ELIGIBILITY FOR COURT-APPOINTED COUNSEL IN STATE CRIMINAL CASES: AN ANALYSIS OF STATE INDIGENCY STATUTES

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ABSTRACT

The Sixth Amendment to the U.S. Constitution and a series of U.S. Supreme Court cases have secured the right to counsel for defendants facing incarceration. Neither the Sixth Amendment nor the Supreme Court cases, however, provide guidance on how eligibility for court-appointed counsel should be determined. This Article analyzes state statutes to determine the extent to which state legislatures have enacted statutory guidance regarding how decisions for court-appointed counsel are made. Results indicate that legislative direction for eligibility decisions varies widely, and many statutes lack objective eligibility criteria. The Article concludes that leaving broad discretion to state judges presents risks for abuse and threats to defendants' rights.

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Tables and Figures

Appendix

I. INTRODUCTION

The Sixth Amendment's right to counsel provision has been a part of American constitutional law since 1791, but it was not originally interpreted to give government-subsidized counsel to those who could not afford it.[3] While twelve of the original thirteen United States colonies recognized a defendant's right to counsel in serious cases, rejecting English common law,[4] the "protections" afforded by these colonies were not always applied in a manner that ensured a defendant's rights were adequately safeguarded.[5] In fact, the practical implications of the right to counsel for indigent criminal defendants did not emerge until the Supreme Court's landmark decision in *Powell v. Alabama* in

[3] U.S. CONST. amend. VI.
[4] Powell v. Alabama, 287 U.S. 45, 64-65 (1932).
[5] *Id.* at 60. Justice Sutherland wrote that in an obvious "perversion of all sense of proportion," English common law rule dictated that defendants facing less serious, misdemeanor offenses were entitled to the "full assistance of counsel," while those charged with treason or another felony were denied that assistance. *Id.*

1932.[6] With the *Powell* decision, the Court opened the door for more meaningful right to counsel protections by incorporating the Sixth Amendment through the application of the Fourteenth Amendment's due process clause.[7] This decision secured the right to counsel for defendants accused of capital crimes in state and federal proceedings. This right would then grow over the next thirty years during which the Court decided *Gideon v. Wainwright* [8] and *Argersinger v. Hamlin.*[9] These cases, together with others, secured the right to counsel for all criminal defendants facing potential loss of liberty.

Despite these critical judicial decisions that changed the theoretical landscape of procedural justice in this country, the Court has never provided practical guidance regarding how the right to counsel should be institutionalized. The work of fleshing out the detail regarding how, when, and for whom the right should be afforded has been left to the federal and state legislatures and lower courts. Absent additional guidance from the Supreme Court or other central authority, the determination of indigency has been left in the hands of the states, and while states use some of the same factors in that determination, no two states employ exactly the same criteria. It, therefore, would be a "gross over-generalization" to say that there is one typical system employed by a majority of states to determine indigency.[10] A review of the extant literature regarding the right to counsel suggests that some jurisdictions have had more success than others in implementing and maintaining indigent defense systems.[11] The literature reveals that, today, more than five decades after the Supreme Court's landmark ruling in *Gideon v. Wainright*, the nation's indigent defense systems are in a state of crisis due, in large part, to heavy caseloads and severe under-funding.[12] State public defender systems have been the target of most of the

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[6] 287 U.S. 45 (1932).
[7] *See id.*
[8] 372 U.S. 335 (1963).
[9] 407 U.S. 25 (1972).
[10] Adam M. Gershowitz, *The Invisible Pillar of Gideon,* 80 IND. L.J. 571, 581 (2005).
[11] *See, e.g.,* COMM'N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2006) (reporting on serious problems with the state of New York's indigent defense system and proposing several recommendations to address the problems identified by the Commission); Jessa DeSimone, *Bucking Conventional Wisdom: The Montana Public Defender Act,* 96 J. CRIM. L. & CRIMINOLOGY 1479 (2006) (reporting on the successful transformation of the Montana public defender system and citing cases that highlight problems with indigent defense systems of Louisiana, Arizona, and Oklahoma); Justine Finney Guyer, *Saving Missouri's Public Defender System: A Call for Adequate Legislative Funding*, 74 MO. L. REV. 335 (2009) (discussing the shortcomings of Missouri's public defense delivery system); Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219 (2010) (examining funding level variations and the impact of the variations on public defender service delivery in five Arizona counties and concluding, in part, that "Arizona's nonmetropolitan counties are at a greater risk of systematic deprivation of adequate council than their urban counterparts.").
[12] *See, e.g.*, Harvard Law Review Association, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems,* 118 HARV. L. REV. 1731 (2005); Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31 (1995); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences,* 43 BUFFALO L. REV. 329 (1995); American Bar Association Standing Comm. on Legal Aid & Indigent Defendants, *Gideon's Broken Promise:*

criticism, and some authors cite similar problems in the federal system.[13]

As described below, the focus of existing literature is almost exclusively on the crisis over ineffectiveness of counsel and solutions aimed at adding funding or increasing performance standards for attorneys.[14] Relatively little attention is given to the study of the methods by which eligibility for court-appointed counsel is determined.[15] Understanding how determinations of eligibility are made is important because these decisions play the most significant role in ensuring the right to counsel for defendants who cannot afford to hire their own attorneys. Thus, the implications for establishing a balanced and standardized approach to eligibility determination are significant. In the absence of relatively objective and uniform standards, eligibility determinations are made more subjectively, increasing the risk of inequality in the appointment of counsel.[16] A lack of uniformity in determining indigency could result in similarly situated defendants being treated unequally with respect to their Sixth Amendment rights.[17] Further, without the ability to obtain counsel on their own, defendants may be forced to represent themselves,[18] leading to a risk of worse case outcomes,[19] including more convictions and longer sentences—concerns not shared by adequately represented defendants.[20] On the other hand, if people

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America's Continuing Quest for Equal Justice (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

[13] *See, e.g.,* John J. Cleary, *Federal Defender Services: Serving the System or the Client?* 58 LAW & CONTEMP. PROBS. 65 (1995) (citing similar problems in the federal system that plague state systems). *But see* Igna L. Parsons, *"Making it a Federal Case": A Model for Indigent Representation,* 1997 ANN. SURV. AM. L. 837 (1997) (arguing that the federal system exemplifies a model or best practice approach).

[14] *See infra* Part III.

[15] *Id.*

[16] *See, e.g*., Carrie Savage Phillips, *Oklahoma's Indigency Determination Scheme: A Call for Uniformity,* 66 OKLA. L. REV. 655, 662-63 (2014) (arguing that while allowing judges "to exercise broad discretion in determining indigency status" permits the flexibility that is sometimes required for dealing with special cases, it also "encourage[s] . . . [or] perhaps even require[s] . . . judges to incorporate their own unique views in rendering a decision" which results in a lack of uniformity and compromises valued principles in our legal system of equal treatment and predictability).

[17] *Id.* at 655.

[18] Ben Kempinen, *Dealing Fairly with An Unrepresented Person*, 78 WIS. LAW. 12 (2005) (noting that "[i]n criminal matters, notwithstanding a right to counsel grounded in the U.S. and Wisconsin constitutions, many accused persons remain unrepresented because they cannot afford to retain private counsel and do not meet prevailing indigency standards").

[19] George C. Thomas III, *How* Gideon v. Wainwright *Became Goldilocks,* 12 OHIO ST. J. CRIM. L. 307, 308 (2015) (arguing that "worse outcomes" at an "instrumental level" suggests fewer acquittals, fewer dismissals, and better plea deals with shorter sentences).

[20] Erwin Chemerinsky, *Lessons from* Gideon*,* 122 YALE L. J. 2676, 2678 (2013) (arguing that "[i]n a criminal justice system where almost all convictions are gained by guilty pleas–ninety-seven percent in federal court and ninety-four percent in state court–the presence of defense attorneys surely often makes an enormous difference in the nature of the plea deal and the length of the sentence"); *see also* Jona Goldschmidt & Don Stemen, *Patterns and Trends in Federal Pro Se Defense, 1996-2011: An Exploratory Study,* 8 FED. CTS. L. REV. 81, 107 (2015) (concluding that, while pro se defendants in federal criminal cases were more likely to have their cases dismissed than those with appointed or retained counsel, pro se defendants were less likely to be acquitted

capable of paying for their own counsel are found eligible for court-appointed counsel, unnecessary stresses will be added to already overloaded public defender systems.

The purpose of this Article is to determine how states make determinations of eligibility for court-appointed counsel for indigent criminal defendants. Specifically, through a comprehensive analysis of relevant state statutes, this Article seeks to identify the legislative parameters in state courts within which the decisions of eligibility for counsel are made for criminal defendants. Results indicate that legislative direction for eligibility decisions varies widely, and many statutes lack objective eligibility criteria. This Article concludes that the lack of adequate legislative guidance leaves broad discretion to state judges, which presents risks for decisions regarding indigency that threaten defendants' equal protection guarantees and Sixth Amendment rights.

II. EVOLUTION OF SIXTH AMENDMENT RIGHT TO COUNSEL

Deriving from English common law, the concept that criminal defendants have a right to attorney assistance against government prosecution was formally enshrined in the United States with the addition of the Bill of Rights to the Constitution in 1791. The Sixth Amendment to the Constitution states, in part, "[i]n all criminal prosecutions, the accused shall enjoy the right to…have the Assistance of Counsel for his defense."[21] The true connotation of that constitutional language did not take shape until the Supreme Court ruled that the Fourteenth Amendment extended the Sixth Amendment right to counsel to the states.[22] The Court's involvement in fleshing out the contours of the right to counsel began with *Powell v. Alabama* in 1932[23] and *Johnson v. Zerbst* in 1938,[24] and would continue to expand through the procedural due process era of the Warren Court with *Gideon v. Wainright*[25] and *Argersinger v. Hamlin*.[26]

A. Powell v. Alabama

Powell v. Alabama marked the first time the Supreme Court dealt directly with the right to counsel, and it did so in the racially and politically charged South.[27] On appeal for violations of the Sixth Amendment, the Court reversed the convictions of eight *pro se* black males convicted of raping two white girls.[28] Writing for the majority, Justice Sutherland found "the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective

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than defendants with retained counsel and were more likely to be found guilty by a jury or trial court than defendants with appointed or retained counsel).

