Gideon in the Garden State: New Jersey's Support for Public Defenders

An Honors Thesis Project by

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Introduction:

Fifty years after the decision of *Gideon v. Wainwright* there are many scholars who feel the Court's decision to apply the 6th Amendment of the Constitution to each state has still not been adequately realized today.[1] Under the 6th Amendment, citizens have a fundamental right to have counsel present during criminal cases in which they face the threat of incarceration. The most commonly used system employed by states in order to fulfill the requirement is a public defender system through which all defendants unable to afford private counsel are provided appropriate counsel from the state, either through statewide or local programs.[2] There is much scholarly criticism of the systems of public defense in the United States, usually citing lack of resources and excessive caseloads, so much so that many legal scholars consider the holding of *Gideon* unrealized in the U.S. and the system itself in a national crisis.[3] However, despite the numerous accounts and evaluations of how broken or failed the dream of *Gideon* may be on a national scale, there are examples of public defender systems that do appear to work well. The state of New Jersey reveals how the Court's protection of defendants' rights may be realized today within a statewide public defender system. This thesis is going to evaluate the public defender system within New Jersey in order to answer the scholarly critiques of the *Gideon* legacy and to provide a model which other states and the federal government should examine in order to

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[1] Dripps, Donald A., "Up from Gideon." Texas Tech Law Review (2012) vol. 45; Baxter, Heather. "Gideon's Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis." Michigan State Law Review (2010): P. 341; Barton, Benjamin H., "Against Civil *Gideon* (and for pro se Court Reform)." Florida Law Review (2010). 1227. P. 1230-1231; Cohen, Andrew. "How Americans Lost the Right to Counsel, 50 Years After 'Gideon'"*Brennan Center for Justice* (2013); Bright, Stephen B., and Sia M. Sanneh. "Fifty years of Defiance and Resistance After Gideon."Yale Law Journal 122 (2013).

[2] Langton, Lynn, and Donald Farole, Jr. *State Public Defender Programs, 2007*. Rep. no. NCJ 228229. N.p.: Bureau of Justice Statistics, 2010.

[3] See Supra Dripps; Baxter; Barton; Cohen; Bright; Sanneh.

understand how more funding for public defense in America can fulfill the dream of equal and effective counsel for all.

Background of Thesis:

The original intended purpose of this thesis was to evaluate the public defender system within New Jersey in comparison with the local county prosecutor offices to analyze any inequalities between the two adversarial systems. The reason I chose New Jersey specifically as a case study was because of my present location studying within the state. My initial hypothesis was that the offices of New Jersey prosecutors would have significant advantages over those of the state public defender system in the form of higher salaries, more resources, more support staff, and less of a caseload burden. This hypothesis was formed following an initial examination of the literature critiquing public defense in the United States as a whole and finding a consensus among scholarly articles regarding the deplorable state of the system on a national level. After doing specific research into the public defender and prosecutor systems within the state, I realized that New Jersey actually strongly supports its public defender system and lacks the overburdened, underworked, understaffing problems of many other states and counties in the country. Because of this realization, my aim for this thesis shifted toward a more broad view of public defenders in the United States in order to compare New Jersey to the national crisis of indigent defense as a positive example, rather than a negative one. It should be noted that there are other public defender systems that manage to fulfill the requirement for meaningful counsel, such as the systems within Washington, D.C.[4] and some counties in California,[5] while other systems have been developing and growing in order to provide effective representation for their

[4] Wice, Paul B. *Public Defenders and the American Justice System*. Westport, CT: Praeger, 2005. P. 12
[5] "San Francisco Public Defender's Office." 2013. <http://sfpublicdefender.org/>.

clients.[6] Nonetheless, the success of the New Jersey Public Defender system can serve as a model for how the *Gideon* decision can be realized. This thesis is organized in three parts; Part I will provide an account of the recent literature examining the legacy of the decision in *Gideon v. Wainwright* and show why such articles should cite systems that work like the state offices in New Jersey to show how an adequate system is possible. Part II will lay out the different parts of a public defender system and demonstrate how the state office in New Jersey provides for each. Finally Part III will argue for federal support in order to reform the failing defender systems and reach the success of New Jersey.

PART 1: A Critique of the Literature

The Need for a Strong Public Defender System:

States must uphold the Court's decision in *Gideon v. Wainwright* in order to fulfill the right American citizens have to the assistance of counsel in their defense in criminal trials under the 6th Amendment. A well-funded public defender system can be seen as a crucial check over executive power when such power threatens individual rights. New York University School of Law professor Martin Guggenheim has argued that a robust public defender system should be viewed as the investigative arm of the judiciary which would provide meaningful oversight on executive power.[7] According to Guggenheim, in the status quo with inadequate funds for public defense and strong political support for the prosecution, the executive branches of government have a license that would have been "unthinkable to the Framers of the Constitution, who

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[6] See: McGregor Smyth, "Holistic is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy" University of Toledo Law Review, Vol. 36 (2005) P. 487: The Bronx Defenders in New York have a strong emphasis on holistic assistance in treating crime and created the Center for Holistic Defense; Lynn, Near. "After 50 Years, A State Of Crisis For The Right To Counsel." *90.9wbur Boston's NPR News Station*. National Public Radio, 19 Mar. 2013: The public defender program in Colorado has been hiring new attorneys and improving the effectiveness of their program despite continuing lack of funding.

