PUBLIC DEFENSE SERVICES COMMISSION

Friday, October 25, 2019
9:45am-12:00
Hallmark Inn, Newport

MEETING AGENDA

1.	**Action Item:** Approval of minutes – PDSC meeting held on August 15, 2019. *(Attachment 1)*	Chair Ramfjord
2.	**Action Item:** Approval of 2020 PDSC Meeting Schedule *(Attachment 2)*	L. Borg/Chair Ramfjord
3.	**Action Item:** Approval of Attorney Qualification Standards for Court-Appointed Counsel *(Attachment 3)*	E. Deitrick
4.	**Action Item:** Approval of Public Defense Complaint Policy *(Attachment 4)*	E. Deitrick/E. Herb/W. Perez
5.	Update on Best Practices for Public Defense Systems *(Attachment 5)*	E. Deitrick
6.	Funding for Multnomah County Courthouse	L. Borg
7.	PCRP for Metropolitan Area	L. Borg
8.	OPDS Monthly Report	OPDS Staff
9.	Public Comment	All

Please note: Lunch will be provided for Commission members at 12:00 p.m. The meeting location is accessible to persons with disabilities. Please make requests for an interpreter for the hearing impaired, or other accommodation for persons with disabilities, at least 48 hours before the meeting, to Brooke Sturtevant at (503) 378-3349.

Next meeting: ***Thursday, November 14, 2019, 10am-2pm in Salem.*** *Meeting dates, times, and locations are subject to change; future meetings dates are posted at:*

https://www.oregon.gov/opds/commission/Pages/meetings.aspx

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

Thursday, August 15, 2019
10:00 a.m. – 2:00 p.m.
Oregon Room
1133 Chemeketa Street NE
Salem, OR 97301

MEMBERS PRESENT: Per Ramfjord (Chair)
Elizabeth Welch (Vice Chair)
Tom Christ
Michael De Muniz

STAFF PRESENT: Lane Borg
Greg Byler
Eric Deitrick
Shelley Dillon
Nikita Gillis
Wendy Heckman
Amy Jackson
Ernest Lannet
Caroline Meyer
Heather Pate
Whitney Perez
Stephanie Petersen
Shannon Storey
Billy Strehlow
Brooke Sturtevant

The meeting was called to order at 10:00 AM.

Agenda Item No. 1 Approval of minutes – PDSC meeting held on May 16, 2019 and June 19, 2019

Commission members unanimously approved minutes from the May 16, 2019 and June 19, 2019 meetings.

Agenda Item No. 7 Public Comment (Out of Order)

Ginger Fitch, an attorney who does public defense work via both contract and hourly compensation, wrote a letter to the PDSC expressing her concern that there is no attorney with

juvenile experience in the General Counsel division. Executive Director Lane Borg responded to her concerns, and the meeting returned to the normal agenda.

Agenda Item No. 2 Post-Legislative Session Summary

Executive Director Lane Borg provided a summary of the agency's budget following the 2019 legislative session. Overall, the agency's budget was increased approximately 12%. There was specific funding for some internal agency positions and case management software.

Additionally, the legislature appropriated $3.5 million to expand the Parent Child Representation Program to Multnomah County. And $20 million was placed into a special purpose appropriation (SPA) account to be used for implementing a response to the 6AC report. The money can be accessed via the Emergency Board during the interim.

Eric Deitrick, General Counsel, provided an update on HB 3145 – the public defense reform bill. Near the end of session, the bill was amended, removing the substantive policy changes to ORS Chapter 151 and converting the bill to a task force. That version of the bill passed the House by one vote, but it was unanimously rejected by the full Senate on the floor. Senators and their staff informed the agency that a task force was not necessary given the 6AC report. Mr. Deitrick provided an analysis of the legislative session and said he would report back on whether the legislature would revisit the bill in '20 or wait until the next full session in '21.

Whitney Perez, Deputy General Counsel, provided a report summarizing legislation from the '19 session. Specifically, she discussed SB 1018 (juvenile justice), SB 1013 (aggravated murder), and SB 24 (aid and assist).

Agenda Item No. 3 Executive Director's Annual Report

Director Borg summarized the annual report and thanked agency staff for helping prepare the document. The PDSC acknowledged receiving the report.

Agenda Item No. 4. Action Item: Payment Policy Revisions and Rate Increase

Stephanie Petersen, CFO for OPDS, submitted proposed changes to payment policy for the PDSC to consider. Specifically, she proposed changes to the parking policies, mileage policies, and the per diem policy for meal reimbursement. Additionally, the proposal increased hourly rates for attorneys, investigators, interpreters, and mitigators.

The PDSC took public comment from investigators and interpreters. Following the comment, the PDSC directed the agency to continue working on scenarios that could increase compensation for investigators. However, for now, the PDSC would adopt the proposed changes, effective September 1, 2019.

Motion: A motion to approve the proposed changes to the payment policy was made and the motion was seconded. The motion was approved unanimously.

Agenda Item No. 5 Action Item: Approval of Case Manager Contracts

Caroline Meyer provided a short summary of PCRP case manager contracts, and she discussed some turnover amongst contractors in PCRP contractors. Dana Brandon, the PCRP case manager administrator, worked with Caroline Meyer to identify three new case managers for Columbia, Linn, and Coos Counties.

Motion: A motion to approve the contracts was made and the motion was seconded. The motion was approved unanimously.

Agenda Item No. 6 OPDS Monthly Report

Director Borg informed the PDSC that the Business Services division of OPDS would be leaving its current location and moving to a new location in downtown Salem. OPDS is taking over space that had been home to the Parole Board and is directly next to Marion County Public Defenders.

Ernie Lannet, Chief Defender of the Criminal Appellate Section, provided an update on some cases that OPDS has recently litigated before the appellate courts. Shannon Storey, Chief Defender of the Juvenile Appellate Section, provided a similar update. She also introduced a newly hired JAS attorney to the PDSC.

Stephanie Petersen provided an update on payment processing and the efforts the agency has taken to keep payment processing to 14 days total.

Agenda Item No. 7 Public Comment

Tom Crabtree, Executive Director of Crabtree and Rahmsdorff, discussed the benefits of an FTE public defense model, with case caps and fair pay.

Rob Harris, the contract administrator for the Oregon Defense Attorney Consortium, discussed his attorney members concerns with an hourly model, particularly given the payment processing times. He then discussed an alternative to an FTE or hourly model. Mr. Harris discussed maintaining the current flat fee contracting model, but providing an additional fee for cases that go to trial. He proffered that this model would address the 6AC Report concerns.

Mr. Harris discussed his role in creating a new consortium-led advocacy group. He was critical of OPDS, the manner in which the agency was trying to obtain information about how contract money was spent, and opined that OPDS was not necessarily a champion of the defense bar.

Amy Miller, Executive Director of Youth, Rights, & Justice, addressed the PDSC to express her concern for Ms. Wakefield's departure from the agency. She emphasized the need for the agency to hire someone soon with experience in juvenile dependency law.

Brook Reinhard, Executive Director for the Public Defender's Office of Lane County, also discussed benefits of an FTE or an hourly model. He discussed turnover at his office, and the challenges of retaining attorneys. Mr. Reinhard discussed the efforts of the 2003 Budget Reduction Advisory Committee (BRAC) in which the court ceased appointed counsel for certain types of cases. He believed such action may be needed now to address the crisis in public defense. He and members of the PDSC discussed the impact of a return to BRAC.

Director Borg discussed the recent caseload challenges surrounding certain contractors, and the impact on the agency when certain offices decline new cases. He noted that the decisions these contractors made were responsive to stark and urgent needs, but that some in the legislature questioned the motivations of case refusal.

Crystal Reeves, an attorney member of the Justice Alliance Consortium in Columbia County, addressed the PDSC. She previously worked at Metropolitan Public Defender and currently participates in the Parent Child Representation Program. She discussed the differences and similarities of working in a defender office versus a consortium.

Amanda Marshall, an attorney in Clackamas County, expressed concern that her consortium was not offered a new contract with the PDSC.

Olcott Thompson, a member of the Marion County Association of Defenders, also discussed the differences between defender offices and private practitioners.

MOTION: A motion was made to adjourn the meeting; the motion was seconded; VOTE: 4-0

Meeting Adjourned.

Attachment 2

Public Defense Services Commission

Draft 2020 Meeting Schedule

Date	Day	Location
January 23, 2020	Thurs	Salem, OR
February 20, 2020	Thurs	Salem, OR
March 19, 2020	Thurs	Salem, OR
April 16, 2020	Thurs	Salem, OR
May 21, 2020	Thurs	Salem, OR
June 18, 2020	Thurs	Bend, OR
August 20, 2020	Thurs	Salem, OR
October 23, 2020	Friday	Sunriver, OR
December 17, 2020	Thurs	Salem, OR

Attachment 3

Oregon

Office of Public Defense Services
198 Commercial St. SE, Suite #205
Salem, Oregon 97301
Telephone (503) 378-3349
Fax (503) 378-4462
www.oregon.gov/opds

To: Members, Public Defense Services Commission
Lane Borg, Executive Director

From: Eric Deitrick, General Counsel

Re: PDSC Attorney Qualification Standards

Date: October 15, 2019

Background: The PDSC has adopted qualification standards regarding eligibility to provide legal services in court appointed cases. Those standards rely primarily on experience, although some case types have requisites regarding training and/or professional recommendations.

In 2019, Oregon enacted SB 1008, which significantly impacts the intersection of juveniles and major felony charges. Currently, when a 15, 16, or 17 year old engages in behavior consistent with ORS 137.707, the state may file criminal charges directly in adult court. On January 1, 2020, those charges must now be filed in juvenile court and the state will have the burden of proof regarding the waiver of the case into adult court. For these cases, court-appointed counsel would need to be well-versed in both juvenile delinquency and adult criminal defense to provide their client with adequate counsel.

Additionally, the qualification standards to provide legal services in Termination of Parental Rights ("TPR") cases need modification. At some point, the standards had been modified to only allow representation if (1) the person has had juvenile dependency qualifications for at least six months and (2) the person is also qualified to handle major felony cases in adult or juvenile courts. This has presented qualification challenges, as many juvenile practitioners handle solely dependency cases. This is particularly true for attorneys in PCRP counties, which will be expanding into Multnomah County effective July 1, 2020.

Agency Recommendation: OPDS proposes two modifications to the existing qualification standards.

First, it sets the requisite for handling "waiver" cases as having major felony experience in both juvenile delinquency and adult criminal courts. In addition, it requires the attorney to meet one of five factors. If the attorney does not meet those standards, there is an additional, and more subjective, approach that includes letters of recommendation.

Second, it adds additional ways an attorney can become qualified to handle TPR cases. An attorney can qualify if they have six months of dependency experience and have co-counseled a TPR case. Additionally, as with "waiver" cases, there is a subjective approach that relies upon letters of recommendation.

Proposed Motion: I move to adopt the suggested modifications to the PDSC's qualification standards regarding eligibility to provide legal services in court appointed cases.

PUBLIC DEFENSE SERVICES COMMISSION
QUALIFICATION STANDARDS
FOR COURT-APPOINTED COUNSEL TO REPRESENT FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE

Revised December 15, 2016

TABLE OF CONTENTS

PUBLIC DEFENSE SERVICES COMMISSION
QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE

The following standards are adopted by the Public Defense Services Commission pursuant to ORS 151.216(1)(f)(F).

STANDARD I: OBJECTIVE

The objective of these standards is to ensure the provision of competent legal representation to all financially eligible persons entitled to court-appointed counsel by state or federal constitution or statute.

STANDARD II: ATTORNEY CASELOADS

Attorneys appointed to represent financially eligible persons at state expense must provide competent representation to each client. Neither defender organizations nor assigned counsel shall accept caseloads that, by reason of their size or complexity, interfere with providing competent representation to each client or lead to the breach of professional obligations.

STANDARD III: GENERAL QUALIFICATIONS TO SERVE AS APPOINTED COUNSEL FOR FINANCIALLY ELIGIBLE PERSONS

Subject to the provisions of Standard V, the appointing authority shall appoint only those attorneys who:

1. Are active members of the Oregon State Bar or are attorneys of the highest court of record in any other state or country who will appear under ORS 9.241;

2. Agree to adhere to Standard II;

3. Either:

    A. Meet the minimum qualifications specified in Standard IV for the applicable case type; or

    B. Possess significant experience and skill equivalent to or exceeding the minimum qualifications specified in Standard IV, and who demonstrate to the satisfaction of the Office of Public Defense Services that the attorney will provide competent representation; or

    C. Work under the supervision of an attorney who does have the requisite qualifications and who describes to the satisfaction of the Office of Public Defense Services how they will provide oversight of attorney performance in order to ensure competent representation.

3. Have adequate support staff and regularly monitored email and telephone systems to ensure reasonable and timely personal contact between attorney and client, and between the attorney and others involved with the attorney's public defense work;

4. Have an office or other regularly available and accessible private meeting space other than at a courthouse suitable for confidential client conferences; and

5. Have read, understood and agree to observe applicable provisions of the current edition of the Oregon State Bar's Performance Standards for Counsel in Criminal, Delinquency, Dependency, Civil Commitment, and Post-Conviction Relief Cases, available at www.osbar.org.

STANDARD IV: MINIMUM QUALIFICATIONS BY CASE TYPE

1. Misdemeanor Cases, Contempt, and Misdemeanor Probation Violation Proceedings in Trial Courts

The minimum qualifications for appointment to misdemeanor and contempt cases and misdemeanor probation violation proceedings require that an attorney:

A. Has reviewed and is familiar with the current version of the ABA Standards for Criminal Justice relating to representation in criminal cases; the Oregon Rules of Professional Conduct; the Criminal, Vehicle and Evidence Codes of Oregon; the criminal drug offenses, and other crimes outside the Criminal Code; the Uniform Trial Court Rules; and Oregon State Bar, Criminal Law (current version); and

B. Satisfies at least one of the following:

a. Has been certified under the Oregon Supreme Court Rules on Law Student Appearances to represent clients on behalf of a public defender office, a district attorney office, or attorney in private practice in criminal cases; has undertaken such representation for at least six months; and can present a letter from the person's immediate supervisor certifying the person's knowledge of applicable criminal procedure and sentencing alternatives;

b. Has observed five complete trials of criminal cases that were tried to a jury;

c. Has served as counsel or co-counsel in at least two criminal cases that were tried to a jury;

d. Has served as co-counsel in at least five criminal cases. Such service shall have included attendance at court appearances and client interviews in each case; or

e. Has served as a judicial clerk for at least six months in a court that regularly conducts criminal trials;

2. Lesser Felony Cases and Felony Probation Violation Proceedings in Trial Courts

Lesser felony cases include all felony drug cases and all Class C felonies other than sexual offenses.

The minimum qualifications for appointment to lesser felony cases and felony probation violation proceedings require that an attorney:

A. Meets the qualifications specified in Standard IV, section 1;

B. Has met the qualifications in Standard IV, section 1 for at least nine months;

C. Has served as counsel or as co-counsel in two criminal cases that were tried to a jury; and

D. In at least one felony case tried to a jury, has served as co-counsel with an attorney who has previously tried felony cases and is otherwise qualified to try felony cases under these standards.

3. Major Felony Cases in Trial Courts

Major felony cases include all A and B felonies other than drug cases, all felony sex offenses, and all homicides other than murder and capital murder cases.

The minimum qualifications for appointment to major felony cases require that an attorney:

A. Meets the qualifications specified in Standard IV, section 2; and

B. Has met the qualifications in Standard IV, section 2 for at least nine months and has had at least nine months experience representing clients in lesser felony cases.

4. Murder Cases in Trial Courts

A. *Lead Counsel.* The minimum qualifications for appointment as lead counsel in murder cases, not including capital murder, require that an attorney:

a. Meets the qualifications specified in Standard IV, section 3;

b. Has met the qualifications in Standard IV, section 3 for at least three years;

c. Has demonstrated to persons with direct knowledge of his or her practice a high level of learning, scholarship, training, experience, and ability to provide competent representation to defendants charged with a crime for which the most serious penalties can be imposed, including handling cases involving co-defendants, a significant number of witnesses, and cases involving suppression issues, expert witnesses, mental state issues, and scientific evidence; and

d. Has acted as lead counsel or co-counsel in at least five major felonies tried to a jury, which include at least one homicide case that was tried to a jury.

B. *Co-counsel.* Co-counsel in murder cases must meet the qualifications in Standard IV, section 4.A, subparagraphs a, b, and c.

5. Capital Murder Cases in Trial Courts

A. *Lead Counsel.* The minimum qualifications for appointment as lead counsel in capital murder cases require that an attorney:

a. Has reviewed and agrees to fulfill the current version of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases;

b. Meets the qualifications specified in Standard IV, section 4.A;

c. Has represented clients in major felony cases for at least five years;

d. Has acted as lead counsel or co-counsel in at least one murder case that was tried to a jury;

e. Has attended within the last two years at least 24 hours of specialized training on in the management, preparation, and presentation of capital cases through an established training program awarding CLE credits;

f. Has demonstrated to persons with direct knowledge of his or her practice:

(1) A commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases;

(2) Substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;

(3) Skill in the management and conduct of complex negotiations and litigation;

(4) Skill in legal research, analysis, and the drafting of litigation documents;

(5) Skill in oral advocacy;

(6) Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;

(7) Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;

(8) Skill in the investigation, preparation, and presentation of mitigating evidence;

(9) Skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements; and

g. On request, can demonstrate all of the above by:

(1) A written statement by the attorney explaining why the attorney believes that he or she has the qualifications required to handle a capital murder case; and

(2) Written statements from those with direct knowledge of the attorney's practice, declaring that they believe that the attorney should be allowed to defend capital murder cases and explaining why the attorney has the qualities required. Written statements must include at least five letters from persons in at least two of the following three groups:

i. Judges before whom the attorney has appeared;

ii. Defense attorneys who are recognized and respected by the local bar as experienced criminal trial lawyers and who have knowledge of the attorney's practice; or

iii. District attorneys or deputies against whom or with whom the attorney has tried cases.