[21] U.S. CONST. amend. VI.

[22] Powell v. Alabama, 287 U.S. 45 (1932).

[23] 287 U.S. 45 (1932).

[24] 304 U.S. 458 (1938).

[25] 372 U.S. 335 (1963).

[26] 407 U.S. 25 (1972).

[27] *See Powell*, 287 U.S. at 72.

[28] *Id.*

appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment."[29] While the Court limited the reach of the decision to defendants in state and federal capital cases, *Powell* represented a monumental step toward procedural fairness through the Sixth Amendment right to counsel.

B. Johnson v. Zerbst

The next significant step on the evolutionary map toward the maturation of the right to counsel was *Johnson v. Zerbst*.[30] Defendant Johnson was tried and convicted of possessing and passing counterfeit money without the assistance of counsel.[31] Upon review of Johnson's habeas corpus petition, the Supreme Court concluded that the "Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, [and] compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty."[32] With its decision in this case, the Court extended the right to counsel established in *Powell* to all criminal defendants facing federal prosecution.

C. Betts v. Brady

The Court next got the chance to review the Sixth Amendment right to counsel and the incorporation of those rights under the Fourteenth Amendment in *Betts v. Brady*.[33] Indicted for robbery, the state trial judge denied Betts' request for court-appointed counsel for trial because the county only appointed counsel for defendants on trial for rape or murder.[34] Betts pled not guilty, represented himself, and was convicted of robbery and sentenced to eight years in prison.[35] Upon review of Betts' petition for habeas relief, the Supreme Court declined to extend the Sixth Amendment right to counsel via the Fourteenth Amendment's due process clause to non-capital state defendants.[36] In a strongly worded dissent, Justice Black noted that "[d]enial to the poor of the request for counsel in proceedings based on charges of serious crime has long been regarded as shocking to the 'universal sense of justice' throughout this country."[37] Further, Justice Black suggested that a judicially approved practice should "assure that no man . . . be deprived of counsel merely because of his poverty . . . [and] [a]ny other practice seems to . . . defeat the promise of our democratic society to provide equal justice under the law."[38]

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[29] *Id*. at 65.
[30] 304 U.S. 458 (1938).
[31] *Id.* at 459.
[32] *Id*. at 467.
[33] 316 U.S. 455 (1942).
[34] *Id*. at 456.
[35] *Id.*
[36] *Id*. at 473.
[37] *Id*. at 476 (Black, J., dissenting).
[38] *Id.* at 477 (Black, J., dissenting).

D. Gideon v. Wainwright

Twelve years later in a case with very similar facts, Justice Black was vindicated through the Court's decision in *Gideon v. Wainwright*.[39] Defendant Gideon was arrested and charged in a Florida state court with breaking and entering into a pool hall with the intent to commit a misdemeanor.[40] He appeared in court without an attorney and without funds to hire one, and he asked the judge to appoint one for him.[41] The trial judge, abiding by the Court's decision in *Betts*, denied the request, citing that courts can only appoint counsel for defendants charged with capital crimes.[42] Gideon proceeded *pro se*, insisting that he was innocent, but the jury convicted and sentenced him to five years in prison.[43] Upon review of Gideon's writ of habeas corpus, a unanimous Supreme Court overruled *Betts* and reversed Gideon's conviction.[44] Justice Black authored the opinion, noting that the Court got it wrong in *Betts*, and in reversing that decision held that the right to counsel is a fundamental right essential to a fair trial.[45]

E. Argersinger v. Hamlin and Beyond

With *Gideon*, the Court extended the Sixth Amendment right to counsel to state non-capital defendants through the Fourteenth Amendment, and nine years later in *Argersinger v. Hamlin*, the Court confirmed that the right was not only reserved for felony defendants.[46] In *Argersinger*, the Court held that the right to counsel was not governed by the classification of the offense, and that any defendant who faces deprivation of liberty as the result of any criminal prosecution, whether felony or misdemeanor, has the right to assistance of counsel.[47]

Despite these landmark decisions, which doctrinally secured the right to counsel for defendants facing loss of liberty, the Court has never defined indigency or addressed the issue of how the right is to be practically implemented.[48] Instead, the work of fleshing out the practicable details regarding how, when, and for whom the right should be afforded has been left to the federal and state legislatures and lower courts. As a result, fifty-one disparate federal and state public defender systems have developed with little or no centralized

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[39] 372 U.S. 335 (1963).
[40] 372 U.S. 335, 336 (1963).
[41] *Id*. at 337.
[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] *Id*. at 344-45.
[46] 407 U.S. 25, 40 (1972).
[47] *Id*.
[48] *See, e.g.,* Allison D. Kuhns, *If You Cannot Afford an Attorney, Will One Be Appointed for You?: How (Some) States Force Criminal Defendants to Choose between Posting Bond and Getting a Court-Appointed Attorney,* 97 IOWA L. REV. 1787, 1798 (2012); Paul Marcus, *Why the United States Supreme Court Got Some (But Not A Lot) of the Sixth Amendment Right to Counsel Analysis Right*, 21 ST. THOMAS L. REV. 142, 153-154 (2009); Phillips, *supra* note 14, at 657.

guidance. Thus, the nature of indigent defense in this country varies widely. For example, while more than half of the states have public defender systems that are organized as statewide systems,[49] fourteen states delegate the responsibility for public defense to counties or groups of counties that comprise a judicial district.[50] The remaining states' indigent defense delivery systems are operated under a type of hybrid of the state and county systems.[51] The methods for providing court-appointed attorneys also differ across various jurisdictions; some systems assign private defense attorneys from a rotation list or on an ad-hoc basis, while other systems enter into contracts with attorneys, bar associations, or non-profit organizations, which provide court-appointed counsel.[52] Most jurisdictions, and virtually all of those with over 750,000 residents, operate public defender programs, which are operated as government or non-profit organizations with full-time staff attorneys and support personnel dedicated to defense services in the jurisdiction.[53] States also use various means to fund their indigent defense delivery systems; some states provide all of the necessary funding for both county and state-based systems, while other county-based systems are funded solely through county funds derived from court costs or other user fees.[54] Note too that many state systems utilize some combination of these funding methods.[55]

With all of the various systems and methods that exist for the provision of indigent defense, it is perhaps no surprise to find that states have also adopted different methods for determining how eligibility for court-appointed counsel is determined. This important aspect of indigent defense, however, has received very little attention in the extant literature.[56]

III. THE FOCUS OF THE EXTANT LITERATURE

The existing literature related to the delivery of indigent defense services is replete with examples illustrating that the nation's public defender systems are in a "perpetual" state of crisis.[57] The primary reason for the crisis cited by legal

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[49] Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 37 (1995).
[50] *Id. at 40.*
[51] *Id.*
[52] *Id*. at 32.
[53] *Id*. at 36.
[54] *Id.*
[55] *Id.* at 41.
[56] *But see* Gershowitz, *supra* note 8 (addressing the issue of eligibility determination in the states and is mentioned further in the following section of this paper); John P. Gross, *Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of their Sixth Amendment Right to Counsel,* 70 WASH. & LEE L. REV. 1173 (2013); and Phillips, *supra* note 14.
[57] *See, e.g.,* Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance after* Gideon v. Wainwright, 122 YALE L. J. 2150 (2013); DeSimone, *supra* note 9; Harvard Law Review Association**,** *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense,* 113 HARV. L. REV. 2062 (2000); Richard Klein, *Symposium Gideon–A Generation Later: The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433 (1999); NATIONAL RIGHT TO COUNSEL COMMITTEE, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009).

scholars and interest groups is the fact that many of these systems are severely under-funded. [58] The under-funding of public defender programs leads to a number of untenable consequences, each of which is given attention in the literature. A lack of adequate funds results in lower salaries for public defenders, which makes recruiting and retaining qualified attorneys difficult because it discourages attorneys–many with enormous law school debts–from participating in the system at all.[59] This can lead to a shortage of qualified attorneys to staff the public defender systems.[60] The attorneys that remain to provide indigent defense services are faced with unmanageably large caseloads and often do not have the time or resources to provide competent assistance,[61] and attempts to manage the caseload lead to very limited contact with defendants and rushed plea-deals.[62] In fact, some argue that the refusal of states to address the under-funding of indigent defense systems has led to systemic neglect of indigent defendants and their rights.[63] This results in some deserving defendants being denied meaningful counsel;[64] some defendants refer to court-appointed attorneys as "public pretenders."[65] One legal scholar noted that the effects of thinly stretched defenders become particularly evident during the sentencing phase of trials, where defenders often "disappear," making the prosecutor's job of obtaining harsh punishments much easier.[66]

The problem of underfunding for indigent defense is serious, and the effects go beyond a shortage of attorneys. Additional effects include insufficient funds for trial resources such as expert, investigative, and support services, which leads to disparity in resources available to the prosecution compared to the defense. This can be brought to bear on cases involving indigent defendants.[67]

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[58] *See, e.g.,* Rodger Citron, *(Un)Luckey v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481 (1991); Harvard Law Review Association, *supra* note 10, at 1731-32; Vick, *supra* note 10; American Bar Association, Standing Comm. on Legal Aid & Indigent Defendants, *supra* note 10, at 7-13; Klein, *supra* note 55, at 1435.

[59] *See, e.g.,* American Bar Association Standing Comm. on Legal Aid & Indigent Defendants, *supra* note 10, at 9-10.

[60] *See, e.g.,* American Bar Association Standing Comm. on Legal Aid & Indigent Defendants, *supra* note 10, at 10; Stephen F. Hanlon, *Boots on the Ground: State Constitutional Challenges to Indigent Defense Systems*, 75 MO. L. REV. 751, 759 (2010) (citing a shortage of attorneys in Massachusetts willing to take appointments to defend indigent defendants due to very low hourly rates); Citron, *supra* note 56, at 484-85.

