent of the defendant who resides in the same household as the defendant, receives means-tested governmental benefits; or

(2) the defendant, through any combination of liquid assets and current income, would be unable to pay the reasonable costs charged by private counsel in that judicial district for a defense of the same matter.\textsuperscript{18}

The courts may also order a defendant who is appointed a public defender to pay part of the costs of representation, in which case partial payments are to be deposited into the state’s general fund.\textsuperscript{19} If the defendant becomes employed while represented by a public defender, the courts may order partial reimbursement to the state for the costs of providing the defense and may issue wage-withholding orders to enforce such repayments.\textsuperscript{20}

The trial courts may investigate at any time the financial status of a defendant represented by a public defender.\textsuperscript{21} Furthermore, if

\textsuperscript{14} MINN. STAT. § 611.17(b)(2).
\textsuperscript{15} Id. § 611.17(b)(3).
\textsuperscript{16} Id. § 611.17(b)(4).
\textsuperscript{17} Id.
\textsuperscript{18} Id. § 611.17(a)(1)–(2). Interestingly, the Criminal Justice Act (CJA) of 1964 uses similar language to determine an applicant’s eligibility for a public defender in a federal case. See Criminal Justice Act of 1964, 18 U.S.C. § 3006A(b) (2008) (appointing a public defender if the defendant “is financially unable to obtain counsel”); Ray v. United States, 367 F.2d 258, 264 (8th Cir. 1966) (holding that the CJA does not grant an eligible defendant any procedural rights like discovery or defense but rather is merely “a means of implementing what the courts have declared to be a constitutional demand”). See also United States v. Foster, 867 F.2d 838, 839 (5th Cir. 1989) and Hanson v. Passer, 13 F.3d 275, 278–79 (8th Cir. 1994), in which both cases construed the phrase “financially unable to obtain counsel” as not requiring a showing of complete indigence—a word often used as shorthand—before qualifying for a public defender; the phrase instead sets a less stringent standard incorporating other factors.
\textsuperscript{19} MINN. STAT. § 611.20(2); \textit{e.g.}, MINN. R. CRIM. P. 5.04(5).
\textsuperscript{20} MINN. STAT. § 611.20(4), (7).
\textsuperscript{21} Id. § 611.20(1).
during the representation a public defender has reason to believe that a defendant is financially able to obtain counsel or to make a partial payment for the appointed public defender, it is the public defender’s duty to advise the court "so that appropriate action may be taken.” If the trial court determines that an accused who obtains a public defender later becomes financially able to obtain private counsel, it “must terminate the appointment of the public defender.”

B. Minnesota’s Office of the Legislative Auditor’s 2010 Evaluation of the Eligibility Process to Obtain a Public Defender

In 2010, Minnesota’s Legislative Auditor released its evaluation of the state’s public defender system. In studying the methods that trial courts used to determine defendants’ eligibility for public defender services, the Auditor found that courts’ procedures varied around the state because the statutory language gives trial judges a great deal of discretion. The Auditor concluded the statutory language creates a vague eligibility standard that provides limited guidance to trial courts regarding what income or asset criteria to consider. Equally troubling, the statutory scheme fails to elaborate on the process of or the criteria for determining the reasonable cost of private counsel as mandated by law.

After reviewing its surveys and conducting interviews, the Auditor realized that trial courts weigh eligibility factors differently, as some judges apply strict poverty level guidelines while others ignore the statutory mandate to consider the costs of retaining private counsel. Similarly, the Auditor found that the

22. Id.
23. Id.
25. Id. at 52; see id. at 55 (“[T]he absence of clear standards has resulted in a lack of uniformity in the eligibility determination process . . . .”); see also id. at 54–55 (entitling the section “Individual Attitudes Affecting Eligibility Determinations”).
26. Id. at 51.
27. Id. at 52.
28. Id.
29. Id. at 52, 53 tbl.4.1 (finding that seventy-five percent of judges gave the defendants’ “income relative to federal poverty guidelines” “great weight”).
30. Id. at 55 (finding that twenty-four percent of judges reported that they did not consider the cost of private counsel “at all”).
application process (1) “varied widely around the state”\(^{31}\) because of the lack of a unified application form,\(^{32}\) (2) screening procedures were different in several judicial districts,\(^{33}\) and (3) trial courts rarely verified the truthfulness of application answers with outside sources.\(^{34}\)