[7] Guggenheim, Martin. "The People's Right to a Well-Funded Indigent Defense System." *New York University Review of Law and Social Change* 36 (2012): 395. P. 400

worked so carefully to ensure that executive power would be checked on a regular basis."[8] The inadequate funding levels can be traced directly to the failure of the legislatures, whether at the local or state level, which leads to an abuse of executive power since it is essentially the state charging citizens of crimes and suspending their right to defend themselves.[9] This abuse of power in favor of prosecutors without meaningful checks on the state's ability to charge and often determine a choice of sentences is, according to law professor Rachel Barkow, the "most significant flaw in the federal criminal system."[10] The sentencing guidelines, like mandatory minimums have increased the power of the state and prosecutors by curbing judicial sentencing discretion and this abuse of power has manifested itself in more plea deals and fewer trials.[11] Depriving an individual of meaningful representation when their liberty and their lives are hanging in the balance is basically, "a frontal assault on the democratic freedoms that the society cherishes."[12] The premise of "innocent until proven guilty" is dependent on the concept of the state's burden of proof. In order for the state to have a standard to meet, prosecutors need to have their cases challenged, otherwise the only voice heard in the courtroom is the accuser's and the possibilities for fairness and the potential of innocence are lost. Skilled defense attorneys are needed in order to test the validity of the prosecution's evidence and effectively cross-examine witnesses. Lawyers who hold prosecutors and the state up to the legal standards of proof provide the best defense against wrongful conviction.[13]

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[8] *id.*
[9] *id.* P. 444
[10] Barkow, Rachel E. "Institutional Design and The Policing of Prosecutors: Lessons from Administrative Law." *Stanford Law Review* 61 (2009): 869. P. 871
[11] *id.* 877
[12] Taylor-Thompson, Kim. "Tuning Up Gideon's Trumpet." *Fordham Law Review* 71.4 (2003): 1461-516. P. 1515
[13] Janet Reno, U.S. Att'y Gen., Remarks at the National Symposium on Indigent Defense (June 29, 2000), in Office of Justice Programs, U.S. Dept. of Justice, Redefining Leadership for Equal Justice: A

A strong public defender system is also essential to uphold the rights of the guilty as well as the innocent. Provision of an effective public defender system would not result in a justice system in which guilty people walk free, but in a system in which guilty individuals are tried and punished fairly. Even those in society who have harmed others deserve a fair trial. As tough on crime attitudes have increased with minimum mandatory sentences and statutes against drug offenses, defendants today are facing more of what legal researchers Norman Lefstein and Robert Spangdenberg call collateral consequences: more severe sanctions than prison sentences, including loss of employment opportunities, immigration status, voting rights, housing, and driver's licenses.[14] The nature of plea bargains incentivizes prosecutors to add extra charges against defendants in order to bring a defendant to plead guilty to the only charges the prosecutor has evidence for and avoid risking conviction on all of the charges in a trial. An effective public defender can provide protection for defendants against the potential prosecutors have to unfairly add additional criminal charges.

As important as an effective defense system is for individuals being charged by the state, such programs are also beneficial to society as a whole. As Tracy Velázquez, executive director of the Justice Policy Institute has argued the country needs to invest in preventing crime rather than focusing on reacting to it with punishment. As she points out, "For every $1 we spend on public defense, we are currently spending nearly $14 on corrections. We need to make smarter investments that will keep us safe and not empty our wallets."[15] If state lawmakers brought more awareness to the need for public defenders and provided more financial support for the

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Conference Report vi (2000): Former U.S. Attorney General, stressed that skilled defense attorneys are the best defense against wrongful conviction.

[14] Lefstein, Norman, and Robert L. Spangenberg. *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*. Publication. National Right to Counsel Committee, April 2009. P. 72

[15] Justice Policy Institute. Overloaded Public Defense Systems Result in More Prison Time, Less Justice. 27 July 2011.

prevention of crime, they could build societal trust in public defenders and fight the stigma attached to the profession. There is an idea among many defendants that they are simply a part of an "assembly-line" justice system which has no regard for their wellbeing.[16] Since they were first prosecuted by the state and then provided with state lawyers in court it can appear that public defenders are merely representatives of the system that locked them up in the first place. This distrust with public defenders is exacerbated when defense attorneys are not able to provide adequate funds or time to make their clients feel they received any defense at all. If more political emphasis and tangible funds were provided to public defenders, attorneys all through the country could work toward building a trust with their communities, which could provide for preventing crime while saving taxpayers money on corrections.

Maintaining a balance between funding for public defenders and prosecutors is important to the pursuit of equality in the practice of justice. The example of Maryland's budget cuts toward the state public defender office while maintaining the state funding for the prosecutor's office[17] illustrates a preference among some lawmakers to maintain support for prosecutors while public defenders suffer from lack of adequate funds. This creates a dilemma, since many politicians do not want to be viewed as soft on crime and catering to dangerous criminals by politically supporting the system that is seen to defend the worst members of society. When the police and prosecutor offices are given so much more funds and resources they can hire more staff and investigators, giving the prosecution side more time and money to be able to prosecute and process cases. Not only does this result in heavier caseloads for public defense offices, but when the budgets of these defenders are cut at the same time, they have less manpower and

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[16] Backus, Mary S., and Paul Marcus. "The Right to Counsel in Criminal Cases, A National Crisis." *Hastings Law Journal* 57 (2006).P 1057

[17] *Id.*

resources and are even less able to provide adequate counsel to the numerous defendants being prosecuted.