[61] *See, e.g.,* American Bar Association Standing Comm. on Legal Aid & Indigent Defendants, *supra* note 10, at 7, 17-18. Citron, *supra* note 56, at 484-85.

[62] *See, e.g.,* American Bar Association Standing Comm. on Legal Aid & Indigent Defendants, *supra* note 10, at 16.

[63] Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169 (2003).

[64] Harvard Law Review Association, *supra* note 10, at 1734.

[65] Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation's Indigent Defense Crisis,* 47 HARV. J. ON LEGIS. 487 (2010) (citing testimony of Alan J. Crotzer, a wrongfully convicted Florida criminal defendant, before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, in which Crotzer testified, "[w]e have a saying for public defenders in Florida: 'public pretenders'").

[66] Vick, *supra* note 10, at 426.

[67] American Bar Association Standing Comm. on Legal Aid & Indigent Defendants, *supra* note 10, at 21-22.

The lack of funding can also mean that attorneys involved in indigent defense operate in environments with "no provision for formal, systematic training" despite the complexity of the cases they handle.[68] The effects of underfunding negatively impact the quality of services received by indigent clients.[69] This problem is amplified by the lack of uniform performance standards for which public defenders can be held accountable.[70] Ultimately, these factors combine to threaten the Sixth Amendment by compromising the effectiveness of counsel in violation of the Court's holding in *McMann v. Richardson*, in which it was established that the right to counsel set forth in the Sixth Amendment must be construed as the right to *effective* assistance of counsel.[71]

While most of the existing literature related to the nation's indigent defense systems focuses broadly on the systemic problems referred to above, some are more narrowly concentrated, providing case studies which highlight specific systems that are failing to succeed,[72] or have been recently overhauled.[73] In a recent comprehensive review of the past, present, and future of the Texas indigent defense system, the authors noted the need for the legislature to revise the criteria for determining indigent status to effectuate more efficient, accurate results.[74] Specifically, the authors suggested the benefits of utilizing information from other government entities that provide assistance, such as housing assistance, food stamps, and county-subsidized healthcare, in order to make determinations for eligibility for court-appointed counsel.[75] Additionally, in a recent review of Wisconsin's indigent defense system, the author noted among many other problems that the criteria "established by the legislature to determine eligibility for a state public defender were flawed from the start . . . [and the] legislature's failure to update the eligibility criteria over the last 20 years has . . . [resulted in] thousands of Wisconsin's poor fac[ing] criminal charges without the assistance of counsel—thus, violating a fundamental right guaranteed by both our state and federal constitutions."[76]

Where the factors affecting the determination of indigency are addressed in the literature, there seems to be a consensus that these factors employed by

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[68] *Id.* at 11.
[69] *See, e.g.*, *id.* at 14-20; *see also* Harvard Law Review Association, *supra* note 10, at 1734.
[70] American Bar Association Standing Comm. on Legal Aid & Indigent Defendants, *supra* note 10, at 10-11, 13-14.
[71] 397 U.S. 759, 771. *See, e.g.*, Klein, *supra* note 55, at 1435-36.
[72] *See, e.g.,* David A. Felice, *Justice Rationed: A Look at Alabama's Present Indigent Defense System with a Vision Towards Change*, 52 ALA. L. REV. 975 (2001); Lola Velazquez-Aguilu, *Not Poor Enough: Why Wisconsin's System For Providing Indigent Defense is Failing*, 2006 WIS. L. REV. 193 (2006); *See also* Parsons, *supra* note 11 (pointing out positive perspectives on the federal criminal justice system).
[73] DeSimone, *supra* note 9 (reviewing the overhaul of the Montana public defender system following a constitutional court challenge by the ACLU); *see also* Catherine Greene Burnett, Michael K. Moore, & Allan K. Butcher, *In Pursuit of Independent, Qualified, and Effective Counsel: The Past and Future of Indigent Criminal Defense in Texas,* 42 S. TEX. L. REV. 595 (2001).
[74] Burnett, et al., *supra* note 71.
[75] *Id.* at 679.
[76] Velazquez-Aguilu, *supra* note 70, at 236.

some states can contribute to the problems that plague indigent defense systems. In addition to the state-specific studies cited above, the American Bar Association's 2004 study of indigent defense systems cited unduly restrictive and outdated eligibility standards, resulting in many indigent defendants not receiving the assistance of counsel.[77]

In an article that addressed the factors states consider to determine eligibility for counsel, Gross found that a majority of states use the Federal Poverty Guidelines, which are based on guidance from legislation, administrative rules, or agency practices.[78] Gross argued, however, that to use "something as arbitrary as the Federal Poverty Guidelines" was "bad public policy."[79] He concluded that "guidelines based on the percentage of a household's income spent on food" may be useful in assessing eligibility for some social programs, doing so for determining eligibility for assigned counsel "ignores economic realities."[80]

In a review of the Oklahoma indigency determination scheme, Phillips argued that the method employed by that state is flawed because it grants trial judges broad discretion that could result in similarly situated defendants being treated differently under the Sixth Amendment.[81] Phillips argued that the Oklahoma system should be altered to decrease judicial discretion by transferring the authority for indigency decisions to the state's public defender commission.[82] Phillips also recommended that the state implement a new method of determining eligibility for court-appointed counsel by creating a more objective predetermined points-based system, which considers the 10 factors that Oklahoma lawmakers consider relevant to a person's financial condition—including income, assets, debts/liabilities, living expenses, and number of dependents among others.[83] Coupled with a provision that allows flexibility in unusual cases or cases with unforeseen circumstances, Phillips concluded that such a system would provide for greater uniformity in indigency determinations.[84]

Recognizing the important role that the process for determining eligibility for court-appointed counsel has on an efficient, fair, and high-quality indigent defense delivery system, Fabelo suggested a review of that component of the system as a part of a comprehensive policy research strategy.[85] Fabelo specifically noted that lacking from the current body of research with respect to the delivery of indigent defense services were considerations of who should be covered by the system, how requests for counsel should be screened, and whether eligibility should be limited to narrow populations of indigent defendants or broadened to allow for partial eligibility for defendants who can contribute to the

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[77] American Bar Association Standing Comm. on Legal Aid & Indigent Defendants, *supra* note 10, at 12.
[78] Gross, *supra* note 54, at 1193-94.
[79] *Id.* at 1218.
[80] *Id.* at 1218.
[81] Phillips, *supra* note 14, at 686.
[82] *Id.* at 686.
[83] *Id.* at 659-60, 686.
[84] *Id.* at 686.
[85] Tony Fabelo, *What Policy-makers Need to Know to Improve Indigent Defense Systems*, 29 N.Y.U. REV. L. & SOC. CHANGE 135, 146-49 (2004).

costs of their defense.[86]

Addressing a portion of this proposed research strategy, Gershowitz conducted a review of the eligibility criteria contained within state statutes and broadly categorized the criteria contained in the statutes by the degree of discretion afforded to the court in making eligibility determinations.[87] He concluded that states have adopted a wide range of eligibility criteria, and most troubling was the lack of a "constitutional floor" or minimum threshold for presumptive determinations of eligibility for court-appointed counsel. Gershowitz argued that absent such a threshold, states would "define away the right to appointed counsel."[88]

The current Article builds upon the works of Gross, Phillips, Fabelo, and Gershowitz by expanding the review of state statutes beyond simple eligibility criteria to several statutory components, reflecting the entire process by which determinations to appoint counsel are made. Through a more comprehensive review of both the eligibility factors and the process by which eligibility is determined, a clearer picture emerges reflecting states' approach to assigning court-appointed counsel. From that picture, it is possible to more fully discern the nature of discretion afforded judges and other government officials and the concomitant risk posed for abuse and discriminatory practices and to defendants' Constitutional rights.

IV. THE REVIEW OF STATE STATUTES

Broadly stated, the purpose of the right to counsel as well as the numerous other rights provided for in the Bill of Rights is a fair and just rule of government. More narrowly, the underlying goal of the right to counsel and the relevant Supreme Court decisions is to level the proverbial playing field in court proceedings between the government and the defendant, and among all classes of defendants notwithstanding wealth, gender, race or other personal characteristics. The goal of the eligibility determination process should be to ensure that every person that cannot afford an attorney is appropriately identified and accommodated. At the same time, abuse of the system by those who can pay for all or a portion of their defense costs should be controlled to the extent possible to protect tight government budgets and restrict unnecessary expenditure of taxpayer funds. With these principles in mind, the process used to determine which defendants should be granted government-subsidized counsel must be as objective as possible. Some flexibility must be preserved in order to address issues that may arise in extraordinary cases; however, the establishment of a standard determination process with clear, objectively based criteria limits unchecked abuses of discretion and helps achieve procedural fairness.

Statutory provisions are just one of several ways that states can set forth the parameters within which decisions for court-appointed counsel should be

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[86] *Id.* at 147.
[87] Gershowitz, *supra* note 8, at 586.
[88] *Id.*

made. Others include the establishment of agency administrative rules or regulations such as those promulgated by judicial councils and public defender agencies or commissions. The judicial decisions of state trial and appellate courts serve to fill in the gaps left by both statutes and administrative guidelines. State legislatures, however, should establish the framework that guides the eligibility determination process toward ensuring procedural fairness.

The purpose of this Article is to determine how states make determinations of eligibility for court-appointed counsel for indigent criminal defendants. Through the identification and review of relevant state statutes, the research seeks to identify the legislative parameters within which the decisions of eligibility for counsel are made for criminal defendants in state courts.

State statutes were analyzed to assess the extent to which state processes for determining eligibility for counsel legislatively address these concerns. To begin, the codes of all fifty states were searched to identify statutes relevant to the issue at hand.[89] After the statutes were compiled, they were reviewed for basic framework and components. From this initial review, several statutory components related to eligibility determination processes were identified and chosen for use in evaluating the elements of all state statutes. The chosen components address issues such as the timing of the determination; how the information on which the determination will be based is obtained; who makes the determination; sanctions for defendants who intentionally provide false information; and the nature of the eligibility criteria. When statutes contain clear provisions addressing these issues, the determination process is made less subjective and discretionary. Further, the effect of the provisions on objectivity is cumulative–the more of them that are present in the statute, the more objective the determination process becomes. Each of the provisions used as criteria in the statute evaluation is described next.

