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SYSTEM OVERLOAD:

THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE

JUSTICE POLICY INSTITUTE | JULY 2011



Justice Policy Institute is a national nonprofit organization that changes the conversation around justice reform and advances policies that promote well-being and justice for all people and communities.

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PART I

INTRODUCTION

Public defense systems¹ serve millions of people in the United States every year.² Nearly four out of five people charged with a crime are eligible for court-appointed counsel.³ Yet, despite the obvious need for a working public defense system to serve so many clients, many public defense systems across the country have been in a state of “chronic crisis” for decades.

The defender systems that people must turn to are too often completely overwhelmed; many dedicated defenders simply have too many cases, too little time and too few resources to provide quality or even adequate legal representation.

Failing to provide the constitutionally guaranteed right to effective counsel, regardless of one’s ability to pay, is not simply a denial of justice, it is costly to individuals, families, communities and taxpayers. Individuals who do not receive quality defense may be more likely to end up behind bars or with a criminal conviction that will follow them for the rest of their lives. Families are torn apart when a loved one is sent to prison or can no longer work due to the collateral consequences of a conviction. Communities suffer both in terms of public safety and through unnecessarily losing friends, neighbors and co-workers who are locked up. And taxpayers bear the monetary costs when under-resourcing legal defense results in more—and more expensive—incarceration.

As the primary clients, people in the lowest income groups are most likely to be impacted by inadequate public defense systems. People

of color and those from low-income communities are already more likely to come into contact with the justice system. That they are more likely to be unable to afford a private attorney and are forced to rely on the often overworked and underfunded public defense systems compounds the negative impacts. They may face a greater likelihood of being held in jail while awaiting trial and being found or pleading guilty and receiving a harsher, less appropriate sentence than someone with more quality legal representation.

Some public defender offices are providing quality legal representation to their clients, and countless dedicated defenders work hard for their clients despite the struggling systems around them. The problem lies in a system that saddles defenders with excessive workloads and inadequate resources.

By not fully investing in public defense systems, states and counties are frequently choosing incarceration over justice, leading to increased costs now and in the future. With many states struggling with overwhelming criminal justice populations and incarceration costs, the need to address the chronic crisis of public defense is as great as ever.

PART II: BACKGROUND

HOW DO PUBLIC DEFENSE SYSTEMS WORK?⁴

The Constitution establishes a “right to counsel” in the 6th Amendment, but it wasn’t until 1963 that the U.S. Supreme Court decided the pivotal case *Gideon v. Wainwright*, which extended a right to counsel to people accused of criminal offenses who cannot afford to hire a lawyer, stating that attorneys are “necessities not luxuries.”⁵

This was not the first time the Supreme Court considered the right to counsel; in 1932 it ruled in *Powell v. Alabama* (also known as the Scottsboro Boys case) that a denial of the right to counsel in “any substantive sense” was a violation of the Constitution.⁶ The *Powell* decision was limited to capital cases, but its reasoning would be later used in *Gideon* and beyond.⁷

In the decades since *Gideon*, the right to counsel has been expanded and further defined to include appellate cases,⁸ juvenile delinquency hearings,⁹ and misdemeanor cases in which incarceration is a possible punishment.¹⁰ In 2008, the Supreme Court held that people have the right to counsel at the beginning of adversarial proceedings (often the person’s first appearance before a judge or other judicial officer), and regardless of whether a prosecutor is involved.¹¹ In short, the right to counsel extends to anyone unable to pay for an attorney who faces the possible loss of liberty and begins as soon as adversarial proceedings start.

Although the Supreme Court has ruled that “the right to counsel is the right to the effective assistance of counsel,”¹² enforcing this has been challenging. In 1984, the Supreme Court established a test to measure ineffective assistance of counsel, requiring that a person show not only that his or her lawyer was deficient beyond any reasonable standards, but also “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”¹³ In essence, to pass an ineffective assistance of counsel test, one must show that his/her lawyer was poor at his/her job and this resulted in a change in outcomes for the case; this leaves out any consideration of whether or not a defender had sufficient time or resources to provide the best possible result for his or her client. According to some, “the test has proved impossible to meet.”¹⁴ Even cases where lawyers have been caught sleeping through parts of a trial, shown up completely unprepared (and admitting it), and used drugs throughout the case¹⁵ were not deemed to have met the standard for deficiency. While the *right* to counsel has a

long history, the reality is that due to both the difficult ineffective assistance of counsel test and a lack of consideration for funding, the strength of this right is questionable.¹⁶

The three primary methods for public defense are a public defender, contract counsel and assigned counsel. Most places use a combination of these methods.¹⁷

- **Public defender:** full- or part-time salaried public defenders provide representation, often in a central office that can include additional support staff.
- **Contract counsel:** private attorneys are selected to provide representation through a contract. The contract is often annual and may be awarded through a bidding process.
- **Assigned counsel:** private attorneys are selected to take cases and are paid by case or by the hour. Sometimes called panel attorneys, they are often used when the public defender's office has a conflict of interest in a case or other situations where public defenders or contract counsel cannot take a case.

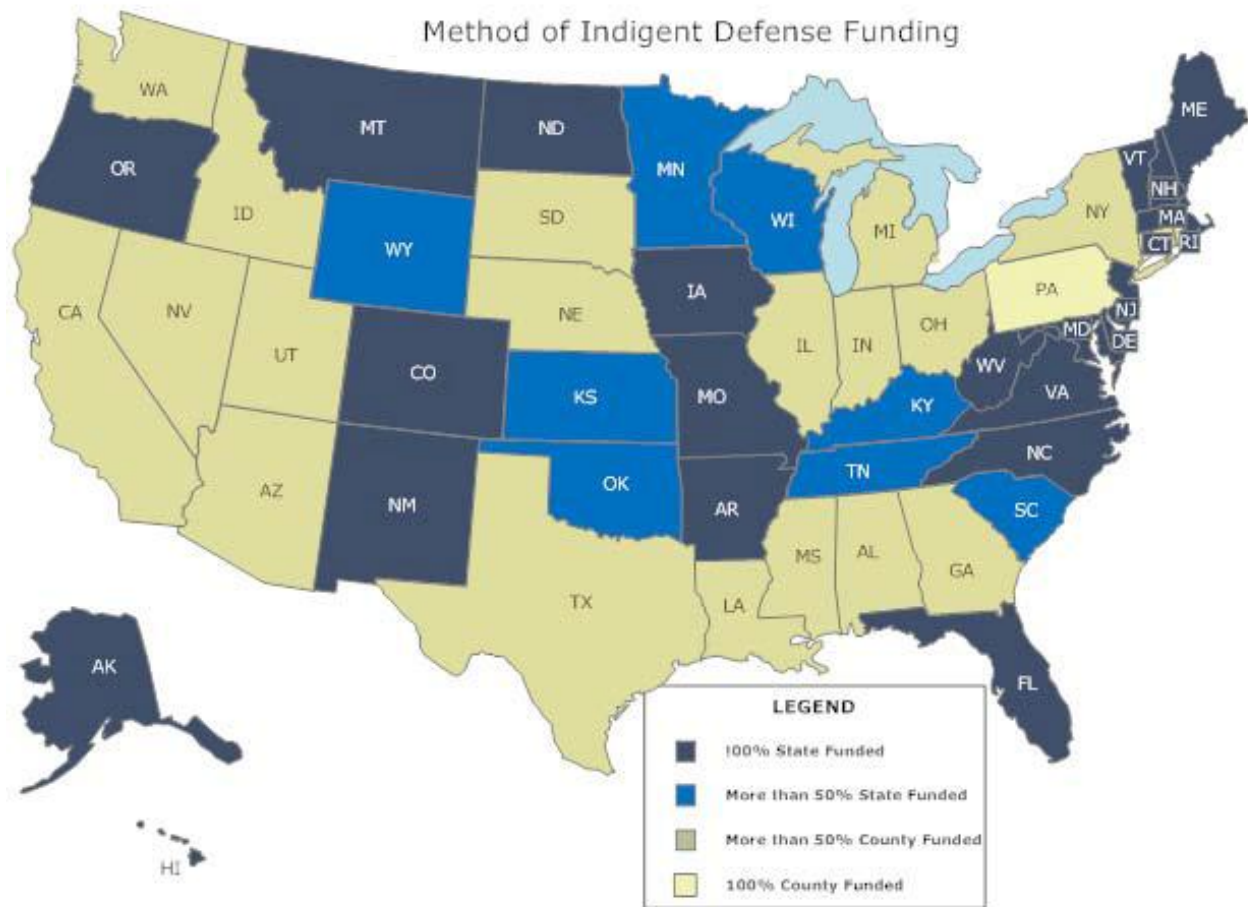
In some jurisdictions, independent non-profit defender offices provide services to some people requiring assistance of counsel.¹⁸

Funding for public defense systems can come from states, counties, or a combination of both.¹⁹ Some of these funding structures were established in the years following the *Gideon* decision, but in the past decade, more systems have been moving towards full or greater statewide funding, recognizing that statewide funding structures offer a number of advantages.²⁰ While systems with statewide funding can still be extremely underfunded and lack essential resources, county-based funding is often criticized because it can create “patchwork” systems in which access to justice could depend on which side of the county line a person is arrested.²¹

According to data from Fiscal Year 2008, over 30 states fund all or most of their public defense at the state level. Eighteen states are more than half county-funded and one state, Pennsylvania, leaves all of the funding responsibilities to its counties.²²



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Source: The Spangenberg Project for the ABA Standing Committee on Legal Aid and Indigent Defense, *State, County and Local Expenditures for Indigent Defense Fiscal Year 2008*, 6.

PART III

PUBLIC DEFENSE IS UNDER-RESOURCED

Nearly 50 years after the Supreme Court decided *Gideon*,²³ many public defense systems across the country continue to face serious and chronic problems.²⁴ While there are many talented, committed and hard-working defenders across the country, many do their jobs *despite* the system of which they are a part of rather than because of it.²⁵

Under-resourcing is a primary challenge for many public defenders and in places where it is most acute, the problems are related to the structure of public defense.

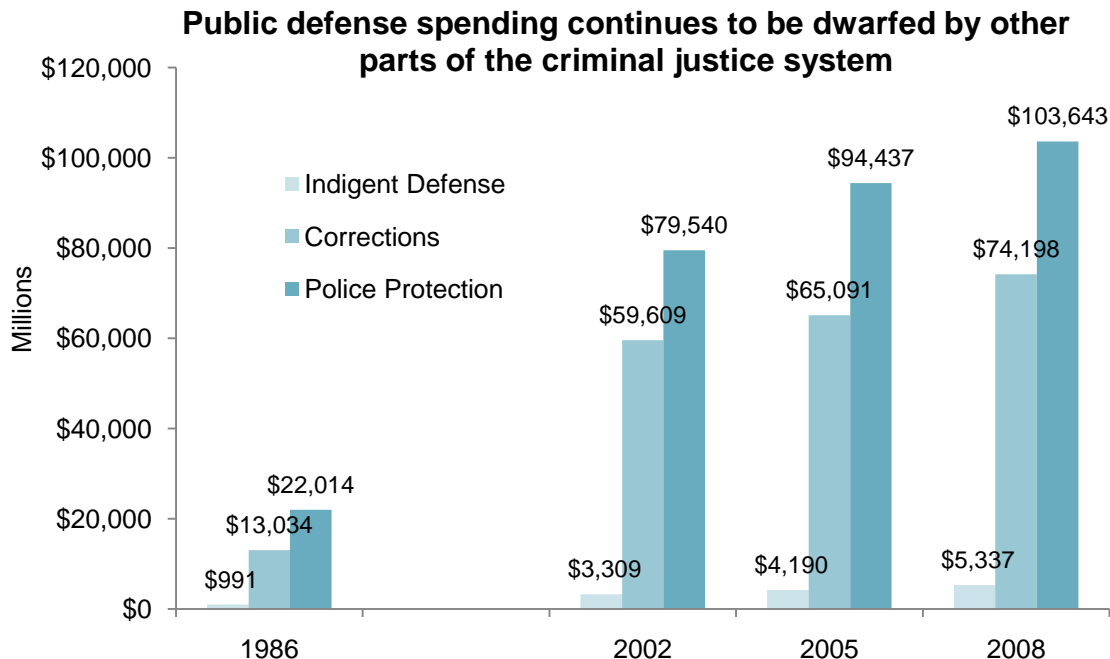
Resources, in the broadest sense, can include funding, time, training, investigative services, independence and oversight. All of these are intertwined and not easily disentangled. For example, a well-funded public defense system is likely to be able to hire more public defenders, which in turn, will reduce caseloads and give defenders more time on each case. At the same time, an adequately funded agency with independence and oversight has control over how those resources are used. A lack of independence and other structural problems further contribute to struggling public defense systems.²⁶

As a result of limited societal investment, many public defenders find it impossible to provide adequate – let alone quality – counsel to their numerous clients due to a fundamental lack of time and resources.²⁷

A VARIETY OF FACTORS CAUSE UNDER-RESOURCING.

Lack of funding is a significant barrier to providing quality public defense.²⁸ While funding has increased since *Gideon*,²⁹ it remains insufficient.³⁰ This is contributing to high caseloads, which in turn, constrains the amount of a time a defender can spend with each client, and generally hinders the quality of representation people receive.³¹ Limited funds can lead to understaffing³² and a lack of access to investigators, experts, support staff, interpreters, forensic services, technology, office equipment and legal research.³³

Over the last 25 years, spending on public defense has increased, but it remains far below other criminal justice expenditures, including corrections and police protection. While there are many contributing factors leading to rising incarceration, underfunding of public defender offices may be one of these. In 2008, for every one dollar spent on public defense, taxpayers spend nearly \$14 on corrections.³⁴



Sources: **Corrections:** National Association of State Budget Officers, State Expenditure Reports, www.nasbo.org; **Indigent Defense:** Holly R. Stevens, Colleen E. Sheppard, Robert Spangenberg, Aimee Wickman and Jon B. Gould, *State, County and Local Expenditures for Indigent Defense Fiscal Year 2008* (Fairfax, Virginia: The Spangenberg Project, George Mason University's Center for Justice, Law and Society, prepared on behalf of the Bar Information Program at the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, 2010). www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/defender/downloads/Indigent_Defense_Expenditures_FY08.authcheckdam.pdf; **Police Protection:** Bureau of Justice Statistics, *Justice Expenditure and Employment Extracts*, 1985, 2002, 2005 and 2007. (Washington, D.C., U.S. Department of Justice), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbse&sid=33>.
 Note: Not adjusted for inflation. Figures for police protection and corrections listed as 2008 are for 2007; figures for police protection and corrections listed as 1986 are for 1985.