In light of these discoveries, the Auditor recommended that current eligibility standards be replaced with a fixed-income standard reflecting the cost of private counsel, with a clear description of what would qualify as “exceptional circumstances” to warrant a judicial waiver.\(^{35}\) The Auditor further recommended that “[t]he Legislature should establish eligibility procedures in statute that require use of a uniform public defender application form and in-person screening by court staff or the judge.”\(^{36}\)


The two cases of *Hawanchak*\(^ {37}\) and *Jones*\(^ {38}\) illustrate many of the day-to-day difficulties faced by trial judges and pro se defendants attempting to follow the current eligibility scheme to obtain a public defender. Although decided on other grounds,\(^ {39}\) the facts in *Hawanchak* show how two contradicting determinations for the appointment of a public defender can be made following the review of one defendant’s application.

The defendant in *Hawanchak* was charged with three counts of

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31. *Id.* at 56.
32. *Id.* at 56–57 (noting that nearly sixty percent of judges said that a “county-or district-specific application form was often or always used” rather than the “standard form issued by the state public defender”).
33. *Id.* at 57.
34. *Id.* at 59 (finding that no county does regular verification); see *id.* at 60–63 (describing the difficulty of performing effective verifications for application accuracy).
35. *Id.* at 59.
36. *Id.*
39. The Minnesota Court of Appeals concluded that the defendant was entitled to a new trial because the district court failed to obtain a written, competent, and intelligent waiver of the defendant’s right to counsel. *Hawanchak,* 669 N.W.2d at 914–15. The court did not address appellant’s argument that the district trial court “erred when it denied his request for appointed counsel.” *Id.* at 915.
fifth-degree assault and one count of disorderly conduct—all misdemeanors punishable by up to ninety days in jail and/or a $700 fine—stemming from an incident in Burnsville. The week prior to his jury trial, the defendant submitted an application for a public defender at a suburban courthouse. He stated on the application that he had “tried to hire two attorneys [but] could not afford either.” Unbeknownst to the defendant, a district court judge reviewed this application and approved the appointment of a public defender “subject to a determination of whether [the defendant] would be required to reimburse the state” for part of his defense costs.

On the first day of trial, at a different courthouse than where the first application was filed, the defendant’s approved application was misplaced, so the defendant submitted another application for a public defender after completing the same form with substantially the same information. Following a brief discussion between the trial judge and defendant, which revealed no new material facts not already contained in the application, the second application for a public defender was denied.

Although it is unknown what factors the first district court judge applied in appointing the public defender in Hawanchak, it is revealing that the eligibility procedure for appointment of a public defender can produce two opposing determinations on substantially identical information. Moreover, it is telling of how much latitude the current statutory scheme gives trial judges in making their eligibility determinations. This wide discretion is especially apparent in Hawanchak, with the first judge applying the

40. Id. at 913.
42. Hawanchak, 669 N.W.2d at 913. The trial was in Hastings and the arraignment and pre-trial conference occurred in Apple Valley.
43. Id.
44. See id.
45. Id.
46. Id.
47. Id. at 913–14.
48. See id.
49. Id. at 914 (“You do not qualify . . . . You have to meet the . . . federal poverty guidelines, and that means considerably less income than what you’ve earned . . . .”).
reimbursement statute to appoint a public defender\textsuperscript{50} and the second judge applying the poverty level guidelines to deny the appointment,\textsuperscript{51} even after the applicant disclosed how he had tried to hire two defense attorneys but could not afford their services.\textsuperscript{52}