B. *Co-counsel.* Co-counsel in capital murder cases must meet the qualifications in Standard IV, section 5.A, subparagraphs a, b, c, e, f, and g.

C. *Procedure for Establishing Equivalent Skill And Experience In Capital Murder Cases.* The Office of Public Defense Services may determine that an attorney with extensive criminal trial experience or extensive civil litigation experience meets the minimum qualifications for appointment as lead or co-counsel, if the attorney clearly demonstrates that the attorney will provide competent representation in capital cases. For qualification under this paragraph, attorneys must have either:

a. Specialized training in the defense of persons accused of capital crimes; or

b. The availability of ongoing consultation support from other capital murder qualified attorney(s).

D. *Caseload.* An attorney shall not handle more than two capital cases at the same time without prior authorization from the Office of Public Defense Services.

6. <u>Civil Commitment Proceedings Under ORS Chapters 426 and 427 in Trial Courts</u>

The minimum qualifications for appointment in civil commitment proceedings under ORS Chapters 426 and 427 require that an attorney:

A. Meets the qualifications specified in Standard IV, section 2;

B. Has handled at least three civil, juvenile or criminal cases in which a psychiatric or psychological expert was consulted by the attorney and the use of psychiatric or psychological evidence was discussed with the client;

C. Has knowledge of available alternatives to institutional commitment;

D. Has knowledge of the statutes, case law, standards, and procedures relating to the involuntary commitment of the mentally ill and developmentally disabled; and,

E. Satisfies one of the following:

a. Has served as co-counsel in two civil commitment cases that have been submitted to a judge for determination; or

b. Has observed five civil commitment hearings that have been submitted to a judge for determination.

7. <u>Juvenile Cases in Trial Courts, Including Delinquency, Waiver Proceedings, Neglect, Abuse, Other Dependency Cases, Status Offenses and Termination of Parental Rights</u>

The minimum qualifications for appointment to juvenile cases, under ORS Chapter 419, are as follows:

A. Juvenile Delinquency Cases in Trial Courts including status offense cases and waiver proceedings

a. Misdemeanor, misdemeanor probation violation, and status offense cases; Meets the qualifications for appointment to misdemeanor cases as specified in Standard IV, section 1, and satisfies at least one of the following:

(1) Has served as counsel or co-counsel counsel in at least two juvenile delinquency cases adjudicated after a contested hearing before a judicial officer; or

(2) Has observed at least five juvenile delinquency cases adjudicated after a contested hearing before a judicial officer.

b. Lesser felony and lesser felony probation violation cases. Lesser felony cases are defined in Standard IV, section 2:

(1) Meets the qualifications for appointment to juvenile delinquency misdemeanor cases as specified in Standard IV, section 7A (a);

(2) Has met the qualifications for appointment to juvenile delinquency misdemeanor cases as specified in Standard IV, section 7A (a) for at least nine months;

(3) Has served as counsel, co-counsel, or associate counsel in two juvenile delinquency cases adjudicated after a contested hearing before a judicial

officer;

(4) In at least one juvenile felony case adjudicated after a contested hearing before a judicial officer has served as co-counsel or associate counsel with an attorney who has previously tried juvenile felony cases; and

(5) On request, can present an additional showing of expertise and competence in the area of juvenile trial practice by submitting at least three letters of reference from other lawyers or judges the attorney has appeared before on juvenile cases. The letters must explain why the attorney has the requisite experience and competence to handle lesser felony cases involving the potential for commitment to a youth correctional facility until age 25.

c. Major felony and major felony probation violations. Major felony cases are defined in Standard IV, section 3:

(1) Meets the qualifications for appointment to juvenile delinquency lesser felony cases as specified in Standard IV, section 7A (b);

(2) Has met the qualifications for appointment to juvenile delinquency lesser felony cases as specified in Standard IV, section 7A (b)for at least nine months and has had at least nine months experience representing clients in lesser felony cases; and

(3) On request, can present an additional showing of expertise and competence in the area of juvenile trial practice by submitting at least three letters of reference from other lawyers or judges the attorney has appeared before on juvenile cases. The letters must explain why the attorney has the requisite experience and competence to handle major felony cases involving the potential for commitment to a youth correctional facility until age 25.

d. Murder cases:

(1) Meets the qualifications for appointment to murder cases in trial courts as specified in Standard IV, section 4(A); and

(2) Has met the qualifications for appointment to juvenile delinquency major felony cases as specified in Standard IV, section 7A (c) for at least three years.

e. **Waiver proceedings:**

(1) Meets the qualifications for appointment to juvenile delinquency major felony cases as specified in Standard IV, section 7A (c) and criminal major felony cases as specified by Standard IV, section 1(3). Where the underlying offense is murder the attorney must meet the qualifications for juvenile murder cases as specified in Standard IV, section 7A(d) and criminal murder cases as required by Standard IV, section 1(4).

(2) In addition, the attorney satisfies one of the following:

i Has (a) served as counsel or co-counsel in at least two delinquency cases adjudicated before a judge which involved alleged conduct at or above the major felony level, or (b) has observed, or reviewed transcripts in, at least two contested waiver hearings which involve alleged conduct at or above the major felony level.

ii. Has demonstrated a skillful understanding of juvenile law, criminal law, the interplay between the two, and is able to advise the client of all outcomes and consequences of the waiver hearing;

iii. Has demonstrated an understanding of child and adolescent brain development, or is willing to undertake the specialized training needed;

iv. Has demonstrated an understanding of working with mitigators as part of the defense team; or

v. Can certify participation in OPDS approved training specifically related to juvenile waiver hearing preparation and litigation.

(3) On request, can present an additional showing of expertise and competence in the area of juvenile trial practice by submitting at least three letters of reference from other lawyers or judges the attorney has appeared before on juvenile cases. The letters must explain why the attorney has the requisite experience and competence to handle major felony cases involving the potential for commitment to a youth correctional facility until age 25 as well as the potential for adult criminal court consequences.

B. Juvenile Dependency Cases in Trial Courts

Meets the qualifications for appointment to juvenile delinquency misdemeanor cases as specified in Standard IV, section 7A (a) or has had equivalent civil or criminal experience involving complicated child-custody issues and satisfies at least one of the following:

a. Has served as counsel, co-counsel or associate counsel in at least two dependency cases adjudicated before a judge; or

b. Has observed at least five dependency cases adjudicated before a judge.

C. Termination of Parental Rights Cases in Trial Courts

Meets the qualifications for appointment to juvenile dependency cases as specified in Standard IV, section 7B for at least six months or has had equivalent experience, civil or criminal, involving complicated child-custody issues and

a. Meets the qualifications for appointment to adult criminal major felony cases as specified in Standard IV, section 3 or meets the qualifications for appointment to juvenile delinquency major felony cases as specified in Standard IV, section 7A (c);

b. **Has served as co-counsel or associate counsel in at least one termination of parental rights trial that resulted in an adjudication; or**

c. **On request, can present an additional showing of expertise and competence in the area of juvenile trial practice by submitting at least three letters of reference from other lawyers or judges the attorney has appeared before on juvenile cases. The letters must explain why the attorney has the requisite experience and competence to handle trials resulting in the termination of parental rights.**

8. <u>Appeals in Misdemeanor Cases, Misdemeanor Probation Violations Proceedings, and Contempt Proceedings</u>

The minimum qualifications for appointment in appeals in misdemeanor cases, misdemeanor probation violation proceedings, and contempt proceedings require that an attorney:

A. Has reviewed and is familiar with:

a. ORS 138.005 - 138.504, ORS 33.015 – 33.155, and ORS Chapter 19;

b. Oregon State Bar, <u>Criminal Law</u> (current edition);

c. The Oregon Rules of Appellate Procedure;

d. Oregon State Bar, <u>Appeal and Review</u> (current edition); and

B. Meets at least one of the following criteria:

a. Has been certified under the Oregon Supreme Court Rules on Law Student Appearances to represent clients on behalf of an attorney in public or private practice in appeals in criminal or juvenile delinquency cases; has undertaken such representation for at least 12 months; and can present a letter from the person's immediate supervisor certifying the person's knowledge of applicable appellate procedure and criminal law;

b. Has served as counsel or co-counsel in at least two appellate cases which were briefed on the merits and argued to the court under the supervision of an attorney eligible for appointment to appellate cases under this standard;

c. Has observed oral argument and reviewed the appellate record in at least five appeals in criminal cases;

d. Has significant experience in written motion practice and arguments in state circuit court or federal district or appellate court; or

e. Will be working under the supervision of an attorney who does have the requisite qualifications or experience.

9. <u>Appeals in Lesser Felony Cases, Felony Probation Violation Proceedings, Judicial</u>

Review of Parole Cases, and Post-Conviction Relief Cases

Lesser felony cases include all felony drug cases and all Class C felonies other than sexual offenses.

The minimum qualifications for appointment in appeals in lesser felony cases, felony probation violation proceedings, judicial review of parole cases, and post-conviction relief cases require that an attorney:

A. Meets the qualifications specified in Standard IV, section 8;

B. Has reviewed and is familiar with:

   a. ORS Chapter 144;

   b. The Oregon Felony Sentencing Guidelines (OAR Ch 213); and

   c. The Rules of the Board of Parole and Post-Prison Supervision (OAR 255).

C. Meets at least one of the following criteria:

   a. Has served as counsel in at least five appeals in criminal cases which were briefed on the merits and argued to the court;

   b. Has significant and extensive experience in written motion practice and arguments in state circuit court or federal district or appellate court; or

   c. Will be working under the supervision of an attorney who does have the requisite qualifications or experience.

10. Appeals in Non-Capital Murder and Major Felony Cases

Major felony cases include all A and B felonies other than drug cases, all felony sex offenses, and all homicides other than capital murder cases.

The minimum qualifications for appointment in appeals in major felony cases require that an attorney:

A. Meets the qualifications specified in Standard IV, section 9;

B. Has served as counsel in at least 10 appeals in criminal cases which were briefed on the merits and argued to the court; and

C. Has demonstrated proficiency in appellate advocacy in felony defense.

11. Appeals in Capital Murder Cases

The minimum qualifications for appointment in appeals in capital murder cases require that an attorney:

A. Meets the qualifications specified in Standard IV, section 10;

B. For appointment as lead counsel, is an experienced and active trial or appellate

lawyer with at least three years' experience in criminal defense;

C. Has demonstrated the proficiency and commitment necessary for high quality representation in capital murder cases.

D. For lead counsel in capital murder appeals, within two years prior to the appointment has attended and completed a legal training or educational program on defending capital cases. A substantial portion of the program must have been directly relevant to appeals in capital cases; and

E. For co-counsel in capital murder appeals, has attended and completed a legal training or education program on appellate advocacy in criminal cases within two years prior to the appointment.

F. *Alternate Procedures for Establishing Equivalent Skill And Experience in Capital Appeals.* The Office of Public Defense Services may determine that an attorney with extensive criminal trial or appellate experience, or both, or extensive civil litigation or appellate experience, or both, meets the minimum qualifications for appointment as lead or co-counsel in appeals of capital cases, if the attorney clearly demonstrates that the attorney can and will provide competent representation in capital appeals. For qualification under this paragraph, attorneys must have either:

a. Specialized training in the defense of persons accused of capital crimes; or

b. The availability of ongoing consultation support from other capital murder qualified attorney(s).

12. <u>Appeals in Juvenile Delinquency Proceedings – Misdemeanor Equivalency</u>

The minimum qualifications for appointment in appeals in juvenile delinquency cases adjudicating the equivalent of misdemeanor offenses require that an attorney:

A. Meets the qualifications specified in Standard IV, section 8;

B. Has reviewed and is familiar with:

a. ORS 419A.200 - 419A.211; and

b. Oregon State Bar, <u>Juvenile Law</u>, (current edition).

13. <u>Appeals in Juvenile Delinquency Proceedings – Felony Equivalency</u>

The minimum qualifications for appointment in appeals in juvenile delinquency cases adjudicating the equivalent of felony offenses require that an attorney:

Meets the qualifications specified in Standard IV, sections 10 and 12.

14. <u>Appeals in Juvenile Dependency and Termination of Parental Rights Proceedings</u>

The minimum qualifications for appointment in appeals in juvenile dependency and termination of parental rights cases require that an attorney:

A. Has reviewed and is familiar with:

a. ORS Chapter 419B;

b. ORS Chapter 419A;

c. ORS Chapter 19;

d. The Oregon Rules of Appellate Procedure;

e. Oregon State Bar, Juvenile Law (current edition);

f. Oregon State Bar, Appeal and Review (current edition); and

B. Meets at least one of the following criteria:

a. Has served as counsel or co-counsel in at least five appeals in juvenile dependency or termination of parental rights proceedings including briefing the cases on the merits and arguing the cases to the court;

b. Has significant and extensive experience in written motion practice and arguments in state trial court and appellate court or in federal district court; or

c. Will be working under the supervision of an attorney who does have the requisite qualifications or experience and who will attest to the quality of the attorney's work by appearing as co-counsel on all filed briefs.

15. <u>Post-Conviction Proceedings Other Than in Murder and Capital Murder Cases</u>

The minimum qualifications for appointment in post-conviction proceedings in cases other than murder and capital murder cases require that an attorney:

A. Meets the qualifications for appointment to an original proceeding involving the highest charge in the post-conviction proceeding;

B. Has reviewed and is familiar with:

a. The Oregon Post-Conviction Hearing Act, ORS 138.510-138.686; and

b. The Oregon State Bar's performance standards for counsel representing petitioners in post-conviction relief proceedings, and the authorities cited therein.

C. Has served as co-counsel or observed proceedings and reviewed the record in at least two post-conviction relief proceedings in which a trial court entered a judgment on the petition;

D. Has attended and completed a legal education and training program on post-conviction relief proceedings within two years prior to appointment.

16. <u>Post-Conviction Proceedings in Murder and Capital Murder Cases</u>

The minimum qualifications for appointment in post-conviction proceedings in murder and capital murder cases require that an attorney:

A. Meets the qualifications specified in Standard IV, section 4;

B. Meets the qualifications specified in Standard IV, section 15;

C. For appointment as lead counsel, has prior experience as post-conviction counsel in at least three major felony cases; and

D. For capital murder cases, meets the qualifications specified in Standard IV, section 5 for co-counsel in capital cases in the trial courts. If more than one attorney is appointed, only one of the attorneys must meet the qualifications specified in Standard IV, section 5.

E. *Alternate Procedures Establishing Equivalent Skill And Experience in Post-Conviction Cases.* The Office of Public Defense Services may determine that an attorney with extensive criminal trial, appellate, or post-conviction experience or extensive civil litigation or appellate experience, or both, meets the minimum qualifications for appointment as lead or co-counsel for post-conviction relief proceedings in capital murder cases, if the attorney clearly demonstrates that the attorney can and will provide competent representation in capital murder cases. For qualification under this paragraph, attorneys must either:

(1) Specialized training in the defense of persons accused of capital crimes; or

(2) The availability of ongoing consultation support from other capital murder qualified attorney(s).

17. Habeas Corpus Proceedings

The minimum qualifications for appointment in habeas corpus proceedings require that an attorney meet the qualifications specified in Standard IV, section 2.

STANDARD V: QUALIFICATION CERTIFICATE AND APPOINTMENT OF COUNSEL

1. Certificate and Supplemental Questionnaire

In order to receive an appointment to represent a financially eligible person at state expense, an attorney must submit a certificate of qualification together with a completed supplemental questionnaire, and be approved by the Office of Public Defense Services for appointment to the case type for which the appointment will be made. The certificate and supplemental questionnaire must be in the form set out in Exhibit A to these standards, or as otherwise specified by the Office of Public Defense Services.

2. Submission Requirements

A. *Contract Attorneys.* Contract attorneys must submit their certificates of qualification and completed supplemental questionnaires to the Office of Public Defense Services (OPDS) prior to the execution of the contract and thereafter as necessary to ensure

that OPDS has current information for each attorney who performs services under the contract.

B. *Assigned Counsel (for all Non-contract Appointments).* Certificates of qualification and completed supplemental questionnaires may be submitted to OPDS at any time. OPDS will periodically require re-submission of certificates of qualification and completed supplemental questionnaires as needed to document that an attorney continues to meet ongoing training requirements and other standards.

3. <u>Supporting Documentation</u>

A. An attorney must submit supporting documentation in addition to the certificate and questionnaire:

a. At the request of OPDS; or

b. When the attorney seeks to qualify for appointments based on equivalent skill and experience.