Building trust in the work of public defenders in order to gain political support is especially crucial to combat the racism inherent in the system. Since public defenders specifically defend the indigent, they have ended up disproportionately representing minority groups within the country. The current Population Survey data from 2010 shows the poverty rate for people who identified as black or African-American at just over 25 percent, while non-Hispanic whites had a rate of about 9 percent.[18] When the high percentage of poverty among African-Americans is combined with racial profiling and arresting,[19] public defenders are necessary to combat the inequality within the justice system. When committed public defenders are not given sufficient funding to stand up and challenge prosecutors on equal footing, society suffers from the state's unchecked power over individual rights, while the lives of poor people and non-white citizens are in danger of being impacted by tough on crime political platforms and racial profiling.

The Criticisms in Response to *Gideon*:

The case of *Gideon v. Wainwright* itself is exemplary for showing the need for effective counsel for protecting individual rights in court. In 1961, Clarence Earl Gideon was accused on eyewitness testimony for breaking and entering a pool hall in Panama City, Florida. When he appeared in court, Gideon requested an appointed attorney since he was unable to afford one himself, to which the judge replied that under the law of the State of Florida he was only assured

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[18] U.S. Census Bureau Current Population Survey, Annual Social and Economic Supplement, 2010.
[19] *System Overload: The Costs of Under-resourcing Public Defense*. Rep. Justice Policy Institute. July 2011. P. 17-18: The Justice Policy Institute data shows that in 2008, 38% of all people in U.S. prisons were black, 20% were Hispanic, and 34% were white.

counsel in capital offense cases, not a felony case.[20] Despite Gideon's insistence that he was guaranteed a right to appointed counsel by the United States Supreme Court and the Bill of Rights, his request was denied. Following his attempts to defend himself in court and argue his innocence as best he could with no formal legal knowledge, Gideon was found guilty.[21] After writing a letter to the Supreme Court on prison stationary, Gideon's case was granted certiorari and heard before the highest court in the land. All of the justices concurred with the result in favor of Gideon, and Justice Hugo Black, writing for the majority held that, "Reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[22] Following the Court's decision, Gideon's case was remanded and tried again in state court, this time with an appointed lawyer who cast enough doubt on the charges to have Gideon acquitted by a jury.[23]

In the years following the Court's ruling, every state in the country, with the exception of Maine,[24] has developed either a state or multiple counties public defender program. However, despite the move to provide the constitutionally mandated assisted counsel, the legacy of the *Gideon* decision has been widely criticized for not fulfilling its promise. According to Michigan Law Professor Donald Dripps in his 2012 essay *Up From Gideon*, the Court ruling was a great decision, but ultimately a failed one.[25] Dripps recognizes the root of the problem as a lack of public funds for indigent defense, which has resulted in a society in which, "[a]lmost no one

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[20] *Gideon v. Wainwright*, 372 U.S. 335 (1963) P. 337
[21] *id.*
[22] *id.* P. 344
[23] Lewis, Anthony. *Gideon's Trumpet*. New York: Vintage, 1989. P. 250
[24] Associated Press. "Maine to Get First Federal Public Defender." Bangor Daily News, Bangor, MN. 14 Nov. 2005, sec. B: B4. For state related offense, Maine only uses appointed counsel rather than a full time public defender office.
[25] Dripps, "Up from Gideon."

thinks Gideon has succeeded in providing effective indigent defense."[26] When the Supreme Court extended the right to counsel to include the states, it essentially missed the chance to explain the precise methods and processes by which the states should provide for the mandate.[27] The result of this has been a lack of required funding and support for the public defender systems, because providing defendants with the illusion of counsel in court has been enough in the eyes of many lawmakers to fulfill the broad requirement of the Court in *Gideon*. Benjamin H. Barton, Professor at the University of Tennessee College of Law, has argued that the Gideon decision ultimately benefitted judges and prosecutors with the illusion of a fair system without a strong adversarial system defending individuals charged by the state. Barton wrote, "[t]he psychological value of Gideon—that everyone can rest easy knowing that lawyers are theoretically ensuring that the system works for rich and poor alike—should not be underestimated. Society gets the appearance of fairness without a high rate of acquittals or actual trials."[28] According to Andrew Cohen, a journalist and a fellow at the Brennan Center for Justice, "We are just lying to ourselves and each other when we pretend that there is equal justice in America."[29] In a forthcoming article in the Yale Law Journal, legal scholars Stephen Bright and Sia Sanneh stress that, "A system in which all of the key actors routinely ignore one of its most fundamental constitutional requirements is not a system based on the rule of law, no matter what it claims to be."[30] They quote former federal judge and FBI director William S. Sessions as observing that the widespread governmental resistance to *Gideon* ought to be a source of immense embarrassment to the judiciary, the bar and public officials because it has "created one

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[26] *id*. P. 2
[27] Taylor-Thompson, "Tuning Up Gideon's Trumpet." P. 1461-2.
[28] Barton, "*Against Civil* Gideon." P. 1231
[29] Cohen, "How Americans Lost the Right to Counsel"
[30] Bright, Stephen B., and Sia M. Sanneh. "Fifty years of Defiance and Resistance After Gideon."Yale Law Journal 122 (2013): P. 4

of our legal system's most shameful deficiencies."[31] These many voices summarize a consensus among legal thinkers today that the ruling of the *Gideon* decision has not been fulfilled and the state of indigent defense across the nation is in crisis.