The recent Minnesota Supreme Court decision of \textit{State v. Jones}\textsuperscript{53} shows similar difficulties encountered by trial courts trying to properly make eligibility determinations for a public defender. The defendant in \textit{Jones} was charged with three felonies\textsuperscript{54} and applied for the services of the public defender at many of his court appearances.\textsuperscript{55} On February 27, 2006, the accused "was arrested and appeared without counsel for his bail hearing . . . ."\textsuperscript{56} The district court informed Jones of his right to counsel and his right to apply for a public defender.\textsuperscript{57} The defendant posted bail; on March 3, 2006, the date of his first appearance, he informed the district court of his intention to retain a private lawyer.\textsuperscript{58} Based on this information, the prosecution requested a continuance of the first appearance.\textsuperscript{59}

On May 5, 2006, Jones appeared without counsel for his continued first appearance hearing and applied for and was denied a public defender without any rationale for the denial on the record.\textsuperscript{60} In a brief exchange with the district court judge,\textsuperscript{61} the judge recommended that Jones seek a continuance to retain an attorney from the court’s list of reduced-fee attorneys.\textsuperscript{62} The defendant agreed and was given a continued first appearance date.\textsuperscript{63}

On June 9, 2006, Jones went to court for his first appearance and was handed a copy of the complaint and waived his right to

\begin{itemize}
  \item \textsuperscript{50} Id. at 913.
  \item \textsuperscript{51} Id. at 914.
  \item \textsuperscript{52} Id. at 913.
  \item \textsuperscript{53} State v. Jones, 772 N.W.2d 496 (Minn. 2009).
  \item \textsuperscript{54} Id. at 500; see MINN. STAT. § 609.631 subdivs. 2, 3, 4(2) (2008); id. § 609.52 subdivs. 2(4), 3(2).
  \item \textsuperscript{55} See Jones, 772 N.W.2d at 500–01 (recounting Jones’s multiple appearances and applications for public defender representation).
  \item \textsuperscript{56} Id. at 500.
  \item \textsuperscript{57} Id.
  \item \textsuperscript{58} Id.
  \item \textsuperscript{59} Id.
  \item \textsuperscript{60} Id.
  \item \textsuperscript{61} Id.
  \item \textsuperscript{62} Id.
  \item \textsuperscript{63} Id.
\end{itemize}
counsel for that hearing. On September 8, 2006, Jones appeared for his omnibus hearing without counsel and informed the court he wanted a jury trial date and could contact one of the reduced-fee attorneys from the county-provided information. The district court judge set the trial date purposely on January 16, 2007, to give the defendant considerable time to retain counsel.

On January 16, 2007, the day of trial, “Jones objected to proceeding without counsel, claiming that he had wrongly been denied a public defender three times.” The trial judge noted his prior application had been denied based on his “income, expenses, and his live-in girlfriend’s income” and would not review that determination. The trial court also noted that by this time, the defendant was employed and that his current income would disqualify him from the appointment of a public defender. Jones mentioned that he had retained a lawyer for an unrelated case in a neighboring county but that he could not afford representation for the pending matter. After a brief recess where the trial judge contacted the defendant’s lawyer, the trial judge continued the jury trial date to February 14, 2007, with the understanding that Jones would attempt to retain his lawyer for the trial.

On February 14, 2007, Jones appeared without an attorney and again claimed he had wrongly been denied a public defender. After a long discussion with the trial court, the defendant again submitted a public defender application that was denied “because his income alone, including overtime, was greater than 125% of the poverty guidelines.” The jury convicted Jones on all three charges. The Minnesota Court of Appeals affirmed. In a split decision, the Minnesota Supreme Court affirmed the conviction, holding that the two applications Jones submitted on the record were properly weighed and denied within the discretion

64. Id. at 501.
65. Id.
66. Id.
67. Id.
68. Id.
69. Id.
70. Id.
71. Id.
72. Id.
73. Id.
74. Id. at 502.
of the trial court. In reviewing the first application of May 5, 2006, Jones argued his application was wrongfully denied “because the district court should have considered only his income and not that of his girlfriend when deciding his eligibility.”