The United States also spends proportionately less on public defense than many other countries including Australia, Germany, Canada, Finland and the United Kingdom. For example, the U.K. spends .20 percent of its GDP on public defense while the U.S. spends only .0002 percent.³⁵

While public defense systems that are entirely or primarily funded at the state level can still be severely underfunded, passing the burden on to counties can lead to greater disparities among counties in public defense representation.³⁶ Counties often rely on

property taxes for revenue which means that less affluent counties may have less money to spend on public defense to begin with, while at the same time a higher percentage of their residents will likely qualify for public defense services.³⁷ Furthermore, these counties may also have less funding for many of the social services that could have a positive impact on public safety³⁸ like treatment and education, that keep people from getting involved in the justice system to begin with. In short, "the counties most in need of indigent defense services are often the ones that least can afford to pay for it."³⁹

Rural and urban county areas may face unique challenges when it comes to providing quality public defense, but county-based funding can have a negative impact on both—creating disparities across systems. According to The Constitution Project, urban counties may be overburdened with cases, while “a rural county, with fewer resources, may be financially crippled by the need to fund the defense of a single serious homicide case.”⁴⁰ The National Association of Counties (NACo) recently reported that due to “declining revenues and budget shortfalls, county officials today are in the unenviable position of having to choose between funding needed services such as health care and human services and upholding the constitutional commitment to guarantee adequate public defense services.”⁴¹ To address the challenges facing rural counties, NACo has proposed instituting systems in which public defenders would ride multi-county circuits, providing defense services in rural counties where other trained attorneys may not exist.⁴²

Public defense has been historically underfunded and overburdened since *Gideon*; however, the recent economic downturn and fiscal/budget crises have made it worse.⁴³ The most recent data from the U.S. Department of Justice (DOJ) shows public defender systems at the state and county levels burdened with excessive caseloads, but that data was from 2007 – before the economic downturn. Many systems had already reached their breaking point and as budgets are cut, public defense may be particularly vulnerable.⁴⁴ Some public defender offices have had their funding cut and lost important resources.⁴⁵ For example, Kentucky’s Department of Public Advocacy experienced \$500,000 in budget cuts this year

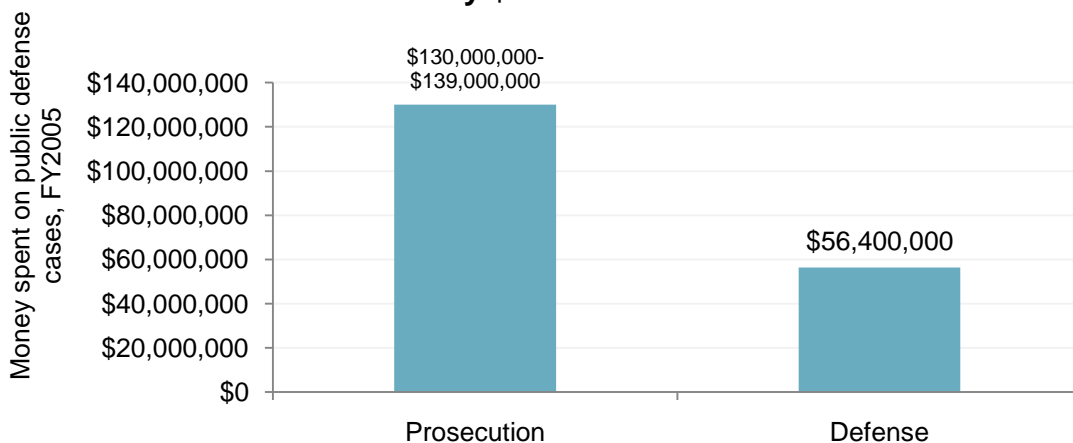
and will face even deeper cuts in 2012, and since 2008, Minnesota has lost nearly 15 percent of their public defender staff.⁴⁶ Other states, like California, attempt to save money by not only shrinking their attorneys and staff, but also by implementing low-bid contracts for public defense.⁴⁷ To address budget shortfalls for public defense, some states are shifting federal dollars for justice improvement funds.⁴⁸ The costs of failing to provide quality public defense to taxpayers and communities make it even more critical to address our public defense crisis.

“The counties most in need of indigent defense services are often the ones that least can afford to pay for it.”

A Race to the Bottom, National Legal Aid & Defender Association, 2008

The defense receives less funding than the prosecution in many jurisdictions, leading to significant inequalities in resources and services to defend people who stand accused.⁴⁹ The importance of parity in funding, salary, resources and workload has been articulated in national standards,⁵⁰ by the Department of Justice,⁵¹ the Supreme Court⁵² and other experts.⁵³ However, funding for public defense often fails to keep pace with that provided for prosecution.⁵⁴ This disparity can be difficult to quantify, but one study in Tennessee examined funding from many different agencies that contributed to prosecution and defense, finding that the prosecution spent between \$130 and \$139 million on public defense cases during FY2005, while the defense spent less than half of that –\$56.4 million.⁵⁵

The prosecution spent \$130-139 million while public defense had only \$56.4 million in Tennessee.



Source: Data from *Resources of the Prosecution and Indigent Defense Functions in Tennessee* (West Newton, MA: The Spangenberg Group, 2007)
www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/defender/downloads/TN_CompStudyFINAL_7_30_07.authcheckdam.pdf

The disparities in funding often translate into significant differences in attorney compensation, staffing and resources, including access to investigators, expert witnesses and crime labs.⁵⁶ For example, public defenders in Cumberland County, New Jersey, handle about 90 percent of all criminal cases, but there are twice as many lawyers and more than seven times as many investigators working on criminal cases in the prosecutor's office than the public defender's office.⁵⁷ With so many more resources going to the people charged with putting people behind bars than to those representing the accused, it is not surprising that incarceration rates have increased over the last 30 years.

The rates as well as the ways in which public defense attorneys are compensated for their work can also impact the quality of representation people receive. Low rates of compensation for public defenders⁵⁸ can make it difficult to attract and keep attorneys, resulting in high turnover and less-experienced defenders.⁵⁹ Low pay can also decrease the participation of private attorneys

as assigned or contracted counsel.⁶⁰ "Low bid" and "flat fee" contract systems can create a disincentive to provide quality representation and spend enough time on public defense cases.⁶¹ In low-bid systems, public defense contracts are awarded to the lowest bidder – attorneys who agree to provide counsel for the least amount of money.⁶² When the contract is also provided at a flat fee or fixed annual amount, there is a financial disincentive for the attorney to spend sufficient time on each case.⁶³ While some dedicated attorneys may go against their financial interest to provide quality representation, this system creates a structural disincentive.⁶⁴ Furthermore, contract attorneys often maintain a private practice in addition to their assigned clients, which can lead to excessive caseloads and may favor paying clients, potentially resulting in less quality representation for those requiring public defense services.⁶⁵ Low rates of compensation and low-bid contracts may keep costs down in the short term, but at the expense of the system providing quality representation for the people requiring public defense services.⁶⁶

The impact of under resourced public defense systems is far-reaching and can lead to increasing incarceration, especially incarceration of people with less income and from communities of color, who are most likely to use public defense systems.

UNDER-RESOURCING MANIFESTS ITSELF IN A NUMBER OF WAYS.

Having access to resources including money, time, investigators, training, independence and oversight is essential to providing quality defense. Without these resources public defenders may experience higher caseloads, less information for trial, and the inability to control and structure their work – all of which pose a challenge to providing quality defense.

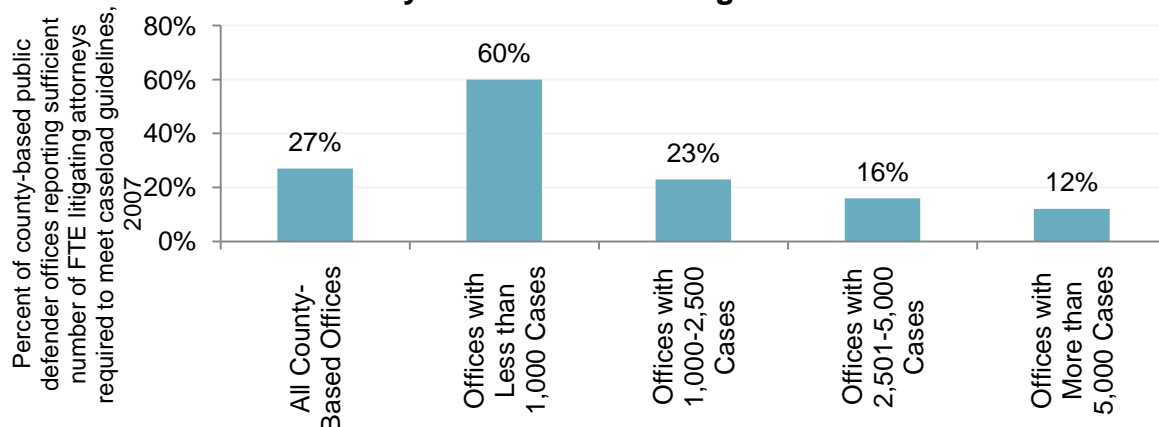
High caseloads create time constraints.

High caseloads can occur when a public defense system does not have the resources to hire or retain defenders. Excessive caseloads contribute to a lack of time to focus on each

individual case, preventing even the most dedicated and talented attorneys from providing their clients with a quality defense.⁶⁷ National standards recommend that public defenders handle no more than 150 felony, 400 misdemeanor, 200 juvenile, 200 mental health, or 25 appeals per year.⁶⁸ However, according to the most recent Census of Public Defense Offices (CPDO) conducted by the DOJ, 73 percent of county-based public defender offices lacked enough attorneys to meet these national caseload standards,⁶⁹ while 23 percent of offices had less than half of the necessary attorneys to meet caseload standards. Only 12 percent of county public defender offices with more than 5,000 cases per year had enough lawyers to meet caseload standards.

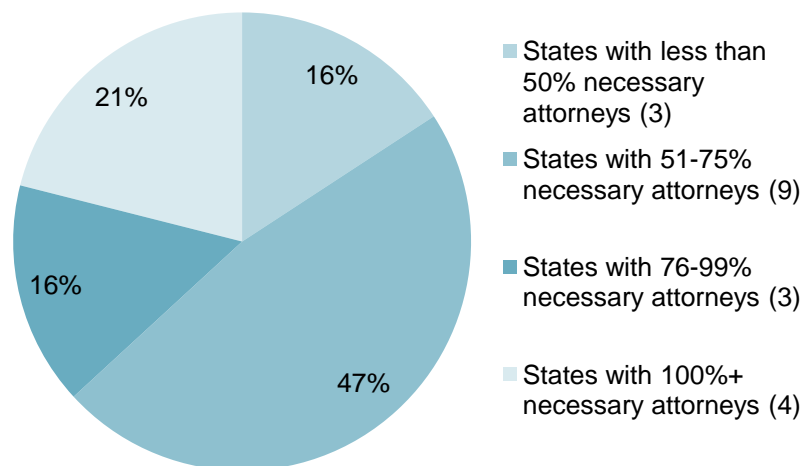
In state-based public defender offices, 15 of the 19 reporting state programs exceeded the maximum recommended limit of felony or misdemeanor cases per attorney.⁷⁰ State public defender programs had a median of 67 percent of the number of attorneys necessary to meet the guidelines.

Only 27 percent of all county-based offices have enough attorneys to meet caseload guidelines.



Source: Donald J. Farole, Jr. and Lynn Langton, *County-based and Local Public Defender Offices, 2007* (Washington, D.C.: Bureau of Justice Statistics, 2010).

79 percent of reporting state public defender systems do not have enough attorneys to meet caseload guidelines.



Source: Donald J. Farole, Jr. and Lynn Langton, *State Public Defender Programs, 2007*, Table 10. (Washington, D.C.: Bureau of Justice Statistics, 2010).

The national picture may be even bleaker. The DOJ study only surveyed public defender offices and did not include assigned counsel or contract counsel. While the method of delivery does not determine the quality of defense services, the study may be skewed toward more unified defender systems, which may have higher levels of quality.⁷¹ However, it still paints a picture of defenders who are largely overwhelmed by excessive caseloads.

Maintaining a manageable caseload and workload is a key component of having a system that can provide quality representation.⁷² In addition to the emphasis on manageable case and workloads in the American Bar Association's Ten Principles of

a Public Defense Delivery System,⁷³ the ABA Standing Committee on Ethics and Professional Responsibility issued a formal opinion regarding excessive caseloads for defenders. The ethical opinion states that "if workload prevents a lawyer from providing competent and diligent representation of existing clients, she must not accept new clients ... Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation."⁷⁴

A number of public defense systems have set caseload limits to help maintain quality representation.

- *Seattle*: The Defender Association, an independent non-profit public defender organization in Seattle, Washington,⁷⁵ set caseload limits early on that were close to the national and state bar standards, significantly contributing to the level of representation they are able to provide.⁷⁶
- *Washington, D.C.*: Public Defender Service (PDS) attorneys are able to control their workload through a consideration of case

"As a consequence [of excessive caseloads] even the best-intentioned lawyers cannot render competent and effective defense services to all of their clients."

Norman Lefstein and Robert L. Spangenberg, *Justice Denied*, The Constitution Project, 2009

complexity,⁷⁷ attorney experience and many other factors, not simply the number of cases. They are able to stay within the National Caseload Standards,⁷⁸ which contributes to their ability to spend enough time on each case, giving each client and case the attention necessary to be an effective advocate.⁷⁹

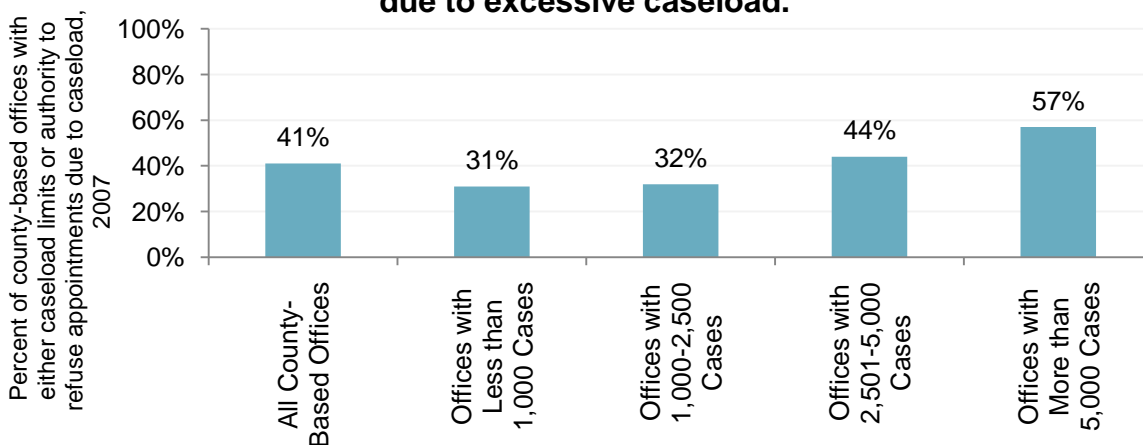
- Some states have instituted caseload limits through state statute (Louisiana), statewide commissions (Montana), case-weighting studies (Colorado) and other mechanisms. In Massachusetts, for example, the significant participation of the private bar as assigned counsel,⁸⁰ combined with workload limits, help to keep caseloads manageable.⁸¹

Despite efforts by individual public defense offices and systems, far more public defense attorneys have excessive caseloads than manageable ones. Nearly 60 percent of county-based public defender offices do not have caseload limits or the authority to refuse cases due to excessive caseloads.⁸² This lack of authority is particularly evident in larger offices with higher caseloads.

Below are just a few jurisdictions which have reported high caseloads.

- *Missouri*: the Public Defender Commission in Missouri found in 2005 that “excessive caseloads can and do prevent Missouri State Public Defenders from fulfilling the statutory requirements [for representation] and their ethical obligations and responsibilities as lawyers.”⁸³ In fact, according to the State Public Defender Deputy Director, the high caseloads meant that public defenders had to “dispose of a case every 6.6 hours of every working day.”⁸⁴ The Commission has attempted to address Missouri’s chronic excessive defender caseloads in recent years. In 2008, the Commission enacted a rule regarding caseloads – both how to determine maximum caseload in each office and how to address excessive caseloads. In 2009, the Missouri Supreme Court upheld the Public Defender’s right to refuse cases.⁸⁵ In 2010, several offices were placed on limited availability or were pending certification.⁸⁶
- *New Orleans*: Part-time defenders have an average of seven minutes to handle

Nearly 60 percent of county-based public defender offices do not have caseload limits or the authority to refuse cases due to excessive caseload.