A. Provisions Describing the Process for Eligibility Determination

Statutes describing the process by which eligibility determinations for court-appointed counsel can inject a degree of objectivity into the process.[90] This can be accomplished through statutes that establish when the determinations must be made, set forth the means by which information for the determination will be obtained, designate decision-making authority, provide for sanctions for the submission of false information, and clearly indicate when the defendant must repay the costs of the defense.

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[89] The searches were conducted using online resources - primarily Westlaw. The initial searches were conducted using the search terms and phrases: indigent, needy, counsel, attorney, public defender, defender, and right to counsel. The "hits" were reviewed and statutes relevant to the appointment of counsel in criminal proceedings were "bookmarked' or saved for further review. In addition, state codes, also accessed via Westlaw, were also browsed and literature with cites to relevant indigency statutes were reviewed to ensure all relevant statutes were identified.

[90] *See* Phillips, *supra* note 14 (arguing generally for increased uniformity in the standards used to determine eligibility for court-appointed counsel, but, aside from addressing the assignment of decision-making authority (i.e., the court versus the public defender commission) does not speak to the other process elements of timing, information collection, or controls for false statements.)

i. Timing of the Eligibility Determination

Under the Supreme Court's 2008 decision in *Rothgery v. Gillesp County, Texas,* defendants' right to counsel attaches at the time of the defendant's first court appearance.[91] Therefore, when defendants claim that they cannot afford to retain their own attorneys, the process to verify eligibility for court-appointed counsel should commence no later than the first appearance. Some statutes stipulate that the determination should be made before or upon the first appearance,[92] and others require a preliminary determination not later than arraignment.[93] Still other state statutes do not specify the timing, but opt for more general standards, which indicate that the court must assign counsel to represent the defendant, "without unnecessary delay"[94] or that the determination should be made in order for counsel to be available at "every critical stage of the proceedings against him."[95] Statutes that establish precisely when eligibility for court-appointed counsel will be determined leave less discretion to the court or other decision-makers regarding when to initiate the process.

ii. Methods Used to Obtain Information

The process is more objective when statutes set forth the methods that must be used to obtain information that will be used in determining eligibility. Many states' statutes, for example, require defendants to complete some type of written statement, describing their financial information, including financial affidavits,[96] certificates of indigency,[97] financial statements,[98] or applications[99] for use in assessing eligibility. Other statutes assess eligibility through a process whereby defendants will be interrogated[100] or interviewed,[101] sometimes under oath,[102] about their financial condition.

iii. Authority for Making the Determination

Objectivity also increases when statutes specify who must make the

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[91] 554 U.S. 191 (2008).
[92] *See, e.g.*, IDAHO CODE ANN. § 19-852 (West 2015); KY. REV. STAT. ANN § 31.120 (West 2015); VT. STAT. ANN. TIT. 13, § 5236 (West 2015); and NEB. REV. STAT. § 29-3901 (West 2015).
[93] *See, e.g.*, LA. REV. STAT. ANN § 15:147 (2015).
[94] MONT. CODE ANN. § 46-8-101(2) (West 2015).
[95] MISS. CODE ANN. § 25-32-9 3901(2) (West 2015); *see also* NEV. REV. STAT. § 180.060 (West 2015) (which similarly states "every stage of the proceedings").
[96] *See, e.g.*, MONT. CODE ANN. § 46-8-101 (West 2015); N.H. REV. STAT. § 604-A:2-c (West 2015); and NEB. REV. STAT. § 29-3903 (2015).
[97] ARK. CODE ANN. § 16-87-213 (West 2015).
[98] CAL. GOV'T CODE § 27707 (West 2015).
[99] FLA. STAT. ANN. § 27.52 (West 2015).
[100] KAN. STAT. ANN. § 22-4504 (West 2015).
[101] MASS. GEN. LAWS ANN. Ch. 211D, § 2A (2015).
[102] ALASKA STAT. ANN. § 18-85-120 (West 2015).

determination of eligibility. Many states may authorize judges[103] or other court officials[104] to do so, while some delegate this responsibility to public defender offices[105] or even probation officers.[106] Still others may choose to use an approach employing a combination of officials to make and review eligibility decisions.[107] The assignment of responsibility for making the determination is important as it sets forth who, ultimately, is accountable for the decision.

iv. Sanctions for False Information

To protect public defender systems from abuse by those that do not need court-appointed counsel, many state indigency determination statutes contain language that specifies sanctions for defendants who intentionally provide false information during eligibility determination. Most such statutes stipulate that such an act constitutes perjury subject to criminal sanctions,[108] but civil sanctions are also a possibility in some states.[109]

v. Recoupment of Costs for Defense

Presumably to try to offset some of the costs of defense by court-appointed counsel, some state statutes include language that requires defendants who are able to repay some or all of the costs of their defense. Some statutes specify that defendants must be made aware in advance of appointing counsel that defendants will have to repay costs of defense if they are convicted of the offense,[110] while others stipulate that repayment is only required if a defendant was "erroneously or improperly determined to be indigent." [111] Whether such recoupment provisions are prudent policy or even constitutional in some cases is debatable.[112] Requiring defendants to reimburse the state for all or some the costs of their defense–should they later become able to do so–seems reasonable at first glance. However, to the extent repayment requirements affect defendants'

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[103] *See, e.g.*, IDAHO CODE ANN. § 19-8-52; 725 ILL. COMP. STAT. ANN. 5/113-3 (West 2015); *See also* N.C. GEN. STAT. ANN. § 7A-453 (West 2015).
[104] VT. STAT. ANN. tit. 13, § 5236 (West 2015) (where the court clerk makes the determination).
[105] *See, e.g.,* CONN. GEN. STAT. § 51-297 (West 2015); GA. CODE ANN. § 17-12-24 (West 2015); HAW. REV. STAT. ANN. § 802-4; (West 2015); WIS. STAT. ANN. § 977.06 (West 2015).
[106] MASS. GEN. LAWS ANN. ch. 211D § 2A (West 2015).
[107] COLO. REV. STAT. ANN. § 21-1-103 (West 2015); OHIO REV. CODE ANN. § 120.05 (West 2015); W.VA. CODE ANN. § 29-21-16 (West 2015).
[108] *See, e.g.*, ALASKA STAT. ANN. § 18-85-120 (West 2015); KY. REV. STAT. ANN § 31.120 (West 2015).
[109] *See, e.g.*, 725 ILL. COMP. STAT. ANN. 5/113-3 (West 2015).
[110] *See, e.g.,* ALASKA STAT. ANN. § 18.85.120 (West 2015) and KAN. STAT. ANN. § 22-4504 (West 2015).
[111] *See, e.g.,* UTAH CODE ANN. § 77-32-202 (West 2015).
[112] *See* Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution,* 42 MICH. J. L. & REFORM 323 (2009). The author examines the pros and cons of recoupment provisions, cites to other articles that address the subject, and ultimately concludes that recoupment provisions are not only bad policy, but they also threaten defendants' Sixth Amendment and equal protection rights.

decisions to opt for court-appointed counsel due to fears of long-term debt or property liens, a different picture emerges revealing risks to Sixth Amendment and equal protection rights.[113] The policy implications of recoupment provisions are not the focus of this Article, but the analysis does consider which states' statutes include them and a description of the nature of the provisions identified.

B. Statutory Criteria for Determining Eligibility

The key components of statutes regarding defendants' eligibility for court-appointed counsel are those specifying the criteria for eligibility. Where the criteria lack specificity and decision-makers are afforded discretion in the determination, mistakes can be costly to defendants' rights or to the state's coffers. Eligibility criteria in state statutes range from a mention of a general financial standard to descriptions of elaborate formulas and presumptive eligibility (or non-eligibility) thresholds. State statutes may contain provisions allowing partial eligibility for defendants who can afford to pay some, but not all, of their defense costs. Several states' statutes are completely devoid of any mention of eligibility criteria; instead, these states delegate rule-making authority to certain agencies and task them with establishing the criteria.[114]

i. General Standard for Eligibility

Most state statutes contain some language regarding the standard used to determine eligibility for court-appointed counsel. In fact, in some cases, a general standard is the only guidance legislatures provide.[115] Such general eligibility standards may denote that defendants should be appointed an attorney if they are: "without sufficient funds or assets to employ an attorney or afford other necessary expenses incidental thereto;"[116] "financially able to employ counsel;"[117] "unable to provide for the full payment of an attorney;"[118] or unable "to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family."[119]

ii. Specific Factors for Consideration

Many states offer more guidance by providing specific factors that courts should use to make eligibility determinations. The Alaska legislature requires

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[113] *Id.* at 357–67.
[114] *See, e.g.*, COLO. REV. STAT. ANN. § 21-1-103 (West 2015); DEL. CODE ANN. tit. 29, § 4602 (West 2015); N.D. CENT. CODE §§ 29-07-01.1, 54-61-02 (West 2015).
[115] *See, e.g.*, ARK. CODE ANN. § 16-87-201 (West 2015); CAL. GOV'T CODE § 27706 (West 2015); HAW. REV. STAT. ANN. § 802-4 (West 2015).
[116] *See, e.g.*, ARK. CODE ANN. § 16-87-201 (West 2015).
[117] *See, e.g.*, CAL. GOV'T CODE § 27706 (West 2015); HAW. REV. STAT. ANN. §§ 80–4 (West 2015).
[118] *See, e.g.*, WYO. STAT. ANN. § 7-6-102 (West 2015).
[119] *See, e.g.*, NEB. REV. STAT. ANN. § 29-3901 (West 2015).

consideration of defendants' "income, property owned, outstanding obligations, and the number and ages of dependents."[120] Similarly, Oregon statutes suggest consideration of a defendant's "assets, liabilities, current income, dependents[,] and other information…."[121] While such statutes provide increased objectivity compared to those only containing general eligibility standards, they still lack clear benchmarks or thresholds against which defendants' resources can be compared to make determinations.

iii. Presumptive Thresholds

Thus, statutes that contain the most objective eligibility criteria are those that prescribe presumptive thresholds. In these states, defendants may be presumed to be eligible for court-appointed counsel if they meet particular requirements. Some statutes leave little room for court discretion when they specify that defendants who earn income below a particular percentage of federal poverty guidelines are presumed to be eligible.[122] Even less subjective are statutes that establish both lower and upper presumptive thresholds.[123] Some states apply presumptive thresholds based upon whether defendants already receive government assistance such as food stamps, public housing, or state-subsidized medical insurance.[124]

The following section contains the results of the analysis of state statutes related to the determination of eligibility for court-appointed counsel based on the foregoing statutory criteria.