Holding to the contrary, the majority stated that “neither the statutes nor the rules of criminal procedure state that the inquiry must be limited to only the defendant’s liquid assets and current income.” In fact, the majority stated, it is the duty of the district court to make a “broad inquiry into the defendant’s financial circumstances that might be relevant to the applicant’s eligibility for a public defender.” The majority held the district court’s decision to consider the income of a live-in girlfriend, especially when the defendant did not dispute including the income, was well within the district court’s discretion.

In reviewing the second application of February 14, 2007, and Jones’s argument that the district court improperly denied the application solely on poverty guidelines, the majority disagreed and found the trial court had properly conducted its investigation and considered more than the poverty guidelines when denying Jones’s application for a public defender. The majority affirmed the trial court by finding that the lower court discussed the financial circumstances with the applicant at length (covering thirteen pages of the transcript) and inquired into his family situation, child support obligations, ability to post bond, and retain counsel in an unrelated matter. The application itself was also discussed with Jones and included information regarding assets, expenses, and income sources. Based on the entire record, the majority felt Jones’s argument that the district court improperly denied his February 14, 2007, application was based on too narrow

76. Jones, 772 N.W.2d at 500. The Minnesota appellate courts apply an “abuse of discretion” standard when reviewing a district court’s determination of eligibility for a public defender. See In re Stuart, 646 N.W.2d 520, 523 (Minn. 2002) (articulating that an abuse of discretion standard is used to review a district court’s appointment of the public defender).

77. Id.

78. Id. at 502.

79. Id. (citing MINN. STAT. § 611.17(b) (2008)) (internal quotation marks omitted).

80. Id.

81. Id.

82. Id.

83. Id.

84. Id.
a reading of the record.\textsuperscript{85} Given the context, the majority felt the district court “conducted a thorough investigation into Jones’s particular financial situation” and concluded “the district court did not fail to exercise its discretion or rely solely on the federal poverty guidelines.”\textsuperscript{86}

Justice Page, in his dissent, stated that “the record presented is insufficient for purposes of determining whether the district court abused its discretion when it decided that Jones was ineligible for a public defender.”\textsuperscript{87} In reviewing a district court’s decision on whether to appoint a public defender, Justice Page agreed with the Jones majority that a district court is required to “make appropriate inquiry into the financial circumstances of the defendant.”\textsuperscript{88} Justice Page further stated that “[t]he defendant must submit a financial statement under oath or affirmation setting forth the applicant’s assets and liabilities” and that “the burden is on the [defendant] to show that he or she is financially unable to afford counsel.”\textsuperscript{89}

However, Justice Page disagreed with the majority that a district court has met its burden of an “appropriate inquiry” by conducting an inquiry without further analyzing whether a defendant, with his or her income disclosed, is unable to pay the reasonable costs charged by private counsel for defense of the case.\textsuperscript{90} Citing the 2002 opinion in \textit{In re Stuart},\textsuperscript{91} where the Minnesota Supreme Court remanded the case due to the trial court’s failure to consider the liquidity of an applicant’s real estate, Justice Page believed a district court that only applies a poverty guidelines analysis absent any finding of whether assets can be used to afford a private attorney abuses its discretion and fails to follow the current statutory eligibility scheme correctly.\textsuperscript{92}

Justice Page provided persuasive arguments to support his reasons for the dissenting opinion. First, the appointment of counsel was requested and applied for by Jones four or five times at different stages of his proceedings, but only two of the applications