Source: Donald J. Farole, Jr. and Lynn Langton, *County-based and Local Public Defender Offices, 2007*, Table 9. (Washington, D.C.: Bureau of Justice Statistics, 2010).

each case and defenders.⁸⁷

- *Others:* Defenders in large cities including Atlanta, Chicago and Miami have over 2,000 misdemeanor cases each year, at least five times the national caseload standards.⁸⁸

When lawyers do not have enough time – sometimes only minutes per case – they are unable to conduct many of the critical tasks necessary to provide quality defense, including interviewing clients and witnesses, conducting legal research, writing motions, accessing and preparing experts, and generally preparing to represent their clients at pretrial hearings, trials and sentencing hearings. Meeting with a client soon after arrest can have a significant impact on the ability to conduct an investigation and prepare a defense, including being able to find defense witnesses and evidence. A lack of confidential space can compound this problem, especially for clients who are incarcerated before trial.⁸⁹

Well-intentioned attorneys who do not have enough time to provide quality representation also run the risk of making serious mistakes that can have devastating consequences for their clients.⁹⁰ In many jurisdictions across the country defenders meet with their clients minutes before their court appearance in courthouse hallways,

“Most of the [public defenders] do not have enough time to do thorough investigations, meet with the clients at length, research all of the potential issues, and file all potential motions specifically tailored to each case.”

Robert C. Boruchowitz, Malia Brink and Maureen Dimino, *Minor Crimes, Massive Waste*, (Washington, D.C.: National Association of Criminal Defense Lawyers, 2009)

often just presenting an offer for a plea bargain from the prosecution without ever conducting an investigation into the facts of the case or the individual circumstances of the client.⁹¹ This kind of hurried, insufficient representation has been referred to as “meet ‘em and plead ‘em,”⁹² “assembly line justice”⁹³ and “McJustice,”⁹⁴ and is not uncommon in courtrooms across the country.⁹⁵

Proper resources and adequate time may not guarantee that every public defender will provide quality representation, but high caseloads and limited resources almost guarantee that it will not happen for all clients. And as will be discussed later, less access to quality representation for clients may mean that more people end up behind bars, through the use of unnecessary pretrial detention, excessive sentences and wrongful convictions.



OVERCRIMINALIZATION: SHOULD SOME CRIMES BE RECLASSIFIED TO REDUCE CASELOADS?

The number of behaviors that are classified as criminal offenses has grown over the past few decades, increasing contacts with the criminal justice system and leaving defenders with crushing caseloads due in part to these policies.⁹⁶ This growth can be linked not to a corresponding growth in crime,⁹⁷ but rather to criminal justice policies emphasizing law and order and getting tough on crime.⁹⁸ Across the country behaviors such as not wearing a seatbelt, walking a dog without a leash, feeding homeless people, riding a bicycle on a sidewalk or occupying more than one seat on a subway car are criminalized and punishable with jail time.⁹⁹ In Georgia, some moving vehicle violations, including speeding, are classified as misdemeanors that could result in up to a year in jail.¹⁰⁰

Some defenders, advocates and researchers believe that reclassifying certain minor and nonviolent criminal offenses as civil infractions would help to reduce caseload and spending on public defense and decrease the criminal and collateral consequences for people. Others believe that reclassifying offenses without removing them entirely from the justice system would have a negative effect on people by removing the right to counsel, leaving people with low incomes to fend for themselves in court without access to legal representation.

Reclassification would reduce caseloads, decrease spending and have a positive impact on people. When public defense budgets, like many programs and services, are facing cuts and increasing funding for resources or additional staff seems unlikely, reducing the number of cases defenders must handle can be an effective way to reduce caseload and workload.¹⁰¹ Reclassification of minor misdemeanors into civil infractions or citations may help to reduce caseloads and save money because counsel would not be needed.¹⁰² A commission in Massachusetts found that over a four-year period, the state paid about \$8.5 million to represent people who could not afford an attorney who were accused of five arguably minor offenses¹⁰³ that, if reclassified as civil infractions rather than criminal offenses, would have reduced the caseload by 59,000 over the four-year period.¹⁰⁴

Reclassification would harm people by removing the right to counsel without removing all of the consequences. Defenders have cautioned against reclassifying some criminal offenses that currently carry possible jail-time as non-jailable misdemeanors because people may still face many of the civil/collateral consequences associated with a criminal conviction. Others have expressed concern with reclassifying them as civil infractions because people may plead guilty and be faced with fines that they cannot afford. Without removing these kinds of behaviors from the justice system all together, simply reclassifying them could result in denying people who cannot afford to hire an attorney the critical assistance of an attorney.¹⁰⁵

While people disagree about the impact of reclassification, criminal justice policies have a significant impact on the ability of public defenders to do their jobs. Aside from increasing the number of criminal offenses, there is more at stake if a person is convicted. For example, mandatory sentencing and “three-strikes” laws¹⁰⁶ can send a person to prison for many years. Civil or collateral consequences of a criminal conviction have also increased and people can lose their immigration status, public housing, public benefits, financial aid for college, child custody, employment and their license.¹⁰⁷ Because of the increased criminal and collateral consequences, defenders must spend more time preparing and advocating for their clients, including conducting research and attending training on criminal and collateral consequences, preparing a defense, and preparing mitigating information and arguments for sentencing.¹⁰⁸ These enhanced consequences also mean that the costs of failing to provide quality counsel are even greater for people and communities.¹⁰⁹

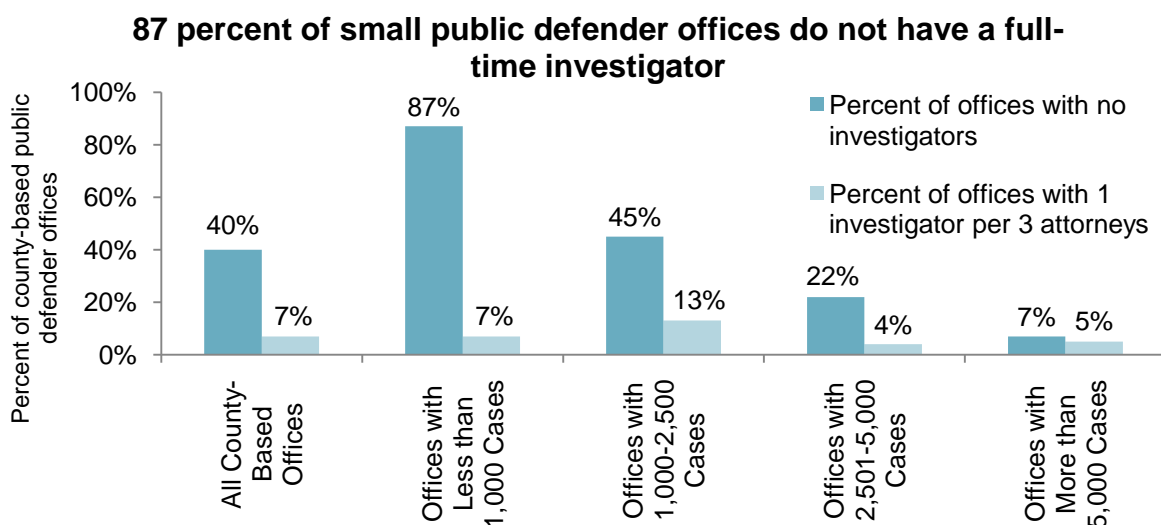
A lack of resources limits training opportunities.

Lack of funding can also lead to limited access to training.¹¹⁰ Despite national standards stressing its importance,¹¹¹ defenders in many places do not receive training, continuing education and other forms of professional development.¹¹² Like in all skilled professions, experience and training are critical to being an effective attorney.¹¹³ As the field of criminal law is neither static nor simple, ongoing education and training is vital,¹¹⁴ especially with technological advancements in DNA and forensics, which can make cases more time consuming and complicated.¹¹⁵ In Washington, D.C., many attorneys at Public Defender Service (PDS) receive forensic training from experts so that they are able to review forensic evidence—like DNA files—gaining an understanding of the evidence and its implications for the case.¹¹⁶ Without this training—or the time to use it—defense attorneys may be less equipped to test the prosecution’s evidence at trial or advise a client regarding a plea offer, possibly leading to a conviction or harsher sentence for their client.

A lack of resources limits the ability to prepare and investigate.

When defenders do not have access to sufficient resources they may be unable to interview key witnesses, collect or test physical evidence, or generally prepare and provide quality defense for their client.¹¹⁷ In other words, without resources, the defense cannot do its job and the prosecution’s case may go untested, resulting in poorer outcomes for the client.¹¹⁸

Both the U.S. Supreme Court¹¹⁹ and national guidelines¹²⁰ have emphasized the importance of investigation in providing quality defense representation. Nevertheless, many public defense attorneys are unable to conduct investigations due to a lack of time and resources. For example, nearly 70 percent of judges responding to a statewide survey in California said that their counties did not have sufficient resources to fund public defense investigation.¹²¹ A study by the DOJ revealed that in 2007, 40 percent of county-based defender offices did not employ any investigators.¹²² This is troubling, as investigation can have a significant impact on the outcome of a case.¹²³



Source: Donald J. Farole, Jr. and Lynn Langton, *County-based and Local Public Defender Offices, 2007*, Table 13. (Washington, D.C.: Bureau of Justice Statistics, 2010).

Note: Percent of Full-time equivalent (FTE) investigators in county-based public defender offices, by office caseload, 2007.

Public defense systems don't have enough independence or oversight.

Structural problems including a lack of independence from judicial and political interference and a lack of oversight compound the problems caused by limited time, funding and resources.¹²⁴ National standards emphasize the importance of ensuring an independent defense system free from undue political or judicial interference.¹²⁵ Without such independence, the defense system's legitimacy can be compromised. In many courtrooms across the country presiding judges are also in charge of approving requests for investigators, expert witnesses in public defense cases¹²⁶ and awarding contracts for public defense.¹²⁷

Political influence over public defense programs can also lead to a prioritization of cost-cutting over providing quality representation.¹²⁸ For example, an Iowa statute allows public defense offices in the state to refuse cases if their caseloads are too high. However, interviews indicate that, despite the law, this is not the reality.¹²⁹ This is due to the structure of the system – the governor appoints the directors of the office and the state funds the program – leading to a lack of independence and an increased susceptibility to political influence over the program, resulting in a de facto inability for public defense offices to control caseloads.

The advantage of an independent public defense system can be seen in Washington, D.C. While private bar defenders¹³⁰ must justify each expert they use because they are paid by the Superior Court, Public Defender

Service (PDS) attorneys can make the decision to hire an expert based solely on his or her usefulness for the case.¹³¹ Since expert witnesses can significantly influence the outcome of a case,¹³² the authority afforded to PDS attorneys through the organization's independence can make a substantial difference to clients facing potentially devastating consequences. Ensuring independence is important in providing the minimum level of representation outlined in the American Bar Association standards.¹³³ It can also allow for new and innovative approaches to defense that go beyond the minimum,¹³⁴ such as community-based or holistic defense.¹³⁵

A lack of oversight has also contributed to a “hodgepodge” of public defense programs within states with varying levels of effectiveness.¹³⁶ This creates a system in which a person's access to justice varies wildly depending on the zip code or county in which he or she was accused of an offense.¹³⁷ Some states are moving towards greater statewide oversight and more unified systems,¹³⁸ and in recent years more states have implemented statewide public defender agencies, commissions, boards or other oversight bodies including statewide appellate defender organizations.¹³⁹ Combined with statewide funding, greater oversight could improve the level of representation afforded to people relying on public defender services.¹⁴⁰

This creates a system in which a person's access to justice varies wildly depending on the zip code or county in which he or she was accused of an offense.

PART IV

WITHOUT QUALITY PUBLIC DEFENSE, MORE PEOPLE ARE INCARCERATED

Overburdened, underfunded, inefficient and inadequate public defense systems lead to more incarceration, in the form of unnecessary pretrial detention, excessive sentences and wrongful convictions.

Incarceration, in turn, can lead to higher costs for individuals, families, communities and taxpayers.¹⁴¹ Alternatively, a system in which defenders have the time and resources to provide a quality defense can actually save money, as well as have a positive impact on people and communities.

THE COSTS OF INCREASED INCARCERATION RESULTING FROM LACK OF QUALITY PUBLIC DEFENSE ARE SIGNIFICANT.

The consequences of inadequate public defense systems, particularly those associated with increased incarceration, harm communities and overburdened taxpayers and negatively impact communities of color.

Today, one in every 100 U.S. residents are incarcerated, and this rate is even more stark for people of color; one in 15 black men age 18

and over was incarcerated in 2008, compared to one in 54 white men and one in 36 Hispanic men.¹⁴² A DOJ study found that if incarceration rates remain unchanged, 6.6 percent of U.S. residents born in 2001 will go to prison at some time during their lifetime.¹⁴³ People of color are most likely to spend time in prison: one in three African-American men born in this year is expected to go to prison; one in six Hispanic men will go to prison; and one in 17 white men will spend time in prison. The incarceration rate of people sentenced to more than a year of prison more than tripled over the past 30 years, growing from 139 people in prison per 100,000 in the general population in 1980 to 502 per 100,000 in 2009.¹⁴⁴

The monetary costs of incarcerating so many people have skyrocketed along with the prison and jail populations. In 1997, it cost about \$43 billion¹⁴⁵ to incarcerate 1.7 million people. As of 2007, the cost of incarcerating approximately 2.3 million people in prisons and jails had reached about \$74 billion,¹⁴⁶ without definitive evidence that incarceration keeps communities safer than other strategies,

including investing in education, employment, or community-based alternatives.¹⁴⁷ Such high costs of incarceration take funding away from these other, more effective public spending opportunities; since 1970, corrections' spending has increased at three times the rate of state spending on education.¹⁴⁸ Research shows that states with higher incarceration rates do not necessarily have lower crime rates,¹⁴⁹ and that longer prison sentences do not produce lower recidivism rates.¹⁵⁰ While long prison sentences can have the largest negative impact, even shorter stints in jail while someone is awaiting trial can have a significant impact on individuals and families.¹⁵¹

While it is important to measure these economic costs of criminal justice policies, the consequences of inadequate public defense for the people being defended, their families and entire communities are just as serious. Having so many people in prisons and jails across the country has a significant impact on communities and families, especially communities of color and those of lower income.¹⁵² People are taken away from their families, children are left without role models—especially male role models—and families struggle to get by on single incomes.

For example, a study conducted by the NAACP Legal Defense Fund attempted to document some of the “social costs” of Mississippi’s inadequate public defense system by surveying over 30 women who were incarcerated for nonviolent offenses. They found that nearly half of the women lost a home or apartment, while 12 lost vehicles. More than half of the women had children living with them when they were

arrested and had to move in with relatives. Eight women had elderly parents who were affected financially.¹⁵³ The impact of inadequate public defense can have a number of tangible criminal justice effects, including increased pretrial detention, more pressure to plead guilty to a charge, longer sentences, and wrongful convictions.

POOR QUALITY PUBLIC DEFENSE CAN INCREASE INCARCERATION IN FIVE WAYS.

There are five primary ways in which inadequate public defense systems can increase the number of people that are unnecessarily incarcerated:

1. more pretrial detention for people who do not need it;
2. increased pressure to plead guilty;
3. wrongful convictions and other errors;
4. excessive and inappropriate sentences that fail to take into account the unique circumstances of the case; and
5. increased barriers to successful re-entry into the community

Lack of quality defense may lead to pretrial detention.