V. RESULTS: THE NATURE OF STATUTORY GUIDANCE FOR ELIGIBILITY DETERMINATIONS

Results revealed that state laws addressing the appointment of counsel varied considerably with respect to organization and the comprehensiveness of content guiding the eligibility determination processes. The research led to the identification of relevant statutes in all states though the statutes varied greatly. Almost all states had statutes that addressed some part of the eligibility determination process and contained language establishing a general standard for eligibility for court-appointed counsel. In general, statutes were more

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[120] ALASKA STAT. ANN. § 18.85.120 (West 2015).
[121] OR. REV. STAT. ANN. § 151.485 (West 2015).
[122] Louisiana statutes, for example, note that defendants earning less than 200% of the federal poverty level are presumed to be eligible, while Montana statutes set the presumptive threshold at less than 133% of the federal poverty level. *See* LA. STAT. ANN. § 15:175 (West 2015).
[123] For example, Florida, Georgia, Iowa, Ohio, Vermont, and Virginia have lower presumptive thresholds, indicating that defendants who earn less than a particular percentage on the poverty guidelines are eligible for court-appointed counsel, and upper thresholds, which exclude from eligibility those earning above particular percentages unless extreme hardship is established. *See* FLA. STAT. ANN. § 27.52 (West 2015); GA. CODE ANN. § 17-12-24 (West 2015); IOWA CODE ANN. § 815.9 (West 2015); OHIO ADMIN. CODE § 120-1-03 (West 2015); VT. STAT. ANN. tit.13, § 5236 (West 2015); VA. CODE ANN. § 19.2-159 (West 2015).
[124] *See, e.g.*, LA. REV. STAT. ANN § 15:175 (2015); MINN. STAT. ANN. § 611.17 (West 2015).

comprehensive in the coverage of the various components describing the process of eligibility determination than in the stipulation of particular eligibility criteria for use in making the decisions. Table 1 summarizes the results of the review by indicating the elements present in the statutes (marked by an X or other indicator) grouped according to whether the factors were related to the process or eligibility criteria.

Table 1. Elements Present in State Eligibility Statutes

	Determination Process					Criteria for eligibility				
State	Timing Specif.	Describes Process to Collect Info	Who Decides?[1]	Penalty For False Info	Def. Must Repay	General Standard	Specific Factors	Presumptive Threshold[2]	Partial eligibility	Delegated
Alabama		X	C	X	X	X	X	L		X
Alaska		X	C	X	X	X	X		X	
Arizona			C		X					
Arkansas		X	C	X	X	X			X	X
California		X	C	X	X	X				
Colorado		X	PD/C	X	X					X
Connecticut		X	PD	X	X	X	X			X
Delaware	X		PD/C							
Florida		X	CC	X	X	X	X	L/U		
Georgia			PD		X		X	L/U		X
Hawaii		X	PD			X			X	
Idaho	X	X	C	X	X		X	L		
Illinois	X	X	C	X	X		X			
Indiana	X		C		X		X		X	X
Iowa	X	X	C	X	X		X	L/U		
Kansas		X	C		X	X	X		X	X
Kentucky	X	X	C	X			X		X	
Louisiana	X	X	C			X	X	L		
Maine										X
Maryland		X			X	X	X	L	X	
Massachusetts		X	PO	X	X	X	X	L	X	X
Michigan	X	X	C			X	X	L	X	
Minnesota		X	C		X	X	X	L		
Mississippi		X	C			X	X			
Missouri		X	PD/C	X	X	X	X		X	X
Montana		X	C	X		X	X	L		
Nebraska	X	X	C	X	X	X	X			
Nevada		X	C			X				
New Hampshire		X	C		X	X	X		X	X
New Jersey		X	C		X	X	X		X	
New Mexico	X	X	C	X	X	X	X			
New York						X				X
North Carolina	X	X	C	X	X	X			X	X
North Dakota			C		X					X
Ohio		X	PD/C		X	X	X	L/U	X	
Oklahoma		X	C	X	X		X	U[3]		X
Oregon		X	C		X	X	X		X	X
Pennsylvania		X	PD	X	X	X				
Rhode Island		X	PD	X		X	X			
South Carolina		X	C		X	X	X		X	X
South Dakota			C		X	X			X	
Tennessee		X	C	X		X	X		X	
Texas		X	C			X	X			X
Utah		X	C	X	X	X	X	L		
Vermont	X	X	CC	X	X	X	X	L/U	X	
Virginia		X	C	X		X	X	L/U		
Washington	X	X	C	X		X	X	L	X	
West Virginia		X	PD/C	X	X	X	X		X	X
Wisconsin		X	PD	X	X	X	X	U	X	X
Wyoming	X	X	C	X	X	X			X	X

[1] Denotes who, specifically is authorized to make the determination: C = Court; PD = Public Defender; CC = Court Clerk; PO = Probation Officer

[2] Denotes the nature of the presumptive threshold: L = Lower; U = Upper; U/L = Both Upper and Lower

[3] Oklahoma's statute stipulates that if the defendant is able to post bond, the fact constitutes a "rebuttable presumption that the defendant is not indigent."

A. Statutory Treatment of the Eligibility Determination Process

All states except two (Maine and New York) have statutes that included at least one element describing the process for the determination of eligibility for court-appointed counsel. The most commonly present process-related elements were those indicating who was authorized to make the decision, which was present in forty-seven states (all except Maine, Maryland, and New York), and those describing at least some part of the process by which information regarding eligibility should be gathered, which was present in forty-two states (all except Arizona, Delaware, Georgia, Indiana, Maine, New York, North Dakota, and South Dakota). Language that establishes criminal or civil sanctions for defendants who provide false statements about their financial condition were found in the statutes of twenty-eight states. Elements setting forth the precise timing requirements for determining eligibility for counsel were less common; only fifteen states had such provisions.

The statutes of ten states contained all four of the elements describing the process for determining the eligibility of counsel (Idaho, Illinois, Iowa, Kentucky, Nebraska, New Mexico, North Carolina, Vermont, Washington, and Wyoming). Based on the criteria selected for evaluation, these states appear to have the least subjective and most transparent, legislatively defined processes for assessing eligibility. Such statutory guidance is helpful in ensuring that those who should receive court-appointments do so; however, the characteristics of the assessment process alone do not create the full picture. The eligibility criteria applied during the process are even more critical to limiting unnecessarily broad discretion toward the ultimate goal of procedural fairness.

As Table 1 shows, thirty-five states have statutes that allow the state to seek some manner of reimbursement for some or all of the costs of defending those defendants that it deems indigent. Seven states, however, provide for recoupment only if the defendant is convicted or pleads guilty to the offense charged;[125] and another six allow recoupment only if the original indigency decision was made incorrectly due to errors or false statements.[126] Of the thirty-five states with recoupment statutes, about half give the court flexibility in deciding to pursue reimbursement from the defendant,[127] and twenty-three states have statutes that require the state to find a subsequent ability of the defendant to

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[125] Alaska, Florida, Georgia, Idaho, Kansas, Maryland, and North Carolina have statutes that provide for recoupment from defendants only if they are convicted or plead guilty or no contest.

[126] Massachusetts, Nebraska, New Mexico, Ohio, Pennsylvania, and Utah statutes only provide for recoupment in the event that the court finds that the defendant was not originally entitled to or eligible for court-appointed counsel or if the court finds that the defendant made false statements regarding his financial condition.

[127] Seventeen state statutes indicate the court "may" seek reimbursement (Alabama, Alaska, Arizona, California, Georgia, Idaho, Illinois, Kansas, Minnesota, Nebraska, New Mexico, Ohio, South Dakota, Utah, West Virginia, Wisconsin, and Wyoming), while 18 statutes stipulate that the court "shall" do so (Arkansas, Colorado, Connecticut, Florida, Indiana, Iowa, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, and Vermont).

pay as a condition of reimbursement.[128] However, six states require the court to seek recoupment notwithstanding the defendant's ability to pay.[129] The method of repayment varies, but in at least nine states includes civil judgments and/or liens against the defendants' property.[130] The Arkansas statute specifies that state income tax refunds or lottery winnings "shall be intercepted" to pay for defense costs.[131]

B. Presence of Eligibility Criteria in State Statutes

Thirty-eight states had statutes that contained language articulating at least a general standard of eligibility for counsel. As noted above, general standards are very broad statements describing eligible requirements. Examples of such statements include those indicating that defendants are "financially unable to employ council,"[132] "does not have the means at his disposal or available to him to obtain counsel in his behalf,"[133] and an "inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family"[134] are eligible for court-appointed attorneys. The statutes of twelve states had no such general standard.[135] Of those, five states' (Arizona, Colorado, Delaware, Maine, and North Dakota) statutes had none of the factors regarding eligibility for counsel, and in all but one of these states, the legislatures delegated the authority for establishing eligibility criteria to other agencies or commissions (Arizona, Colorado, Maine, and North Dakota). Thus, Delaware was the only state with statutes that were completely silent on anything related to criteria for eligibility.