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} \textit{Id.}
\item \textsuperscript{87} \textit{Id. at 507.}
\item \textsuperscript{88} \textit{Id.} (quoting \textsc{Minn. Stat.} § 611.17 (a)(2) (2008)) (internal quotation marks omitted).
\item \textsuperscript{89} \textit{Id.} (alteration in original) (quoting \textsc{Minn. R. Crim. P.} 5.02, subdiv. 4) (internal quotation marks omitted).
\item \textsuperscript{90} \textit{Id.}
\item \textsuperscript{91} 646 N.W.2d 520 (Minn. 2002).
\item \textsuperscript{92} Jones, 772 N.W.2d at 507–08.
\end{enumerate}
\end{footnotesize}
are contained in the record: one of May 5, 2006, and one of February 14, 2007.95 Because the district court in both of these instances “failed to make any findings or explain its reasons for denying the applications on the record in any meaningful way,”94 Justice Page believed it was impossible for the appellate court to properly review an abuse of discretion standard on such a scant record.

Similarly, in the record presented on appeal, Justice Page found both applications were denied by the district court after applying the poverty guidelines criteria.96 The application of May 5, 2006, lists income information but no information as to the reasonable costs charged by private counsel in the judicial district for a defense of the same matter.97 At the top of the May 5, 2006, form, the words “deny—over guidelines” are circled.98 The application of February 14, 2007, similarly lists income and assets, but no information as to the reasonable costs of private counsel is included.99 On the record, when the defendant asked the district court why his application was denied, the trial court collector testified that Jones’s income was over 125% of the federal poverty guidelines (the only reason given for the denial).100

If, as it appears on the record, the only reason for denying the public defender appointment was based on poverty guidelines, then, as Justice Page asserted, this amounts to “an abuse of the district court’s discretion because the statutory scheme requires consideration of a defendant’s financial circumstances including liquid assets, current income, assets, liabilities, and the reasonable costs associated with paying for private counsel.”101 Even if the district court considered all the information contained in the applications as the majority asserted, and not just the income levels compared to the federal poverty guidelines, Justice Page believed the district court still abused its discretion by not articulating why the excess income (whether it be the live-in girlfriend’s money of the May 5, 2006, application or the defendant’s income from his

93. Id. at 508.
94. Id.
95. See id.
96. Id.
97. Id. (internal quotations omitted).
98. Id.
99. Id.
100. Id.
101. Id. at 508–09.
newly found employment noted on the February 14, 2007, application) was sufficient to pay for the reasonable costs of private representation as mandated by the statutory scheme.

Although six years passed between the appellate decisions in *Hawanchak* and *Jones*, their similarities highlight a continuing problem experienced at both the trial and appellate courts: a poor record to review. Both cases involve lost public defender applications and little to no record explaining why the public defender application was denied. Understandably, the crowded dockets, limited resources, and strict time limits are suffocating the trial courts to obtain the necessary financial information to make a meaningful decision of whether to appoint a public defender.

However, since the trial court’s decision is reviewed at the appellate level under “an abuse of discretion” standard, it is vitally important, as Justice Page argued in his *Jones* dissent, to keep an accurate, articulated record to ensure the trial court (1) reviews the financial circumstances of the defendant in a meaningful way; and (2) applies the correct eligibility scheme to see if the defendant is either receiving a means-tested government benefit or is unable to pay the reasonable costs charged by a private attorney in his district.

**IV. MINNESOTA’S CURRENT BUDGET WOES AND THE DIRE CONDITION OF THE STATE’S PUBLIC DEFENDER OFFICE**

Starting in mid-2008, the Minnesota Board of Public Defense, which administers the public defense system, predicted a deficit of almost $4 million for fiscal year 2009 due in part to an unexpected reduction of $1.5 million in the 2009 fiscal year budget. In response to the immediate crisis, by June 2008, the Board of Public
Defense announced layoffs, with some positions to remain vacant for the next fiscal year. These 2008 vacancies equaled fifteen percent of the total number of public defenders statewide. In 2009, the state legislature addressed the funding for Minnesota’s justice system with the final law reducing the Board of Public Defense’s fiscal year 2010 appropriation by $140,000 and fiscal year 2011 appropriation by $284,000. The Board of Public Defense’s anticipated loss of funding from 2009 caused the elimination of ninety-eight attorney positions or twenty percent of the attorney positions statewide. The further reduction in the Board’s budget for 2010 and 2011 will cause additional lawyer positions to be lost.