In places where defender caseloads are very high or the court fails to appoint counsel in a timely manner, poor people accused of criminal offenses may spend a lot of time in jail before ever speaking to a lawyer or appearing in court.¹⁵⁴ Unnecessary or prolonged pretrial detention due to case delays, late appointments of counsel, lack of or limited pretrial advocacy can also increase costs.

JONATHON*

Jonathon spent 30 days in the Baltimore City jail without once speaking to a public defender. He met his attorney in the courtroom on the day of his appearance. While Jonathon's defender "did a good job" in the courtroom, Jonathon knows that defenders "are overworked" and in his case did not conduct any investigation until the day of his court appearance. Having a defender involved earlier on could have saved Jonathon the 30 days in jail, which "shut [his] entire life down," and could have avoided the collateral consequences of being locked up that Jonathon continues to suffer, including being unable to get interviews and a full-time job.

*Name has been changed.

Personal Interview, Baltimore, MD, June 8, 2011.

PRETRIAL DETENTION IS BAD FOR PEOPLE.

Pretrial detention negatively affects people awaiting trial, as well as their children and families. For people who have jobs when they are arrested, being held in jail can jeopardize their employment – not only affecting their own lives, but the financial stability of their families.¹⁵⁵ They may lose their residence or vehicle¹⁵⁶ – spending time in jail can push people already on the economic margins further into poverty. Incarceration can have a ripple effect on families and communities that is difficult to measure, but extremely significant – all before a person has even been convicted of an offense.¹⁵⁷

People who spend time in jail pretrial are more likely to receive a guilty sentence than someone who is released pretrial.¹⁵⁸ By remaining in jail, people are less able to help in their defense, are more likely to lose their jobs or interrupt their education, are kept from their families and can lose custody of their children.¹⁵⁹ Further, people who are held in jails pretrial may be more likely to receive a sentence of incarceration over probation,¹⁶⁰ resulting in more time away from a person's family and community, and make it more difficult to return to society after

incarceration. Having representation at bail hearings or arraignment can help keep people out of jail while awaiting trial,¹⁶¹ ensuring that they can help in their defense and remain a contributing member of their family and community.¹⁶² In addition, people who are released may be more eligible for diversion programs such as treatment or community service.

PRETRIAL DETENTION IS BAD FOR TAXPAYERS.

When defenders do not have the time or resources to provide meaningful pretrial advocacy, their clients may be more likely to be locked up before trial.¹⁶³ When public defense attorneys do not have enough time to handle all of their cases, they may be forced to continue (get time extensions for) many of their cases, resulting in an inefficient, costly system for all those involved and taxpayers in general.¹⁶⁴ In addition to wasting time and the additional jail bed costs for those incarcerated pretrial, continuances waste court resources including paying for court reporters, transporting people awaiting trial to the courthouse among other daily expenses. For example, in Minnesota, budget cuts to an already under-funded system¹⁶⁵ led to 13 percent of Minnesota's public defenders being laid off, which contributed to system-wide inefficiencies and a slower process, resulting in wasted time and resources.¹⁶⁶ Case delays can also mean that people are spending more time locked up awaiting their day in court.¹⁶⁷

Our clients lose the ability to contribute to their families both financially and, as importantly, in being around for their children.

Ensuring early involvement by a public defender could help to reduce unnecessary pretrial detention, increase the chances of an appropriate sentence later and help divert minor cases out of the justice system.¹⁶⁸ For example, in 2007 one-third of all misdemeanor cases in the state of Washington were driving with a suspended license,¹⁶⁹ often resulting from the failure to pay a traffic ticket.¹⁷⁰ Relicensing and diversion programs can help to reduce these cases, helping to reduce excessive defender caseloads, minimize unnecessary justice system contact for people, and reduce wasteful use of taxpayer money to incarcerate people.¹⁷¹ Having defenders involved early in the process can help connect people to these programs, providing appropriate and potentially beneficial consequences while reducing wasteful spending on unnecessary incarceration.¹⁷²

Lack of quality defense may lead to more pressure to plead guilty.

Sometimes clients feel additional pressure to waive their right to counsel and plead guilty fearing that refusing to do so could result in having to stay in jail or a harsher sentence in the future.¹⁷³ This is sometimes a result of overt pressure from the court.

Being detained before trial can augment existing pressure, creating a situation in which pleading guilty in order to get out of jail may be appealing even to people who may be innocent.¹⁷⁴ When people do not have the assistance of counsel early on in the process, they may end up pleading guilty after having already spent time in jail pretrial, in order to get out of jail and back to their families and jobs; they may be unaware of the potentially serious collateral consequences of the criminal conviction they will have as a result of their plea.

Lack of quality defense could lead to excessive prison sentences.

Inadequate representation can also lead to excessive sentences, unnecessarily harming clients and increasing costs to taxpayers. According to experts, defenders with enough time to be effective at sentencing could help secure accurate and appropriate sentences and could decrease sentencing errors that hurt clients and costs taxpayers tens of millions of dollars a year.¹⁷⁵ In Michigan, a significant number of cases are reversed on appeal due to mistakes at sentencing.¹⁷⁶ When defenders do not have time to review a presentencing report with their client or have stand-ins at

JIM*

Jim was arrested in 1996 after a fight with his cousin, resulting in a charge of aggravated assault with a weapon. He did not make bail and was desperate to get out of jail. He was assigned a public defender who told him that if he pled guilty he could go home. So he did. But when he tried to get back to his life he faced new challenges – those that come with a criminal conviction. Jim's public defender never told him what would happen if he was burdened with a conviction, or he never would have pled guilty.

Fifteen years later, Jim is still faced with the collateral consequences of his conviction. He is a nurse by trade, but has not been able to work. Recently, he has been applying for assisted living, but has been denied. Because of the nature of his offense and his guilty plea, expunging his record has been a challenge, and Jim is working with a neighborhood defender service to apply for a pardon, but he knows he has a slim chance. "If [my public defender] had told me how [pleading guilty] would affect my future, I would have waited for a jury trial. I'm still paying for something that happened 15 years ago."

*Name has been changed.

Personal Interview, Baltimore, MD, June 8, 2011.

sentencing hearings, mistakes can and do happen.

A general lack of advocacy at sentencing, coupled with a lack of investigation throughout the process can lead to unnecessarily harsh sentences. If a lawyer does not meet with his/her client until the day of the trial, has not conducted any investigation into the facts of case or regarding the client's individual circumstances or background he/she will likely be ill-equipped to advocate effectively at trial and a sentencing hearing.¹⁷⁷ For instance, if a client suffers from mental illness or substance abuse, presenting this information to the court could help secure more appropriate sentences that could benefit the client without harming public safety. However, in some places this kind of sentencing advocacy is rare for people represented through the public defense system.¹⁷⁸ Furthermore, given how many cases result in guilty pleas, sentencing can be a very important part of a case, and a critical time for defenders to provide meaningful advocacy.

While it can be difficult to quantify these mistakes or deficiencies, a study in Michigan attempted to measure the costs of some of these problems. Michigan's State Appellate Defender Office (SADO) showed that between 2004 and 2007, they were able to save at least \$3,675,000 by correcting sentencing errors.¹⁷⁹ That means that throughout the entire state, Michigan could have saved nearly \$70 million dollars over that five-year period had sentencing mistakes been avoided in the first place, not to mention the additional costs from the appeals and litigation required to correct the mistakes.¹⁸⁰

Lack of quality defense can lead to more mistakes and wrongful convictions.

Excessive caseloads can cause defenders to make mistakes, harming their client and ultimately contributing to greater corrections costs. Evidence of the extent of wrongful convictions has grown, largely due to advancement in the use of DNA; however, it is difficult to know how many mistakes are actually being made and how many people are wrongfully enduring prison sentences across the country.¹⁸¹ If mistakes are being identified in high-profile cases, many more are probably happening in lower-level cases that are not as closely scrutinized.¹⁸² While ineffective counsel may not be the sole or even primary reason for many wrongful convictions, according to former Attorney General Janet Reno, "in the end, a good lawyer is the best defense against wrongful conviction."¹⁸³

The costs of years of unnecessary incarceration, appeals, and sometimes civil suits and settlements, can leave the taxpayer with a hefty bill. The Michigan State Appellate Defender Office study also attempted to quantify waste through examining ineffective assistance of counsel (IAC) claims. While these claims are often unsuccessful and may not adequately represent the extent of ineffective public defense, there is significant demonstrable waste.¹⁸⁴ By correcting IAC mistakes, Michigan was able to save over \$5 million dollars in terms of prison costs in just 10 cases; however, because these mistakes took years to correct, there was a cumulative waste of 114 years of appeals in the courts.¹⁸⁵

TYRONE NOLING

In 1996, Tyrone Noling was sentenced to death in the killing of an elderly couple in Portage County, Ohio.

In 2006, the *Cleveland Plain Dealer* began its own investigation into the incident, finding witness statements, evidence of polygraph tests, evidence connecting the weapon to another person, and other information that the prosecution had not disclosed to the Mr. Noling's public defenders. The three men implicating Mr. Noling later indicated that one was coerced by prosecutors to implicate him and two others who lied on the stand to save themselves.

The *Cleveland Plain Dealer* laid bare troubling problems related to the way that public defense is structured in Ohio. In Ohio, prosecutors do not have to show defenders evidence, but a citizen – or in this case, the newspaper – was able to submit a public records request to obtain the information.

Furthermore, a better-resourced defense might have been able to prepare its defenders to try a capital case and hire the best investigators to build their own case without relying on prosecutors. For example, more funds may have allowed the defense to conduct their own polygraph tests, question witnesses, and otherwise investigate the case.

In rural counties like Portage, a single capital case can overwhelm the public defense system and stretch the budget beyond its already scant resources. Although Mr. Noling's defense team likely did the best they could with the resources they had, they could have done more with more.

Recently, the 6th U.S. Circuit Court of Appeals allowed the ruling to stand, but expressed real concern that Ohio would be executing an innocent man. With a few state appeals remaining and all his federal appeals exhausted, Mr. Noling's defense team plans to petition the U.S. Supreme Court, but the chances they will hear the case are slim. While it is impossible to predict what would have happened if his public defenders had access to the resources necessary to conduct a thorough investigation into the case and prepare an effective defense for Mr. Noling at his trial, it is not surprising that in a system without adequate resources, mistakes are made that jeopardize people's liberty and in some cases lives.

Sources:

Andrea Simakis, "Judges worry, but affirm death sentence of Tyrone Noling," *Cleveland Plain Dealer*, June 30, 2011. http://blog.cleveland.com/metro/2011/06/judges_worry_but_affirm_death.html

Andrea Simakis, "Hiding in Plain Sight: Ohio Supreme Court's decision to let a bad ruling stand keeps public records out of reach of those who need them most," February 10, 2007. <http://tyronenoling.com/news/2-10-2007.html>

Lack of quality defense may prevent people from successfully returning to the community from prison.

People with criminal convictions and those who have spent time behind bars face numerous collateral consequences that can make it difficult to access basic supports and services, including supportive housing, college tuition assistance, and a number of jobs.¹⁸⁶ Research shows that access to

substance abuse or mental health treatment, education, employment and housing can be strong predictors of future behavior: people with access to these services and supports are less likely to engage in illegal behavior in the future.¹⁸⁷ In addition, the loss of voting rights in a number of states after criminal conviction can make people feel less a part of their community or democratic society, which may lead to illegal behavior.¹⁸⁸ While a number of public defense systems work with clients to

expunge records and help people access jobs and other services, many do not have the capacity to do so, leaving their clients to fend for themselves as they reenter the community.¹⁸⁹

Lack of quality defense erodes public trust.

Another cost of an inadequate public defense system is a loss of public trust in the justice system as a whole.¹⁹⁰ Poor quality defense compromises the integrity of the entire justice system¹⁹¹ and people who experience the harsh consequences of a poor quality defense system may lose confidence that the justice

When people see the system working against them, they wonder why they should participate at all.

system will treat them fairly.¹⁹² While it is not the only factor, an inadequate public defense system contributes to the feeling, especially among communities of color and those with low income, that the system is stacked against them,¹⁹³ that they are “part of a justice system that feels unjust.”¹⁹⁴ In other words, when people see their lawyer – their sole advocate in the courtroom – unable to do the bare minimum necessary to mount a sufficient defense, they may lose faith in the system.¹⁹⁵

People who have used public defense services are not the only ones who may question the legitimacy of the justice system. Family members, co-workers, friends and neighbors who have seen people affected by inadequate public defense may also lose faith in the justice system as a result, leading to greater disillusionment with the processes and the outcomes of justice.¹⁹⁶

An eroded trust in the justice system can negatively impact public safety and community well-being. People may be more likely to ignore the rule of law when they

have less respect for the justice system.¹⁹⁷ In other words, people may be more likely to break the law if they think the system is unfairly targeting them, but may be less likely to re-offend if they believe they received a fair trial. Additionally, people may be more resistant to serve on juries, work with law enforcement and come forward as witnesses when they have little faith in the system.¹⁹⁸

In addition to compromising the legitimacy of the defense system, the lack of an independent defense system can also contribute to a feeling in the community that the defenders are an arm of the same system that is unfairly targeting them.¹⁹⁹ Ensuring independence can be a critical first step to rebuilding support for the system by establishing trust between the client, community and the defenders.

Victims may also be harmed by inadequate public defense and its effect on the legitimacy of the justice system. Justice and closure may be delayed and victims may doubt the accuracy of case outcomes.²⁰⁰ Furthermore, all members of the community can be affected when public safety is weakened by a diminished faith in the justice system.

An effective public defense system can be a powerful tool in restoring public faith in justice, improving public safety and lawfulness. In Washington, D.C., some Public Defender Service (PDS) clients appreciate the amount of work their attorneys put into their case, which helps to overcome an initial lack

“A strong indigent defense system promotes the legitimacy of the system – legitimacy necessary to maintain public support for the system.”

Tony Fabelo, “What Policy-Makers Need to Know to Improve Indigent Defense Systems,” 2001, www.ncjrs.gov/pdffiles1/bja/190725.pdf

of trust.²⁰¹ Working with members of the community outside of the courtroom can also help to restore trust. The Defender Association in Seattle has contributed to building trust and respect for the justice system by working closely with community organizations in addition to increasing confidence in public defenders.²⁰² In Baltimore, the Neighborhood Defenders have established a greater level of trust with their clients by moving their office into the community and providing effective and holistic representation.²⁰³ The community now sees the public defenders as part of the solution, rather than part of the problem. Having an effective advocate both in and outside of the courtroom can help restore public faith in the justice system by making it more balanced between the defense and the prosecution, in reality and perception.

PEOPLE OF COLOR AND COMMUNITIES WITH LESS INCOME ARE DISPROPORTIONATELY AFFECTED BY A LACK OF QUALITY DEFENSE.

A lack of quality public defense and the costs that accompany them disproportionately affect people of color and those earning low income salaries. While counties and states define eligibility in many different ways, public defense is provided to people who cannot afford to hire an attorney. According to defenders, their clients are exclusively or overwhelmingly people with low income.²⁰⁴ Nearly all state and county based public defender programs considered income level when determining eligibility and many also considered federal poverty guidelines.²⁰⁵ More people from communities with low

Public confidence in the integrity of the system is lost when the community perceives that inadequate representation creates a system that metes out justice differently to the rich and the poor.