Thirty-six states had statutes that set forth specific factors that should be considered when determining eligibility for court-appointed counsel, though some of the factors were admittedly limited in the guidance set forth. For example, South Carolina's statute stipulates that the eligibility determination should simply consider "all [of the person's] assets,"[136] and the Oklahoma statute states that the consideration should include whether or not the defendant has been "released on

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[128] Alabama, Alaska, California, Colorado, Connecticut, Georgia, Idaho, Indiana, Iowa, Kansas, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, South Dakota, Vermont, and West Virginia statutes all contain language suggesting that recoupment decisions would consider the defendant's ability to pay–not only at the time of the initial proceedings, but for some time after in most cases.

[129] Statutes for Arkansas, Florida, North Carolina, Oklahoma, Pennsylvania, and South Carolina have language indicating that the court "shall" seek reimbursement or repayment from the defendant, but do not have any stipulations regarding the defendant's ability to pay for those costs.

[130] California, Florida, Kansas, New Jersey, North Carolina, Oklahoma, Oregon, South Carolina, and South Dakota statutes authorize the state to enter a judgment against the defendant and/or a lien against his or her property.

[131] ARK. CODE ANN. § 16-87-213 (West 2015).

[132] *See, e.g.*, N.Y. COUNTY LAW § 717 (McKinney 2015).

[133] *See, e.g.*, MO. ANN. STAT. § 600.086 (West 2015).

[134] *See, e.g.*, NEB. REV. STAT. ANN. § 29-3901 (West 2015).

[135] Arizona, Colorado, Delaware, Georgia, Idaho, Illinois, Iowa, Kentucky, Maine, North Dakota, and Oklahoma included no language defining indigency or setting a general standard for eligibility of counsel.

[136] S.C. CODE ANN. § 17-3-30 (2015).

bond."[137] Most state statutes that specify factors for consideration in indigency determination decisions include several aspects related directly to a defendant's financial condition including: "the nature, extent, and liquidity of assets, the disposable net income of the defendant, the nature of the offense, the effort and skill required to gather pertinent information and the length and complexity of the proceedings;"[138] "income, property owned, outstanding obligations and the number and ages of his dependents;"[139] "current income prospects, taking into account seasonal variations in income," liquid assets, "fixed debts and obligations," child care, transportation, age, physical infirmity, efforts made to obtain private legal representation;[140] and comparison of the "defendant's assets and incomes with the minimum cost of obtaining qualified private counsel."[141]

Thirteen states allowed for the consideration of the cost of and the defendant's ability to make bail or bond when determining eligibility for court-appointed counsel,[142] and in five of those cases, the statutes specifically say that counsel should not be denied based on the defendant's ability to do so.[143] Seven states' statutes stipulate that the income or assets of the defendant's spouse or immediate family–and in one case the defendant's friends and employer–should be considered when assessing eligibility for court-appointed counsel.[144] Another area of consideration in state eligibility criteria was related to the nature and complexity of the case against the defendant, and recognizing that more complex cases will cost more to defend, the statutes of six states contained such a provision.[145] Additionally, New Jersey statutes required that defendants "demonstrate convincingly that he has consulted at least three private attorneys,

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[137] OKLA. STAT. ANN. tit. 22, § 1355A (West 2015). (The defendant's ability to post bond is the only factor for consideration specified in the Oklahoma statutes. As noted below, several other state statutes mention consideration of the defendant's ability to post bond and whether that factor should be considered when determining eligibility.); *See, e.g.*, MO. ANN. STAT. § 600.086 (West 2015) (requiring consideration of a defendant's "ability to make bond, his income and the number of persons dependent on him for support…."); *See also*, Kuhns, *supra* note 46, at 1810 (examining the effects of using the ability to post bond on indigency determination and arguing that statutes that presume a defendant is not indigent if he or she can post bond "forces individuals to make an impossible choice between the right to counsel and liberty").

[138] ALA. CODE § 15-12-5 (2015).

[139] N.M. STAT. ANN. § 31-16-5 (West 2015).

[140] W.VA. CODE § 29-21-16 (West 2015).

[141] N.H. REV. STAT. ANN. § 604-A:2-(c) (2015).

[142] The states with statutes citing the cost and/or ability of the defendant to make bail/post bond are Florida, Idaho, Kentucky, Missouri, New Jersey, New Mexico, Ohio, Oklahoma, Tennessee, Texas, Vermont, Washington, and West Virginia.

[143] New Jersey, New Mexico, Texas, Vermont, and Washington prevent out right denial of counsel simply because of the defendant's ability to make bail or post bond.

[144] The statutes of Indiana and Mississippi include spousal income as factors for consideration as do the statutes in Virginia, Washington, and Wisconsin except those that specify that the spouse's income should only be considered if the spouse is not the victim of the alleged crime of the defendant. Montana's statute includes consideration of others in the "household," and New Jersey's includes reference to consideration of the willingness and ability of immediate family, friends, and the defendant's employer to assist with the costs of the defense.

[145] The states with statutes that included consideration of the complexity of the case at hand in eligibility determination proceedings include: Alabama, Kansas, Maryland, New Jersey, Utah, and Washington.

none of whom would accept the case for a fee within his ability to pay."[146] Finally, three states, Kansas, Minnesota, and Utah have statutory provisions requiring the court to consider whether defendants may have transferred or otherwise divested themselves of assets in anticipation of eligibility determination.[147]

Eighteen states have statutes with criteria that specify presumptive thresholds for eligibility. As noted above, presumptive thresholds are benchmarks against which a defendant's financial condition is compared to determine eligibility. Benchmarks can be either categorical or quantitative in nature and can be based on a minimum income (lower threshold) or a maximum income (upper threshold) or both. Maryland's statute, for example, sets a lower quantitative presumptive threshold by stipulating that defendants' whose "assets and net annual income are less than 100 percent of the federal poverty guidelines" are deemed eligible for public defender services with no additional needs assessment.[148] Both Louisiana and Washington statutes include both quantitative and categorical lower presumptive eligibility thresholds. For example, Louisiana statutes stipulate that a defendant who either earns less than twenty percent of federal poverty guidelines or receives government assistance, such as food stamps, Medicaid, or public housing is presumed to be eligible for court-appointed counsel.[149] Similarly, Washington statutes presume defendants that earn less than 125 percent of federal poverty guidelines or receive government assistance benefits are indigent.[150] Of the eighteen states with statutes that include eligibility thresholds, ten provide for one or both of these types of lower presumptive thresholds,[151] and these states are denoted in Table 1 with an "L" in the "Presumptive Threshold" column.

The Florida statute provides an example of an upper presumptive threshold because it stipulates that a defendant having a net equity of $2,500 or more in property, excluding the value of his or her home and vehicle worth under $5,000, is presumed ineligible for court-appointed counsel.[152] Also, in Georgia, defendants earning more than 250 percent of the federal poverty guidelines are presumed ineligible for court-appointed counsel, unless they can prove extraordinary conditions or hardship.[153] States with statutes that specify upper

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[146] N.J. PERM. STAT. § 2A:158A-14 (West 2015). *See also* W.VA. CODE § 29-21-16 (stipulating that West Virginia eligibility decisions should consider whether the defendant "has made reasonable and diligent efforts to obtain private legal representation[] and the result of those efforts").

[147] KAN. STAT. ANN. § 22-4513; MINN. STAT. ANN. § 611.17 (West 2015); UTAH CODE ANN. § 77-32-202.

[148] MD. CODE ANN., CRIM. PROC. § 16-210 (West 2015). For defendant's whose "assets and net annual income equal or exceed 100 percent of the federal poverty guideline," a more detailed needs assessment will be conducted to determine eligibility.

[149] LA. STAT. ANN § 15:147 (2015).

[150] WASH. REV. CODE ANN. § 10.101.010 (West 2015).

[151] Alabama, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Oklahoma, Utah, and Washington all have statutory language establishing a lower presumptive threshold for eligibility.

[152] FLA. STAT. ANN. § 27.52 (West 2015).

[153] GA. CODE ANN. § 17-12-2 (West 2015).

presumptive thresholds are shown in Table 1 denoted with a "U." Most states with statutes that have upper presumptive thresholds also have lower thresholds. Both Florida and Georgia, in addition to the upper thresholds described here also have lower thresholds based on income-levels compared to the federal poverty guidelines.[154] Six states have both upper and lower thresholds, and these are shown in Table 1 with an "U/L."[155] However, the statutes of two states only provide for upper thresholds–or statutes that presumptively assume non-eligibility or non-indigence. The Wisconsin statute presumes that defendants' assets or income are "available to the person to pay the costs of legal representation if the assets exceed $2,500 in combined equity value" or if his or her "gross income exceeds 115 percent of the federal poverty guidelines."[156] Oklahoma's statutes set a very strict upper threshold by stipulating that if the defendant is able to make bail or post bond–with his own money or with the help of another person–this "shall constitute a rebuttable presumption that the defendant is not indigent."[157]

Statutes reflecting both lower and upper presumptive thresholds, with an exception clause, such as in the Georgia statute described above, provide the most objectivity in the eligibility determination, while maintaining needed flexibility to consider dire situations that may compromise an otherwise financially capable defendant's ability to pay for all of his defense costs.

Twenty-three states have statutes with partial-eligibility provisions that allow for the fact that some defendants may be able to afford to pay for some, but not all, of their defense costs.[158] Where partial eligibility provisions exist, courts may appoint counsel but order the defendant to make co-payments to the public defender or court.[159] Partial eligibility provisions present flexibility needed by many defendants who are not totally destitute, but simply cannot afford costly up-front retainer fees and hourly-billing rates of privately retained attorneys.

Finally, twenty-one states have statutes that specifically delegate all or a portion of the authority for setting eligibility standards and determining the process by which such determinations should be made.[160] In Colorado, for example, the responsibility for setting eligibility criteria lies with the state

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[154] Florida presumes that defendants that earn less than 200 percent of federal poverty guidelines to be indigent and eligible for court-appointed counsel. *See* FLA. STAT. ANN. § 27.52 (West 2015). Georgia presumes that defendants that earn less than 100 percent of federal poverty guidelines to be indigent and eligible for court-appointed counsel. *See* GA. CODE ANN. § 17-12-2 (West 2015).