These statewide cuts drastically handicap the ability of local offices to meet their client demands. In Hennepin County, for example, home to the state’s largest public defender office, the county ordered every department to reduce their 2011 budgets by five percent. To achieve this result while hoping to avoid mandatory layoffs, Chief Public Defender William Ward was authorized to offer his veteran employees an incentive of $400 tax-free for every year of completed service provided the employee resigns by fall of 2010. Despite the creative nature to obtain vacated positions, when asked if his office would one day replace the retiring employees, Mr. Ward stated regrettably, “I can’t give you that guarantee.”

110. Id.
111. Id. at 150.
113. State of Criminal Justice, supra note 109, at 151.
115. Hennepin County is somewhat of a hybrid in that county money and state money are mixed to provide the public defender service. See Duchschere, supra note 114.
116. See id.
117. Id.
118. Id.
V. DAKOTA COUNTY’S RESPONSE TO ADDITIONAL PUBLIC DEFENDER LAYOFFS ENSURE APPLICANTS ARE TRULY ELIGIBLE

Similar to other trial courts around the state, Dakota County’s public defender office suffered additional layoffs and loss of resources due to budget cuts for the fiscal years of 2009 and 2010.\(^{119}\) One response Director Steve Holmgren pursued was to develop a pilot program with the Dakota County District Court to ensure that the lawyers of the First Judicial District Public Defender’s Office were not mistakenly appointed to defendants who could afford private counsel.\(^{120}\)

The pilot program instituted three systematic changes to help ensure truly eligible applicants were being appointed a public defender. The first change adopted a new “screening process” to ensure that the financial information supplied by the applicant was both complete and accurate.\(^{121}\) Second, if an applicant is not receiving a means-tested government benefit, the pilot program developed a uniform process to determine whether the applicant is financially unable to pay the reasonable costs charged by a private lawyer.\(^{122}\) Third, the pilot program developed a uniform reimbursement fee schedule for those applicants who are determined eligible for a public defender and are able to contribute a reimbursement fee for their defense costs.\(^{123}\)

To ensure the court obtained a complete and accurate summary of the applicant’s financial situation, the pilot program trained Dakota County Court Collectors to review the financial application thoroughly and required a face-to-face interview with the applicant. The financial information disclosed is considered confidential, and any notes completed by the Court Collector are destroyed after the district court makes an eligibility determination. The Court Collector obtains all the relevant information, uses computer resources to confirm the information if time permits, and completes a recommendation form which is delivered to the presiding judge. After review, the determination by the district court and any notes and confidential information, including the recommendation form, are removed from the file and destroyed.

\(^{119}\) See Evaluation Report, supra note 24, at 55.
\(^{120}\) See id.
\(^{121}\) See id.
\(^{122}\) See id.
\(^{123}\) See id.
To uniformly determine whether an applicant is eligible for a public defender for being unable to pay the reasonable costs of private counsel, the pilot program developed a set of income standards, linked to the level of the pending charge (misdemeanor, gross misdemeanor, or felony), that allows a uniform analysis for determining whether the applicant can afford a local attorney.  

Under the pilot program standards, those charged with a misdemeanor can earn up to $12 per hour and be considered eligible for a public defender.  

For those applicants charged with a felony, the applicant can earn up to $20 per hour and be considered eligible. To assist the screeners, the standards are reduced to a grid and the Court Collectors are able to make recommendations based on it. Under the program, district court judges make the final eligibility determination and may waive the recommended standards depending on the financial information submitted. 