In Defense of Public Access to Justice, National Legal Aid & Defender Association, 2004

income are arrested than people from more affluent communities.²⁰⁶ The justice system in general disproportionately affects people with low income and a significant majority of all cases are brought against people who cannot afford an attorney.²⁰⁷ According to the former Chief Public Defender of Wisconsin, over 93 percent of people arrested in the state are eligible for public defenders.²⁰⁸

Research also shows that the justice system in general also disproportionately affects people of color.²⁰⁹ As people of color are also disproportionately affected by poverty,²¹⁰ they are also more likely to require court appointed counsel when arrested.

Despite a lack of data regarding the disproportionate impact of public defense systems on communities of color, overwhelming evidence from courtrooms, jails and prisons across the country show that people of color are more likely to rely on public defenders.²¹¹

According to a report by the National Association of Criminal Defense Lawyers (NACDL), “because of the higher rates of minority poverty and the higher rates at which minorities are arrested, public defenders and court-appointed counsel have a disproportionate number of minority clients. As a result, the crisis in America’s public defense system has a much more acute impact on communities of color.”²¹²

The consequences of being denied quality representation can be extreme. People with fewer resources may be unable to afford bail that high- or middle-income earning individuals can, so the lack of representation at the bail hearing may mean a disproportionate number of people with low income are incarcerated pretrial. Because those earning low income salaries may be less able to withstand the economic impact of a period of incarceration, this also increases the pressure for those who can't make bail to plead guilty rather than wait for trial in jail. This can have a particularly strong impact on people of color. People of color may also be overrepresented in wrongful convictions. For example, even though African Americans represent only about 12 percent of the national population,



64 percent of people wrongfully convicted for rape and eventually exonerated with DNA evidence are black.²¹³

Failure to provide adequate assistance of counsel to accused indigents draws a line not only between rich and poor, but also between white and black ... When discussing the inadequacies of the current system of providing counsel for the accused poor, one cannot ignore the correlation between race and poverty ... Failure to ensure the adequacy of public defender programs produces a disproportionate impact not only on the poor, but also on members of communities of color, a result that is unacceptable in a society committed, as ours is by the Fourteenth Amendment, to equal treatment under the law.

Charles J. Ogletree, "An Essay on the New Public Defender for the 21st Century," 1995

DEFENDING YOUTH

The impact of inadequate counsel is not limited to adults; youth of color and from low-income communities are disproportionately affected by “broken” juvenile public defense systems.

In its 1967 *In re Gault* decision, the U.S. Supreme Court extended the right to counsel to youth facing juvenile delinquency proceedings. The Court reasoned that the potential loss of liberty a child faces “is comparable in seriousness to a felony prosecution.” However, the public defense available to youth may be even worse than what is available to adults in the justice system, resulting in routine denial of the constitutional right to counsel for youth. Representing youth requires specialized knowledge of the relevant laws and procedures and an understanding of the unique developmental capabilities and challenges of their clients. The National Juvenile Defender Center (NJDC) stresses the importance of zealously representing the client in court while also providing holistic representation including identifying and providing services and resources. Additionally, since youth have different intellectual and emotional capabilities that manifest in different decision making and behaviors, an understanding of development can be very important for defenders trying to represent a young client. Training, therefore, is very important for juvenile defenders. Despite the Supreme Court’s decisions and the principles of the NJDC, juvenile defenders face a lack of resources, training and time, and youth end up with the consequences of failing juvenile public defense systems.

The National Legal Aid & Defenders Association’s report examining public defense in Michigan wrote that “as inadequate as adult representation is, the treatment of kids in delinquency proceedings is far worse.” In Mississippi, according to a report written by the NAACP Legal Defense Fund “while resources for the defense of adults are scarce, even fewer resources are devoted to the defense of juveniles. As a result, children in some youth courts are routinely ‘adjudicated delinquent’ without the benefit of anything resembling legal advocacy.”

Accordingly, “broken indigent systems increase the likelihood that low-income youth will suffer the consequences of false confessions, unconstitutional guilty pleas, wrongful convictions, pretrial detention, and incarceration in secure facilities.”

The consequences of an inadequate juvenile public defense system also fall disproportionately on low-income youth and youth of color. In one Mississippi youth court, virtually all of the youth in the courtroom are youth of color.

The justice system in general disproportionately affects youth of color and those with low income, so while this problem is not limited to public defense, having effective representation matters. In other words, “without effective legal representation, it is virtually impossible for low-income youth of color to challenge these injustices in the system and protect their own rights.” However, a good defender can help to correct some of the other systemic imbalances. A juvenile defender with adequate time and resources could have a significant, positive impact on youth incarceration.

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Katayoon Majd and Patricia Puritz, “The Cost of Justice: How Low-Income Youth Continue To Pay the Price of Failing Indigent Defense Systems,” *Georgetown Journal on Poverty Law & Policy* XVI, Symposium Issue (2009).

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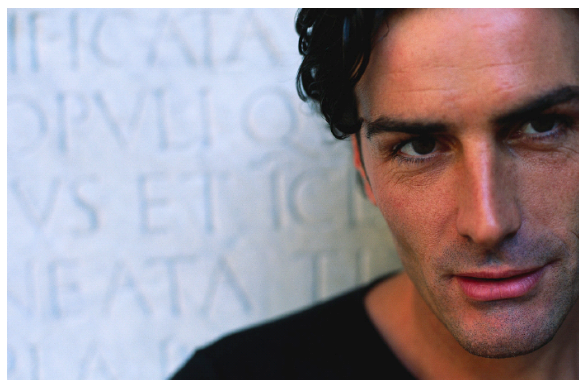
Phone interview with Mary Ann Scali, Deputy Director, National Juvenile Defender Center, June 9, 2011.
Sarah Geraghty and Miriam Gohara, *Assembly Line Justice*, 2003.

QUALITY PUBLIC DEFENSE SERVICES CAN REDUCE HEAVY FINANCIAL AND SOCIAL BURDENS ASSOCIATED WITH INCARCERATION.

A good public defense system can reduce wasteful incarceration. Access to an effective public defense system can reduce corrections spending both on pretrial detention and subsequent sentences without compromising public safety.²¹⁴ In Georgia, a public defender office with a policy requiring defenders to meet with their incarcerated clients with 72 hours of arrest helped to reduce the number of people incarcerated before trial and the length of time they spent waiting. The County Sherriff noticed the improvement, saying “the defendants benefit, the court system benefits and it benefits Catoosa County.”²¹⁵ Having fewer people in jail – 190 instead of 220 on an average day despite an increase in the number of cases – saves the county \$40 per person each day totaling a savings of \$36,000 a month.

While a lower incarceration rate is not entirely a result of having a good public

defender, there are several characteristics that contribute to the office’s effectiveness and the county’s lower incarceration rate: proximity of the office (both physically and in presence allowing PDs to provide more legal services), continuity, experience, training, parity (as an equal partner in the justice system) and creative allocation of resources creating greater efficiency.²¹⁶ Washtenaw County, Michigan saved over \$2 million a year in corrections costs by having prison commitment rates significantly below state averages – an amount that happens to be more than the entire 2003 budget for the Washtenaw County Public Defender.²¹⁷ Of the 13 counties compared in the study, one other also had a public defender office; however, it was underfunded and the caseloads were four to five times higher than the caseloads in Washtenaw County.²¹⁸ As a result, its prison commitment and probation violation rates were significantly higher. The Washtenaw County public defender office has a policy of seeing all people in jail on the same day that they are arrested; in doing so, defenders are able to gather information that can influence the client’s options throughout the entire process, including pretrial alternatives to detention and pretrial advocacy.



MURRIEL JOHNSON

Murriel Johnson credits his public defender and social worker with saving his life. The Vietnam veteran and former armed security officer for the U.S. General Service Administration suffered from depression and post-traumatic stress disorder for decades, self medicating with alcohol, drugs and his work, but a tragedy in his life triggered a flashback and violent incident. He was arrested and, unable to post a half million dollar bail, was detained to await trial. His public defender worked with a social worker at the Neighborhood Defender in Baltimore to not only provide zealous legal advocacy, but also to uncover and address the underlying causes of Mr. Johnson's incident and arrest. They were able to connect him to the treatment and services he needed for his substance abuse and depression. According to Mr. Johnson, "they helped me when I couldn't help myself." His defender and social worker kept him and his family informed at every stage in the process leaving Mr. Johnson with "no doubt" that they were working on his behalf, "advocating for me in my best interest." Ultimately, they were able to secure an appropriate sentence – 10 months in Spring Grove Hospital Center, a mental health center that provides treatment to people with mental illness including those who are involved in the criminal justice system.

Mr. Johnson has been clean and sober for five years, is currently a college student studying addiction counseling and social work, and hopes to apply these interests as a counselor or social worker. Mr. Johnson put in the work as a partner in his defense, but without the help of his public defender and social worker, he may have never had the opportunity to succeed. According to Mr. Johnson, without them, he would have become a number in the system; "without them, I really don't know where I would be." For Mr. Johnson, "[public defenders] can and did make a difference in my life."

Personal Interview with Murriel Johnson, Maryland Office of the Public Defender and Neighborhood Defenders Northwest client, Baltimore, MD, June 8, 2011.

PART V

DOING IT BETTER: HOLISTIC AND COMMUNITY-BASED APPROACHES

Some places are using holistic or community-based approaches to public defense. While there are many different approaches (and terminology)²¹⁹ the general theory is to treat the client as a whole, not simply as a criminal case, and to examine and address the underlying causes of justice system involvement for clients and ultimately break the cycle of criminal justice system contact.²²⁰

This approach takes into account the many factors that can lead a person to come into contact with the justice system – mental or physical health problems, drug or alcohol use or abuse, education or housing issues – and attempts to find alternative solutions to incarceration that actually address those root causes.

While most defenders do not employ a client-centered approach to advocacy, the network of holistic, community-based defenders is growing. The Brennan Center for Justice at New York University School of Law began the Community Oriented Defender Network (COD) in 2003 in order to “enable defense counsel to engage community based institutions to reduce unnecessary criminal justice system contact” and has grown to over 50 agencies. The Network has identified 10 principles:

1. create a client-centered practice;
2. meet clients’ needs;
3. partner with the community;
4. fix systematic problems;

5. educate the public;
6. collaborate;
7. address civil legal needs;
8. pursue a multidisciplinary approach;
9. seek necessary support; and
10. engage fellow COD members.

Their report – *Community Oriented Defense: Stronger Public Defenders* – provides examples of defenders practicing these principles.²²¹

THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA

Enough time, funding, manageable caseloads and access to resources: Washington D.C.’s Public Defender Service (PDS) attorneys have enough time to provide quality representation to their clients.²²² Having manageable caseloads, combined with access to resources and support enables PDS attorneys to manage their workloads, spend enough time on each case, and provide quality representation. For example, PDS investigators help conduct

thorough investigations that enable the attorneys to work on other aspects of the case—conduct legal research, prepare cross examinations, think about case theory and meet other important legal duties. However, this would not be possible without the active participation of the private bar.²²³ According to the PDS FY2011 Budget Justification, “PDS handles a majority of the most difficult, complex, time-consuming, and resource-intensive criminal cases, while private attorneys (CJA lawyers) handle the majority of the less serious felony, misdemeanor, and regulatory offenses.”²²⁴ This, combined with access to adequate resources and funding, allows PDS attorneys to maintain more reasonable caseloads compared to many defenders across the country. This is one of the reasons PDS is able to provide quality services to their clients.

A client-centered approach: Washington, D.C. PDS approaches cases with the perspective that the client – not the law – comes first, so they try to get to know the person, identify underlying issues that may have contributed to justice system involvement and find solutions that will help the client and prevent

re-arrests.²²⁵ This is also evident through PDS’s many specialty divisions, including trial, appellate, special litigation, parole, civil legal services, mental health, community defender, defender services, office of rehabilitation and development and investigation divisions.²²⁶

Intensive training contributes to PDS’s success as does its independence from the judiciary and political influence. All of these factors contribute to an office culture and a national reputation that help to maintain the quality of representation.²²⁷ Furthermore, PDS attorneys and staff are involved in the policymaking process, making sure that the perspective of defenders and their clients are included when policy decisions are made.

PDS is a good example of how a defender can provide quality representation in and outside of the courtroom when he/she has enough time and resources to do so.

To learn more about the D.C. Public Defender Service, please visit www.pdsdc.org.

DAVID*

Twelve years ago David faced the possibility of spending 30 years in prison for conspiracy and drug charges in Washington, D.C. His D.C. PDS public defender helped to achieve a more appropriate outcome and sentence for his client and David ended up accepting a plea bargain and serving eight and a half years in prison. David “could tell that [his public defender] cared” because he showed up to every hearing and “went the extra mile” for him. David has faced challenges since his release from prison over five years ago, but has successfully completed culinary school and is a chef and instructor. He has been able provide an example for other formerly incarcerated people who are looking for a second chance just like he was. This means a lot to him because he “is able to help rebuild the community [he] hurt.”

*Name has been changed.

Personal Interview. Washington, D.C., June 2, 2011.

NEIGHBORHOOD DEFENDERS NORTHWEST BALTIMORE, MARYLAND

By locating their offices in the community, rather than in a courthouse or other building removed from the people who use defender services, the Neighborhood Defenders are able to establish relationships with community members and organizations and build trust. For example, the Neighborhood Defenders in Baltimore are located in a neighborhood where many of their clients live. This has contributed not only to building trust and relationships in the community, but has increased their ability to establish and maintain client contact and conduct thorough investigations into cases. By establishing early intervention with their client the Neighborhood Defenders are better able to advocate for pretrial release which not only reduces costs, but can help get people into treatment and diversion programs, having a real impact on people's case outcomes.²²⁸ They are also able to help connect people to resources. In fact, some Baltimore residents come into their office to access services even if they are not clients. Being in the neighborhood has also impacted how the defenders see their clients and how the system treats them, perhaps increasing their awareness of some of the systemic problems and need for policy changes and reform.²²⁹

This approach can have a real impact for people. Anthony²³⁰ was arrested for assault and public intoxication and was released on bail. After he was released, he saw a flyer for the Neighborhood Defenders in Baltimore and asked for help. The public defender he worked with was "really nice" and was always available to take his calls. He helped

Anthony resolve his case and explained everything that was happening while it was happening so there were no surprises. They are still working on modifying his sentence and he is very appreciative of the service he is being provided. Anthony hopes that they "keep doing what they're doing," by helping people like himself.²³¹

To learn more about the Baltimore Northwest Defenders, please visit www.opd.state.md.us/neighborhood.html.

RHODE ISLAND PUBLIC DEFENDER

The Rhode Island Public Defender (RIPD) uses a holistic, client-centered approach to advocacy.²³² This approach originated out of the belief that simply working hard to provide quality legal representation was not enough; that engaging community partners and resources for their clients was important and necessary. In addition to attorneys, the office includes social workers, investigators, interpreters and a community outreach liaison that specializes in community outreach and engagement, and systemic reform and policy efforts in addition to providing case management for clients. One of RIPD's programs, the Defender Community Advocacy Program (DCAP) provides early intervention, having social workers on call in the courtroom during arraignment. This way, social workers can help get people into appropriate diversion and treatment programs rather than being incarcerated before trial.