B. Supporting documentation requested by OPDS may include, but is not limited to:

a. A written statement explaining why the attorney believes that he or she has the qualifications required to handle the case type(s) selected by the attorney; and

b. Written statements from those with direct knowledge of the attorney's practice explaining why they believe that the attorney is qualified to handle the case type(s) selected by the attorney. Written statements may include those from persons in the following three groups:

(1) Judges before whom the attorney has appeared;

(2) Defense attorneys who are recognized and respected by the local bar as experienced trial lawyers and who have knowledge of the attorney's practice; and

(3) District attorneys or deputies against whom or with whom the attorney has tried cases.

C. Contract providers seeking to qualify attorneys pursuant to the Public Defense Organization provision of Standard III, section 3.C, shall submit prior to execution of its contract with OPDS and update as necessary:

a. A description of the organization’s management, supervision, evaluation and training procedures, along with an explanation of how these procedures will ensure adequate and competent representation by the organization’s attorneys;

b. Certificates of Attorney Qualification, with supplemental questionnaire, from the organization’s supervisory attorneys;

c. A Certificate of Attorney Qualification for each attorney qualifying pursuant to Standard III, section 3.C, signed by an authorized representative of the organization that states the type of cases for which the attorney is eligible to receive appointment; and

d. A supplemental questionnaire for each attorney qualifying pursuant to Standard III, section 3.C, completed and signed by each attorney.

4. Approval for Appointment

A. *Review of Submitted Certificates.* OPDS will review the qualification certificates and may request supporting documentation as needed. Not all attorneys who meet the minimum qualifications for a case type will be approved for appointment to cases of that type. OPDS's goal is to select attorneys who:

a. Are more than minimally qualified;

b. Have specialized skills needed in a particular community;

c. Are available to cover cases in the appropriate geographic area;

d. Are able to meet specific needs of the court such as availability at specific times;

e. Are able to effectively and efficiently manage a law practice, observing appropriate fiscal and organizational practices; and

f. Have other qualities that would benefit the court, the clients or OPDS.

At the completion of the review, OPDS shall notify the attorney of the case types for which the attorney has been approved for appointment and the reason for its decision not to approve the attorney for appointment in any case type for which certification was submitted.

B. *Request for Reconsideration.* An attorney who is not approved for appointment in case types for which the attorney has certified qualification may request reconsideration by submitting to OPDS, within 21 calendar days of the notice of approval/disapproval for appointment in particular case types, additional information, including supporting documents, if any, which the attorney believes demonstrates that the attorney meets the criteria for selection set forth in Paragraph 4.A.

C. *Review of Request for Reconsideration*. Within 21 calendar days of OPDS's receipt of a request for reconsideration the executive director of OPDS, or a person designated by the executive director, shall review the request and issue a final determination. OPDS shall notify the attorney of its final determination.

D. *Extension of Time for Good Cause*. The time for requesting reconsideration and for issuing a final determination may be extended for good cause.

E. *Provision of Lists to the Courts.* OPDS will prepare a list of attorneys approved for appointment for counties that routinely appoint attorneys who do not provide public defense services pursuant to a contract with OPDS. Other courts should contact OPDS for assistance in identifying attorneys available for appointment.

F. *Updating Lists.* OPDS will update lists as necessary.

5. Suspension from Appointment

A. *Suspension from Future Appointments.* If OPDS obtains information that calls into question an attorney's ability to provide adequate assistance of counsel, OPDS shall notify the attorney of the information and shall perform such investigation as is necessary to determine whether the attorney is able to provide adequate assistance of counsel. After completing its investigation and reviewing any information provided by the attorney OPDS shall have authority to suspend the attorney from future appointments for any or all case types until OPDS is satisfied that the attorney is able to provide adequate assistance of counsel. When OPDS suspends an attorney from future appointments OPDS shall notify the attorney and the court of the suspension and the reason(s) for the suspension.

B. *Suspension from Current Appointments*. The court, after reviewing the reason(s) for the suspension, shall consider whether the attorney should be relieved as counsel in any pending court-appointed cases. The court shall consider with respect to each open case: the reason for the suspension, the needs of the client, and the ability of the attorney to provide adequate assistance of counsel under all of the circumstances. The court shall comply with the Paragraph 1.7 of OPDS's Public Defense Payment Policies and Procedures relating to substitution of counsel.

C. *Request for Reconsideration*. An attorney who is suspended from future appointments may request reconsideration by submitting to OPDS, within 21calendar days of the notice of suspension, additional information, including supporting documents, if any, which the attorney believes establish the attorney's ability to provide adequate assistance of counsel.

D. *Review of Request for Reconsideration*. Within 21 calendar days of OPDS's receipt of a request for reconsideration, the executive director of OPDS, or a person designated by the executive director, shall review the request and issue a final determination. In reviewing the request, the executive director or the executive director's designee may select and empanel a group of public defense attorneys to advise the executive director about the attorney's ability to provide adequate assistance of counsel and whether the attorney should be suspended from future appointment for any or all case types. OPDS shall notify the attorney and the court of its final determination and the reasons for its final determination.

E. *Extension of Time for Good Cause*. The time for requesting reconsideration and for issuing a final determination may be extended for good cause.

EXHIBIT A

PUBLIC DEFENSE CERTIFICATE OF ATTORNEY QUALIFICATION FOR NON-CAPITAL CASE TYPES

Name: _____ Bar Number: _____

Address: _____ Vendor or Tax ID#: _____

_____ Email: _____

_____ Foreign language fluency in: _____

Phone Number: _____ Years of Experience:

Mobile Phone Number: _____ Practice of Law _____ Criminal _____

Juvenile _____ Appellate _____

For appointments in the following county(ies): _____

TRIAL LEVEL		**APPELLATE LEVEL**	
Murder		Murder	
Lead Counsel	G	Lead Counsel	G
Co-counsel	G	Co-counsel	G
Major Felony	G	Major Felony	G
Lesser Felony	G	Lesser Felony	G
Misdemeanor	G	Misdemeanor	G
Juvenile Delinquency		Juvenile Delinquency	
Major Felony	G	Major Felony	G
Lesser Felony	G	Lesser Felony	G
Misdemeanor	G	Misdemeanor	G
Juvenile Dependency	G	Juvenile Dependency	G
Juvenile Termination	G	Juvenile Termination	G
Civil Commitment	G	Civil Commitment	G
Contempt	G	Contempt	G
Habeas Corpus	G	Habeas Corpus	G
Post-Conviction Relief		Post-Conviction Relief	
Murder	G	Murder	G
Other Criminal	G	Other Criminal	G

Please check only one box below:

G I certify that I have read the PDSC Qualification Standards for Court-Appointed Counsel (Rev. _) and that I meet the requirements of those standards and wish to be listed as available to accept appointment to the case types checked above. If I have checked any case types because I believe I possess equivalent skill and experience, pursuant to Standard III, section 3.B, I have submitted supporting documentation and explained how I am qualified for those case types.

or

G I certify that the above-named attorney will be working under the supervision of an attorney as described in Standard III.3.C, and have submitted a statement from the attorney or contract provider describing that supervision.

_____ _____

Signature Date

Submit signed certificates together with the supplemental questionnaire and any supporting documentation to: mail@opds.state.or.us

SUPPLEMENTAL QUESTIONNAIRE TO CERTIFICATE OF ATTORNEY QUALIFICATION

If this questionnaire does not address important aspects of your experience, please feel free to attach additional information. If more space is needed to answer any of the questions below, please do so on additional pages.

1. Name (please print):

2. Date admitted to Oregon State Bar:

3. Oregon State Bar number:

4. Number of years and location(s) of legal practice in Oregon:

5. Number of years and location(s) of legal practice outside Oregon:

6. What percentage of your present practice involves handling criminal cases? juvenile cases? (or other cases as appropriate, such as civil commitment, habeas corpus, post-conviction relief)

7. What percentage of your present practice involves handling public defense cases?

8. Do you meet the stated minimum qualifications for the case types selected on your certificate of attorney qualification? If you answer no here, proceed to Question 9. If you answer yes, describe in detail below and on additional pages if necessary, how you satisfy each of the minimum qualifications for the case type(s) that you have certified.

9. If you answered No to Question 8, are you certifying qualification on the basis of equivalent skill and experience? If no, proceed to Question 10. If yes, please separately attach the following: 1) A statement explaining why you believe equivalent skill and experience qualifies you to handle the case types you have certified; and 2) At least two letters or statements from persons familiar with you legal experience and skill that describe why they believe you are qualified to handle the case types you have certified.

10. If you answered No to Question 9, are you certifying qualification because you will be working under the supervision of an attorney who meets the qualifications for the case types that you have certified? If yes, attach a statement from the supervising attorney, pursuant to Standard III.3.C or Standard V.3.C, describing the supervision that the attorney will perform?

11. What has been the extent of your participation in the past two years with continuing legal education courses and/or organizations concerned with law related to the case types you have certified?

12. List at least three names and addresses of judges and/or attorneys who would be able to comment on your experience in handling the case types you have certified.

13. List the most recent two cases by county and case number that have been tried and submitted to a jury, or if the attorney is certifying qualification for juvenile delinquency or civil commitment cases, tried and submitted to a judge, in which you served as counsel or co-counsel.

14. Have you ever been convicted of a crime? If yes, please provide the crime(s) of conviction, date and jurisdiction. (Do not answer yes or provide information for convictions that have been expunged or sealed.)

15. Are there any criminal charges currently pending against you? If yes, please identify the charges, the jurisdiction and the status of the proceedings.

16. Is there any complaint concerning you now pending with disciplinary counsel of the Oregon State Bar, or otherwise pending formal charges, trial or decision in the bar disciplinary process?

17. Has the Oregon Supreme Court, Oregon State Bar or any other bar association ever found you in violation of a Disciplinary Rule or Rule of Professional Conduct? If yes, please describe the violation and provide the date of decision.

18. Has a former client ever successfully obtained post-conviction relief based on your representation? If yes, please describe and cite to opinion, if there is one.

I certify that the above information is true and complete.

_____ _____

SIGNATURE DATE

Attachment 4

Oregon

Office of Public Defense Services
198 Commercial St. SE, Suite #205
Salem, Oregon 97301
Telephone (503) 378-3349
Fax (503) 378-4462
www.oregon.gov/opds

To: Members, Public Defense Services Commission
Lane Borg, Executive Director

From: Eric Deitrick, General Counsel

Re: OPDS Complaint Policies

Date: October 15, 2019

Background: OPDS has a complaint policy regarding both (1) the quality of public defense providers and (2) payments regarding attorney fees and non-routine expense requests. ORS 151.216 implies that OPDS shall have a policy regarding the former, and directs OPDS to have a policy regarding the latter.

The current OPDS complaint policy was adopted by the PDSC on October 22, 2004, and it has remained unchanged. Presently, there are several reasons to amend the complaint policy. It's unnecessarily long and complicated. It differentiates between current and former clients in a way that is not helpful. And the threshold of "facially reasonable issue regarding quality of services," is vague and provides uncertain guidance to the agency.

Additionally, there is no list of remedies for those who have received founded complaints. Historically, OPDS has fashioned remedies on a case-by-case basis. Former general counsel Paul Levy noted the need to update this policy in a memo to the agency.

Agency Recommendation: OPDS recommends the PDSC adopt the proposed OPDS complaint policy. On a practical level, the product is more clear and direct. It also eliminates the "facially reasonable issue regarding quality of services."

In its place, it requires OPDS to investigate complaints if the complaint "presents sufficient information to show that the public defense attorney may have failed to satisfy state and federal constitutional requirements for the provision of adequate and effective assistance of counsel." This aligns the complaint policy with the contract terms and the level of services for which the client is entitled. This standard provides better direction to agency staff in assessing where to focus our limited resources responding to complaints.

The proposal continues to provide the agency with discretion when complaints do not meet that burden, but the agency believes investigation is warranted. Finally, the proposal includes a list of possible remedies for founded complaints.

Proposed Motion: I move to adopt the proposed OPDS Complaint Policy.

Proposed OPDS Complaint Policy

The following OPDS Complaint Policy and Procedures is adopted by the Public Defense Service Commission (PDSC) pursuant to ORS 151.216(1)(f)(j) and (h), effective _____.

Policy

It is important for OPDS to be aware of complaints regarding the performance of public defense providers and the cost of public defense services, to have a policy regarding the process of such complaints, and to address such complaints in a manner that is consistent with its obligation to provide high quality, cost-efficient public defense services. OPDS has an independent duty to oversee quality and cost effectiveness.

This policy governs the procedure for receiving, investigating, and responding to complaints regarding (1) the quality of services provided by public defense attorneys, and (2) payment from public funds of attorney fees and nonroutine fees and expenses incurred in cases.

To provide OPDS with specific guidelines for the handling of complaints, the PDSC adopts the following procedures.

Complaint Policy and Procedures Regarding Quality of Services of Public Defense Attorneys

I. Definitions and screening

A. "Public defense attorney" means counsel appointed to perform legal services for financially eligible individuals as required by ORS 34.355, 135.055, 138.500, 138.590, 161.346, 161.348, 161.365, 419A.211, 419B.201, 419B.208, 419B.518, 419B.908, 419C.209, 419C.408, 419C.535, 426.100, 426.135, 426.250, 426.307, 427.295, 436.265 or 436.315, the Oregon Constitution, or the United States Constitution.

B. All complaints about public defense attorneys shall be directed to the General Counsel division of OPDS. Complaints regarding the quality of services provided by a public defense attorney must be made in writing. Submissions to OPDS may be made in confidence or may include information submitted in confidence. OPDS will not disclose such information, except as required by law, without the consent of the person making the submission.

C. After receiving a complaint, an attorney from the General Counsel Division will review the complaint to determine if it presents sufficient information that the public defense attorney may have failed to satisfy state and federal constitutional requirements for the provision of adequate and effective assistance of counsel as required in the General Terms of the Public Defense Legal Services Contract.

D. If the complaint does not present sufficient information to show that the public defense attorney may have failed to satisfy state and federal constitutional requirements for the provision of adequate and effective assistance of counsel as required in the General Terms of the Public Defense Legal Services Contract, the General Counsel Division will notify the public defense attorney by providing him or her with a copy of the complaint and close the matter. OPDS shall also notify the complainant that the matter has been closed.

E. If the complaint does present sufficient information to show that the public defense attorney may have failed to satisfy state and federal constitutional requirements for the provision of adequate and effective assistance of counsel as required in the General Terms of the Public Defense Legal Services Contract, an attorney from the General Counsel Division will begin an investigation and notify the public defense attorney by providing him or her, and their supervisor or consortium administrator (if applicable) with a copy of the complaint.

F. OPDS reserves the right to investigate any complaint even if it does not present sufficient information to show that the public defense attorney may have failed to satisfy state and federal constitutional requirements for the provision of adequate and effective assistance of counsel as required in the General Terms of the Public Defense Legal Services Contract.

II. Procedure for investigating complaints

A. During the course of investigation, if more information is needed, OPDS may contact the complainant. Complaints will not be decided based solely on the assertions of the complainant. OPDS will investigate all complaints by contacting the public defense attorney and discussing the complaint with the attorney and providing the attorney with an opportunity to respond to the complaint. OPDS may gather information from any other source.

B. When a complaint is received, OPDS will determine whether it is appropriate to refer the complainant to the Oregon State Bar (OSB) or the court. If the complainant has already initiated a complaint with OSB, OPDS will monitor OSB's resolution of the complaint. OPDS may still conduct its own independent investigation.

III. Resolution of complaints

A. After conducting an investigation and considering the public defense attorney's response, OPDS shall determine whether the public defense attorney's representation failed to satisfy state and federal constitutional requirements for the provision of adequate and effective assistance of counsel as required in the General Terms of the Public Defense Legal Services Contract. If OPDS determines that the public defense attorney's representation failed to satisfy the requisite standards, OPDS may take any actions including but not limited to the following:

1. Discussion with attorney and supervisor or consortium administrator (if applicable), with agreement for an appropriate course of action;
2. Written reprimand;
3. Mandatory training and/or attendance at a continuing legal education program;
4. Require the public defense attorney to obtain a mentor;
5. Modification of the public defense attorney's qualifications for case types;
6. Suspension from representation in public defense cases.

B. OPDS shall notify the attorney and the supervisor or consortium administrator (if applicable) in writing of its findings and of any action taken or sanction imposed in response to a finding of unsatisfactory representation.

C. OPDS shall notify the complainant in writing of any action taken as a result of their complaint following investigation.

D. OPDS shall maintain a record of each complaint filed under this section and of any action taken in response to the complaint.

E. Nothing in this policy prohibits OPDS from receiving information in any form from any source regarding the performance of public defense attorneys and taking such action as it deems appropriate.

Complaint Policy and Procedures Regarding Payment from Public Funds of Attorney Fees and Non-routine Fees and Expenses

I. Screening of complaints

A. A complaint regarding payment from public funds of attorney fees or non-routine fees and expenses shall be made in writing and directed to the General Counsel division of OPDS. Submissions to OPDS may be made in confidence or may include information submitted in confidence. OPDS will

not disclose such information, except as required by law, without the consent of the person making the submission.

B. After receiving a complaint, an attorney from the General Counsel Division will review the complaint to determine if it presents sufficient evidence that the payment from public funds of attorney fees or non-routine fees and expenses was unreasonable.

C. If the complaint does not present sufficient evidence that the payment from public funds of attorney fees or non-routine fees and expenses was unreasonable, OPDS will notify the complainant and close the matter.

D. If the complaint does present sufficient evidence that the payment from public funds of attorney fees or non-routine fees and expenses was unreasonable, an attorney from the General Counsel Division will begin an investigation.