[155] Florida, Georgia, Iowa, Ohio, Vermont, and Virginia statutes include language establishing both upper and lower presumptive eligibility and non-eligibility thresholds.

[156] WIS. STAT. ANN. § 977.02 (West 2015).

[157] OKLA. STAT. ANN. tit. 22, § 1355A (West 2015).

[158] Alaska, Arkansas, Hawaii, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming have provisions requiring defendants who cannot afford to pay all but can afford to pay a portion of their defense costs to do so.

[159] *See, e.g.*, Anderson, *supra* note 110, at 329-32.

[160] Arizona, Arkansas, Colorado, Connecticut, Georgia, Indiana, Kansas, Maine, Massachusetts, Missouri, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, Texas, West Virginia, Wisconsin, and Wyoming statutes delegate the responsibility for establishing eligibility criteria or standards to a particular state agency.

supreme court.[161] Indiana statutes delegate the same authority to the state's Public Defender Commission,[162] while in Massachusetts, the Committee for Public Counsel is responsible,[163] and in Kansas it is the job of the State Board of Indigent Defense Services to set eligibility standards.[164] In North Dakota, every aspect related to indigent defense, including establishing criteria, creating processes, and making the ultimate determination is the purview of the North Dakota Commission on Legal Counsel for Indigents.[165]

C. Overall Comprehensiveness of States' Statutes

The characteristics of both the process used and the eligibility criteria applied to ascertain eligibility for counsel are critical to any overall judgment regarding state statute comprehensiveness and objectivity. To the extent that the criteria chosen to evaluate the state statutes in this case (notwithstanding the elements accounting for recoupment of defense costs and the delegation of the determination duties) can be said to be indicative of clarity and objectivity in the determination process, one could argue that the effects are cumulative. When more of these specific elements are contained in state statutes, the less subjective the determination process becomes. With that in mind, the data collected for this Article and reflected in Table 1 was used to generate the sum of the number of statutory elements present in each state's statutes. For example, the first state listed in Table 1 is Alabama, and the table shows that Alabama statutes include six of the eight key elements (again, not including the "Repay" or "Delegated" elements). The six elements contained in the Alabama statutes include: description of process to collect eligibility information ("Describes Process to Collect Info"), assignment of who is responsible for the eligibility determination ("Who Decides?), stipulation of penalties for defendants that provide false information ("Penalty for False Info"), language stating a general eligibility standard ("General Standard"), specific factors that should be considered when assessing eligibility ("Specific Factors"), and a lower presumptive threshold for eligibility ("Presumptive Threshold" = "L"). Thus, by summing the number of elements, Alabama would receive a "score" of six. Maine statutes do not include any of the eight key elements and would receive scores of zero, while Arizona, New York, and North Dakota would each receive a score of one because statues of those states only have one element each. This scoring was done for all states in order to determine which states had relatively more comprehensive and objective legislative direction for determining which defendants are eligible for counsel. Using this methodology, Vermont and Washington scored the highest, because the statutes of those states contained all eight criteria reviewed. The frequency data were graphed, and the results (shown in Figure 1 with state abbreviations placed within the frequency bars) indicated a slightly skewed distribution of the

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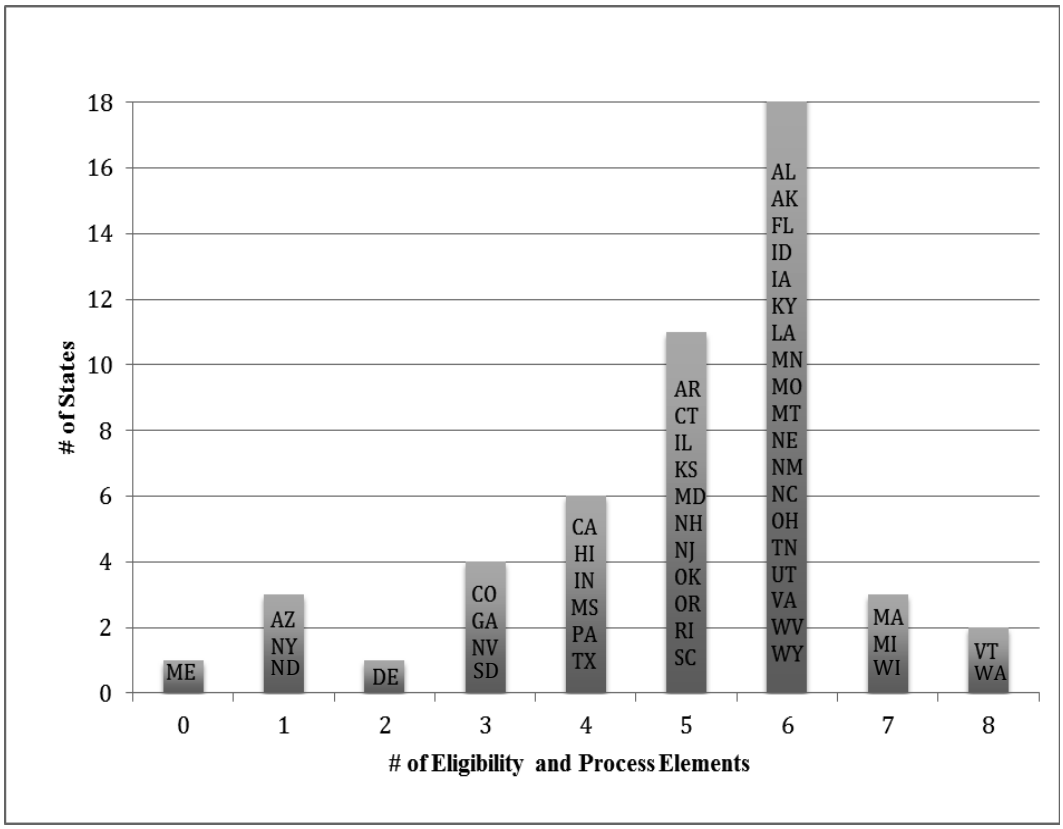
[161] COLO. REV. STAT. ANN. § 21-1-103 (West 2015).
[162] IND. CODE ANN. § 33-40-5-4 (West 2015).
[163] MASS. GEN. LAWS. ANN. ch. 211D § 2 (West 2015).
[164] KAN. STAT. ANN. § 22-4504 (West 2015).
[165] N.D. CENT. CODE ANN. § 54-61-02 (West 2015).

number of statutory elements across the fifty states, with most states having between four and six.

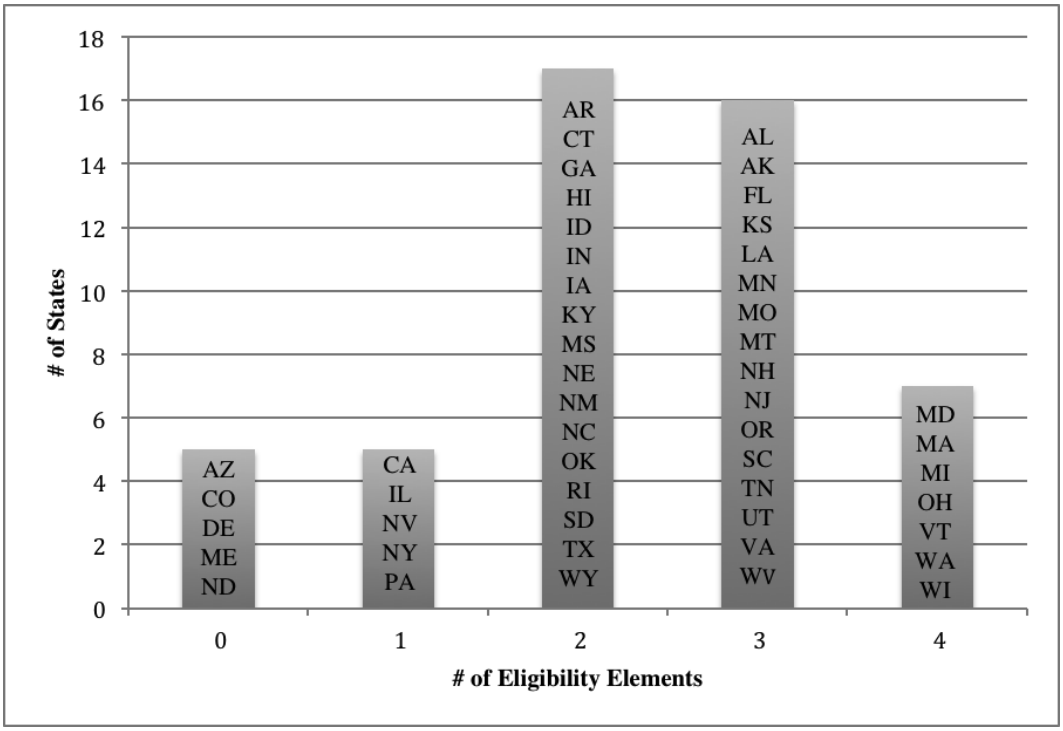
Figure 1. Number of Statutory Elements (Eligibility and Process) Present per State



Based on this analysis it can be concluded that Vermont and Washington (with eight elements) and Massachusetts, Michigan, and Wisconsin (with seven elements) have statutes that, based on the criteria chosen, provide the most objective means for determining eligibility for assigned counsel. Obviously, this simple analysis does not take into account the notion that all of the elements chosen for this review may not represent equally important aspects of state statutes. For example, noted above was the argument that statutes that stipulate both upper and lower thresholds provide a more objective basis for determining eligibility for court-appointed counsel. Such considerations are not taken into account here, because the method was used to simply get a measure of how states stack up against one another. Additionally, it could be argued that the most important elements of the analysis should be limited to the ones that focus on the criteria for determining which defendants are eligible for court-appointed counsel, and not the process by which the determination is made. Results for limiting the analysis to the four eligibility components–general eligibility standards, specific factors to be considered, presumptive eligibility thresholds, and partial eligibility provisions are in Figure 2. Only seven states have statutes with all four eligibility

components, while 10 states have fewer than two of the components. Most states, however, have at least two or three of the eligibility components, and therefore, provide some legislative guidance for the eligibility determination decisions.