While these articles, essays, and legal writings speak to many of the problems with public defense in the United States and draw upon numerous examples of counties and states which are failing,[32] they ultimately fail to address where the system does function well. Some of the essays only briefly mention that there are some defender systems which function meaningfully with low caseloads and sufficient funding.[33] Some of the authors, such as Dripps admitted that there are some jurisdictions which provide effective legal representation,[34] but he did not mention any of them specifically or by what means they manage to fulfill the right to counsel. In a recent Missouri Law Review article, law professor Rodney Uphoff listed several public defender systems that were well-funded and managed as examples of how states can provide for a well-rounded system. However, the focus in his article was solely on the problems in the broken systems without providing details on the effective ones as a contrast.[35] In order to get a more accurate perspective on how different defender systems can operate well in different jurisdictions, a more complete picture needs to be illustrated, which includes those defender programs which are working as well as those which are failing.

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[31] *id*. P.18

[32] See Baxter, "Gideon's Ghost," in which the public defense systems in the states of New York, Michigan, Florida, and Kentucky are examined to show the national crisis.

[33] See Bright, & Sanneh. "'Gideon v. Wainwright": in which California is mentioned as having some county public defender systems that provide quality indigent counsel while some of the counties are in a crisis state.

[34] Dripps, "Up from Gideon." P. 23: "I have not denied that some jurisdictions provide generally effective public representation."

[35] Uphoff, Rodney. "Symposium: Broke and Broken: Can We Fix Our State Indigent Defense System?" Missouri Law Review 75 (2010). Uphoff lists the Washington Public Defender Services and the Wisconsin Public Defender Office as systems which are examples of how a well-funded system can provide constitutionally acceptable indigent defense services.

It is important to recognize where the Gideon decision is working because while the country as a whole is bound by the Constitution, when differing jurisdictions like states and counties are in charge of managing their own public defense systems, a holistic evaluation of the *Gideon* legacy requires state by state analysis. To say the dream of *Gideon* has never been fulfilled because the nation as a whole does not provide for the 6th Amendment right to counsel is to ignore the states and offices which work hard every day and are able provide meaningful representation. Discourse on the inadequacy of public defender offices to perform adequately without meaningful discussion of the systems that operate well may add to the ever-present social ideas that portray public defenders as inadequate counsel,[36] despite studies that show a full time public defender without an oppressive caseload usually performs as well as a private attorney does.[37] When public counsel attorneys are viewed as inept lawyers who are only tasked with defending dangerous criminals, people generally would not understand the need for providing extra funds to such offices when those funds could be provided to public safety instead. This dilemma is circular in nature as politicians adopt tough on crime attitudes in order to cater to societal views and cut funding from public defense. Recognizing the offices and states which do fulfill the Supreme Court's promise in *Gideon* is a crucial step in seeing the decision realized. This thesis is going to attempt to redress the shortcomings of the current scholarly literature on the *Gideon* legacy by examining a statewide public defender system that is well-funded. The goal is to provide counterweight to the arguments that it is impossible for states to live up to their obligations under the ruling of *Gideon v. Wainwright*.

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[36] See McIntyre, Lisa J. The Public Defender: The Practice of Law in the Shadows of Repute. Chicago: University of Chicago, 1987. P. 87: "Ask, 'Who does not respect the public defenders?' and the typical answer is, 'Everyone.'"; Wice, *Public Defenders*, P. 26: Wice found Essex County, NJ public defenders suffered from a "stigma of ineptitude" in the eyes of the public, despite their success.
[37] Wice, *Public Defenders*, P. 19-20

PART 2: The System in New Jersey

History of the New Jersey System:

The late political science professor Paul Wice described two differing public defender program categories in his book *Public Defenders and the American Justice System*; those being a traditional system and a reform system. According to Wice, traditional systems are usually described as long-established bureaucratic organizations that are resistant to change, located in large cities and typically suffer from excessive caseloads, inadequate budgets, inexperienced staff attorneys, and a lack of political independence within the county or state.[38] Reform systems are typically distinguished by a more experienced staff, adequate funding, vertical case representation—which means the same attorney represents a client in all stages of the same case, as opposed to horizontal representation when different attorneys handle the same case in different stages of the trial—and are independent of political influence.[39] For his book, Wice decided to study the public defender office of Essex County, New Jersey, located in the old city of Newark. He was expecting to find an overburdened and underfunded office with all of the problems of a traditional system, but after extensive study and interviews with the long-time employed public defenders who worked in Newark, Wice concluded that the office was in fact well managed and provided a positive model for providing effective legal defense for indigent defendants.[40]

So what makes New Jersey different from the states and counties with failing systems that undermine respect for the decision of *Gideon v. Wainwright*? Just south-west of Jersey lays

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[38] *id.* P. 12: The Indigent defense systems Wice used as examples to illustrate the traditional system were those in Chicago and New York City.
[39] *id.* P. 12
[40] *id.* P. 186

the state of Maryland, with a similar population size[41] and income per capita level,[42] in which the public defender office does not have enough staff to adequately handle the amount of cases, and where the hardworking attorneys cannot fully meet the constitutional mandate of providing meaningful representation.[43] What sets New Jersey apart from a state like Maryland? How should states like Maryland use New Jersey as an example in order to reform their systems and meet the requirements laid down in the Court's decision in *Gideon*?