II. Procedure for investigating complaints

A. OPDS shall review records related to the attorney fees or non-routine expense authorization or payment. If the matter complained of is not resolved by a review of the records, OPDS shall contact the public defense attorney or provider for additional information. During the course of investigation, if more information is needed, OPDS may contact the complainant. OPDS may gather information from any other source.

III. Resolution of complaints

A. After completing its investigation, OPDS shall determine whether all of the information available establishes or fails to establish that the fee or expenditure complained of was unreasonable. If the fee or expenditure was not unreasonable the matter shall be closed and the complainant notified of the closure.

B. If OPDS determines that the fee or expense was unreasonable, it make take any or all of the following actions, unless the fee or expense was specifically pre-authorized by OPDS and used for the purpose authorized:

1. Decline payment for the goods or services in question;
2. Seek reimbursement for any funds determined to have been improperly obtained or used;
3. Written reprimand;
4. Upon approval by the executive director of OPDS, suspend the attorney's eligibility for appointment in public defense cases or decline to authorize future fees or expenses for the provider; and,

5. Take such additional measures as may be appropriate under the circumstances.

C. If a fee or expense determined to be unreasonable was specifically preauthorized by OPDS and used for the purposes authorized, OPDS shall review its policies and procedures and take such action as appears appropriate to avoid future preauthorization of unreasonable fees and expenses.

D. OPDS shall notify the attorney, provider (if applicable), and the complainant in writing of its findings and of any action taken or sanction imposed.

E. OPDS shall maintain a record of each complaint filed under this section and of any action taken in response to the complaint.

F. Nothing in this policy prohibits OPDS from receiving information in any form from any source regarding the cost of public defense services and taking such action as it deems appropriate.

PDSC COMPLAINT POLICY AND PROCEDURES

The following Public Defense Complaint Policy and Procedures (PDCPP) is adopted by the Public Defense Services Commission (PDSC) pursuant to ORS 151.216(1)(f)(j) and (h), effective October 22, 2004.

Policy:

It is important for the Office of Public Defense Services ("OPDS") to be aware of complaints regarding the performance of public defense providers and the cost of public defense services, to have a policy regarding the processing of such complaints, and to address such complaints in a manner which is consistent with its obligation to provide high quality, cost-efficient public defense services.

Certain complaints are in the jurisdiction of the courts or of the Oregon State Bar and should be conducted under procedures adopted by them for such matters. OPDS has an independent duty to oversee the quality and cost of public defense services and to take appropriate action to ensure quality and cost effectiveness.

The PDCPP governs the procedure for receiving, investigating, and responding to complaints regarding (1) the quality of services provided by public defense attorneys, and (2) payment from public funds of attorney fees and non-routine fees and expenses incurred in cases.

In order to provide OPDS with specific guidelines for the handling of complaints, the PDSC adopts the following procedures.

Procedures:

1. Complaints regarding the quality of services provided by public defense attorneys.

   a. A "public defense attorney" is an attorney who provides legal representation at state expense pursuant to ORS 151.216 and other statutes.
   b. A complaint regarding the quality of services provided by a public defense attorney shall be made in writing and signed by the complainant.
   c. Upon receipt of a complaint under this paragraph, OPDS will make an initial determination whether the complaint raises a facially reasonable issue regarding the quality of services provided by a public defense attorney.
   d. If the complaint raises a facially reasonable issue regarding the quality of services, OPDS shall determine whether:

i. the complaint relates to a current concern or dispute which may be capable of resolution through OPDS intervention (for example, a current client contacts OPDS to report lack of contact with the client's lawyer); or
ii. the complaint relates to past or continuing conduct which cannot be resolved by OPDS intervention.

e. If the complaint relates to a current concern which may be capable of informal resolution, OPDS shall provide the attorney and, if applicable, the attorney's employer or consortium administrator, with a copy of the complaint. OPDS shall attempt to resolve the issue with the attorney or the attorney's employer or consortium administrator by agreeing upon an appropriate course of action.

f. If the concern is about past or continuing conduct which has not been or cannot be resolved by OPDS intervention, OPDS shall then determine whether the concern is one which is being or should be addressed:
i. by the court (for example, if the client is seeking to have counsel relieved and new counsel appointed, or if the client has filed a petition for post conviction relief alleging inadequate representation by counsel); or
ii. by the bar (for example, if the allegation is one of misconduct by the lawyer).

g. If one or more of the collateral proceedings identified in *fi* and *fii* above has already been initiated, OPDS shall inform the complainant, the attorney, and, if applicable, the attorney's employer or consortium administrator that OPDS will monitor the progress of the proceeding in the court or bar.

h. If the complaint is of a nature which would more appropriately be addressed by the court or bar and such proceedings have not been initiated, OPDS will inform the complainant of the availability of those processes and inform the attorney, and the attorney's employer or consortium administrator if applicable, that the complainant has been so advised.

i. If:
i. the complaint is not capable of informal resolution and is also not properly the subject of a court or bar proceeding (such as an allegation that an attorney is continually failing to meet obligations under the attorney's contract with PDSC or fails to meet PDSC's Qualification Standards for Court Appointed Counsel to Represent Indigent Persons at State Expense), or
ii. the court or bar proceedings have resulted in a determination that the lawyer has failed to adequately represent the client or has violated an OSB disciplinary rule,

j. Then:
OPDS shall review information submitted and findings made in collateral proceedings, if any, and may perform its own investigation. After notice to the attorney and the attorney's employer or consortium administrator, if

any, of the information obtained by OPDS and an opportunity for the attorney and the employer or administrator to respond, OPDS shall determine whether all of the information available establishes or fails to establish that the attorney's representation with respect to the matter complained of has been unsatisfactory.

i. If OPDS determines that the representation has been unsatisfactory it may take appropriate action to attempt to correct the problem.
ii. If corrective action is not possible or if the attorney or the employer or consortium administrator fails to correct the conduct complained of in a timely manner, OPDS may take such additional action as is appropriate under the circumstances, including but not limited to suspension of the attorney from appointment for any or all case types, in addition to any action authorized under PDSC's contract with the attorney or the attorney's employer or consortium.

k. OPDS shall notify the attorney and the employer or consortium administrator, if any, in writing of its finding and of any action taken or sanction imposed in response to a finding of unsatisfactory representation.
l. If a complaint is resolved informally, no written notice to the complainant is required. If a complaint is not resolved informally, OPDS shall notify the complainant in writing of its finding and of any corrective action taken or sanction imposed in response to a finding of unsatisfactory representation.
m. OPDS shall maintain a record of each complaint filed under this section and of any action taken in response to the complaint.

2. Complaints regarding payment from public funds of attorney fees and non-routine fees and expenses.

n. A complaint regarding payment from public funds of attorney fees or non-routine fees and expenses shall be made in writing and signed by the complainant.
o. Upon receipt of a complaint under this paragraph, OPDS shall make an initial determination whether the complaint raises a facially reasonable claim regarding the payment from public funds of attorney fees or non-routine fees and expenses.
p. If the complaint raises a facially reasonable claim, OPDS shall review records related to the attorney fees or non-routine expense authorization or payment.
q. If the matter complained of is not resolved by a review of the records, OPDS shall contact the attorney or provider for an explanation. The attorney or provider may respond orally or in writing.
r. If, after a review of the records and any additional information obtained from the attorney or provider, a reasonable concern remains that attorney

fees or non-routine fees or expenses may have been unreasonable, OPDS shall notify the attorney or provider of its concern and shall conduct such further investigation as may appear appropriate under the circumstances.

s. After completing its investigation, OPDS shall determine whether all of the information available establishes or fails to establish that the fee or expenditure complained of was unreasonable.

t. If OPDS determines that the fee or expense was unreasonable, it may take any or all of the following actions unless the fee or expense was specifically pre-authorized by OPDS and used for the purpose authorized:
    i. decline payment for the goods or services in question;
    ii. seek reimbursement for any funds determined to have been improperly obtained or used;
    iii. warn the attorney or provider;
    iv. upon approval by the executive director of OPDS, suspend the attorney's eligibility for appointment in public defense cases or decline to authorize future fees or expenses for the provider; and
    v. take such additional measures as may be appropriate under the circumstances.

u. If a fee or expense determined to be unreasonable was specifically pre-authorized by OPDS and used for the purpose authorized, OPDS shall review its policies and procedures and take such action as appears appropriate to avoid future pre-authorization of unreasonable fees and expenses.

v. OPDS shall notify both the attorney or provider and the complainant in writing of its finding and of any action taken or sanction imposed in response to a finding that a fee or expense was unreasonable.

w. OPDS shall maintain a record of each complaint filed under this section and of any action taken in response to the complaint.

2. Nothing in the PDCPP prohibits OPDS from receiving information in any form from any source regarding the performance of public defense providers or the cost of public defense services, and taking such action as it deems appropriate.

3. Submissions to OPDS may be made in confidence or may include information submitted in confidence. OPDS will not disclose such information, except as required by law, without the consent of the person making the submission.

Attachment 5

BRENNAN CENTER FOR JUSTICE

A Fair Fight

Achieving Indigent Defense Resource Parity

By Bryan Furst PUBLISHED SEPTEMBER 9, 2019

Shondel Church spent over 40 days in a Missouri jail — accused of stealing a generator and toolbox — before even seeing his public defender. His lawyer thought they could win the case but explained that his high caseload would prevent them from going to trial for four to six months. Church sat in jail for 125 days, for which Missouri charged him $2,600, before pleading guilty in order to return to his life and family.[1] While Missouri is among the worst examples, indigent defense systems across the country have been chronically under-resourced for decades.

Spending tax dollars on indigent defense has long been unpopular. Shortly after the Supreme Court ruled in 1963 in *Gideon v. Wainwright* that indigent people accused of crimes are entitled to a lawyer, public sentiment for being "tough on crime" skyrocketed and persisted well into the 1990s.[2] As a result, today's systems of indigent defense developed in an era of mass incarceration that is historically unprecedented.[3] It is not surprising that many of these systems remain in crisis today.

Indeed, a half century after the Supreme Court's landmark ruling, the Brennan Center posited in a report, *Gideon at 50: Three Reforms to Revive the Right to Counsel*, that the right to counsel has never been broadly realized in this country.[4] This remains just as true today, with one key difference: criminal justice reform is now seeing broader public support than ever before.[5]

Many of the issues that affect our criminal justice system today — overly long sentences, racial bias, wrongful convictions — are exacerbated by overwhelmed indigent defense systems. In this moment of bipartisan support for reform, creating resource parity between prosecutors and indigent defenders could help achieve transformative change and lend needed credibility to our criminal justice system.

The Supreme Court has observed that the "very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."[6] Whenever adequate defense counsel is lacking, however, "a serious risk of injustice infects the trial itself."[7]

And the infection appears widespread. Until recently in New Orleans, single public defenders were forced to handle upward of 19,000 misdemeanor cases in a year — translating into seven minutes per client.[8] Research has shown that only 27 percent of county-based and 21 percent of state-based public defender offices have enough attorneys to adequately handle their caseloads.[9]

A functioning adversarial legal system requires two adequately resourced opposing sides. But American prosecutors, while sometimes under-resourced themselves, are the most powerful actors in the U.S. legal system.[10] In addition to better funding,[11] there are numerous structural advantages a prosecutor holds that worsen the resource disparity. For example, harsh mandatory minimums and widespread pretrial incarceration create conditions in which people have essentially no choice but to accept whatever plea deal the prosecutor offers.[12]

Historically, improving the resource disparity for defenders has been politically difficult because of the cost and the fear of looking "soft on crime."[13] This might not be as true today, when 71 percent of voters think it is important to reduce the prison population[14] and 66 percent support

the use of government tax dollars to provide indigent defense.[15]

In addition, the fiscal costs of indigent defense reform are not nearly as high when one accounts for the savings it can bring. Issues exacerbated by defender resource disparity — pretrial incarceration, overly long sentences, wrongful convictions — are extremely expensive. The Prison Policy Initiative estimates that the United States spends $80.7 billion on corrections each year, while pretrial detention alone costs $13.6 billion.[16] From 1991 to 2016, Texas paid out over $93 million to wrongfully convicted people.[17]

Providing better indigent defense does not always mean spending more money. State indigent defense systems are often structured in extremely inefficient ways that cost states more than necessary and lead to worse outcomes for people accused of crimes.[18] Restructuring for those jurisdictions may require an up-front investment but can lead to savings in the long term.

At the heart of defender resource disparity is the chronic underfunding of indigent defense — a phenomenon that is widespread and well-documented.[19] But fixing the problem will require more than simply increasing funding, and the question demands thinking broadly about the many issues that drive it. This report identifies five key challenges that contribute to defender resource disparity:

- Improperly structured indigent defense systems
- Unsustainable workloads
- Defender-prosecutor salary disparity
- Insufficient support staff
- Disparate federal funding as compared to law enforcement

Many of the solutions presented in this analysis will improve resource parity, requiring increased up-front spending. Some will produce savings in the long term through cost sharing between indigent defense offices or reduced levels of incarceration, while others, such as mandating open discovery, will cost almost nothing to implement.[20]

This analysis identifies various characteristics of the justice systems that contribute to defender resource disparity and presents solutions to move toward parity. It seeks to build upon and elevate the work of many others in the multi-decade effort to realize the right to counsel in this country — one of many necessary reforms required to dismantle the systems of mass incarceration.

Consequences of Indigent Defense Resource Disparity

Adequately funding indigent defense will require a large public investment — one that lawmakers have long been loath to make. But focusing only on this price tag misses costs borne by both the accused and society at large due to inadequate public defense.

Public defender resource disparity means defense lawyers are overworked, underpaid, undertrained, and lack adequate support resources. This leads to numerous injustices for those accused of crimes, such as increased incarceration and wrongful convictions. Additionally, chronic resource disparity causes harmful effects to the culture of indigent defense systems, perpetuates the often all-too-accurate characterization of "assembly line justice," and ultimately erodes trust in our criminal justice system. And while the entire nation is impacted, these consequences are disproportionately shouldered by people of color.[21]

A. Impact on Those Accused of Crimes

Under-resourcing indigent defense contributes to unnecessary incarceration in myriad ways. Early in a case, public defenders with crushing caseloads are unable to zealously advocate for their clients to be released pending trial.[22] Pretrial detention leads to numerous downstream consequences, such as higher conviction rates, longer sentences, and increased recidivism.[23] Of course, improving pretrial representation alone will not overcome the many injustices of bail systems across the country, but there is evidence that it can help. A 2018 policy brief by the California Policy Lab found that by providing access to counsel prior to arraignment (generally a person's first appearance before a judge), the San Francisco Public Defender's Pretrial Release Unit was able to double a person's chance of release from 14 to 28 percent.[24]

Public defenders in Kansas City, Missouri, on the other hand, are so severely backlogged that a man there was recently arrested for a robbery and held in jail pretrial for thirteen months before his public defender had an opportunity to investigate his case. Video footage from a nearby convenience store's security camera clearly showed the man was not at the scene of the crime when it was committed. The charges were quickly dropped, but the man had already lost a year of his life.[25] Unfortunately, stories like this are not uncommon.[26]

Studies also show that the quality of defense has a direct impact not just on conviction rates but on sentence length following conviction. One study found that people in Philadelphia who were represented by full-time public defenders, as opposed to private attorneys appointed by the court, received on average a 24 percent decrease in sentence length and were 62 percent less likely to receive a life sentence.[27] The authors suggest the differences were partly due to "extremely low compensation" of appointed counsel that "makes extensive preparation economically undesirable."[28]

Wrongful convictions are also more likely when public defenders are under-resourced. Since 1989, the University of Michigan National Registry of Exonerations has documented 2,468 exonerations to date amounting to 21,726 years of wrongful incarceration,[29] though the actual number of wrongful convictions is surely much higher.[30] As the National Right to Counsel Committee reported in 2009, "The causes of wrongful conviction, such as mistaken eyewitness identifications, faulty scientific evidence, and police perjury, are all matters that competent defense lawyers can address."[31]

B. Impact on the Culture Among Indigent Defense Attorneys

Decades of under-resourcing has created cultures within many indigent defense systems that value efficient case processing above zealous representation.[32] Defenders are forced to work with a complete lack of resources, inadequate institutional support, and perverse financial incentives, all of which, as Michigan Law Professor Eve Primus has said, "beat the fight out of them."[33] As a result, harmful practices — such as failing to conduct investigations or perform legal research and pushing clients to plead guilty prior to learning the facts of a case — become normalized and entrenched.

Underfunding public defenders can also exacerbate the problems of implicit bias that are entrenched at every stage of the criminal process. Well-documented racial bias of police, prosecutors, and judges leads to unjust outcomes every day, and public defenders are often the first and last line of defense against it.[34] But public defenders are susceptible to implicit racial bias like everyone else, which can lead to worse outcomes for clients unintentionally perceived as more guilty. Academics and practitioners have long warned that the conditions public defenders

work under (that is, tired people under high stress with a large amount of discretion) make them more vulnerable to implicit bias.[35]

These cultural norms among indigent defense providers then become obstacles to reform as attorney assumptions and beliefs become embedded. Jonathan Rapping, the founder and president of Gideon's Promise, argues that "if we do not change the underlying assumptions that evolve from an underfunded, structurally corrupt system, reform cannot be achieved."[36] But changing culture in any organization is difficult and will require a deep commitment internally, as well as support from state and local governments.