Figure 2. Number of Eligibility Elements Present per State



VI. CONCLUSION

Results of this Article indicate that states statutes vary considerably with respect to the extent to which they prescribe processes and eligibility criteria for determining the need for court-appointed counsel. Some states' statutes provide virtually no direction on the issue, while others contain several sound and objective criteria for use in making eligibility decisions. While this Article provides a starting point for understanding how decisions to appoint counsel are made in the states, at this point it would be problematic to draw firm conclusions. As noted above, state statutes represent just one source of information related to how states determine indigency. To gain a more complete and accurate picture, analysis of the administrative guidelines of agencies and commissions as well as the case law of each state is necessary. Nevertheless, state legislation serves the important function of creating the basic parameters within which lower courts and agency decisions are typically made. Therefore, legislatures that firmly establish sound, objective criteria upon which determinations of eligibility can be made, help ensure that defendants' rights will be protected and counsel will be appointed when needed.

Notwithstanding the fact that several state legislatures have set forth clearly objective standards for the determination of eligibility, this Article makes

apparent that many states lack such legislative guidance. These states leave broad discretion to magistrates and trial court judges to make these decisions. Mistakes in making that decision which result in denial of court-appointed counsel for a defendant who cannot afford to hire his or her own have potentially serious implications. While courts' discretionary decisions can normally be reviewed for clear error and abuse of discretion, those standards are often difficult to prove. This would particularly be the case for defendants who do not have the assistance of an attorney to file an appeal. A lack of objective criteria to guide eligibility decision-making can lead to unequal treatment under the law, and unfettered judicial discretion increases the risk that those decisions will be made based on personal prejudices or biases. Discriminatory decisions clearly could lead to violations of defendants' Sixth and Fourteenth Amendment rights. Here, legislatures and judiciaries should learn from problems with judicial discretion in the area of criminal sentencing.[166] Sentencing disparities that raised concerns about discrimination and inequality have led to substantive changes in the way sentences are determined, by significantly reducing judicial discretion through sentencing guidelines and mandatory minimum sentencing structures.[167] Clearly, the criminal justice system has seen the effects of a lack of objective standards on particular classes of defendants, thus legislatures should take note and apply those lessons learned in other areas, including the appointment of counsel.

The right to counsel is a fundamental right, but when those who require court-appointed counsel exercise that right, the government must take on the role of adequately managing and funding public defender systems. Today, as noted above, most accounts indicate that the nation's state public defender systems are in a state of crisis due to huge caseloads and a lack of funding. Denying counsel to those that need it and are facing a loss of liberty should not be the means to decrease public defender caseloads. Perhaps a different approach is warranted, specifically, examining a different way to control inputs into the system.

This nation's paramount criminal justice paradigm of the last thirty years has no doubt contributed to the problem by increasing the demand on the criminal justice system. The "get-tough on crime" philosophy accompanied by the "Wars on Crime, Drugs, and Terror" has led to increased criminalization of offenses once considered minor.[168] One of the results of this phenomenon has been an increase in the number of offenses for which loss of liberty is a potential sanction. In addition, harsher punishment strategies have also increased the demands on the criminal justice system by incarcerating more defendants for longer periods of time. This is particularly evident when the impact of three-strikes laws and mandatory minimum sentencing schemes are considered.[169] One important consequence of the expansion of criminal laws and sanctions for breaking those laws is the increased demand on public defender systems.[170]

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[166] Phillips, *supra* note 14, at 670-72.
[167] *Id*.
[168] NATIONAL RIGHT TO COUNSEL COMMITTEE, *supra* note 55, at 70.
[169] Sara Steen & Rachel Bandy, *When the Policy Became the Problem: Criminal Justice in the New Millennium*, 9 PUNISH. & SOC'Y 5 (2007).
[170] Greg Hollon, *After the Federalization Binge: A Civil Liberties Hangover,* 31 HARV. C. R. - C.L. L. REV. 499 (1996).

The workload on the public defender system and the concomitant drain on state budgets are just two of the many negative effects of the criminalization trend of the last three decades. The other numerous deleterious effects need not be itemized here; however, their combined impact on the justice system, government as a whole, and society indicates a change may be necessary. Perhaps such a change–one in which the justice system is more focused on identifying and addressing front-end factors related to the sources and root causes of crime and less on increased criminalization and retribution–could lead to benefits across many facets of society, not just in decreasing the public defender caseload.

APPENDIX

Table 2. State Statutes Analyzed

STATE	STATUTES
ALABAMA	ALA. CODE § 15-12-1, 5, 25 (2015)
ALASKA	ALASKA STAT. ANN. § 18.85.110, 120, 170 (West 2015)
ARIZONA	ARIZ. REV. STAT. ANN. § 9-499.09, § 11-584 (2015)
ARKANSAS	ARK. CODE ANN.§ 16-87-201, 213 (West 2015)
CALIFORNIA	CAL. GOV'T CODE § 27706, § 27707 (West 2015) CAL. PENAL CODE § 987.8 (West 2015)
COLORADO	COLO. REV. STAT. ANN. § 21-1-103, 106 (West 2015)
CONNECTICUT	CONN. GEN. STAT. ANN. § 51-289, 297-298 (West 2015)
DELAWARE	DEL. CODE ANN. tit. 29 § 4602 (West 2015)
FLORIDA	FLA. STAT. ANN. § 27.52 (West 2015)
GEORGIA	GA. CODE ANN. § 17-12-2, 24, 51, 80 (West 2015)
HAWAII	HAW. REV. STAT. ANN. § 802-2, 3, 4, 6 (West 2015)
IDAHO	IDAHO CODE ANN. § 19-852, 854 (West 2015)
ILLINOIS	725 ILL. COMP. STAT. ANN. 5/113-3, 5/133.3.1 (West 2015)
INDIANA	IND. CODE ANN. § 33-40-5-4, 6, 7, § 35-33-7-6 (West 2015)
IOWA	IOWA CODE ANN. § 815.9 (West 2015)
KANSAS	KAN. STAT. ANN. § 22-4503, 4504 (West 2015)
KENTUCKY	KY. REV. STAT. ANN. § 31.110,120 (West 2015)
LOUISIANA	LA. STAT. ANN. § 15:143, 175 (2015)
MAINE	ME. STAT. ANN. tit. 4 § 1804 (2015)
MARYLAND	WEST'S MD. CODE ANN. § 16-210, 211 (West 2015)
MASSACHUSETTS	MASS. GEN. LAWS. ANN. ch. 211D § 2, 2A, ch. 261 § 27A, 27B (2015)
MICHIGAN	MICH. COMP. LAWS ANN. § 780.991 (West 2015)
MINNESOTA	MINN. STAT. ANN. § 611.17, 18, 20 (West 2015)
MISSISSIPPI	MISS. CODE ANN. § 25-32-9, § 99-15-15 (West 2015)
MISSOURI	MO. ANN. STAT. § 600.086, 090 (West 2015)
MONTANA	MONT. CODE ANN. § 46-8-101, § 47-1-111 (West 2015)
NEBRASKA	NEB. REV. STAT. ANN. § 29-3901-3903, 3908, 3916 (West 2015)
NEVADA	NEV. REV. STAT. ANN. § 171.188, § 180.060 (West 2015)
NEW HAMPSHIRE	N.H. REV. STAT. Ann. § 604-A:2, A:2c, A2d, A:9, A:10 (2015)
NEW JERSEY	N.J. STAT. ANN. § 2A:158A-2, 14, 15.1, 16, 17 (West 2015)
NEW MEXICO	N.M. STAT. ANN. § 31-16-2, 5, 7 (West 2015)
NEW YORK	N.Y. COUNTY LAW § 717, N.Y. EXECUTIVE LAW § 832 (McKinney 2015)
NORTH CAROLINA	N.C. GEN. STAT. ANN. § 7A-450, 453, 455, 456, 498 (West 2015)
NORTH DAKOTA	N.D. CENT. CODE ANN. § 54-61-01, 02, § 29-07-01.1 (West 2015)
OHIO	OHIO REV. CODE ANN. § 120.05, OHIO ADMIN. CODE ANN. § 120-1-03 (West 2015)
OKLAHOMA	OKLA. STAT. ANN. tit. 22, § 1355A, 1355.14 (West 2015)
OREGON	OR. REV. STAT. ANN. § 151.485, 487, 489 (West 2015)
PENNSYLVANIA	16 PA. STAT. AND CONS. STAT. ANN. § 9960.6, 8 (West 2015)
RHODE ISLAND	R.I. GEN. LAWS ANN. § 12-15-8, 9, 11 (West 2015)
SOUTH CAROLINA	S.C. CODE ANN. § 17-3-10, 30, 45, 340 (2015)
SOUTH DAKOTA	S.D. CODIFIED LAWS § 23A-40-6, 10, 11 (2015)
TENNESSEE	TENN. CODE ANN. § 40-14-201, 202 (West 2015)
TEXAS	TEX. CODE CRIM. PROC. ANN. § 1.051, 26.04, TEX. GOV'T CODE ANN. § 79.034 (West
UTAH	UTAH CODE ANN. § 77-32-202 (West 2015)
VERMONT	VT. STAT. ANN. tit.13, § 5201, 5236, 5238 (West 2015)
VIRGINIA	VA. CODE ANN. § 19.2-159, 161 (West 2015)
WASHINGTON	WASH. REV. CODE ANN. § 10.101.010, 020 (West 2015)
WEST VIRGINIA	W.VA. CODE ANN. § 29-21-16 (West 2015)
WISCONSIN	WIS. STAT. ANN. § 967.06, § 977.02, 06, 07 (West 2015)
WYOMING	WYO. STAT. ANN. § 7-6-102, 106, 108 (West 2015)