Challenges to the Effectiveness of Public Defenders

A claim often made in discourse on state justice systems is that the public defender, or indigent defense system, is of lesser quality than retained counsel, or private attorneys. It might be determined that the said claim is based in part on the following propositions: 1) this quality differential is caused, at least in part, by a lack of funding in public defender systems; 2) public defenders take on a significantly larger caseload than retained counsel, incentivizing swift resolutions that may not be in the indigent defendant's best interest; 3) the difference in quality caused by the aforementioned lack of funding and overly heavy caseloads results in a significant difference in case outcomes, where retained counsel consistently achieves more favorable verdicts than public defenders. This paper will contain examinations of each of these propositions and will attempt to determine the truth or error in each.

To better understand challenges to the indigent defense system's effectiveness, one must examine both the history of the system and the statistical information derived from investigating the system's current performance. Prior to a landmark decision in *Gideon v. Wainwright*, state-appointed legal counsel for indigent defendants was provided very rarely, in some states only in cases where a "person is charged with a capital offense" (*Gideon v. Wainwright,* 1963), and in others the state would not "appoint counsel for indigent defendants except in murder and rape cases" (*Gideon v. Wainright,* 1963). Such precedent had previously been established in *Betts v. Brady*, 1942, where the Supreme Court of the United States ruled that the Constitutional right to legal counsel, found in the Sixth Amendment to the U.S. Constitution, would only include appointed counsel for indigent defendants in cases regarding federal laws. By the time two decades had passed, a later Supreme Court revisited the question posed in *Betts* when a strikingly similar case arose in *Gideon*. The later Court determined that, "Upon full reconsideration we

conclude that *Betts v. Brady* should be overruled" (*Gideon v. Wainwright,* 1963). This decision established a new precedent, and effectively spawned state-level implementations of indigent defense, or public defenders, into state- and local-level justice systems.

Though the history is straightforward, the statistical information is more difficult to parse. The *Bureau of Justice Statistics* of the Office of Justice Programs of the U.S. Department of Justice has released two reports that contain relevant information, though there is difficulty aligning the dates. These reports are titled, "Justice Expenditures and Employment in the United States, 2017" and "State Government Indigent Defense Expenditures, FY 2008–2012." The limited date range of the latter report affects the recency of the information, but there is enough overlap between the dates covered in the former report (ranging from 1997 to 2017) that analysis is possible using both. The analysis undertaken in this paper will examine the expenditure information from the 2008-2012 study, and then compare that with the information from the 2017 study that dates from 2008 to 2012, paying careful attention to how indigent defense expenditures are proportional to spending on all judicial and legal functions, as well as to total expenditures.

A Purported Lack of Funding in Indigent Defense Systems

In a working paper, Assistant Professor of Law, Julie Jonas, of the University of St. Thomas School of Law, reveals the apparent tragedy of innocent parents being convicted by juries of "assault or homicide in cases involving infants and toddlers in their care" (Jonas, 2023) in cases regarding Shaken Baby Syndrome or Abusive Head Trauma. Jonas attributes these convictions to juror's acceptance of expert testimony provided by the prosecution, in which cases proper funding is unavailable or even denied for the defense to find adequate expert witnesses of their own. According to Jonas, "In postconviction litigation, however, where defendants were

able to present well qualified experts to refute the points made by the government's experts, their convictions were overturned" (Jonas, 2023). The experts only became available to defendants as funds were made available or experts became willing to testify for no- or low-cost. Though Jonas' work is not focused solely on indigent defense, it does highlight an important point regarding funding: namely, that a lack of funds hinders the effectiveness of defense, leading to largely different outcomes than if adequate funding were available in the first place.

With this in mind, the question of funding must now be examined specifically for indigent defense. According to the fiscal year 2008-2012 report from the Bureau of Justice Statistics, "state government indigent defense expenditures ranged from $2.2 billion to $2.4 billion" between 2008 and 2012 (OJP, Herberman, and Kyckelhahn, 2014). In the 2017 report, it is noted that total expenditure on judicial and legal functions amounts to an estimated $67.16 billion (OJP and Buelher, 2021; see Appendix Table 1). Using a calculator, it can be found that the ratio of total expenditure on judicial and legal functions to expenditure on indigent defense is 1679 : 60, or that the percentage of total expenditure made up of indigent defense expenditure is about 3.6%. Consider also that "state government indigent defense expenditures showed an average annual decrease of 0.2% from 2008 to 2012" (OJP, Herberman, and Kyckelhahn, 2014). Despite indigent defense making up a significantly minimal amount of total expenditures across state government, funding regularly decreased in this area over the studied four-fiscal-year period.

It might be noted that the 2017 and 2008-2012 reports do conflict when compared on the share of total judicial expenditure comprised of indigent defense spending, with this paper's comparison of the two reports arriving at a lower percentage than is reported in the 2008-2012 report, which claims that "as a share of total judicial-legal expenditures by state governments,

spending on indigent defense held steady between 9.5% and 10.0% from 2008 to 2012" (OJP, Herberman, and Kyckelhahn, 2014). Regardless, both the comparison and the 2008-2012 report demonstrate that indigent defense is responsible for only a small amount of total spending.

An emphasis on lack of funds is insisted upon repeatedly in the literature around United States public defenders' work (Champion, 1989; Gottlieb, 2021; Harris, 2023; Jonas, 2023; Ovalle, 2021; Primus, 2023; Vick, 1995), extending even into research on indigent defense systems in other countries (Quintana-Navarrete and Fondevila, 2022). Likewise, the larger portion of this work suggests that underfunded indigent defense leads to outcomes that are less favorable for the indigent defendant; the most drastic consequence of which is demonstrated by Jonas' example, in which innocent defendants are found guilty because lack of funds negatively impacted the quality of their representation.