Along with the widely reported injustices to individual people accused of crimes, the cultural status quo of indigent defense justifiably causes the public to question the legitimacy of criminal justice systems. This is just one reason why 91 percent of Americans say the criminal justice system has problems that need fixing.[37]

Structural Contributors to Indigent Defense Resource Disparity

Policy decisions that states make regarding the structure of indigent defense administration and delivery have enormous implications for the quality of representation received. The relatively short and uncertain history of indigent defense in the United States has resulted in a patchwork of systems that has failed to deliver on the rights established in *Gideon*. This is especially true in light of the unique powers of American prosecutors' offices.

The jumble that has evolved offers defense services through various combinations of three different models. One model, the fully state-funded public defender office, has generally proved to be the most effective. Despite this recognition by experts, most indigent defense systems are not structured this way, lowering the quality of indigent defense nationwide. In addition, the challenges presented by improperly structured defense systems are compounded by unsustainable public defender workloads, a salary disparity between defenders and prosecutors, insufficient support resources, and a lack of federal funding.

A. Improperly Structured Indigent Defense Systems

While the origins of the American prosecutor can be traced back to the 17th century, the idea of the public defender was not proposed until 1893 by Clara Foltz, one of the nation's first female lawyers.[38] The first colony-wide system of public prosecution predates the first public defender office on American soil by 210 years.[39] In fact, by 1914, when Los Angeles County opened the first public defender office, all but five states in the nation had county level public prosecutor offices closely resembling those of today.[40] As a result, while modern prosecutor offices had centuries to develop, indigent defense providers did so more rapidly.

In 1960, three years before the Supreme Court announced the right to a court-appointed attorney in *Gideon*, only 96 public defender offices existed.[41] In the wake of *Gideon*, states scrambled to comply with this unfunded federal mandate with no instruction from the court on how to do so. To make matters worse, the development of most indigent defense programs in the United States coincided with the unprecedented 40-year growth of mass incarceration and "tough on crime" culture.[42] In these reluctant "laboratories of democracy," many experiments were tried, most were failures.

Today, an indigent person accused of a felony in Washington, D.C., will likely receive the highest quality legal representation available — but that is far from the norm.[43] Accused of the same crime in Kansas City, Missouri, or New Orleans, Louisiana, a defendant may be one of a hundred active cases on an attorney's docket, resulting in sitting in jail for months before the attorney has time to meet.[44]

1. Indigent Defense Delivery

Across the United States, there are three main forms of indigent defense delivery: public defender offices, assigned counsel, and contract counsel. The method a state chooses has wide implications for the quality of representation:

- **Public defender office:** Salaried attorneys perform indigent defense in a jurisdiction on a full-time or part-time basis. They generally work together in an office setting akin to a law firm and share support staff. The public defender model has been shown by some studies to be the most effective form of indigent defense, as measured by conviction rates, sentence length, and likelihood of receiving a life sentence.[45] While public defender offices require a larger up-front investment to establish, they can lower costs by sharing expenses and pooling resources in the long run. A study in Texas, for example, revealed that misdemeanor cases handled by public defender offices in the state cost 23 to 32 percent less than those handled by other indigent defense models while felony cases cost 8 to 22 percent less.[46] The authors calculated that switching to a statewide public defender system could lead to savings of $13.7 million per year.[47] A similar study in New York found that cases handled by public defender offices in the state cost about $77 less per case than assigned counsel, while yet another study in Iowa found a difference of $200.[48]

- **Assigned counsel:** Private attorneys are appointed by the court to represent indigent persons accused of crimes on a case-by-case basis. They are generally paid an hourly rate or a predetermined amount that corresponds to the type of case being tried. Some counties rely primarily on assigned counsel while others only use them to supplement public defender

offices when there is a conflict of interest. Assigned counsel are often paid very low hourly rates. In about half of the states, they are subject to fee caps that dictate the maximum amount an attorney can earn on a given case, which incentivizes attorneys to do less work on a case once they reach the maximum threshold. A 2013 survey by the National Association of Criminal Defense Lawyers (NACDL) found that, of the 30 states that had established statewide compensation rates, the average was $65 an hour but the rate was as low as $40 an hour in some states.[49] These rates do not consider attorney overhead costs, which can be over 50 percent of an attorney's revenue.[50]

- **Contract counsel:** Private attorneys contract with a jurisdiction to provide all or a portion of indigent defense representation. States often award contracts to the lowest bidder. The Sixth Amendment Center reports that by far the most prevalent form of indigent defense in the nation is the flat-fee contract system.[51] Under a flat-fee contract, a private attorney represents an unlimited number of clients for a set fee. Flat-fee contracts financially incentivize attorneys to do as little work as possible on each case. This is because all costs for a case, such as investigation or consulting expert witnesses, come out of the same fee and thus directly eat away at whatever profit the attorney makes. For this reason, the American Bar Association (ABA), along with many others, recommends banning flat-fee contracts in its *Ten Principles of a Public Defense Delivery System*.[52] While the practice remains pervasive throughout the country, many state and local jurisdictions have taken steps to bar its use.[53]

> While public defender offices require a larger up-front investment to establish, they can **lower costs** by sharing expenses and pooling resources in the long run.

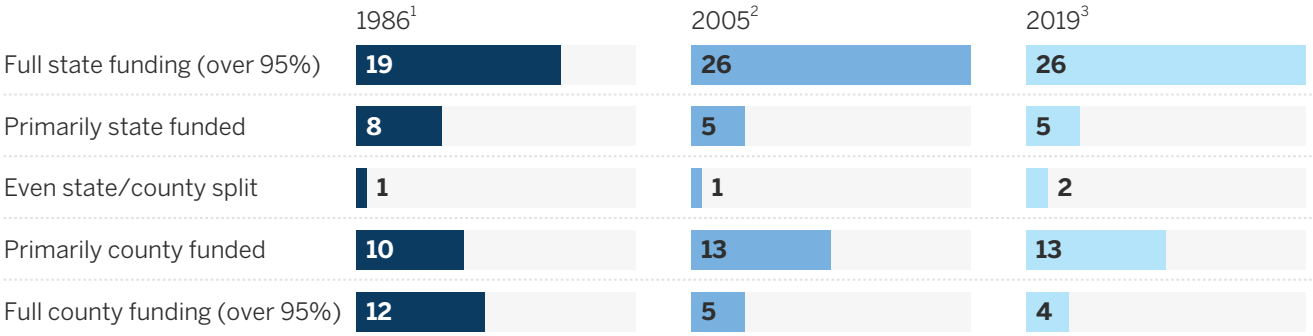
2. Administration and Funding of Indigent Defense

Like methods of delivery, the methods of administrating and funding indigent defense vary widely among the states. This, too, directly impacts the quality of representation provided in a given jurisdiction. Across the United States, there are differing approaches to how indigent defense oversight is divided between state and county governments. Expert bodies that have studied indigent defense, such as the National Right to Counsel Committee, have observed that large urban counties can be overwhelmed by high case volumes, while rural counties may not have adequate resources to handle even a single serious homicide case.[54] They conclude that, in general, the more authority and responsibility a statewide commission or agency has for administering and funding indigent defense, the better and more consistent the level of representation is throughout the state.[55] The following section describes how the administration and funding of indigent defense is divided between county and state governments.

- **Administration of indigent defense:** The administration of indigent defense includes oversight duties such as setting standards of practice, limiting workloads, and appointing chief public defenders. The structure of administration ranges from total control in a statewide commission or agency to either partial state control or purely county control. Consolidating control of indigent defense in a single statewide authority or public defender office allows for the formulation of consistent standards, training of attorneys, and sharing of resources, such as paralegals and investigators.
- **Indigent defense funding sources:** The source of funding for indigent defense is intimately linked to control over its delivery. Of all the states that have a statewide indigent defense system, only Louisiana relies primarily on local sources of revenue for funding.[56] Multiple studies have shown that when counties are left to fund indigent defense, there is wide disparity in the quality of representation between them.[57] An encouraging trend from the mid-1980s to the early 2000s showed systems moving away from county funding and toward increased state funding. However, as the table below illustrates, this trend seems to have stagnated. Currently, 17 states rely primarily or fully on county funding for indigent defense, often leading to inconsistent representation and severely under-resourced indigent defenders.[58] But statewide funding is no guarantee of *adequate* funding, as evidenced by Missouri, which fully funds indigent defense statewide but at grossly inadequate levels.[59] The latest available data on nationwide indigent defense spending at the state level showed that, from 2008 to 2012, 18 states increased spending on indigent defense while 26 decreased it.[60]

Some states rely on erratic funding sources that are inconsistent relative to government general revenue. A 2010 Brennan Center report found that, of the 15 states with the highest prison populations, 13 charged defendants fees to recuperate the costs of public defense.[61] Louisiana infamously funds its public defense system through

Table 1: Indigent Defense Funding Source by Number of States



As the table above indicates, the encouraging national trend toward increased state funding seems to have stagnated in recent years.

a $45 court fee assessed on every person convicted of so much as violating a local ordinance.[62] This means that indigent defense funding relies on inconsistent revenues, such as traffic tickets, leading to regular budget cuts and hiring freezes.[63]

3. The Unique Powers of the American Prosecutor

The role of the indigent defender cannot be properly understood without some comparison with the extraordinarily broad powers of their courtroom adversaries. Prosecutors — and district attorneys in particular — are often described as the most powerful legal actors in criminal systems across the United States.[64] As far back as 1931, scholars noted that "the prosecutor has more power over the administration of justice than the judges, with much less public appreciation of his power."[65] This underlying belief is the genesis of the current progressive prosecutor movement as a vehicle for criminal justice reform.[66] Whether electing reform-minded district attorneys alone will lead to lasting transformational change is an open question, but the fact remains that prosecutors wield immense courtroom power that defense attorneys and their clients must confront every day.[67]

The power of prosecutors stems primarily from their largely unfettered and unreviewable discretion to bring charges and conduct plea bargaining. In an era of mandatory minimums and enhanced sentences, the power to charge is ultimately the power to dictate the sentence.[68] Prosecutors can use the threat of large mandatory minimums to leverage a plea deal with a lower sentence, making the term "plea bargaining" somewhat of a misnomer. In general, the prosecutor will present a take-it-or-leave-it deal that raises a familiar dilemma to anyone involved in the criminal justice system: accept a plea for a reduced number of years or risk losing at trial and be sent to prison under an excessive mandatory minimum. To make matters worse, the accused person is often forced to make this decision while incarcerated in a jail that threatens their health and safety.

Despite the potential for abuse inherent in prosecutorial discretion, even reform advocates such as American University Professor Angela Jordan Davis acknowledge that it "is essential to the operation of our criminal justice system."[69] In her book *Arbitrary Justice: The Power of the American Prosecutor*, Davis explains that this discretion is necessary due to the proliferation of criminal statutes across the country, the limited resources in prosecutor offices, and the need for individualized justice.[70] The problem, she explains, is that prosecutors generally exercise this discretion "without meaningful guidance, standards, or supervision," leading to decisions that are "more arbitrary than individualized, and deep-seated, unconscious views about race and class are more likely to affect the decision-making process."[71]

Adding to this power, the Supreme Court has repeatedly refused to submit prosecutorial discretion to judicial review.[72] Because their broad discretion is ultimately unreviewable, prosecutors face very little accountability outside the will of the voters, and, until recently, voters were not paying much attention.

B. Unsustainable Workloads

Establishing reasonable workload standards is essential to ensuring that attorneys deliver effective representation and to informing budget decisions. However, *national* caseload standards are of limited utility. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals (NAC) recommended the following annual maximum caseloads for single attorneys in a public defender office: 150 felonies, 400 misdemeanors,

200 juvenile court cases, 200 Mental Health Act cases, and 25 criminal appeals.[73]

These are the only national caseload recommendations ever proffered and were widely promulgated — not just as maximums but as norms in many jurisdictions — by leading government and advocacy groups for decades.[74] However, as Indiana University School of Law Professor Norman Lefstein points out in his seminal book on public defender caseloads, these standards were never based on any empirical research and were set too high.[75] Even at the most well-resourced public defender offices in the country, a single attorney with 150 felonies on her docket in a single year is unable to effectively represent clients.[76]

As the NAC itself forewarned, the entire concept of national caseload standards is fraught,[77] because the number of required hours to effectively handle a given case can vary widely from one jurisdiction to the next. Tellingly, no national caseload standards for prosecutors exist. After a three-year effort to set accurate national workload standards, the National District Attorneys Association "found that it was impossible for such standards to be developed" while controlling for changing case factors between jurisdictions.[78]

Continuing to use the NAC standards as benchmarks undermines efforts to achieve more reasonable workloads. Today, there is movement toward developing more localized workload standards. Since 2014, the ABA has commissioned studies to determine state-specific workload standards in Missouri, Louisiana, Colorado, and Rhode Island.[79] The studies utilize the Delphi method[80] to determine the average number of hours it takes an attorney to provide "reasonably effective assistance of counsel pursuant to prevailing professional norms," and they include a national blueprint for other states to use in determining reasonable workloads[81] — in other words, how many hours it should take an attorney to handle a case on average while providing effective assistance of counsel.

While a direct comparison of workload standards is difficult because case types are organized differently among jurisdictions, the following table gives an idea of the wide variation in workload standards between states.

The studies further revealed the extent of underfunding in these systems. In Rhode Island, for example, the study determined that the Rhode Island public defender system only has capacity to handle 36 percent of its current caseload while still providing reasonably effective representation.[82] In Louisiana, the system has capacity to handle only 21 percent of its current caseload and is understaffed by an astounding 1,406 full-time attorneys.[83]

Rather than relying on uninformed misconceptions about the respective roles and importance of defenders and prosecutors, these studies provide an evidence-based rationale for setting necessary funding levels. But determining what is a reasonable workload standard is far easier than enforcing it in jurisdictions that are reticent to increase indigent defense funding. As of 2013, only five states in the nation had any binding statewide workload standards,[84] and only Massachusetts has workload limits that are significantly lower than the NAC standards.[85]

C. Defender-Prosecutor Salary Disparity

Unsurprisingly, studies show that years of experience are directly correlated to success in defending criminal cases.[86] In order to ensure that indigent defense providers are comparably experienced to their prosecutor counterparts, it is essential to have salary parity at every staff level, from line attorneys to chief public defenders and district attorneys. Recent surveys suggest that pay parity between prosecutors and full-time attorneys at major public defender offices may be becoming the norm.[87] But in many places, the disparity still exists. Take the Fourth Judicial District in Florida, for example, where public defenders with zero to three years of experience earn about $10,000

Table 2: Average Hours per Case Required for Reasonably Effective Representation by State[1]

	Missouri	Louisiana	Colorado	Rhode Island
Highest-level felony category	107	201	427	182
Misdemeanor	12	8–12[2]	11–16[3]	13
Probation revocation	10	8	7	17

less than their prosecutor counterparts.[88] Or Colorado's First Judicial District (Denver), where the average salary of the most junior defenders is $15,000 less than the most junior prosecutors.[89]

The situation is even more bleak for contract-based indigent defense providers and appointed counsel, for which parity is harder to measure. A 50-state survey conducted by the NACDL in 2013 found that these attorneys were consistently underpaid due to unreasonably low hourly rates and maximum fees and the use of flat-fee contracts.[90] Attempts to achieve parity must go beyond the salaries of full-time public defenders and ensure that all indigent defense providers are being paid a reasonable wage.

> Flat-fee contracts **financially incentivize** attorneys to do as little work as possible on each case.

One powerful way to achieve pay parity and advocate for higher pay in general is through formal or informal collective bargaining partnerships between defenders and prosecutors. In 1994, public defenders and prosecutors in Ventura County, California, formed a union and successfully bargained for pay parity with other counties.[91] More recently, New York City public defenders and prosecutors joined forces to advocate for pay parity with other city attorneys.[92] The unlikely alliance made for a powerful force at city council meetings and also captured media headlines, furthering the attorneys' message and ultimately winning a gradual shift to pay parity by 2024.[93]

D. Insufficient Support Staff

Providing effective representation requires adequate support resources, such as investigators, paralegals, and access to expert witnesses. This is particularly true for indigent defense providers who do not have the same access to government resources as their prosecutor counterparts. This includes police investigation, forensic labs, and employees who can testify as expert witnesses.[94]

A survey of 29 statewide indigent defense programs in 2013 found that six states had fewer than 10 full-time investigators on staff in the entire state and 19 states had fewer than 10 paralegals.[95] As to be expected, things are even worse in county-based systems. A 2007 survey found that 40 percent of all county-based offices and 87 percent of small offices (those receiving less than 1,000 cases per year) employed no investigators whatsoever.[96] Only 7 percent of county-based offices nationwide met the accepted professional guidelines for investigator-to-attorney ratio — a statistic that understates the scope of the problem given the widespread understaffing of attorneys.[97]

A comparison to prosecutorial investigatory resources highlights the disparity. A nationwide Bureau of Justice Statistics survey of prosecutor's offices found a total of 7,311 full-time investigators, compared with just 2,473 full-time investigators in state-administered indigent defense systems and county-based public defender offices.[98] While it is true that prosecutors carry the burden of proof and must investigate certain cases that are ultimately never charged, they also have the enormous benefit of police resources to conduct investigations, greater access to police records, and government-funded forensic labs.