In order to answer these questions, we must first look to New Jersey's history supporting the right to counsel and how the state gave support to the *Gideon* decision. In 1948, the New Jersey Supreme Court created the country's first systematic statewide program for assigning counsel to indigent defendants by requiring all practicing attorneys to work pro bono defense cases in the counties in which they resided.[44] Following the decision of *Gideon v. Wainwright*, in 1967 New Jersey established a statewide public defender system with full time compensated attorneys working out of regional offices in every county to provide for the constitutional mandate.[45] Even after the establishment of a statewide system to provide paid counsel for felony-level cases, New Jersey continued to enhance its public defense system.[46] The statewide model used by New Jersey today is unique in how felony-level cases facing more than a year of incarceration are handled by the state-wide public defender and cases facing less than that—commonly classified as misdemeanors in other states—are represented by public defenders employed on the municipal level. Following the signing of S-1886Sca into law in 1997, the

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[41] "Population Distribution and Change: 2000 to 2010." *Census.gov*. United States Census Bureau, Mar. 2011. <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>.
[42] "State Rankings -- Statistical Abstract of the United States." *Personal Income Per Capita in Current Dollars, 2007*. United States Census Bureau.
[43] III, Charles H. Deputy Public Defender, MD. Personal interview. 4 April. 2013.
[44] *id*. P. 646
[45] Martin Robert J., and Walter Kowalski. "A Matter of Simple Justice: Enactment of New Jersey's Municipal Public Defender Act."*Rutgers Law Review* 51.Spring (1999): 637-94. P. 645-6
[46] *id*. P. 639

Garden State required at least one full time public defender within all of the 537 municipal courts in the state in order to handle cases in which the defendants face less than a year of incarceration or other "serious consequences.[47] The passage of legislation was considered "a triumph of justice of enormous benefit to indigent defendants" because it replaced the inadequate mandatory pro bono assigned counsel system then in place.[48] If such legislation were to be passed in a state like Maryland, or Connecticut, then the statewide programs could concentrate their attorneys and resources on trying serious felony cases and the individual municipalities would be required to provide full time paid public defenders to handle the misdemeanor cases facing incarceration on the municipal level.

Adopting the legislation needed to structure other public defender programs after the model in New Jersey could greatly benefit failing systems within other states and counties. The primary advantage of a statewide system over a countywide group of offices is the ability for state-based public defender offices to share resources among local offices where needed.[49] When the resources can be shared within offices in the state, regional offices outside of the high income areas do not have to worry about lack of funding. Even though rural, less populated areas tend to have less crime and therefore require fewer public defenders, the offices in those locations still need to maintain employee training programs and adequate infrastructure. While some states and counties have resorted to lawsuits against their governments in order to fix their defense programs by establishing caseload limits,[50] New Jersey has had supportive legislation to provide caseload limits and adequate funds.[51] The legislators in New Jersey recognize the benefits of

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[47] *id*. P. 638
[48] Martin, & Kowalski. "A Matter of Simple Justice." P. 638
[49] Langton, *State Public Defender Programs,* P. 3
[50] Eckholm, Erik. "Citing Workload, Public Lawyers Reject New Cases." *The New York Times*. 09 Nov. 2008
[51] Langton, *State Public Defender Programs,* P. 13

having a strong public defender office, which is evident from the lack of budgetary cuts in comparison to other states. Paul Wice found, while interviewing experienced attorneys in the Essex County office, that the defenders there were able to rely on requested funds from the state in order try particularly expensive cases with no questions asked.[52] While the independent state agency for public defense in New Jersey is provided a healthy budget, the public defender office in Maryland, which suffers from a lack of political support in terms of funding.[53]

New Jersey Compared to Other Public Defense Systems:

Adequate funding provides public defender offices with the potential to build a strong system and provide effective counsel, which is what the Court's mandate in *Gideon* required. However, in order to ultimately evaluate how well individual attorneys within an office perform in representing their clients requires extensive data, including, but not limited to, the charges, the amount of evidence against each client, the seriousness of the potential sentences, the client's past criminal history, the plea deals settled on by defense attorneys and the details in the plea deals offered by prosecutors. Since this thesis is focusing primarily on how well New Jersey provides for the decision in *Gideon v. Wainwright*, I shall be evaluating the state on metrics regarding the potential for effective counsel within the public defender offices. These measurements of potential for effective counsel will be based on how well the public defender offices are able to pursue a balance with the prosecutorial system, hire support staff, maintain attorney training and office infrastructure, and appropriately manage the amount of cases that come through the offices.