Caseload Sizes Between Public Defenders and Private Attorneys

Overly large caseloads have been cited as one cause or challenge that would hinder the effectiveness of public defenders (Gottlieb, 2021; Ovalle, 2021; Primus, 2023; Vick, 1995). Public defenders are constantly stated to be "rendered ineffective by virtue of the heavy caseloads that they are forced to carry" (Primus, 2023), that "in almost three-quarters of county public defender offices, attorney caseloads are greater than the maximum recommended," (Gottlieb, 2021), public defenders "are required to juggle oppressive caseloads" (Vick, 1995), and "unmanageable caseloads are leading causes of inconsistent and subpar representation from public defenders" (Ovalle, 2021). In research done by Linhorst et. al. (2017), it was found that:

> *A study of defendants in 1996 from the 75 largest counties found that among state felony cases, public defenders represented 68.3% of defendants, assigned attorneys represented 13.7% of defendants, and private attorneys represented*

17.6% of defendants, with 0.4% of cases being self-represented. … In 2007, public defenders received almost 5.6 million cases.

Comparison of Case Outcomes Between Public Defenders and Private Attorneys

Given the large size differential between public defender caseloads and those taken on by private attorneys, as well as the apparent lack of funding given to indigent defense systems across the United States, it is reasonable to conclude that there is some negative effect on work done by public defenders. However, reported research would suggest that this conclusion isn't as clear-cut as one might think. Jonas' (2023) work reveals that the lack of funding for expert testimony on the defendant's behalf has less to do with state-appointed defense exclusively and more to do with unattainable or even denied funding for expert testimony. In a comparison of cases involving defendants with mental illness, "case outcomes, such as probability of conviction and severity of symptoms, generally do not differ for defendants represented by public defenders versus private attorneys" (Linhorst et. al., 2017). Ovalle (2021) states that "Previous studies on the subject have yielded mixed results but the overwhelming majority has found little to no significant differences in major case outcomes between the two types of counsel," and cited a survey, in which "six hundred and sixty-six federal and state judges were surveyed for their academic opinion on quality of counsel due to their close relationship with attorneys. This survey resulted in the finding that federal judges generally consider public defenders and private attorneys similar in quality of defense" (Ovalle, 2021).

Given this information, it may be determined that the quality of work is similar between private attorneys and public defenders, though as Primus (2023) comments, "there are far too many examples of what I have called 'personal' ineffectiveness. Attorneys who sleep through trial, abuse alcohol or drugs during their representation of a client, or are just too lazy or cocky to

investigate their cases or meet with their clients fall in this category." Primus' comments here seem to be applicable to an attorney based on behavior, and not exclusively as a trait of being either public defenders or private attorneys.

If it is then individual behavior which can impact case outcome or attorney effectiveness, the factors that influence behavior should be examined. One factor that Primus (2023) cites is caseload, stating the following:

> *The National Advisory Commission on Criminal Justice Standards and Goals as well as the American Bar Association's Standards for Criminal Justice explain that no defense attorney can effectively handle more than 150 felony cases or 400 misdemeanors in one year. Yet, severe underfunding of indigent defense means that public defenders nationwide are repeatedly forced to handle caseloads that far exceed these national standards. … In Tennessee in 2006, six attorneys handled more than 10,0000 misdemeanor cases. That is over 1,600 cases per attorney.*

Vick (1995), corroborating the negative effect that overly heavy caseloads inflict on defense attorneys, reports the following example in his work on underfunded indigent defense and death sentences: "In 1992, the Georgia legislature created a small statewide capital defender program to relieve some of the pressures on county public defender offices, but the program has been staffed with only four attorneys, while there are over 120 capital cases awaiting trial in Georgia at any one time." Vick (1995) and Jonas (2023) both report that lack of funds negatively impact case outcome for defense, as well, an issue exacerbated by "the states' failure to provide adequate funding for defense experts and investigators" (Vick, 1995) that harms a public defender's ability to adequately prepare the indigent client's case prior to trial.

Conclusion

Quality of representation is generally comparable between public defenders and private attorneys (Linhorst et. al., 2017; Ovalle, 2021), and outcomes based solely on performance are similar as a result. Potential challenges to public defender work seem to primarily include funding (Champion, 1989; Gottlieb, 2021; Harris, 2023; Jonas, 2023; Ovalle, 2021; Primus, 2023; Vick, 1995) and caseloads (Gottlieb, 2021; Ovalle, 2021; Primus, 2023; Vick, 1995). Though some initiative has been taken to attempt to reduce caseload or provide more funding to indigent defense systems (Vick, 1995), contemporary indigent defense systems are still grossly underfunded and overworked (Primus, 2023), even seeing decreases in expenditure over a span of recent fiscal years (OJP, Herberman, and Kyckelhahn, 2014).

Further research should be directed in two primary areas: 1) what possible expenditure increases for indigent defense systems are feasible, to more fairly equip public defenders and other state-appointed indigent defense counsel for adequate representation of indigent clientele; and 2) what can be done to incentivize increased numbers of attorneys in the field of indigent defense, to reduce caseload and enable a wider variety of talents that can adequately meet the needs of indigent clients. Attorney retention specifically in public defense should be considered, and factors that contribute to that end should be defined; factors that could be researched in these considerations include burnout, attorney experience, and attorney relationships to other figures in court networks (Ovalle, 2021).

Overall, perceptions that the public defender, or indigent defense system, is of lesser quality than retained counsel, or private attorneys, may be attributed to lack of funding and to overly heavy caseloads for public defenders, but such a view is most likely not applicable to the

quality of performance of most attorneys, as private attorneys and public defenders are rated similarly in terms of performance.

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