The only way to truly remedy this disparity is to hire more full-time indigent defense investigators. However, one low-cost step that jurisdictions can take toward investigative resource parity is to ensure prosecutors follow expansive discovery policies, also known as open discovery.[99] Discovery is the process in which the defense and prosecution exchange files that are relevant to the case. Expansive discovery policies allow defense counsel to have early access to all or most of the unprivileged information in a prosecutor's file.

Early and open discovery allows defense counsel to assess the strength of a case to inform plea bargaining, the method by which over 94 percent of cases are closed.[100] Restrictive discovery can leave people accused of crimes at an enormous disadvantage. Take New York for example: Until 2019, discovery was not required until the day before trial was set to start.[101] While the prosecution had access to police records, forensic testing results, and potential witnesses, defense counsel was largely left in the dark. Often this obstacle was insurmountable and put accused people in the impossible position of negotiating a plea without knowing the strength of the government's case.

The ABA has long recommended expansive and early discovery, and it has become the norm in many jurisdictions. Some district attorneys have proactively instituted open discovery practices with the understanding that it is essential for the fair administration of justice.[102] Other jurisdictions have had to resort to legislation to mandate open discovery.[103]

E. Disparate Federal Funding as Compared to Law Enforcement

***Gideon* has always been and remains an unfunded** federal mandate. The federal government plays a miniscule role in funding indigent defense at the state level, despite historically playing a far larger role in funding state and local law enforcement.[104]

It is worth noting that grants from the Department of Justice, known as Byrne-JAG funding, can be used to support public defense, and several states make good use of those federal dollars.[105] But only a few states choose to spend the grants that way. In 2016, states allocated just $1.8 million of Byrne-JAG funding to indigent defense, less than 1 percent of available funds, compared to $17 million categorized as "prosecution and court initiatives."[106] A federal survey found that only half of public defender offices were even aware they were eligible for these grants.[107]

The federal government should earmark funds specifically for indigent defense to ensure the money is spent that way. One current proposal to do just that is the Equal Defense Act, introduced by Senator Kamala Harris (D-CA) in 2019.[108] If passed, the legislation would provide grant funding to states that improve data collection, set reasonable workload limits based on statewide data, and institute pay parity between public defenders and prosecutors.[109] This model could be used to incentivize states to adopt a range of best practices in indigent defense delivery, including those required by the Equal Defense Act as well as other needed reforms, such as implementing a state-administered system of indigent defense delivery and requiring open and expansive discovery.

Recommendations

The following changes will help deliver on *Gideon*'s promise to provide the quality of indigent defense needed in our adversarial system:

Structuring Indigent Defense Systems

- **Establish statewide indigent defense providers:** Indigent defense should be overseen by a statewide public defender agency or commission with the power to set practice standards across the state. The public defender office should be the primary delivery model whenever possible. Not only will this help protect peoples' Sixth Amendment rights, but it can lower justice system costs by increasing efficiency, lowering the number of wrongful convictions, and reducing the incarcerated population.

- **Fund indigent defense at the state level from general revenue:** This will ensure higher quality and more consistent representation statewide. Choosing a stable funding stream, such as state general revenue, would increase budget predictability and the independence of indigent defense providers.

- **Ban flat-fee contracts:** Flat-fee contracts create a direct conflict between an attorney's financial interests and their duty to provide zealous representation. In addition, attorneys operating under such contract models are generally under-resourced and are thus unable to provide adequate representation to their clients.

- **Conduct training to improve indigent defense culture:** As reforms are achieved, they must be accompanied by regular training in order to ensure that embedded harmful practices do not continue once more resources are available. The training should encourage indigent defense providers to use their unique positions to elevate the voices of the accused and push for further reform.

Workload Standards

- **Set state-specific workload standards:** States should set defender workload standards based on the number of hours required to reasonably defend a person for a particular class of crime in the state. To do so, states can utilize the blueprint from ABA-commissioned studies in Louisiana, Missouri, Rhode Island, and Colorado. These studies should be repeated at regular intervals to account for changing conditions, and they should act as the cornerstone for setting maximum workload limits and funding levels. When state or county governments fail to fund indigent defender and prosecutor offices based on calculated workload standards, public defenders and prosecutors should receive proportional funding equal to their respective workloads.

Defender-Prosecutor Salary Disparity

- **Create salary parity between indigent defense providers and prosecutors:** Salary parity ensures that the adversarial offices will have equal opportunity to develop and retain experienced attorneys. In jurisdictions without pay parity, indigent defense providers and prosecutor offices should consider forms of collective bargaining, as seen in New York City and Ventura County, California. Where assigned counsel and contract counsel systems are in place, those attorneys must be compensated at a rate based on prevailing professional norms, and caps on the amount an attorney can earn on a given case should be removed.

Increase Federal Funding

- **Pass federal legislation to supplement indigent defense costs:** The federal government should pass legislation, such as the Equal Defense Act, that establishes grant programs for indigent defense providers that certify they have implemented best practices. Comparable grants have been provided to law enforcement for billions of dollars per year for decades without a corresponding commitment to funding indigent defense.

Broader Criminal Justice Reforms to Reduce Resource Disparity

- **Reduce the number of people entering the system who require public defenders:** Local, state, and federal governments must find ways to shrink the number of people entering the justice system requiring public defenders. One way to do this is to reduce the number of offenses for which a person can be jailed. Some prominent advocates have suggested eliminating incarceration as a penalty for all crimes that are currently subject to a maximum of one year or less jail time.[110] Meaningful probation and parole reform can also reduce caseloads for indigent defense providers.[111] A recent report by the Council of State Governments Justice Center found that 45 percent of state prison admissions were due to violations of probation or parole.[112] As a result, public defenders spend an inordinate amount of time handling these types of cases.[113]

- **Pass legislation that requires prosecutor offices to adopt open discovery:** This is a relatively inexpensive way to begin to reduce a disparity that is enormous in some jurisdictions.[114] Of course, prosecutor offices do not have to wait for legislation to force their hand and should proactively adopt such policies.[115]

- **Elect prosecutors that will advocate for increased resource parity:**[116] As administrators of justice, prosecutors hold a duty to ensure the adversarial process is functioning correctly. The growing movement to elect reform-minded prosecutors should incorporate demands for increased funding for indigent defense. Head prosecutors can leverage their political positions to advocate for increased funding and require line prosecutors to flag when defense counsel appears inadequate.

Conclusion

Indigent defense in the United States largely developed in an era that was far more concerned with locking people up than ensuring their Sixth Amendment rights were respected. Chronic underfunding has led to drastic resource disparities between prosecutors and defenders, undermining the very basis of our criminal legal system.

Achieving resource parity does not necessarily mean that prosecutors and indigent defense providers should be granted the exact same amount of funding — a policy that has been resisted because they perform significantly different duties.[117] Nor does it mean that prosecutors should always receive greater funding based on prevailing societal views of their respective importance. Rather, it means that both the defense and the prosecution are adequately resourced to participate as equals in the adversarial system of U.S. criminal justice.[118]

To move past this shameful era of mass incarceration, state, local, and federal governments must implement the above solutions as part of critically needed criminal justice reforms.

Endnotes

1 Church is the lead plaintiff in an ongoing ACLU lawsuit against the state of Missouri for failing to provide the indigent with adequate legal representation. Complaint for Injunctive Relief at 3, *Church v. Missouri*, No.17-CV-04057-NKL (W.D. Mo. 2017), www.aclu.org/sites/default/files/field_document/aclu_missouri_petition_-_170308_ohs_file.pdf.

2 Peter K. Enns, "The Public's Increasing Punitiveness and Its Influence on Mass Incarceration in the United States," *American Journal of Political Science* 58 (2014): 857–872, figure 2, https://ecommons.cornell.edu/bitstream/handle/1813/57116/Enns-2014-American_Journal_of_Political_Science.pdf?sequence=2&isAllowed=y.

3 See generally, *Fact Sheet: Trends in U.S. Corrections* (Washington, D.C.: Sentencing Project, 2019), https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf.

4 Thomas Giovanni and Roopal Patel, Gideon *at 50: Three Reforms to Revive the Right to Counsel* (New York: Brennan Center for Justice, 2013), www.brennancenter.org/sites/default/files/publications/Gideon_Report_040913.pdf.

5 See, for example, U.S. Senate Committee on the Judiciary, "Poll Shows Americans Overwhelmingly Support Prison, Sentencing Reforms," press release, August 23, 2018, https://www.judiciary.senate.gov/press/rep/releases/poll-shows-americans-overwhelmingly-support-prison-sentencing-reforms.

6 *Herrin v. New York*, 422 U.S. 853, 862 (1984).

7 *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980).

8 Underfunding of the New Orleans public defense system led to a million-dollar budget deficit in 2015, prompting the desperate office to run a crowdfunding campaign to raise an additional $50,000. Dylan Walsh, "On the Defensive," *Atlantic*, June 2, 2016, www.theatlantic.com/politics/archive/2016/06/on-the-defensive/485165/.

9 See Lynn Langton and Donald Farole Jr., *County Based and Local Public Defender Offices, 2007* (Washington, D.C.: Bureau of Justice Statistics, 2010), 8, https://www.bjs.gov/content/pub/pdf/clpdo07.pdf (finding that 27 percent of county-based public defender offices had a sufficient number of full-time litigating attorneys required to meet maximum caseload guidelines); Lynn Langton and Donald Farole Jr., *State Public Defender Programs, 2007* (Washington, D.C.: Bureau of Justice Statistics, 2010), 12, www.bjs.gov/content/pub/pdf/spdp07.pdf (finding that 15 of 19 reporting state public defender programs "exceeded the maximum recommended limit of felony or misdemeanor cases per attorney"); see also *System Overload: The Costs of Under-Resourcing Public Defense* (Washington, D.C.: Justice Policy Institute, 2011), 10–11, www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf.

It should be noted that even these estimates underrepresent the degree to which indigent defense workloads are too high, because they rely on the National Advisory Commission's maximum caseload standards, which are far too high. For further explanation on this point see infra text accompanying notes 76–91.

10 See infra text accompanying notes 67–75.

11 See, for example, Maureen Cain and Karen Porter, *2017 Budget/Salary Comparison for District Attorney Trial Offices/Office of State Public Defender Trial Offices* (Denver: Office of the Colorado State Public Defender, 2018), 1, www.coloradodefenders.us/wp-content/uploads/2018/02/2017-DA-OSPD-Survey.pdf (showing Colorado spends $156,574,431 on prosecution and $78,542,342 on defense); *System Overload*, 9 (showing Tennessee prosecutors had a budget of $130–139 million compared to $56.4 million for public defense in 2005).

12 See infra text accompanying notes 22-26, 71.

13 For an in-depth examination of this argument and why it may not be universally true see Ronald Wright, "Parity of Resources for Defense Counsel and the Reach of Public Choice Theory," *Iowa Law Review* 90, no. 219 (2004).

14 American Civil Liberties Union, "91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds," news release, November 16, 2017, www.aclunc.org/news/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds (finding 87 percent of democrats, 67 percent of independents, and 57 percent of Republicans believe it is important to reduce the prison population in America).

15 Belden Russonello Strategists, *American's Views on Public Defenders and the Right to Counsel* (Washington, D.C.: American University School of Public Affairs, Justice Programs Office, 2017), 12, https://static1.squarespace.com/static/55f72cc9e4b0af7449da1543/t/5a0225139140b76ff9027de7/1510090007542/Americans%27+Views_11-7-17.pdf.

16 Peter Wagner and Bernadette Rabuy, "Following the Money of Mass Incarceration," Prison Policy Initiative, January 25, 2017, www.prisonpolicy.org/reports/money.html.

17 Johnathan Silver and Lindsay Carbonell, "Wrongful Convictions Have Cost Texans More Than $93 Million," *Texas Tribune*, June 24, 2016, www.texastribune.org/2016/06/24/wrongful-convictions-cost-texans-over-93-million/.

18 See Eve Brensike Primus, "Defense Counsel and Public Defense," in *Reforming Criminal Justice*, vol. 3, *Pretrial and Trial Processes*, ed. Erik Luna (Phoenix, AZ: Academy for Justice, 2017), 131–132, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1113&context=book_chapters.

19 See, for example, *System Overload*, 6–15; National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (Washington, D.C.: Constitution Project, 2009), 52–64, https://constitutionproject.org/wp-content/uploads/2012/10/139.pdf; American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (Chicago: ABA, 2004), 7–14, www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

20 See *Expanded Discovery in Criminal Cases: A Policy Review* (Washington, D.C.: Justice Project, 2007), 9 ("Initial expenses to implement expanded discovery would be minimal" and would be "offset by overall cost savings of improved efficiency of the courts").

21 While the data shows black and Latino people are more likely to be assigned a public defender, the majority of all racial groups required one. Caroline Wolf Harlow, *Defense Counsel in Criminal Cases* (Washington, D.C.: Bureau of Justice Statistics, 2000), 9, www.bjs.gov/content/pub/pdf/dccc.pdf (finding that in state criminal cases "69 percent of white inmates reported they had lawyers appointed by the court, 77 percent of blacks and 73 percent of Hispanics had public defenders or assigned counsel").

22 See for example, John Yang and Frank Carlson, "Missouri Public Defenders Are Overloaded With Hundreds of Cases While Defendants Wait in Jail," *PBS NewsHour*, May 2, 2018, www.pbs.org/newshour/show/missouri-public-defenders-are-overloaded-with-hundreds-of-cases-while-defendants-wait-in-jail.

23 Will Dobbie et al., "The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges," *American Economic Review*, 108 (2018), 224–226, https://pubs.aeaweb.org/doi/pdf/10.1257/aer.20161503; Christopher Lowenkamp et al., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, The Laura and John Arnold Foundation, 2013, https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_state-sentencing_FNL.pdf (finding those held pretrial

were over four times more likely to receive a jail sentence and received jail sentences almost three times as long and prison sentences more than twice as long as those not held pretrial); Christopher Lowenkamp et al., *The Hidden Cost of Pretrial Detention*, The Laura and John Arnold Foundation, 2013, https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf (finding those held for two to three days were 40 percent more likely to be rearrested pretrial and those held for eight to 14 days were 51 percent more likely to recidivate within two years after their cases closed than those held for less than 24 hours).

24 Alena Yarmosky, *The Impact of Early Representation: An Analysis of the San Francisco Public Defender's Pre-Trial Release Unit* (Los Angeles: California Policy Lab, 2017), 3, www.capolicylab.org/wp-content/uploads/2018/06/Policy-Brief-Early-Representation-Alena-Yarmosky.pdf.

25 Editorial Board, "Innocent Kansas City Man Spent a Year in Jail Because of the Public Defender's Crushing Caseload," *Kansas City Star*, October 22, 2017, www.kansascity.com/opinion/editorials/article180100306.html.

26 See, for example, Mario Koran, "Wisconsin's 'Constitutional Crisis' Is Forcing People to Sit in Jail Without a Lawyer," *Appeal*, May 20, 2019 https://theappeal.org/wisconsin-public-defense-constitutional-crisis-is-forcing-people-to-sit-in-jail/ (reporting on two people that killed themselves after waiting for more than a week to be appointed a lawyer); Larry Hannan, "Ineffective Public Defense Nullifies 10-Year Sentences for Jacksonville Man," *Florida Times-Union,* August 4, 2016, https://www.jacksonville.com/news/crime/2016-08-04/story/ineffective-public-defense-nullifies-10-year-sentence-jacksonville-man (reporting on the case of Gregory Green, whose attorneys failed to speak with Green before his plea deal expired, leading to an enhanced 10-year sentence).

27 See James M. Anderson and Paul Heaton, "How Much Difference Does the Lawyer Make?: The Effect of Defense Counsel on Murder Case Outcomes," *Yale Law Journal* 122 (2012): 154, www.yalelawjournal.org/pdf/1105_8izvsf8m.pdf; see also Morris B. Hoffman, Paul H. Rubin, and Joanna Shepherd, "An Empirical Study of Public Defender Effectiveness: Self-Selection by the 'Marginally Indigent,'" *Ohio State Journal of Criminal Law* 3 (2005): 242 (finding that private lawyers received sentences that were on average nearly five years shorter than public defenders).

28 Anderson and Heaton, "How Much Difference," 188.

29 "Exonerations by State" and "Exonerations Total by Year," National Registry of Exonerations, last accessed July 7, 2019, www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx.

30 See Samuel R. Gross et al., "Exonerations in the United States 1989 Through 2003," *Journal of Criminal Law and Criminology* 95 (2005): 527 ("It is certain — this is the clearest implication of our study — that many defendants who are not on this list, no doubt thousands, have been falsely convicted of serious crimes but have not been exonerated").

31 National Right to Counsel Committee, *Justice Denied*, 47.

32 See Jonathan Rapping, "Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense," *Loyola Journal of Public Interest Law* 9 (2008): 192–193, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1349358; Eve Brensike Primus, "Culture as a Structural Problem in Indigent Defense," *Minnesota Law Review* 100 (2016), 1756, www.minnesotalawreview.org/wp-content/uploads/2016/06/Primus_Online.pdf (connecting indigent defense providers' culture of "meet-and-plead" to structural problems in the indigent defense system).