It should be noted that prosecutor offices do require more funding in general than public defender offices because not all defendants qualify for indigent defense lawyers so prosecutors

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[52] Wice, *Public Defenders*, P. 70
[53] Dorsey III, Charles H. Deputy Public Defender, MD. Personal interview. 4 April 2013.

need to face private defense in court as well. Also, prosecutors bear the burden of proof in all criminal cases, therefore they require extra funds in order to produce evidence and gather witnesses to testify against a defendant. However, public defense offices do require a minimum amount of resources in order to operate effectively against the prosecutorial system. This amount may vary by state according to the amount of cases that require indigent defense. The need for extra staff is a particularly important element in an office trying to match the investigative power of the prosecutorial system which can draw upon the resources provided for the public safety systems including detectives and police to question witnesses and defendants, as well as the forensic laboratories to conduct investigations and analyze evidence. In order for there to be equality within the justice system public defender offices need to have the resources available to hire expert witnesses to testify in court and to have full time investigators to assist in analyzing evidence and questioning witnesses. Such a balance of power is necessary to ensure that the adversarial nature of justice is met without one side having a clear unfair advantage. As public defenders struggle to keep up with the better funded and staffed prosecutors, they are not able to provide meaningful counsel, which results in less public trust in their abilities[54] and less political support for funds. Despite this dilemma being a problem for so many other states, New Jersey legislators provide funds for defense attorneys, enabling them to hire on average 2 full-time investigators per 1 attorney, which is even more than the Bureau of Justice Statistics recommended minimum amount of 1 investigator per 3 litigating attorneys.[55] In 2007 the only state other than Jersey which provided enough investigators to meet the recommended amount

[54] See McIntyre, *The Public Defender,* P. 87; Wice, *Public Defenders*, P. 26
[55] Langton, *State Public Defender Programs,* P. 16

was Connecticut.[56] States can look to the balance of funds New Jersey maintains between the prosecutor and defense offices in order to have a just adversarial system.

Not only does New Jersey provide funds for hiring staff and maintaining cases, but it also provides for attorney development[57] and office infrastructure. Legal development and training programs are necessary in order for new defenders to be able to adequately represent clients in court. In states facing budgets cuts, such as Maryland,[58] training programs are some of the first areas to be cut. Not only are underfunded counties and states suffering from a lack of training, but budget cuts can hurt the technology and infrastructure of a defense office. In Maryland, the infrastructure and IT budgets have been cut back in the last few years, resulting in out of date computers with less memory than the attorneys' cell phones.[59] The New Jersey public defender offices are able to provide for training and office infrastructure with the high annual amount of expenditures they are able to spend every year.[60]

While statewide programs like the one in Maryland, county systems like those in Florida,[61] and federal districts[62] across the country face detrimental budget cuts, New Jersey has maintained a strong state support for its public defense system and managed to keep a working budget for providing its citizens with constitutionally mandated counsel which appears to be related to political support rather than state income level. The cause for this political support may be tied to the state's history of judicial and legislative support of public defense. While other states are unable to adopt New Jersey's historical support for public defense, they can see how

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[56] *id*. P. 16: Of the 22 states with statewide systems, only New Jersey and Connecticut had the recommended amount of investigators, while the data for Missouri and New Mexico support staff was not available.
[57] *id*. P. 17
[58] Dorsey III, Charles H.
[59] Dorsey III, Charles H.
[60] Office of the Public Defender FY 2013 Budget." *Transparency Center*. State of New Jersey, 2013.
[61] Eckholm, "Citing Workload,"
[62] Johnson, Carrie. "We Have Nothing Left To Cut" *NPR*. National Public Radio, 10 Apr. 2013.

the Garden State's financial support can result in an effective system. Currently ranked as the 3rd highest state in terms of income per capita, New Jersey is a relatively wealthy state. However, among the top ten ranked states with statewide defense models are Connecticut and Maryland—ranked 1st and 5th in average income per capita respectively[63]— which have had to cut back on the funding toward defense programs,[64] with Maryland cutting as much as 14% statewide in the last few years.[65] Colorado, ranked as 10th in average income per capita has been working hard to provide for counsel by doubling its amount of hired attorneys in the last 6 years to fight oppressive caseload problems, but the office has been unable to provide its public defenders with a pay raise in the last 5 years.[66] No matter how dedicated and hardworking the men and women who represent indigent defenders are, when the legislators do not provide adequate budgets, the offices must struggle ever harder to maintain meaningful representation in court. In order for other states to be able to maintain a budget as significant as New Jersey, which had the highest operating expenditures of any state in 2007 [67] and maintains a current budget of near $120 million for its 21 regional offices to represent felony-level defendants,[68] lawmakers of other states would have to recognize the benefits of a strong public defender system and provide accordingly.