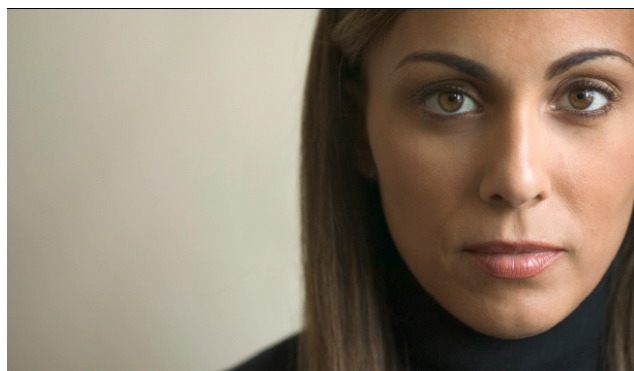
The office attempts to be proactive rather than reactive, building community partnerships, providing community education and trainings, working on policy reform, and accessing resources for clients that will help address root causes of justice system

involvement. RIPD has seen tangible results, like getting people into diversion and treatment programs instead of prison and helping to get people into housing and jobs. For example, DCAP saved the state at least \$23.6 million over a three year period.²³³ They have also seen palpable changes in community sentiment, getting significant positive feedback from clients and community members. While defenders in Rhode Island still face challenges when it comes to workloads and larger criminal justice policies, using social workers and a holistic approach can improve and expand their ability to provide quality representation and advocacy for their clients inside and outside of the courtroom.

To learn more about the Rhode Island Public Defender visit www.ripd.org.

THE BRONX DEFENDERS

The Bronx Defenders provide public defense to their clients through a holistic, client-centered team approach.²³⁴ The members of the team include criminal defense, family, immigration and civil attorneys, other legal advocates and social workers. All members of the team bring their skills and resources to the table and the client is able to access these people and resources, and make key decisions regarding his or her priorities regarding the case.



The Bronx Defenders also engage in systemic and policy reform and engage the community of which they are a part. They host community block parties to connect with local organizations and community members. They are also working on various reform efforts regarding criminal justice policies that affect them and their clients, including the overcriminalization of behaviors like subway turnstile jumping and low level drug offenses that have flooded the courts and weighed on defender workloads. They also weigh in on bail and pretrial detention policies that lead to increased pressure to plead guilty in order to be released from jail.

The Bronx Defenders have seen the impact of their work: according to data from their case files, they are able to win favorable case outcomes – dismissals and acquittals – nearly twice as frequently as attorneys in the same courts and serving about 20 percent less jail time. Furthermore, 75 percent of their clients who are convicted end up receiving sentences that do not include incarceration, which can include diversion and treatment programs. They have measured an impact on community perception, with 9 out of 10 clients indicating that they were happy with their representation.²³⁵ The Bronx Defenders are also providing technical assistance to other defender offices from across the country through their Center for Holistic Defense.

To learn more about the Bronx Defenders visit www.bronxdefenders.org.

PART VI

RECOMMENDATIONS: A VISION FOR PUBLIC JUSTICE

Defenders are in a unique position to witness firsthand potential injustices, wasteful spending practices, and a need for policy reform. As such, public defenders can and should advocate for justice system reform that could begin to correct policies and practices that produce disproportionate impacts on communities of color and those with low income.²³⁶

By seeking a seat at the decision-making table, defenders would be able to provide an important perspective on the impact of certain policies on communities of color and those with low income.²³⁷ Given the opportunity, they may even be able to help shape policies that would not only improve their own ability to provide quality defense, but also address biases throughout the system. For instance, the Defender Association in Seattle initiated the Racial Disparity Project to examine and address racial disproportionality in driving with a suspended license cases and is now beginning to address similar issues in drug arrests and prosecution.²³⁸ In Washington, D.C., public defenders take a very active role in the policy making process; many defenders testify as experts, sit on committees, help write legislation and play other important roles in the policymaking process.²³⁹

Public defenders can also examine the root causes of justice system involvement. Mental health and substance abuse issues can be a significant factor in many people's contact with justice system, and people with mental illness make up a growing proportion of defender clients.²⁴⁰ While middle- and high-income people with mental illness may be able to access

services and treatment, people with low income may have less access to these kinds of services and may end up in the justice system.²⁴¹ Illustrating that point, there are more people with mental illness incarcerated than in mental hospitals.²⁴² Defender programs can help connect people in need of mental health or substance abuse treatment to services and in turn divert cases and people from further justice system involvement.²⁴³

Defenders have the opportunity to begin to identify and address racism and classism throughout the justice system. While it would not likely eliminate race- or class-based bias or disparate outcomes in the entire justice system, improving all public defense could have a significant impact on addressing these imbalances. Defender offices could begin by indentifying racial disparities within public defense through collecting data systematically. Having good data will help identify and begin to address disparate outcomes not only within public defense, but throughout the justice system as a whole. In Wisconsin, for example, the Public Defender has started to collect data on disparate sentencing outcomes and as a result will be able to show patterns and disparities to judges with the hopes of

correcting racial bias in this part of the justice system.²⁴⁴

In addition to involving public defenders in identifying some of the problems with the system, the Justice Policy Institute makes the following recommendations for a more fair and effective justice system that includes quality representation for all people and including those affected in the policymaking decisions.

Follow the ABA Ten Principles.²⁴⁵ The Ten Principles represent the minimum standards in providing quality public defense. In order to ensure all people are receiving quality counsel, these principles should be met.

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.
2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.
4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
5. Defense counsel's workload is controlled to permit the rendering of quality representation.
6. Defense counsel's ability, training, and experience match the complexity of the case.
7. The same attorney continuously represents the client until completion of the case.
8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.
9. Defense counsel is provided with and required to attend continuing legal education.

10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

Integrate a holistic and community-based approach to public defense. Community-based and holistic approaches to defense can help address the root causes of justice system involvement and prevent future involvement by treating the whole client. This can improve public safety, save money on corrections and have a positive impact on people and communities.

Collect better data and conduct more empirical evaluations on the impact of public defense systems on people, communities and criminal justice. Rigorous research and data collection on all justice policies and practices, but especially public defense, can help policymakers make informed decisions on policies that impact public defense.

Involve public defenders and affected communities in the policymaking process. As people who are directly involved with the laws and policies in a state or locality, defenders are in the unique position of being able to offer insight on the impact these policies have on people, on their law offices, and on the justice system. As such, defenders should be actively engaged in the policymaking process for criminal justice policies as equal partners in the justice system.

Policymakers, researchers and advocates should actively seek out the voices and perspectives of people who have used defender services to gain a better understanding of the realities of various systems and the implications for people. Nobody knows better the impact of criminal justice policies and practices than people who are involved in the justice system. Involving people directly impacted by the justice system will provide crucial information on making better and more effective and just policies.

¹ Throughout the report “public defense” is used to refer to all forms of indigent defense – public defender offices, assigned counsel and contract counsel.

² According to the Bureau of Justice Statistics, in 2007 there were over 5.6 million cases reviewed by public defender offices alone, which does not include assigned or contract counsel who make up a significant component of indigent defense services. Bureau of Justice Statistics, “Indigent Defense Systems” (accessed July 18, 2011) <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=28>.

³ Scott Wallace and David Carroll, *Implementation and Impact of Indigent Defense Standards* (Washington, D.C.: National Legal Aid & Defender Association, 2003), i.

⁴ While this report attempts to examine many aspects of public defense and the justice system in which it operates, it does not address the death penalty, its impact on public defense systems or the challenges associated with providing death penalty representation. For more information about this issue, see the American Bar Association’s Death Penalty Representation Project. www.americanbar.org/advocacy/other_aba_initiatives/death_penalty_representation.html.

⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963), 344.

⁶ Norman Lefstein and Robert L. Spangenberg (Reporters), *Justice Denied: America’s Continuing Neglect of our Constitutional Right to Counsel Report of the National Right to Counsel Committee* (Washington, D.C.: The Constitution Project, 2009), 19. www.nlada.org/DMS/Documents/1239831988.5/Justice%20Denied_%20Right%20to%20Counsel%20Report.pdf; *Powell v. Alabama*, 287 U.S. 45 (1932).

⁷ Norman Lefstein and Robert L. Spangenberg, 2009, 19.

⁸ *Douglas v. California*, 372 U.S. 353 (1963); *Halbert v. Michigan*, 545 U.S. 605 (2005) extended the right to include appeals following a guilty plea.

⁹ *In Re Gault*, 387 U.S. 1 (1967).

¹⁰ *Argersinger v. Hamlin*, 407 U.S. 25 (1972); The right also includes cases in which people who receive a suspended jail sentence results and probation are incarcerated due to probation revocation following *Alabama v. Shelton*, 535 U.S. 654 (2002).

¹¹ *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008).

¹² *McMann v. Richardson*, 397 U.S. 759, (1970), 775 (footnote 14).

¹³ *Strickland v. Washington*, 466 U.S. 668 (1984), 694.

¹⁴ David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (New York, NY: The New Press, 1999), 78-9.

¹⁵ David Cole, 1999.

¹⁶ The authors of *Justice Denied* have said the Supreme Court’s right to counsel rulings are an “unfunded mandate,” Norman Lefstein and Robert L. Spangenberg, 2009, 29-30.

¹⁷ Norman Lefstein and Robert L. Spangenberg, 2009.

¹⁸ See, for example, The Defender Association in Seattle, Washington: www.defender.org.

¹⁹ Phone Interview with Robert Spangenberg, Professor and Researcher, the Spangenberg Project, George Mason University, April 22, 2011.

²⁰ Interview with Robert Spangenberg.

²¹ Phone Interview with James Neuhard, Former Director of the State Appellate Defender Office of Michigan (SADO), April 27, 2011.

²² Holly R. Stevens, Colleen E. Sheppard, Robert Spangenberg, Aimee Wickman and Jon B. Gould, *State, County and Local Expenditures for Indigent Defense Fiscal Year 2008* (Fairfax, Virginia: The Spangenberg Project, George Mason University’s Center for Justice, Law and Society, prepared on behalf of the Bar Information Program at the American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants, 2010). www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/defender/downloads/Indigent_Defense_Expenditures_FY08.authcheckdam.pdf.

²³ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²⁴ Personal Interview with David Carroll, Director of Research and Evaluations and Jon Mosher, Research Associate, National Legal Aid & Defender Association, Washington, D.C., April 13, 2011.

²⁵ Phone Interview with Norman Lefstein, Professor of Law and Dean Emeritus, Indiana University School of Law, April 14, 2011.

²⁶ Interview with David Carroll and Jon Mosher.

- ²⁷ Phone Interview with Randolph Stone, Director, Criminal & Juvenile Justice Project, Clinical Professor of Law, The University of Chicago Law School; May 4, 2011; Stone has also served as Public Defender of Cook County, IL and Deputy Director for the Public Defender Service for the District of Columbia.
- ²⁸ *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (Washington, D.C.: American Bar Association, 2004), 38. www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/defender/brokenpromise/execsummary.authcheckdam.pdf.
- ²⁹ The Spangenberg Project for the Bar Information Program at the ABA SCLAIID, 2010.
- ³⁰ *Gideon's Broken Promise*, 38.
- ³¹ *Gideon's Broken Promise*, 38.
- ³² "Indigent Defense: Ensuring the Constitutional Right to Counsel" in *Smart on Crime Recommendations for the Administration and Congress* (Washington, D.C.: The Smart on Crime Coalition, The Constitution Project, 2011), 75. www.besmartoncrime.org/pdf/Complete.pdf.
- ³³ *Gideon's Broken Promise*, 7, 17; Norman Lefstein and Robert L. Spangenberg, 2009, 93, 95.
- ³⁴ **Corrections:** National Association of State Budget Officers, State Expenditure Reports, www.nasbo.org; **Indigent Defense:** The Spangenberg Project for the Bar Information Program at the ABA SCLAIID, 2010.
- ³⁵ Amanda Petteruti and Jason Fenster, *Finding Direction: Expanding Criminal Justice Options by Considering Policies of Other Nations* (Washington, D.C.: Justice Policy Institute, 2011), 51. www.justicepolicy.org/research/2322
- ³⁶ Phone Interview with Nicholas Chiarkas, Former State Public Defender of Wisconsin, May 5, 2011.
- ³⁷ *A Race to the Bottom, Speed and Savings Over Due Process: A Constitutional Crisis* (Washington, D.C.: National Legal Aid & Defender Association, 2008), 5-6. www.nlada.net/sites/default/files/mi_racetothetbottomjseri06-2008_report.pdf.
- ³⁸ NLADA, *A Race to the Bottom*, 2008.
- ³⁹ NLADA, *A Race to the Bottom*, 2008.
- ⁴⁰ Norman Lefstein and Robert L. Spangenberg, 2009, 54-5.
- ⁴¹ "NACo seeks indigent defense system reform for rural America" (Washington, D.C.: National Association of Counties News Release, January 19, 2011), 1. www.naco.org/newsroom/latest/Documents/indigent%20defense%20quotes.pdf.
- ⁴² NACo Press Release; Personal Interview with Donald Murray, Senior Policy Advisor to the National Association of Counties for Justice and Public Safety, NACo, Washington, D.C., June 14, 2011.
- ⁴³ Interview with Robert Spangenberg; Interview with David Carroll and Jon Mosher.
- ⁴⁴ Interview with David Carroll and Jon Mosher; Interview with Norman Lefstein; Interview with James Neuhard; Interview with Randolph Stone; Interview with Nicholas Chiarkas.
- ⁴⁵ Laurence A. Benner, *When Excessive Public Defender Workloads Violate the Sixth Amendment Right to Counsel Without a Showing of Prejudice* (Washington, D.C.: American Constitution Society, 2011), 12. www.acslaw.org/sites/default/files/bennerib_excessivepd_workloads.pdf.
- ⁴⁶ Nathan Koppel, "Public Defenders Stretched Thin by State Cuts," *The Wall Street Journal*, April 14, 2011. <http://online.wsj.com/article/SB10001424052748704530204576232812464584064.html>.
- ⁴⁷ Benner, *When Excessive Public Defender Workloads Violate the Sixth Amendment Right to Counsel Without a Showing of Prejudice*, 12.
- ⁴⁸ See, for example, Jennifer Burnett, "Justice in Jeopardy; Budget Cuts Put State Public Defense Systems Under Stress, The Council of State Governments, July 1, 2010. <http://knowledgecenter.csg.org/drupal/content/justice-jeopardy-budget-cuts-put-state-public-defense-systems-under-stress>.
- ⁴⁹ *Gideon's Broken Promise*, 38.
- ⁵⁰ *Ten Principles of a Public Defense Delivery System* (Chicago, IL: American Bar Association Standing Committee on Legal Aid and Indigent Defendants, 2002).
- ⁵¹ *Improving Criminal Justice Systems through Expanded Strategies and Innovative Collaborations Report of the National Symposium on Indigent Defense, 1999* (Washington, D.C.: U.S. Department of Justice Office, 2000). www.sado.org/fees/icjs.pdf.
- ⁵² *Argersinger v. Hamlin*, 407 U.S. 25 (1972).
- ⁵³ According to Former Attorney General Janet Reno, "[m]y experience as a prosecutor and as Attorney General have taught me just how important it is for every leg of the criminal justice system to stand strong. Indigent defense is an equally essential element of the criminal justice process, one which should be appropriately structured and funded and operating with effective standards. When the conviction of a defendant is challenged on the basis of inadequate representation, the very legitimacy of the conviction itself is called into question. Our criminal justice system is

interdependent: if one leg of the system is weaker than the others, the whole system will ultimately falter” (DOJ, Improving Justice Systems, xiii).

⁵⁴ Norman Lefstein and Robert L. Spangenberg, 2009, 61; *Gideon’s Broken Promise*, 38.

⁵⁵ *Resources of the Prosecution and Indigent Defense Functions in Tennessee* (West Newton, MA: The Spangenberg Group, 2007).

www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/defender/downloads/TN_CompStudyFINAL_7_30_07.authcheckdam.pdf.