Finally, to develop a uniform reimbursement fee schedule for those applicants that are eligible for the services of a public defender but able to contribute to their defense, the pilot program developed a uniform reimbursement fee schedule based also on the level of the pending charge and the applicant’s hourly income. If, for example, the defendant is facing a felony-level offense and earns only $14 per hour, the defendant would be asked to pay a reimbursement fee of $200 to offset part of his defense costs. A copy of the Dakota County Public Defender Eligibility Grid is attached in the Appendix.

The Dakota County pilot program should be heralded as a forerunner in its attempt to meet all the statutory eligibility standards and gather in-depth, accurate information. Moreover, by training screeners and mandating face-to-face interviews, this pilot program takes meaningful steps to eliminate possible abuses in the eligibility process while providing the defendant a more profound understanding of the eligibility criteria. As an unexpected morale boost, the attorneys for the First District’s Public Defender’s Office

124. See id.
125. See id.
126. See id.
127. See id.
128. See id. at 55.
129. See id. at 73.
VI. ONE PROPOSAL TO IMPROVE MINNESOTA’S PROCEDURE TO DETERMINE PUBLIC DEFENDER ELIGIBILITY

In order to ensure fair and consistent eligibility determinations and equal treatment for defendants, the current Minnesota procedure to determine eligibility for a public defender should be reformed to include the following mandatory procedures (hereinafter the “Proposal”):

1. Any decision of ineligibility for a public defender should be reviewable by an expedited interlocutory appeal. The applicant should be informed of this right to appeal, and if the applicant desires to exercise it, the appeal shall be heard by a different district court judge. The hearing of the interlocutory appeal shall not stay or delay any criminal proceedings;

2. All decisions of ineligibility by the district court shall be reduced to a written findings of fact, conclusions of law, and an order specifically addressing whether the applicant receives means-tested government benefits and whether the applicant is unable to pay for private counsel located in his district; and

3. The decision by either the district court by initial application or by interlocutory appeal shall be final, with no additional rights to an immediate appeal, unless the defendant can first prove an “exceptional change” to his financial situation permitting the defendant’s eligibility to be redetermined.

The legal authority for providing an interlocutory appeal to an applicant who was denied the appointment of a public defender dates back to before courts largely made the eligibility decisions. Prior to state statutes vesting the eligibility determination on trial courts, appointments were largely made by the public defender, assigned counsel, or contractor directly following the traditional
private lawyer model.\textsuperscript{132} The need for interlocutory appeals therefore was necessary because the aggrieved applicants had no recourse because courts had little involvement in the public defender application process.\textsuperscript{133} Paragraph (a) is largely taken from Guideline 1.6, entitled “Method of Determining Financial Eligibility” and republished by the National Legal Aid and Defender Association.\textsuperscript{134}

Also regarding legal authority, providing an interlocutory appeal to the current eligibility procedures would enact a similar process to an already promulgated public defender statute. Under section 611.21 of the Minnesota Statutes, when a public defender needs money to pay for additional investigative or expert services necessary to represent their client, the lawyer files an ex parte motion to the district court requesting extraordinary funds.\textsuperscript{135} The motion is confidential with mandatory written findings of fact and conclusions of laws stating the bases for denying the requested services.\textsuperscript{136} Since the requested funds are directly related to providing an adequate defense, the statute allows for an expedited hearing at the district court and an immediate appeal to the Minnesota Court of Appeals.\textsuperscript{137}

The adoption of the Proposal to reform public defender eligibility procedures would bring immediate improvements to the public defender system. The first benefit would be to ensure strict compliance with Minnesota’s statutory scheme for public defender appointment. The current practice at the district court shows an eligibility process that has run amok.\textsuperscript{138} In its Evaluation Report,
the Minnesota Legislative Auditor found eligibility requirements being weighted differently by trial court judges, with some judges paying little or no attention to the considerations outlined in the statute. \footnote{Evaluation Report, supra note 24, at 52.} Another example is the fact scenario in \textit{Hawanchak},\footnote{State v. Hawanchak, 669 N.W.2d 912 (Minn. Ct. App. 2003).} where the defendant provided financial evidence of being indigent and not being able to afford local counsel only to have one judge approve his application and another trial judge deny the request based on the poverty guidelines criteria.\footnote{Id. at 913.} Revising the eligibility practice pursuant to the Proposal would help eliminate flawed determinations and bring more predictability to the process.