An adequate budget is most essential for hiring enough attorneys to handle the caseloads of each state since the amount of time an attorney has to represent a defendant can determine whether or not the defendant's rights are being recognized under the *Gideon* ruling. According to

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[63] "State Rankings -- Statistical Abstract of the United States." *Personal Income Per Capita in Current Dollars, 2007*. United States Census Bureau.
[64] Storey, Susan O. *The Annual Report of the Public Defender*. Rep. N.p.: Connecticut Division of Public Services, 2013. P. 1
[65] Dorsey III, Charles H.
[66] Lynn, Near. "After 50 Years, A State Of Crisis For The Right To Counsel." *90.9wbur Boston's NPR News Station*. National Public Radio, 19 Mar. 2013.
[67] Langton, *State Public Defender Programs,* P. 19
[68] "Office of the Public Defender FY 2013 Budget." *Transparency Center*. State of New Jersey, 2013.

the 1973 U.S. Department of Justice's national advisory Commission on Criminal Justice Standards and Goals, a public defender should not have more than 150 felony or 400 misdemeanor cases in one year.[69] In reality, the Bureau of Justice Statistics reported in 2007 that about 73% of all county-based offices exceeded the maximum recommended caseload limit per attorney,[70] while almost all statewide programs handled above the recommended amount of cases.[71] Out of the 18 statewide programs that had reported data, only Massachusetts, Montana, Minnesota, New Jersey, and New Hampshire had enough attorneys to handle the annual caseloads reported.[72] Massachusetts reported the highest number of full time public defenders compared to caseload, much higher than even New Jersey. The reason for this is due to how the state public defender program in Massachusetts manages far less indigent cases, relying predominantly on representation by private assigned counsel. The Committee for Public Counsel Services in Massachusetts provides full salaried public defenders for about 10% of the indigent criminal cases and the current Governor of Massachusetts has been trying to enact legislation to reform the system and hire up to 1,000 more attorneys in order to end the reliance on the use of assigned private counsel and build a more experienced and efficient defender program.[73]

New Jersey's predominant use of full salaried attorneys instead of part-time court appointed counsel ensures better legal quality from experience within the court system and lower costs overall. New Jersey only utilizes a private pool of attorneys to handle cases that have

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[69] Langton, *State Public Defender Programs,* P. 12

[70] Langton, Lynn, and Donald Farole, Jr. *County-based and Local Defender Offices, 2007*. Rep. no. NCJ 228229. N.p.: Bureau of Justice Statistics, 2010. P. 1

[71] Langton, *State Public Defender Programs,* P. 13, Caseload data was not available for Alaska, Missouri, New Mexico, or Connecticut.

[72] *id.* Caseload data was not available for Alaska, Missouri, New Mexico, or Connecticut.

[73] "MassCounsel.org." N.p., 2013. http://www.masscounsel.org/the-current-system/quick-facts-about-current-system/: While studies have shown that on average salaried defenders provide more meaningful representation to indigent defendants than assigned counsel, in order to evaluate the quality of the system in Massachusetts in particular, statistical data needs to be gathered in order to see how well the assigned system works there compared to a system relying on public defenders like New Jersey's.

conflicts with the public defense office or during instances when there are multiple-defendant cases. The compensation of assigned counsel within New Jersey in 2005 was $20 per hour for out-of-court and $30 for in-court-time,[74] which is considerably low in comparison to many other jurisdictions, but the state has been actively trying to raise compensation for assigned counsel while the public defender office assists where it can by providing investigators and expert witnesses.[75] The use of full-time public defenders over appointed counsel is beneficial due to how public defenders are often better integrated in the court system and spend a lot of time around the same prosecutors and judges, while private attorneys tend to handle a wider range of cases in different courts and may not be as well versed in the court community as public defenders. A recent study of court-appointed attorneys conducted by Radha Iyengar, a post-doctoral fellow at Harvard's Institute for Quantitative Social Sciences, and presented as a National Bureau of Economic Research working paper, discovered that salaried public defenders outperformed part-time appointed counsel. According to Iyengar's study, defendants represented by appointed part-time counsel are more likely to be found guilty and receive longer sentences than those who are represented by public defenders, which appears to be linked with the higher average experience level of salaried attorneys.[76]

In offices across the country where there are oppressive caseloads, even the most dedicated and ethically motivated attorneys are unable to provide their clients with adequate representation.[77] When an attorney is faced with more assigned cases than they can handle, the

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[74] Wice, *Public Defenders*, P. 105
[75] *id.*
[76] Iyengar, Radha. "An Analysis of The Performance of Federal Indigent Defense Counsel."NATIONAL BUREAU OF ECONOMIC RESEARCH NBER Working Paper No. 13187 (2007).
[77] Klein, Richard. "The Eleventh Commandment: Thou Shalt Not Be Compelled To Render The Ineffective Assistance." *Indiana Law Journal* 68 (1993); *Attorney General Eric Holder Addresses the Department of Justice National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000–2010.* United States Department of Justice. Feb. 18, 2010.

only option they usually have is to strongly advise defendants to take plea deals, even in cases when the defendant may actually be innocent. Ineffective counsel that does not take the time to provide for individual client cases is next to no counsel at all. This goes against the very philosophy of the *Gideon* decision. As Justice Black stated, "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[78] An attorney meeting a client in court for the first time with only minutes to discuss a plea deal is most often not meaningfully better than if the defendant met the prosecutor on their own. Thus, *Gideon* is not being fulfilled in that courtroom. However, the model for indigent defense used in New Jersey is different than most of the rest of the country. It does not have to be, because the lawmakers of states can look to New Jersey's program to see how providing more funds and hiring more attorneys can provide for the ruling in *Gideon*. Under the model used in New Jersey, the public defenders in the state offices are not overburdened with cases.[79] They have the time necessary to meet with clients and provide meaningful representation. They are able to provide vertical representation for their clients.[80] If Clarence Earl Gideon was charged today in a state with overburdened and underfunded defense offices, his chances of getting meaningful representation would be very low. If he was charged in the state of New Jersey, he would be provided an attorney from a well-funded office who would have the time to dedicate to helping him fight his wrongfully accused charges in court.