⁵⁶ Norman Lefstein and Robert L. Spangenberg, 2009, 61-2.

⁵⁷ Norman Lefstein and Robert L. Spangenberg, 2009, 62.

⁵⁸ See Donald J. Farole Jr. and Lynn Langton, *County-based and Local Public Defender Offices, 2007* (Washington, D.C.: Bureau of Justice Statistics, 2010) and Lynn Langton; Donald Farole Jr., *State Public Defender Programs, 2007* (Washington, D.C.: Bureau of Justice Statistics, 2010) and *Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview* (West Newton, MA: The Spangenberg Group, 2007), for more on compensation rates for public defenders, assigned counsel and contract counsel.

⁵⁹ Robert C. Boruchowitz, Malia Brink and Maureen Dimino, *Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Court*, (Washington, D.C.: National Association of Criminal Defense Lawyers, 2009).

[www.nacdl.org/public.nsf/defenseupdates/misdemeanor/\\$FILE/Report.pdf](http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf); Norman Lefstein and Robert L.

Spangenberg, 2009, 65; *Gideon’s Broken Promise*, 38; Excessive caseloads, minimal resources, supervision, support and other factors can also contribute to burnout and high rates of turnover (Robert C. Boruchowitz, Malia Brink and Maureen Dimino, 2009, 46). Turnover can have financial costs, including spending money training new staff (Interview with James Neuhard).

⁶⁰ *Gideon’s Broken Promise*, 9-10, 27.

⁶¹ *Gideon’s Broken Promise*, 7; Norman Lefstein and Robert L. Spangenberg, 2009, 64.

⁶² Interview with David Carroll and Jon Mosher.

⁶³ NLADA, *A Race to the Bottom*, 9-11.

⁶⁴ NLADA, *A Race to the Bottom*, 11.

⁶⁵ Sarah Geraghty and Miriam Gohara, *Assembly Line Justice: Mississippi’s Indigent Defense Crisis* (New York, NY: NAACP Legal Defense and Educational Fund, Inc., 2003), 16.

www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/ms_assemblylinejustice.authcheckdam.pdf

⁶⁶ Interview with David Carroll and Jon Mosher.

⁶⁷ Stephen J. Schulhofer and David D. Friedman, “Reforming Indigent Defense: How Free Market Principles Can Help to Fix a Broken System,” *Cato Institute Policy Analysis* no. 666 (2010). www.cato.org/pubs/pas/pa666.pdf; Robert C. Boruchowitz, Malia Brink and Maureen Dimino, 2009, 20-1.

⁶⁸ Department of Justice, National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Courts 13.12 (1973).

⁶⁹ Donald J. Farole Jr. and Lynn Langton, *County-based and Local Public Defender Offices, 2007*, 8-10.

⁷⁰ Lynn Langton and Donald J. Farole Jr., *State Public Defender Programs, 2007*, 12.

⁷¹ This is not to say that public defender offices are always more effective than assigned counsel and contract counsel based systems. There are systems that rely on assigned counsel and/or contract counsel that provide high quality defense services, and public defender offices that fail to (Interview with David Carroll and Jon Mosher).

⁷² Personal Interview with Arthur Ago, Deputy Trial Chief, Public Defender Service for the District of Columbia, Washington, D.C., May 4, 2011; Phone Interview with Robert Boruchowitz, Professor, Seattle University School of Law, Former Director, The Defender Association, April 26, 2011.

⁷³ ABA *Ten Principles*.

www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf

⁷⁴ Formal Ethical Opinion 06-441: Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation (Chicago, IL: American Bar Association Standing on Ethics and Professional Responsibility, 2006).

www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/defender/downloads/ethics_opinion_defender_caseloads_06_441.authcheckdam.pdf

⁷⁵ For more information about the Defender Association, see their website at: www.defender.org.

⁷⁶ Interview with Robert Boruchowitz.

⁷⁷ *Halting Assembly Line Justice: PDS: A Model of Client-Centered Representation* (Washington, D.C.: National Legal Aid & Defender Association, 2008), 12-13. www.nlada.net/sites/default/files/dc_haltingassemblylinejusticejseri08-2008_report.pdf

⁷⁸ NLADA *Halting Assembly Line Justice*, 13.

⁷⁹ Interview with Arthur Ago; Interview with Randolph Stone.

⁸⁰ The ABA *Ten Principles* identifies participation of the private bar as an important component of delivering quality public defense. An engaged private bar can ease caseloads and lead to better representation (Interview with Randolph Stone).

⁸¹ Personal email with Jon Mosher, Research Associate, National Legal Aid & Defender Association, Washington, D.C. June 13, 2011; for more information about Louisiana, see <http://lpdb.la.gov/index/index.php>; for more information about Montana, see <http://publicdefender.mt.gov/resources.asp>; for more information about Colorado see <http://pdweb.coloradodefenders.us/>; and for more information about Massachusetts, see www.publiccounsel.net. Indiana requires counties have caseload limits in order to receive financial assistance (www.in.gov/judiciary/pdc/counties.html) and Oregon sets caseload limits in its contracts for trial-level public defense services (www.oregon.gov/OPDS/).

⁸² Donald J. Farole Jr. and Lynn Langton, *County-based and Local Public Defender Offices*, 2007.

⁸³ Norman Lefstein and Robert L. Spangenberg, 2009, 65.

⁸⁴ Norman Lefstein and Robert L. Spangenberg, 2009, 69.

⁸⁵ *State ex rel Missouri Public Defender Commission v. Pratte* 298 S.W.3d 870 available at www.nlada.net/sites/default/files/mo_stateexrelmissourivpratte_12-08-2009.pdf. The Court held that the Public Defender could not refuse cases by category. In 2010 several offices were placed on “limited availability” due to excessive caseloads. State of Missouri Public Defender Commission Fiscal Year 2010 Annual Report available at www.publicdefender.mo.gov/about/FY2010AnnualReport.pdf

⁸⁶ State of Missouri Public Defender Commission Fiscal Year 2010 Annual Report.

⁸⁷ Robert C. Boruchowitz, Malia Brink and Maureen Dimino, 2009, 21.

⁸⁸ Robert C. Boruchowitz, Malia Brink and Maureen Dimino, 2009, 21.

⁸⁹ Norman Lefstein and Robert L. Spangenberg, 2009; ABA *Ten Principles*. [www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.uthcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf).

⁹⁰ Norman Lefstein and Robert L. Spangenberg, 2009, 68.

⁹¹ Interview with James Neuhard; Robert C. Boruchowitz, Malia Brink and Maureen Dimino, 2009, 31.

⁹² Robert C. Boruchowitz, Malia Brink and Maureen Dimino, 2009, 31

⁹³ Sarah Geraghty and Miriam Gohara, 11.

⁹⁴ NLADA, *A Race to the Bottom*, 16.

⁹⁵ Norman Lefstein and Robert L. Spangenberg, 2009, 95; see Robert C. Boruchowitz, Malia Brink and Maureen Dimino, 2009.

⁹⁶ Interview with Robert Boruchowitz; Robert C. Boruchowitz, Malia Brink and Maureen Dimino, 2009, 25.

⁹⁷ Justice Policy Institute, *Pruning Prisons: How Cutting Corrections Can Save Money and Protect Public Safety* (Washington, D.C.: 2009) www.justicepolicy.org/research/1928.

⁹⁸ Norman Lefstein and Robert L. Spangenberg, 2009, 70-1.

⁹⁹ Robert C. Boruchowitz, Malia Brink and Maureen Dimino, 2009, 25.

¹⁰⁰ Norman Lefstein and Robert L. Spangenberg, 2009, 73.

¹⁰¹ Interview with David Carroll and Jon Mosher; Robert C. Boruchowitz, Malia Brink and Maureen Dimino, 2009, 27.

¹⁰² For an overview of reclassification and recent state activity see *An Update on State Efforts in Misdemeanor Reclassification, Penalty Reduction and Alternative Sentencing* (Fairfax, Virginia: The Spangenberg Project, George Mason University’s Center for Justice, Law and Society, prepared on behalf of the Bar Information Program at the American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants, 2010). www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/defender/downloads/20110321_aba_tsp_reclassification_report.authcheckdam.pdf.

¹⁰³ Larceny by check, trespassing, disturbing the peace/disorderly conduct, shoplifting and driving with a suspended license or registration.

¹⁰⁴ Report of the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts, Chapter 253 of the Acts of 2004 (2005). www.publiccounsel.net/administration/pdf/Rogers%20Commission%20Report.pdf

¹⁰⁵ Personal Interview with Natalie Finegar, Director, Neighborhood Defender NW, Maryland Office of the Public Defender, Baltimore, MD, April 26, 2011.

¹⁰⁶ Norman Lefstein and Robert L. Spangenberg, 2009, 71-2.

¹⁰⁷ Robert C. Boruchowitz, Malia Brink and Maureen Dimino, 2009, 34.

¹⁰⁸ Norman Lefstein and Robert L. Spangenberg, 2009, 72, Robert C. Boruchowitz, Malia Brink and Maureen Dimino, 2009, 34.

¹⁰⁹ A report by the National Association of Criminal Defense Lawyers argues that increased collateral consequences of arrests, pleas and convictions should lead to higher trial rates; however, overwhelming evidence shows that trials are “nearly non-existent” in misdemeanor courtrooms. This could be indicative of defenders, already dealing with excessive caseloads, are not researching or communicating the collateral consequence to their clients. (Robert C. Boruchowitz, Malia Brink and Maureen Dimino, 2009, 34).

¹¹⁰ Interview with Randolph Stone.

¹¹¹ ABA *Ten Principles*.

¹¹² *Gideon’s Broken Promise*, 11.

¹¹³ Norman Lefstein and Robert L. Spangenberg, 2009, 91, ABA *Ten Principles*.

¹¹⁴ *Gideon’s Broken Promise*, 11; Norman Lefstein and Robert L. Spangenberg, 2009, 76.

¹¹⁵ Norman Lefstein and Robert L. Spangenberg, 2009, 76.

¹¹⁶ Interview with Arthur Ago.

¹¹⁷ Norman Lefstein and Robert L. Spangenberg, 2009, 93-4.

¹¹⁸ According to many experienced defenders, the key role of a defender is to test the prosecution’s case and to serve as “quality control,” Interview with James Neuhard; Interview with Nicholas Chiarkas; Interview with Arthur Ago.

¹¹⁹ See Benner, *When Excessive Public Defender Workloads Violate the Sixth Amendment Right to Counsel Without a Showing of Prejudice*.

¹²⁰ ABA *Ten Principles*

¹²¹ Norman Lefstein and Robert L. Spangenberg, 2009, 94.

¹²² Donald J. Farole Jr. and Lynn Langton, *County-based and Local Public Defender Offices*, 2007, 12. Some prosecutors say that they do not have sufficient access to investigators. A study found that in 2001 there was one investigator for every 3.6 prosecutors and that investigators made up 9.4 percent of total personnel in prosecutors offices. In 2005, investigators made up 9 percent. While lack of access to investigators may be a concern in some offices, prosecutors have the discretion to select which cases to prosecute whereas public defenders must provide representation to all those who are eligible. Koppel, “Public Defenders Stretched Thin by State Cuts,” *The Wall Street Journal*, April 14, 2011; Bureau of Justice Statistics, *Prosecutors in State Courts*, 2001 and 2005 (Washington, D.C.: U.S. Department of Justice). <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbs&sid=9>

¹²³ Laurence A. Benner, “The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California,” *California Western Law Review* 45 No 20 (2009), 278.

¹²⁴ ABA *Ten Principles*, Interview with Norman Lefstein.

¹²⁵ ABA *Ten Principles*.

¹²⁶ *Gideon’s Broken Promise*, 20-1

¹²⁷ “Having judges maintain a role in the supervision of indigent defense services can create the appearance of partiality – thereby undermining confidence in the bedrock principle that every judge be a scrupulously fair arbitrator. Policy-makers should guarantee to the public that critical decisions regarding whether a case should go to trial, whether motions should be filed on a defendant’s behalf, or whether certain witnesses should be cross-examined are based solely on the factual merits of the case and *not* on a public defender’s desire to please the judge in order to maintain his job” (NLADA, *A Race to the Bottom*, 37-8). For examples of the impact of lack of independence in Michigan counties, see NLADA’s report, *A Race to the Bottom*, 35-55.

¹²⁸ For examples of influence exercised by defense funding sources, see Norman Lefstein and Robert L. Spangenberg, 2009, 80-2.

¹²⁹ Interview with Norman Lefstein.

¹³⁰ Because of Washington, D.C.’s unique status, the “private bar” is made up of CJA (Criminal Justice Act) Panel Attorneys; lawyers who are authorized to provide representation to eligible defendants in federal cases.

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- ¹³¹ Interview with Arthur Ago.
- ¹³² Norman Lefstein and Robert L. Spangenberg, 2009, 25, 93.
- ¹³³ ABA *Ten Principles*; Interview with David Carroll and Jon Mosher.
- ¹³⁴ Interview with David Carroll and Jon Mosher.
- ¹³⁵ For more about holistic and community-based approaches to public defense, see Part V of this report.
- ¹³⁶ *Gideon's Broken Promise*, 21.
- ¹³⁷ Interview with James Neuhard.
- ¹³⁸ See Norman Lefstein and Robert L. Spangenberg, 2009, 148-151.
- ¹³⁹ Interview with Robert Spangenberg; see also Norman Lefstein and Robert L. Spangenberg, 2009, 148-151.
- ¹⁴⁰ ABA *Ten Principles*.
- ¹⁴¹ Failing to properly fund public defense does not reduce cost, but shifts them to corrections, Norman Lefstein and Robert L. Spangenberg, 2009, 87.
- ¹⁴² Pew Center on the States, *One in 100: Behind Bars in America 2008* (Washington, D.C.: Pew Public Safety Performance Project, 2008) www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf
- ¹⁴³ Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001* (Washington, D.C.: Bureau of Justice Statistics, 2003) <http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf>
- ¹⁴⁴ U.S. Department of Justice, *Correctional Populations in the United States, 1997* (Washington, D.C.: Bureau of Justice Statistics, 2000). <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus97.pdf>; Paige M. Harrison and Allen J. Beck, *Prisoners in 2005* (Washington, D.C.: Bureau of Justice Statistics, 2006); William J. Sabol, Heather Couture and Paige M. Harrison, *Prisoners in 2006* – Appendix table 6 (Washington, D.C.: Bureau of Justice Statistics, 2007); William J. Sabol, Heather C. West and Matthew Cooper, *Prisoners in 2008* – Appendix table 10 (Washington, D.C.: Bureau of Justice Statistics, 2009); Heather C. West, William J. Sabol and Sarah J. Greenman, *Prisoners in 2009* (Washington, D.C.: Bureau of Justice Statistics, 2010).
- ¹⁴⁵ Includes State, Federal and Local expenditures. Sidra Lea Gifford, *Justice Expenditure and Employment Extracts 1997*, Table 1 (Washington, DC: Bureau of Justice Statistics, 2000) <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1031>
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- ¹⁴⁷ Don Stemen, *Reconsidering Incarceration: New Directions for Reducing Crime* (New York, NY: Vera Institute of Justice, 2007); M. Lynch, "Beating a dead horse: is there any basic empirical evidence of the deterrent effect of imprisonment," *Crime, Law and Social Change* 3, no. 4 (1999): 361; Elizabeth K. Drake, Steve Aos, and Marna G. Miller, "Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State," *Victims and Offenders*, 4 (2009):170–196. Table 1, www.wsipp.wa.gov/rptfiles/09-00-1201.pdf
- ¹⁴⁸ From 1970 to 2008, Education and Libraries spending increased 1,292 percent while Corrections spending increased 3,768 percent. National Center for Education Statistics, *Digest of Education Statistics, Table 30: Amount and percentage distribution of direct general expenditures of state and local governments, by function: Selected years, 1970-71 through 2007-08*, August 2010. http://nces.ed.gov/programs/digest/d10/tables/dt10_030.asp
- ¹⁴⁹ Justice Policy Institute, *Factsheet: Percent Change in Incarceration and Crime Rates by State, 1994-2004* (Washington, D.C.: 2007) www.justicepolicy.org/research/1974; Sarah Lyons and Nastassia Walsh, 2010.
- ¹⁵⁰ Data from the Department of Justice shows little difference in recidivism rates for people who spend short sentences in prison compared to those who are in prison longer. Patrick A. Langan and David J. Levin, *Recidivism of Prisoners Released in 1994* (Washington, D.C.: Bureau of Justice Statistics, 2002) <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf>
- ¹⁵¹ Interview with Norman Lefstein.
- ¹⁵² Sarah Lyons and Nastassia Walsh, *Money Well Spent: How positive social investments will reduce incarceration rates, improve public safety, and promote the well-being of communities* (Washington, D.C.: Justice Policy Institute, 2010) www.justicepolicy.org/research/1904
- ¹⁵³ Sarah Geraghty and Miriam Gohara, 20.
- ¹⁵⁴ Sarah Geraghty and Miriam Gohara, 8; *Gideon's Broken Promise*, 23.
- ¹⁵⁵ Interview with Norman Lefstein; Geraghty and Gohara, 20-1
- ¹⁵⁶ Sarah Geraghty and Miriam Gohara, 20.
- ¹⁵⁷ Interview with Norman Lefstein.
- ¹⁵⁸ See, for example, Anne Rankin, "The Effect of Pretrial Detention," *New York University Law Review* 39 (1964), 641–655; Michael R. Gottfredson and Don M. Gottfredson, *Decision Making in Criminal Justice: Toward a Rational Exercise of Discretion*