33 Primus, "Culture as a Structural Problem," 1770.

34 See, for example, Lindsey Devers, *Plea and Charge Bargaining* (Washington, D.C.: Bureau of Justice Assistance, 2011), 3, www.bja.gov/Publications/PleaBargainingResearchSummary.pdf. "Studies that assess the effects of race find that blacks are less likely to receive a reduced charge compared with whites (Farnworth and Teske, 1995; Johnson, 2003; Kellough and Wortley, 2002; Ulmer and Bradley, 2006). Additionally, one study found that blacks are also less likely to receive the benefits of shorter or reduced sentences as a result of the exercise of prosecutorial discretion during plea bargaining (Johnson, 2003). Studies have generally found a relationship between race and whether or not a defendant receives a reduced charge (Piehl and Bushway, 2007:116; Wooldredge and Griffin, 2005)."; Center for Policing Equity, "The Science of Justice: Race, Arrests, and Police Use of Force," July, 2016, https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf; Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich, Christ Guthrie, "Does Unconscious Racial Bias Affect Trial Judges?" *Notre Dame Law Review* 84 (2009): 1195, https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1691&context=facpub.

35 See L. S. Richardson & Phillip A. Goff, Implicit Racial Bias in Public Defender Triage, *Yale Law Journal* 122 (2013),2628, https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=5597&context=ylj; Chris Chambers Goodman, "Shadowing the Bar: Attorneys' Own Implicit Bias," *Berkeley La Raza Law Journal*, 28 (2018): 18, 32, https://scholarship.law.berkeley.edu/blrlj/vol28/iss1/2/; Jessica Blakemore, "Implicit Racial Bias and Public Defenders," *Georgetown Journal of Legal Ethics* 29 (2016): 833, https://heinonline.org/HOL/LandingPage?handle=hein.journals/geojlege29&div=33&id=&page=&t=1560976738; see also Jeff Adachi, "Public Defenders Can Be Biased, Too, and It Hurts Their Non-white Clients," *Washington Post,* June 7, 2016, www.washingtonpost.com/posteverything/wp/2016/06/07/public-defenders-can-be-biased-too-and-it-hurts-their-non-white-clients/?noredirect=on&utm_term=.2b6cf8f49707.

36 Rapping, "Winds of Change," 200.

37 American Civil Liberties Union, "91 Percent of Americans."

38 See Joan E. Jacoby, "The American Prosecutor in Historical Context," *Prosecutor* 30 (1997), https://cdn.ymaws.com/mcaa-mn.org/resource/resmgr/Files/About_Us/AmericanProsecutorHistorical.pdf; Laurence A. Benner, "The California Public Defender: Its Origins, Evolution and Decline," *California Legal History* 5 (2010): 175, https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1148&context=fs.

39 See John L. Worrall and M. Elaine Nugent-Borakove, eds., *The Changing Role of the American Prosecutor* (Albany: State University of New York Press, 2008), 7, www.sunypress.edu/pdf/61690.pdf (explaining that Connecticut became the first colony to abandon private prosecution in lieu of a public prosecution system in 1704); Benner, "California Public Defender," 179 (explaining that Los Angeles County adopted the first public defender office in 1914).

40 Jacoby, "American Prosecutor"; Benner, "California Public Defender" ("By 1912…the process of consolidating prosecutorial power and discretion in the local prosecuting attorneys was essentially complete. The local prosecutor was the primary representative of the public in the area of criminal law").

41 Emery A. Brownell, "A Decade of Progress: Legal Aid and Defender Services," *American Bar Association Journal* 47, no. 9 (1961): 867, https://www.jstor.org/stable/pdf/25721718.pdf?seq=1#page_scan_tab_contents.

42 See Enns, "The Public's Increasing Punitiveness."

43 For a full analysis on the model of representation at the Public Defender Service for the District of Columbia, see *Halting Assembly Line Justice: PDS: A Model of Client-Centered Representation* (Washington, D.C.: National Legal Aid & Defender Association, 2008), www.nlada.net/sites/default/files/dc_haltingassemblylinejustice-jseri08-2008_report.pdf.

44 See notes 8 and 25–26 and accompanying text.

45 See Anderson and Heaton, "How Much Difference"; Radha Iyengar, "An Analysis of the Performance of Federal Indigent Defense Counsel," (working paper 13187, National Bureau of Economic Research, Washington, D.C., 2007) (finding that sentences for defendants with appointed counsel were on average 8 months longer than

those with federal public defenders).

46 Texas Task Force on Indigent Defense, *Evidence for the Feasibility of Public Defender Offices in Texas*, 2011, 4, http://www.tidc.texas.gov/media/31124/pd-feasibility_final.pdf.

47 Texas Task Force on Indigent Defense, *Evidence for the Feasibility of Public Defender Offices in Texas*, at 5.

48 New York State Office of Indigent Legal Services, *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York — 2015 Update*, 2016, 11, https://www.ils.ny.gov/files/Hurrell-Harring/Caseload%20Reduction/Estimate%20of%20the%20Cost%20of%20Compliance%20with%20Maximum%20National%20Caseload%20Limits%20in%20Upstate%20New%20York%20-%202015%20Update.pdf (finding that public defenders spent on average $306.27 per case while assigned counsel spent $383.44); Office of the Iowa State Public Defender, State Public Defender's Efficiency Report, 2007, https://www.legis.iowa.gov/docs/publications/DF/7519.pdf (finding public defenders spent $227 per case compared to $427 for court-appointed attorneys).

49 John P. Gross, *Gideon at 50: Part 1, Rationing Justice: The Underfunding of Assigned Counsel Systems* (Washington, D.C.: NACDL, 2013), https://www.nacdl.org/Document/GideonI-RationingJusticeUnderfundedAssignedCounsel.

50 ALM Legal Intelligence, *Survey of Law Firm Economics* (Atlanta, GA: Managing Partner Forum, 2012), 4, www.managingpartnerforum.org/tasks/sites/mpf/assets/image/MPF%20-%202012%20Survey%20of%20LF%20Economics%20-%20Exec%20Summary%20-%209-20-12.pdf.

51 "Abolishing Flat Fee Contracts for Public Defense Services – ABA Principle 8," Sixth Amendment Center, accessed July 2019, http://sixthamendment.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/abolishing-flat-fee-contracts-for-public-defense-services-aba-principle-8/.

52 See *Ten Principles of a Public Defense Delivery System* (Chicago: ABA, 2002), 3, www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciples-booklet.authcheckdam.pdf; see also *Contracting for Indigent Defense Services: A Special Report* (Washington, D.C.: Bureau of Justice Assistance, 2000), www.ncjrs.gov/pdffiles1/bja/181160.pdf.

53 For example, the Washington State Supreme Court largely banned their use in 2008 ("Such contracts involve an inherent conflict between the interests of the client and the personal interests of the lawyer"); Washington State Rules of Professional Conduct, Comment 27, www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garpc1.08. See also Sixth Amendment Center, "Abolishing Flat Fee Contracts for Public Defense Services—ABA Principle 8," https://sixthamendment.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/abolishing-flat-fee-contracts-for-public-defense-services-aba-principle-8/ (describing Idaho and Michigan's legislative efforts to bar flat fee contracts).

54 National Right to Counsel Committee, *Justice Denied*, 55.

55 National Right to Counsel Committee, *Justice Denied*, 166; see also Miriam S. Gohara, James S. Hardy, and Damon Todd Hewitt, "The Disparate Impact of an Underfunded, 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 (2005), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6199&context=fss_papers.

56 As of 2013, 28 states and the District of Columbia had state-administered indigent defense systems. See Suzanne M. Strong, *State-Administered Indigent Defense Systems, 2013* (Washington, D.C.: Bureau of Justice Statistics, 2016), www.bjs.gov/content/pub/pdf/saids13.pdf; see also "Know Your State: Louisiana," Sixth Amendment Center, last updated 2013, https://sixthamendment.org/know-your-state/louisiana/ ("Louisiana stands alone in the nation as the only jurisdiction with a statewide indigent defense system that relies to a large extent on locally generated non-governmental funding for the right to counsel").

57 See infra note 66; see also National Right to Counsel Committee, *Justice Denied*, 54-55, n. 32 (compiling studies from New York, Nebraska, and Georgia that demonstrate that leaving funding to the counties results in disparate quality of indigent defense).

58 Task Force and Advisory Committee on Services to Indigent Criminal Defendants, *A Constitutional Default: Services to Indigent Criminal Defendants in Pennsylvania* (Harrisburg: General Assembly of Pennsylvania, 2011), http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2011-265-indigent%20defense.pdf.

59 See Editorial Board, "Poor and Need a Lawyer in Missouri? The Public Defender System Is Failing Its Clients," *Kansas City Star*, June 29, 2018, www.kansascity.com/opinion/editorials/article214001804.html.

60 Oliver Roeder, "Just Facts: A Different Kind of Defense Spending," Brennan Center for Justice, July 25, 2014, www.brennancenter.org/blog/different-kind-defense-spending.

61 Rebekah Diller, Alicia Bannon, and Mitali Nagrecha, *Criminal Justice Debt: A Barrier to* Reentry (New York: Brennan Center for Justice, 2010), 17, www.brennancenter.org/publication/criminal-justice-debt-barrier-reentry.

62 "Know Your State: Louisiana," Sixth Amendment Center; see also Giovanni and Patel, *Gideon at 50*, 4 (noting that at least 13 other states have similar fee systems).

63 For a description of the latest round of budget shortfalls and hiring freezes at the New Orleans' public defender office, see Matt Sledge, "Orleans Public Defenders to Cut Services, Freeze Hiring in Face of Revenue Shortfall," *New Orleans Advocate*, May 5, 2019, www.theadvocate.com/new_orleans/news/courts/article_ab56f4f0-6f72-11e9-85ae-2f6df23f566f.html.

64 See, for example, Angela J. Davis, "Prosecution and Race: The Power and Privilege of Discretion," *Fordham Law Review* 67 (1998); Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* (New York: Oxford University Press, 2007).

65 National Commission on Law Observance and Enforcement, *Report on Prosecution* (Washington, D.C.: U.S. Government Printing Office, 1931), 11, www.ncjrs.gov/pdffiles1/Digitization/44542NCJRS.pdf.

66 See, for example, Fair and Just Prosecution et al., *21 Principles for the 21st Century Prosecutor* (New York: Brennan Center for Justice, 2019), www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf; "The Power of Prosecutors," ACLU, last accessed July 8, 2019, www.aclu.org/issues/smart-justice/power-prosecutors; Angela J. Davis, "The American Prosecutor: Independence, Power, and the Threat of Tyranny," *Iowa Law Review* 86 (2001), https://digitalcommons.wcl.american.edu/facsch_lawrev/156/.

67 For a comprehensive argument questioning prosecutorial reform as a theory of change, see Jeffrey Bellin, "The Power of Prosecutors," *NYU Law Review* 94 (2019), www.nyulawreview.org/issues/volume-94-number-2/nyulawreview-94-2-bellin/ (challenging the notion that prosecutors are the most powerful actors in the criminal justice system and arguing that blind acceptance of this fact "overlooks the powerful forces that can and do constrain prosecutors, and diverts attention from the most promising sources of reform"); see also Andrew Cohen, "Reformist Prosecutors Face Unprecedented Resistance From Within," Brennan Center for Justice, June 19, 2019, www.brennancenter.org/blog/reformist-prosecutors-face-unprecedented-resistance-within (describing reactionary forces that are stymieing reform in jurisdictions that have elected reformist prosecutors).

68 For a history of the development of mandatory minimums in the United States, see U.S. Sentencing Commission, "History of Mandatory Minimum Penalties and Statutory Relief Mechanisms," in *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Washington, D.C., 2011), www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_02.pdf.

69 Davis, *Arbitrary Justice*, 12.

70 Davis, *Arbitrary Justice*, 13–14.

71 Davis, *Arbitrary Justice*, 17.

72 See *Wayte v. United States*, 470 U.S. 598, 607 (1985) ("This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review.…Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.")

73 National Advisory Commission, *The Criminal Justice Standards and Goals*, 1973, Standard 13.12, Workload of Public Defenders (Washington, D.C.: National Legal Aid & Defender Association, 1973), www.nlada.net/sites/default/files/nac_standardsforthedefense_1973.pdf.

74 Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense* (Chicago: ABA, 2011), 45–47, www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.pdf#page=17 (explaining various ways in which the American Bar Association, the American Council of Chief Defenders, and individual leaders of the National Association of Criminal Defense Lawyers have endorsed the NAC standards). Government agencies rely upon the NAC standards as well. For example, using the NAC standards, a 2007 Bureau of Justice Statistics report determined that 15 of 19 public defenders were over the "nationally accepted caseload guideline." While this helped illustrate how overburdened many systems were, the report also illustrates the extent to which these standards have been accepted and suggests far more systems have unrealistic workloads. Langton and Farole, *State Public Defender Programs, 2007*, 12–13.

75 Lefstein, *Securing Reasonable Caseloads*, 44–45 ("It is clear that no empirical study in support of its recommended caseload limits was ever undertaken. In fact, it appears that the NAC did not actually do any work of its own in order to come up with the caseload standards attributed to it for so many years.").

76 Lefstein, *Securing Reasonable Caseloads*, 48 ("The lawyers employed by the District of Columbia Public Defender Service in its felony division could not do so in the 1970s, when I served as the agency's director, and they cannot do it today, despite having outstanding support services. Nor can the full-time public defense lawyers employed by the Massachusetts Committee on Public Counsel Services represent as many as 150 felony defendants annually."); see also *Halting Assembly Line Justice*, 13 ("The 1973 DOJ/LEAA report assessing PDS as 'exemplary' noted that a caseload of 20 active felony cases suggests that a lawyer handling adult felony cases would close 'between 110-120 [cases] annually'").

77 NAC, *Criminal Justice Standards,* commentary for Standard 13.12 ("Acknowledging the dangers of proposing any national guidelines, the committee arrived at the cases per attorney per year adopted by the standard. The Commission has accepted these, with the caveat that particular local conditions — such as travel time — may mean that lower limits are essential to adequate provision of defense services in any specific jurisdiction").

78 *How Many Cases Should a Prosecutor Handle? Results of the National Workload Assessment Project* (Alexandria, VA: American Prosecutors Research Institute, 2002), 27.

79 American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, *The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload Standards* (Chicago: ABA, 2014), https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.pdf; American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, *The Louisiana Project: A Study of the Louisiana Defender System and Attorney Workload Standards* (Chicago: ABA, 2017), www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf; American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, *The Colorado Project: A Study of the Colorado Public Defender System and Attorney Workload Standards* (Chicago: ABA, 2017), www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_co_project.pdf; American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, *The Rhode Island Project: A Study of the Rhode Island Public Defender System and Attorney Workload Standards* (Chicago: ABA, 2017), www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ri_project.pdf.

80 For a full description of the Delphi method, see Committee on Legal Aid and Indigent Defendants, *Rhode Island Project*, 12.

81 Committee on Legal Aid and Indigent Defendants, *Louisiana Project*, 1.

82 Committee on Legal Aid and Indigent Defendants, *Rhode Island Project*, 26.

83 Committee on Legal Aid and Indigent Defendants, *Louisiana Project*, 2.

84 "In Your State," Gideon at 50, last accessed July 11, 2019, http://gideonat50.org/in-your-state/#workload-standards (under the "Select a Map" heading, choose "Workload Standards" for a map showing the various level of workload standards across the country).

85 "Massachusetts," Gideon at 50, last accessed July 11, 2019, http://gideonat50.org/in-your-state/massachusetts/#workload-standards (Massachusetts adheres to the following workload limits expressed as case type per year: 125 felony, 250 misdemeanor, 165 juvenile, and 125 youthful offender).

86 See Iyengar, "Analysis of the Performance," 23 (finding that among the defense lawyers studied in the federal system, just one additional year of experience led to sentences that were five months shorter).

87 See *2018 Public Service Attorney Salary Report* (Washington, D.C.: National Association for Law Placement, 2019), 13–21, www.psjd.org/salary-report_2018_pdf (national survey with 44 public defender organizations and 60 prosecutor offices reporting finding slightly higher salaries for public defender offices); see also Massachusetts Bar Association Commission on Criminal Justice Attorney Compensation, *Doing Right by Those Who Labor for Justice* (Boston: Massachusetts Bar Association, 2014), www.massbar.org/docs/default-source/mba-reports/massbar-blue-ribbon-commission-report-doing-right-by-those-who-labor-for-justice-2014-may-09.pdf?sfvrsn=2 (finding that entry-level defenders made slightly more than entry-level prosecutors in Massachusetts but that both were underpaid relative to other states).

88 Max Marbut, "Public Defenders Fight Pay Disparity," *Jacksonville Daily Record*, November 13, 2017, www.jaxdailyrecord.com/article/public-defenders-fight-pay-disparity.

89 Cain and Porter, *2017 Budget/Salary Comparison*.

90 Gross, *Gideon at 50: Part 1.*

91 Barbara Murphy, "Prosecutors and Defenders to Form Union," *Los Angeles Times*, October 28, 1994, www.latimes.com/archives/la-xpm-1994-10-28-me-55745-story.html; Ventura County Grand Jury, *Pay Parity Comparison Final Report*, 1999, https://vcportal.ventura.org/GDJ/docs/reports/1998-99/report_lawJusticePublicSafety_payParity.pdf; Tracy Wilson, "Supervisors OK Pay Hike For County's Attorneys," *Los Angeles Times*, October 6, 1999, BI.

92 See "Oversight Hearing on Pay Parity and Retention Rates for ADAs and Public Defenders," City Council Committee on Justice System Cong., October 25, 2018 (testimony of Chief Assistant District Attorney Karen Friedman-Agnifilo), www.manhattanda.org/wp-content/uploads/2018/10/10.25.18-City-Council-Hearing-re-pay-parity-final.pdf.