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[78] *Gideon v. Wainwright*, P. 344

[79] Jones, Dale: New Jersey State Public Defenders handle about 130 cases each year.

[80] Langton, *State Public Defender Programs,* P. 8: According to the Bureau of Justice Statistics (BJS) special report on state public defender systems published in 2010, the same attorney should represent a client in all proceedings of the same case. Several nearby states to New Jersey, such as Maryland and Delaware use a combination of horizontal and vertical, in which a different attorney may represent the same client during a different day or stage in the same case being charged.

PART 3: REFORMING THE NATIONAL CRISIS

In order to follow the success of the New Jersey public defender office, other states and the federal government need to recognize how necessary political support for public defense really is and to provide the necessary funding required for a defense program to operate as well as the system in New Jersey. New Jersey may be among the top ten ranked states in terms of income per capita, but nearby similar states like Maryland and Virginia have defense programs that are struggling under lack of state support and funds. In the case of states where the necessary funds for the amount of cases are not possible to provide, the federal government should intervene to provide such funds. Such intervention of the federal government to provide for the states is an extension of the power of Congress to enforce laws to provide for due process under the 14th Amendment. Therefore the federal government needs to recognize the importance of a strong public defense system to serve as a check on abuse of gvernment power and to protect the rights all citizens have to a fair trial.

Some states, like Michigan have legislators who are trying to push for a statewide system to improve their public defense, but such attempts have not been successful so far within the state.[81] This is an example where the federal government could provide Michigan lawmakers the funds to provide for a statewide public defender office and the financial means for the office to comply with the Department of Justice's standards for the maximum caseload limit required for effective counsel. In order to persuade states to provide higher funds for public defense programs, the federal government could design a monetary incentive package which would be provided to states that meet a certain level of annual defense counsel funding. This level of annual state funding could be based on percentages of annual caseloads within each state. For

[81] "Editorial: For Fairness, Fix Indigent Defense." *Lansing State Journal.* A Gannet Company, 11 Apr. 2013.

states that do meet this threshold of spending on public defense, the government could offer a package of money for each state to spend on law enforcement with the requirement that a certain percentage of the federal money go toward state public defender systems. Since politicians have incentives to provide more funding for law enforcement, this plan would persuade states to comply with the funding requirements for public defense. The federal government has already implemented plans like this to influence state laws, such as how federal highway funds are provided to each state in order to maintain a national minimum drinking age of 21.[82] With the use of federal funds to incentivize better managed statewide systems on par with the offices in New Jersey, the dream of *Gideon* may be realized as the national defense crisis is provided for.

Conclusion:

While individual states experiment with new methods of improving their indigent defense systems—from attorney vouchers in West Virginia[83] to an experimental project in a Texas county to allow indigent defendants to choose the attorney who represents them[84]—public defender programs across the country have been working hard to meet the mandate of *Gideon* and provide meaningful counsel for their poor clients. The public defender system in New Jersey has met this mandate, with a statewide system for felony-level cases and municipal public defenders to handle misdemeanor-level cases.[85] Legal scholars have called for the Supreme Court's help to reform the system. Donald Dripps called for the Supreme Court to provide the "Holy Grail" of advocates of effective defense; a court ruling laying out the necessary requirements of an attorney, such as a caseload meeting recognized standards a single litigator

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[82] TITLE 23, U.S.C.—HIGHWAYS. § 158. (a)(1)
[83] "Voucher Information." *West Virginia Public Defender Services*. Available at: <http://www.wvpds.org/>.
[84] Johnson, Carrie. "Some Public Defenders Warn: 'We Have Nothing Left To Cut'" *NPR*. National Public Radio, 10 Apr. 2013.
[85] Jones, Dale.

can handle in a single year.[86] Some critiques of the *Gideon* legacy feel the court missed the opportune chance to provide such requirements in the ruling of *Gideon*.[87] Until the Supreme Court provides a ruling laying out the requirements for an effective public defender system, state and federal lawmakers can look to New Jersey to see how the system can be done effectively. New Jersey shows how a state system can provide for the funding and caseload, as long as the legislative body recognizes the importance of having a strong public defense system. Having a strong public defender system within society does not mean society will see more criminals walk out of court unpunished; it means that those individuals who are arrested are tried and punished fairly. It means that there is a system in place to fight against abuse of governmental power and to fight against the racism in law enforcement. As important as it is to recognize where the system is breaking, it needs to be an equally important priority for legal scholars and researchers to examine where the system works in order to be able to provide equal protection for all.

[86] Dripps, "Up from Gideon." P. 13
[87] Taylor-Thompson, "Tuning Up Gideon's Trumpet." P. 1461-2.

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