(New York: Plenum Press, 1988); Williams, "The Effect of Pretrial Detention on Imprisonment Decisions," 299–316; C. E. Frazier and J.K. Cochran, "Detention of Juveniles: Its Effects on Subsequent Juvenile Court Processing and Decisions," *Youth and Society* 17, no. 3 (1986): 286–305

¹⁵⁹ Interview with James Neuhard.

¹⁶⁰ Rod Morgan, "England/Wales," in Dünkel and Vagg, *Waiting for Trial*, 198.

¹⁶¹ See for example, The Pretrial Release Project at the University of Maryland School of Law.

¹⁶² Interview with James Neuhard.

¹⁶³ Interview with Norman Lefstein.

¹⁶⁴ Interview with David Carroll and Jon Mosher.

¹⁶⁵ Judge Kevin S. Burke, "Just why should we care about legal services for the poor?" *MinnPost*, April 15, 2011.

www.minnpost.com/community_voices/2011/04/15/27443/just_why_should_we_care_about_legal_services_for_the_poor

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¹⁶⁸ Interview with James Neuhard.

¹⁶⁹ Joanne I. Moore and David K. Chapman, *Driving While License Suspended 3rd Degree Survey of Courts of Limited Jurisdiction* (Washington State Office of Public Defense, 2008), 3. www.opd.wa.gov/TrialDefense/090602_DWLS3Survey.pdf

¹⁷⁰ Robert C. Boruchowitz, *Diverting and Reclassifying Misdemeanors Could Save \$1 Billion per Year: Reducing the Need For and Cost of Appointed Counsel* (Washington, D.C.: American Constitution Society, 2010), 2. www.acslaw.org/files/Boruchowitz%20-%20Misdemeanors.pdf

¹⁷¹ For examples of programs see Boruchowitz, *Diverting and Reclassifying Misdemeanors Could Save \$1 Billion per Year*; Interview with Robert Boruchowitz.

¹⁷² Interview with Norman Lefstein; Interview with Robert Boruchowitz; Interview with James Neuhard.

¹⁷³ Norman Lefstein and Robert L. Spangenberg, 2009.

¹⁷⁴ Robert C. Boruchowitz, Malia Brink and Maureen Dimino, 2009, 32.

¹⁷⁵ Interview with James Neuhard.

¹⁷⁶ Interview with James Neuhard.

¹⁷⁷ Stephen B. Bright, Marion Chartoff, Mary Sidney Kelly, Alexander Rundlet, Roslyn Satchel and Lance Stewart, "If you cannot afford a lawyer ... " *A Report on Georgia's failed indigent defense system*, (Atlanta, GA: Southern Center for Human Rights, January 2003), 18. www.schr.org/files/resources/jan_2003_report.pdf

¹⁷⁸ SCHR, "If you cannot afford a lawyer," 39–40.

¹⁷⁹ Dawn Van Hoek, "Penny-Wise and Pound-Foolish: Waste in Michigan Public Defense Spending" Chief Deputy Director, Written Testimony to the U.S. House of Representative Committee on the Judiciary, House Subcommittee on Crime, Terrorism and Homeland Security, March 26, 2009. www.sado.org/sado_news/DVH_testimony_3-26-09.pdf.

¹⁸⁰ While trial level defense is provided on a county level in Michigan, SADO is a statewide organization that handles about a quarter of in indigent appeals. The \$3,670,000 was saved by SADO's 2–4 person special unit of attorneys who handle appeals on guilty pleas. By correcting the errors, they reduced between 122.5 and 309 years from sentences. Assuming an annual cost of corrections of \$30,000, they saved \$3,670,000 between 2003 and 2007. If extended to a system-wide level, Michigan could have saved nearly \$70 million by avoiding these sentencing errors on the trial level.

¹⁸¹ Norman Lefstein and Robert L. Spangenberg, 2009, 45–6.

¹⁸² Interview with David Carroll and Jon Mosher.

¹⁸³ Remarks of U.S. Attorney General Janet Reno at the 2000 National Symposium on Indigent Defense.

www.nlada.org/Publications/Indigent_Defense/OctNovArticle3?printable=yes.

¹⁸⁴ "Despite the difficulty of satisfying the *Strickland* standard on appeal, ineffective assistance of trial counsel is found in a significant number of cases. And the cost to the system is often extravagant." (Van Hoek, "Penny Wise and Pound Foolish.")

¹⁸⁵ Van Hoek, "Penny Wise and Pound Foolish" Appendix B.

¹⁸⁶ Personal Interview with Betsy Biben, Chief of the Office of Rehabilitation and Development, Public Defender Service for the District of Columbia, Washington, D.C., April, 2011.

¹⁸⁷ See JPI's Public Safety Series, www.justicepolicy.org/research/category/294.

¹⁸⁸ See Ryan S. King, *A Decade of Reform: Felony Disenfranchisement Policy in the United States* (Washington, D.C. The Sentencing Project, 2006). www.sentencingproject.org/doc/publications/fd_decade_reform.pdf, 18–9.

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- ¹⁸⁹ For example, the Neighborhood Defenders in Baltimore provide expungement assistance to clients and community members. Public Defender Service of D.C. hosts a Community Re-entry and Expungement Summit every year.
- ¹⁹⁰ Sarah Geraghty and Miriam Gohara, 21.
- ¹⁹¹ Interview with Randolph Stone.
- ¹⁹² Interview with James Neuhard.
- ¹⁹³ Tony Fabelo, "What Policy-Makers Need to Know to Improve Indigent Defense Systems" *New York University School of Law Review of Law and Social Change* 29 (2004), 137.
- ¹⁹⁴ Interview with Nicholas Chiarkas.
- ¹⁹⁵ Interview with David Carroll and Jon Mosher.
- ¹⁹⁶ Miriam S. Gohara, James S. Hardy and Damon Todd Hewitt, The Disparate Impact of an Under-funded, Patchwork Indigent Defense System on Mississippi's African Americans: The Civil Rights Case for Establishing a Statewide, Fully Funded Public Defender System *Howard Law Journal* 49 Issue 1 (Fall 2005), 91-2.
- ¹⁹⁷ Interview with Randolph Stone; Interview with Nicholas Chiarkas; Fabelo, 137
- ¹⁹⁸ *In Defense of Public Access to Justice: An Assessment of Trial-Level Indigent Defense Services in Louisiana 40 Years After Gideon* (Washington, D.C.: National Legal Aid & Defender Association, 2004); Interview with David Carroll and Jon Mosher.
- ¹⁹⁹ Interview with Randolph Stone.
- ²⁰⁰ Miriam S. Gohara et al, 2005, 91-2.
- ²⁰¹ Interview with Arthur Ago.
- ²⁰² Interview with Robert Boruchowitz.
- ²⁰³ Interview with Natalie Finegar.
- ²⁰⁴ Interview with Randolph Stone; Interview with Nicholas Chiarkas; Interview with James Neuhard.
- ²⁰⁵ Lynn Langton and Donald J. Farole Jr., *State Public Defender Programs, 2007*; Donald J. Farole Jr. and Lynn Langton, *County-based and Local Public Defender Offices, 2007* Table 3a and 3b: all state based public defender programs except for New Hampshire used between three and eight criteria to determine eligibility. Out of these 21 states, all considered income level and many considered public assistance and federal poverty guidelines. Similarly, 98 percent of county-based public defender offices considered income level, while many considered public assistance and federal poverty guidelines. Other forms of written and formal criteria include: defendants' sworn application, debt lever, residence in public institution, ability to post bail/bond, defendant's unsworn application and the judge's discretion.
- ²⁰⁶ Interview with Arthur Ago; Sarah Lyons and Nastassia Walsh, 2010.
- ²⁰⁷ According to experts, about 80 percent of defendants are eligible for court-appointed counsel (Interview with Robert Spangenberg; Wallace and Carroll, 2003, i; in 2000 A DOJ report released in 2000 found that over 80 percent of felony defendants charged with violent crimes in state court were represented by court-appointed counsel, Caroline Wolf Harlow, *Defense Counsel in Criminal Cases* (Washington, D.C.: Bureau of Justice Statistics, 2000).
- ²⁰⁸ Interview with Nicholas Chiarkas
- ²⁰⁹ See Sarah Lyons and Nastassia Walsh, 2010.
- ²¹⁰ According to Current Population Survey data from 2010, the poverty rate for people who identified as black or African American was over 25 percent, while the rate for non-Hispanic whites was over 9 percent. U.S. Census Bureau Current Population Survey, Annual Social and Economic Supplement, 2010.
- ²¹¹ Interview with David Carroll and Jon Mosher; Robert C. Boruchowitz, Malia Brink and Maureen Dimino, 2009, 47; Interview with Robert Boruchowitz; Interview with Randolph Stone; Interview with Nicholas Chiarkas; Interview with James Neuhard; Interview with Betsy Biben.
- ²¹² Robert C. Boruchowitz, Malia Brink and Maureen Dimino, 2009, 47.
- ²¹³ Robert C. Boruchowitz, Malia Brink and Maureen Dimino, 2009, 47, citing: Press Release, 200 *Exonerated, Too Many Wrongfully Convicted*, Innocence Project, available at www.innocenceproject.org/Content/530.php.
- ²¹⁴ Interview with Norman Lefstein.
- ²¹⁵ Norman Lefstein and Robert L. Spangenberg, 2009, 87-8, citing Lori Yount, "Paying for Public Defenders," *Chattanooga Times Free Press*, December 17, 2007.
- ²¹⁶ Joe DeGraff, Community Corrections Manager, Washtenaw County, Michigan "Reducing the Corrections Budget through Effective Public Defense" (Michigan State University, Institute for Public Policy and Social Research, Public Policy Forum, October 15, 2003) www.sado.org/fees/washtenaw_reduce.pdf.
- ²¹⁷ Joe DeGraff, 2003.

²¹⁸ Cait Clarke and James Neuhard, "Making the Case: Therapeutic Jurisprudence and Problem Solving Practices Positively Impact Clients, Justice Systems and Communities They Serve," *St. Thomas Law Review* 17 (2005)

²¹⁹ Different offices may call it "holistic," "client-centered," "problem-solving," "community-based," "community oriented," or "neighborhood defenders." These approaches vary in more than terminology (and within each category). This report does not intend to generalize these approaches, but rather examine themes within these promising alternative methods to public defense that generally attempts to treat the client as a whole person and utilize community-based alternatives to incarceration. For more on these approaches, see Melanca Clark and Emily Savner, *Community Oriented Defense: Stronger Public Defenders* (New York, NY: Brennan Center for Justice at New York University School of Law, 2010). brennan.3cdn.net/930f13b765ab919c80_ylm6beoe2.pdf

²²⁰ Interview with David Carroll and Jon Mosher; Interview with Betsy Biben; Melanca Clark and Emily Savner.

²²¹ See Melanca Clark and Emily Savner.

²²² Interview with Arthur Ago.

²²³ Interview with Randolph Stone; Interview with Norman Lefstein.

²²⁴ Avis E. Buchanan, *Fiscal Year 2011 Congressional Budget Justification* (Washington, D.C.: Public Defender Service for the District of Columbia, 2010), 4. www.pdsdc.org/Resources/Publication/FY2011-BudgetJustification.pdf.

²²⁵ Interview with Betsy Biben.

²²⁶ PDS FY2011 *Congressional Budget Justification*, 25; Interview with Betsy Biben.

²²⁷ Interview with Betsy Biben; Interview with Arthur Ago; Charles J Ogletree, "An Essay on the New Public Defender for the 21st Century," *Law and Contemporary Social Problems* 58, no 1, (1995); Interview with Betsy Biben.

²²⁸ According to many defenders, when someone is incarcerated awaiting trial they are less likely to be accepted into diversion programs rather than incarceration. When people are out in the community before trial, they can begin treatment or other programs and their defender can present a compelling alternative to incarceration.

²²⁹ Interview with Natalie Finegar.

²³⁰ Name was changed.

²³¹ Personal Interview, Baltimore, Md, June 8, 2011.

²³² Phone Interview with Rachel Levenson, Community Outreach Liaison, Rhode Island Public Defender, June 13, 2011.

²³³ Melanca Clark and Emily Savner, 24.

²³⁴ Phone Interview with Kate Rubin, Director of Policy and Community Development, The Bronx Defenders, June 23, 2011.

²³⁵ See www.bronxdefenders.org/our-work/we-zealously-defend-accused. Data is from 2005-2006. Personal email from Kate Rubin, Director of Policy and Community Development, The Bronx Defenders, June 23, 2011.

²³⁶ Interview with Randolph Stone; Interview with Robert Boruchowitz.

²³⁷ Interview with Betsy Biben.

²³⁸ Interview with Robert Boruchowitz.

²³⁹ Interview with Betsy Biben; PDS FY2011 *Congressional Budget Justification*.

²⁴⁰ Interview with James Neuhard; Norman Lefstein and Robert L. Spangenberg, 2009, 75.

²⁴¹ Sarah Lyons and Nastassia Walsh, 2010, 44.

²⁴² Norman Lefstein and Robert L. Spangenberg, 2009; Sally Satel, *Out of the Asylum, into the Cell*, The N.Y. Times, Nov. 1, 2003.

²⁴³ Interview with Natalie Finegar.

²⁴⁴ Interview with Nicholas Chiarkas.

²⁴⁵ ABA *Ten Principles* (Black Letter Guidelines), for the guidelines with commentary see [www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.uthcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf)

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