Another benefit would be to eliminate the multiple-application scenario and bring some finality to the eligibility process. Under the Proposal, the application for a public defender would be accepted, reviewed, and determined by the trial court. The determination would be reduced to an order with written findings and conclusions of law with a short period of time to seek an interlocutory appeal. If unsuccessful at the interlocutory appeal stage, the application process is final absent a defendant showing an “exceptional change” in his financial situation.

If reapplication is later pursued, the trial court must first determine if its applicant has met an initial burden of “exceptional change” before addressing the updated information while armed with the previous written findings. The Proposal would provide the trial court with more information on which to base its decisions and provide some finality to the process that would help eliminate day of trial reapplications and repeated delays while not disturbing the already enacted scheme where the defendant has the burden to prove his eligibility for a public defender.

A third benefit would be to ensure an accurate and complete record for both the interlocutory appeal and appellate review. In \textit{State v. Jones},\footnote{772 N.W.2d 496 (Minn. 2009).} Justice Page emphatically stated in his dissent that the record presented in \textit{Jones} was insufficient for purposes of reviewing public defender determinations under an abuse of discretion standard.\footnote{Id. at 507.} The defendant in \textit{Jones} filed four or five circumstances, but it appears that the vast majority of applicants cannot afford a private attorney.\footnote{Id. at 507.}
applications with the district court, but the appellate court could only review two applications. In the applications that were reviewable, Justice Page believed it was unclear what criteria was followed as both applications referenced poverty level guidelines with no clear findings of whether the defendant could afford local counsel. Adopting the Proposal would abruptly end the difficulties faced by the trial court in Jones, bring some clarity to a murky process, and eliminate sloppy record keeping practices found in Hawanchak and Jones.

Lastly, a collateral effect of adopting the Proposal would be to protect the vitally important resources of the State’s Public Defender’s Office. Having already experienced massive layoffs and cutbacks and with the immediate future looking bleak, ensuring that only the truly eligible applicants are appointed public defenders strengthens the Sixth Amendment and furthers the integrity of the judicial system.

144. Id. at 508.
145. Id.
## Appendix: Samples of Eligibility Determination Guides

### Samples of Eligibility Determination Guides

#### Dakota County Public Defender Eligibility Grid

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<tr>
<th></th>
<th>High</th>
<th>Medium</th>
<th>Low</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Felonies</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Eligible for a Public Defender</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Gross Misdemeanors</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Not Eligible for a Public Defender</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Misdemeanors</strong></td>
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<td>$300</td>
<td>$350</td>
<td>$400</td>
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</table>

**Felony**
- High: Murder, kidnapping, criminal sexual conduct, 1st and 2nd degree controlled substance
- Medium: Identity theft, burglary, terrorist threats, DWI, aggravated forgery, 3rd and 4th controlled substance
- Low: 5th degree controlled substance, welfare fraud, financial card fraud

**Gross Misdemeanors**
- High: Domestic and other assault, 2nd and 3rd degree DWI, forgery, criminal vehicular operation, 5th degree criminal sexual conduct
- Medium: Theft, property damage, serving alcohol to minors, offering a forged check
- Low: Driving after suspicion/revocation, intent to escape tax, school bus stop arm, prostitution, shoplifting

**Misdemeanors**
- High: 4th degree DWI, domestic assault, 5th degree assault
- Medium: Bad check, theft, careless driving, driving after license revocation/cancellation
- Low: Loud party, housing code violations, driving after suspension, minor consumption

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146. Depending on their income and the criminal charge, defendants found eligible for a public defender pay a reimbursement to the state to offset the cost of their defense. Source: Dakota County District Court.