93 See, for example, Jason Grant, "Legal Aid Calls for Public Defender Pay Parity With Corporation Counsel Lawyers," *New York Law Journal,* March 19, 2019, www.law.com/newyorklawjournal/2019/03/19/legal-aid-calls-for-public-defender-pay-parity-with-corporation-counsel-lawyers/; David Brand, "Public Defenders and Prose-

cutors Agree on Pay Parity, Funding Increases," *Queens Daily Eagle*, March 19, 2019, queenseagle.com/all/2019/3/19/public-defenders-and-prosecutors-can-agree-raise-pay; R. J. Vogt, "NYC Public Defenders, District Attorneys Demand Pay Parity," Law 360, October 28, 2018, www.law360.com/articles/1096330/nyc-public-defenders-district-attorneys-demand-pay-parity; Sarah Lustbader and Vaidya Gullapalli, "The High Costs of Low Pay for Public Defenders," newsletter, *Appeal*, November 1, 2018, https://theappeal.org/the-high-costs-of-low-pay-for-public-defenders/; Victoria Merlino, "De Blasio, Johnson Agree on 2020 Budget; Will Fund Public Defender Pay Parity," *Queens Daily Eagle*, June 14, 2019, https://queenseagle.com/all/de-blasio-johnson-agree-on-2020-budget-will-fund-public-defender-pay-parity; Harry DiPrinzio, "Low Pay for Public Defenders and Prosecutors Seen as Threat to Justice," *City Limits*, October 29, 2018, https://citylimits.org/2018/10/29/low-pay-for-public-defenders-and-prosecutors-seen-as-threat-to-justice/; Sonia Weiser, "Lawyers by Day, Uber Drivers and Bartenders by Night," *New York Times*, June 3, 2019, https://www.nytimes.com/2019/06/03/nyregion/legal-aid-lawyers-salary-ny.html; R. J. Vogt, "For NYC Defenders, Pay Promise Is Vague But Encouraging," Law 360, June 23, 2019, www.law360.com/access-to-justice/articles/1171796/for-nyc-defenders-pay-promise-is-vague-but-encouraging.

94 See Stephen A. Saltzburg, "The Duty to Investigate and the Availability of Expert Witnesses," *Fordham Law Review* 86 (2018): 11. https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5482&context=flr (showing less frequent use of expert witnesses among indigent-defense lawyers).

95 Strong, *State-Administered Systems,* 13.

96 Langton and Farole, *County-Based and Local Public Defender Offices*, 12.

97 Langton and Farole, *County-Based and Local Public Defender Offices*, 12.

98 For the total number of investigators in prosecutor offices see Steven W. Perry and Duren Banks, *Prosecutors in State Courts, 2007 – Statistical Tables* (Washington, D.C.: Bureau of Justice Statistics, 2011), table 2, www.bjs.gov/content/pub/pdf/psc07st.pdf. For the total number of investigators in state and county systems see Strong, *State-Administered Systems*, 9, and Langton and Farole, *County-Based and Local Public Defender Offices*, 12.

99 See *Expanded Discovery in Criminal Cases*, 9 (explaining that the burden is minimal because most states have systems in place for expansive discovery in civil cases).

100 Erica Goode, "Stronger Hand for Judges in the 'Bazaar' of Plea Deals," *New York Times*, March 22, 2012, www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html (reporting that 97 percent of federal cases and 94 percent of state cases end in plea deals).

101 Beth Schwartzapfel, "Defendants Kept in the Dark About Evidence, Until It's Too Late," *New York Times*, August 7, 2017, www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html?_r=0 ("New York is one of 10 states where prosecutors can wait until just before trial to share evidence").

102 Fair and Just Prosecution et al., *21 Principles*, 18.

103 For a description of recent legislative reforms to state discovery practices in New York, Virginia, California, Texas, Louisiana, Ohio, and North Carolina, "Discovery Reform Legislative Victories," see National Association of Criminal Defense Lawyers, www.nacdl.org/criminaldefense.aspx?id=31324&libID=31293.

104 See Inimai Chettiar et al., *Reforming Funding to Reduce Mass Incarceration* (New York: Brennan Center for Justice, 2013), www.scribd.com/fullscreen/186309074?access_key=key-.

105 See Jennifer Burnett, "Justice in Jeopardy: Budget Cuts Put State Public Defense Systems Under Stress," Council of State Governments, July 1, 2010, https://knowledgecenter.csg.org/kc/content/justice-jeopardy-budget-cuts-put-state-public-defense-systems-under-stress.

106 See *How States Invest Byrne JAG in Public Defense* (Washington, D.C.: National Criminal Justice Association), https://higherlogicdownload.s3.amazonaws.com/NCJA/8d0b2ead-b5b8-47ef-96d0-9aca227fcbb2/UploadedImages/Byrne_JAG_Investments/2016_Topical_One-Pagers/Public_Defense.pdf; *Justice Assistance Grant Program: Activity Report, Fiscal Year 2016* (Washington, D.C.: Bureau of Justice Assistance, 2018), www.bja.gov/Programs/JAG/JAG-FY2016-Activity-Report_508.pdf.

107 *Indigent Defense: DOJ Could Increase Awareness of Eligible Funding and Better Determine the Extent to Which Funds Help Support This Purpose*, U.S. Government Accountability Office, GAO-12-560, 28-29, May 2012, www.gao.gov/assets/600/590736.pdf.

108 S. 1377, EQUAL Defense Act, Sess. 116, (2019).

109 S. 1377, EQUAL Defense Act, Sess. 116, (2019).

110 Paul Butler, *Chokehold: Policing Black Men* (New York: New Press, 2017), 233–234 (recommending that we eliminate prison as a sanction for any crime that is currently punished by less than one year and instead imposing fines that are based on a person's ability to pay).

111 Studies show that probation and parole polices are leading drivers of recidivism and mass incarceration. See Danielle Kaeble and Mary Cowhig, *Correctional Populations in the United States, 2016* (Washington, D.C.: Bureau of Justice Statistics, 2018), www.bjs.gov/content/pub/pdf/cpus16.pdf (finding that there were 4.5 million people on community supervision in the United States at the end of 2016); see also Beth Schwartzapfel, "Want to Shrink the Prison Population? Look at Parole," Marshall Project, February 11, 2019, www.themarshallproject.org/2019/02/11/want-to-shrink-the-prison-population-look-at-parole.

112 "Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets," Council of State Governments, https://csgjusticecenter.org/confinedandcostly/.

113 For example, according to one study in 2014, parole violations made up 25 percent of the total cases in the Missouri indigent defense system, which translated to 8 percent of the total hours worked by public defenders on cases. Committee on Legal Aid and Indigent Defendants, *Missouri Project*, 16.

114 For best discovery practices that offices can readily implement, see, for example, *ABA Standards for Criminal Justice Discovery and Trial by Jury*, 3rd. ed. (Washington, D.C.: ABA, 1996), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/discovery_trialbyjury.pdf; Douglass Mitchell and Sean Broderick, *Recommended E-Discovery Practices for Federal Criminal Justice Act Cases* (Washington, D.C.: Defender Services Office Training Division), www.fd.org/sites/default/files/Litigation%20Support/recommended-e-discovery-practices.pdf.

115 Many head prosecutors have taken it upon themselves to do this. For specific discovery policies that district attorneys can implement, see Fair and Just Prosecution et al., *21 Principles*, 17.

116 Prosecutors can also advocate for increased indigent defense funding by joining litigation as amici. In a 2010 lawsuit, the Brennan Center was joined by 62 former state and federal prosecutors as amici in New York's highest court arguing that the indigent defense systems in five of New York's counties were deficient and violated defendants' rights. There, they argued that when defense counsel is inadequate, "prosecutors cannot ensure that justice is done" and the public loses confidence in the justice system. Brief of Amici Curiae Former Prosecutors Michael A. Battle et al., in Support of Plaintiffs, *Hurrell-Harring v. State of New York*, 75 AD4d 667 (N.Y. Ct. App. 2010). District attorneys and federal prosecutors need not wait until their terms are finished, however, to advocate for effective indigent defense. In *Gideon,* 22 state attorneys general famously wrote in support of Clarence Gideon. Brief for the State Government Amici Curiae, *Gideon v. Wainwright,* 372 U.S. 335 (1963). Although these instances have been few and far between, the current trend toward "progressive prosecution" should hopefully lead to more support. But see Bruce A. Green, "*Gideon's* Amici: Why Do Prosecutors So Rarely

Defend the Rights of the Accused?," *Yale Law Journal* 122 (2013): 8, 10, https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5585&context=ylj (noting that prosecutors rarely support the rights of the accused).

117 See Phyllis E. Mann, "Understanding the Comparison of Budgets for Prosecutors and Budgets for Public Defense," National Legal Aid & Defender Association, February 9, 2011, www.nlada.net/library/article/na_understandingbudgetsforprosanddefs.

118 The American Bar Association's *Ten Principles of a Public Defense Delivery System* describes resource parity in its Eighth Principle: "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. There should be parity of workload, salaries, and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense." *Ten Principles*, 3.

Endnotes for Table 1

1 *Criminal Defense for the Poor, 1986* (Washington, D.C.: Bureau of Justice Statistics, 1988), table 4, www.bjs.gov/content/pub/pdf/cdp86.pdf.

2 National Right to Counsel Committee, *Justice Denied,* 54.

3 The 2019 data was gathered with assistance from the Sixth Amendment Center, which keeps an online index of state funding breakdowns. "Know Your State," Sixth Amendment Center, last accessed July 10, 2019, https://sixthamendment.org/know-your-state/. Through contact with the Sixth Amendment Center, the author learned that information on the website was current except for Michigan and New York, which had undergone recent reform to increase the proportion of state funding. While currently at 40 percent state funding, the proportion of state funding in New York will continue to increase through 2023. See David Carroll, "New York Caseload Standards Announced and Their Importance to Statewide Reform Explained," Sixth Amendment Center, https://sixthamendment.org/new-york-caseload-standards-announced-in-wake-of-state-funding-agreement/.

Endnotes for Table 2

1 All data in this table is taken from the Committee on Legal Aid and Indigent Defendant's workload studies. See note 79.

2 The ends of this range reflect the hours per case for each category of misdemeanor. The Louisiana study broke misdemeanors down into two categories: "Misdemeanor or City Parish Ordinance," which are described as "misdemeanor offenses" and averaged 7.94 hours per case and "Enhanceable Misdemeanor," which is described as "misdemeanor offense, which may be increased to a felony with additional offenses" and averaged 12.06 hours per case. Committee on Legal Aid and Indigent Defendants, *Louisiana Project,* appendix F.

3 This range reflects the categories of "Misdemeanor 2 or 3," which averaged 11.4 hours per case and "Misdemeanor 1," which averaged 16.3 hours per case. Not included were DUI, traffic, or sex offense misdemeanors. Committee on Legal Aid and Indigent Defendants, *Colorado Project,* 20.

ABOUT THE AUTHOR

▶ **Bryan Furst** is counsel and the George A. Katz Fellow with the Brennan Center's Justice Program, where he works on research and advocacy to reform and eliminate systems of mass incarceration. While in law school, he interned at the Bronx Defenders, Brooklyn Defender Services, and the Public Defender Service for the District of Columbia. He holds a JD, magna cum laude, from NYU School of Law and BA in public health from the University of Washington.

ACKNOWLEDGMENTS

The Brennan Center gratefully acknowledges Joan Ganz Cooney and Holly Peterson Fund, Democracy Alliance Partners, Jason Flom, Ford Foundation, The Margaret and Daniel Loeb Foundation, Open Society Foundations, Solidarity Giving, and William B. Wiener Jr. and Evolve Foundations for their support of our Justice work. Arnold Ventures' founders, Laura and John Arnold, are donors to the Brennan Center for Justice. This is an independent Brennan Center publication; the views expressed are those of the authors and do not necessarily represent those of our supporters.

We are also grateful to Wachtell, Lipton, Rosen & Katz for its generous support of the Katz Fellowship.

The author would like to express his gratitude to Taryn Merkl for her guidance and thoughtful feedback, Lauren-Brooke Eisen and John Kowal for their support and leadership, and Sunwoo Oh, Adureh Onyekwere, Lauren Seabrooks, Sabah Abbasi, and Sam Rubinstein for their research and editing assistance. The Brennan Center's communications team, Jeanne Park, Rebecca Autrey, Alexandra Ringe, Joshua Bell, Matthew Harwood, Alden Wallace, and Yuliya Bas, provided critical support in readying this analysis for publication. The author was fortunate to receive comments from Randy Hertz, Jon Rapping, and Adam Murphy on drafts of this paper, for which he is extremely grateful. The Sixth Amendment Center also answered questions related to their excellent research on this issue.

ABOUT THE BRENNAN CENTER'S JUSTICE PROGRAM

The Brennan Center's Justice Program seeks to secure our nation's promise of equal justice for all by creating a rational, effective, and fair justice system. Its priority focus is to reduce mass incarceration while keeping down crime. The program melds law, policy, and economics to produce new empirical analyses and innovative policy solutions to advance this critical goal.

BRENNAN CENTER FOR JUSTICE

Brennan Center for Justice at New York University School of Law
120 Broadway | 17th Floor | New York, NY 10271
www.brennancenter.org

ALEC American Legislative Exchange Council
LIMITED GOVERNMENT • FREE MARKETS • FEDERALISM

www.alec.org

RESOLUTION IN SUPPORT OF PUBLIC DEFENSE

Policy Status

Type: **Model Policy** Status: **Draft** Date Introduced: **July 16, 2019**

Task Forces

- Criminal Justice

Tags

- AM19
- Criminal Justice

Summary

The right to counsel is a central principle embodied in the Bill of Rights. This resolution encourages states to ensure that all individuals accused of crimes are properly represented by counsel.

DRAFT

RESOLUTION IN SUPPORT OF PUBLIC DEFENSE

Resolution in Support of Public Defense

WHEREAS, the United States Constitution guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense";

WHEREAS, the United States Supreme Court and federal and state constitutions, guarantee all who are accused of a crime the right to the assistance of counsel at all critical stages of the proceedings;

WHEREAS, the overwhelming majority of those accused of a criminal offense lack the personal resources needed to hire counsel to challenge the government's evidence or present their case, and thus require access to publicly funded defense services;

WHEREAS, a robust defense function protects both the individual and the community;

WHEREAS, effective and independent defenders can shine a light on government overreach and abuses of power and preserve the protections of the Fourth, Fifth, and Sixth Amendments, protect the innocent from wrongful conviction, facilitate treatment, services, and other outcomes that reduce recidivism, and help ensure fair trials.

WHEREAS, the collateral consequences of even minor criminal charges creating long-lasting barriers to employment, education, and housing;

WHEREAS, excessive caseloads prevent even the most dedicated of defenders from having the time needed to properly and fully investigate the government's accusations;

WHEREAS, inadequate compensation coupled with significant student debt prevents many skilled and committed attorneys from pursuing a career in public defense;

WHEREAS, assigned counsel rates that fail to keep pace with the basic costs of operating a law practice and fee structures that set limitations on compensation without regard to the needs of individual cases deter meaningful participation in public defense by the private bar;

WHEREAS, there are many jurisdictions in which inadequate support for pubic defense services causes individuals to languish in jail without counsel for prolonged periods, as well as many jurisdictions in which individuals enter guilty pleas without the benefit of counsel; and

WHEREAS, the fundamental principles of equality and justice cannot be fully realized under our adversarial system without a well-resourced public defense system and prompt access to effective assistance of counsel;

THEREFORE, LET IT BE IT RESOLVED:

<u>Access to Public Defense Services</u>:

That every person accused of a crime shall be guaranteed counsel at their first appearance before a judicial officer at which liberty is at stake or at which a plea of guilty to any criminal charge may be entered;

That public defense services shall be made available in all cases in which a criminal conviction could occur; and

That public defense services, including counsel and ancillary services, shall be provided to those who are financially unable to obtain effective representation without substantial hardship.

Effective Public Defense Delivery Systems:

That whenever a jurisdiction's population, needs, and caseload warrant it, a public defense delivery system includes a public defender office as well as meaningful participation of the private bar and provides representation consistent with the best practices in the legal community;

That public defense delivery systems be adequately funded to ensure attorneys have reasonable workloads so as to allow them to provide ethical and competent representation pursuant to prevailing professional norms;

That public defense providers regularly receive relevant training;

That public defense providers have access to support services such as investigators, social workers, and experts; and

That compensation for public defense providers is sufficient to ensure the recruitment and retention of qualified and skilled advocates taking into consideration for public defenders the rates being paid to other government employees performing similar functions, and for court-appointed counsel the overhead costs and prevailing attorneys' fees for the jurisdiction.

State Responsibility:

That state government bears the ultimate responsibility to protect the right to counsel, so while it may elect to delegate to localities, some or all decisions regarding structure, oversight, and funding, it is the state which must ensure there are sufficient resources, support, and structure for every community to have a constitutionally effective public defense delivery system.

Independence and Equality:

That to ensure the defense may fulfil its role in the adversarial system, the defense be insulated from undue influence, involvement and control by actors whose interests may be directly or indirectly adverse to the defense function. Supervision of the public defense system by the judiciary and the units of the government should be no greater than that which is exercised over the private bar; and

That in order to maintain a vibrant, healthy, and robust adversarial process the defense function be included as an equal and valued partner in the criminal justice system.