The Guiding Hand of Counsel: Effective Representation for Indigent Defendants in the Cordele Judicial Circuit

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The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.1

I. INTRODUCTION

The right to be represented by an attorney at a criminal trial is a fundamental right guaranteed by the Georgia constitution.2 If a criminal defendant cannot afford to hire an attorney, the state must provide one.3 Unfortunately, upholding this constitutional mandate has been challenging in some parts of the state. In January 2014, the

2. GA. CONST. art. 1, § 1, para. XIV.
3. Cf. ABA, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002) [hereinafter ABA, TEN PRINCIPLES] ("Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.").
Southern Center for Human Rights sued a number of defendants on behalf of indigent plaintiffs in the Cordele Judicial Circuit for a second time, claiming that the quality of representation that indigent defendants in that circuit receive fails to meet the constitutional guarantee of assistance of counsel.\textsuperscript{4} This lawsuit highlights a critical gap in access to justice for some of the state's poorest citizens.

II. HISTORY

\textit{Gideon v. Wainwright}\textsuperscript{5} is the seminal case in American jurisprudence holding that indigent criminal defendants are entitled to representation by counsel to ensure they receive a fair trial.\textsuperscript{6} Gideon was charged with a felony in Florida, and he requested an attorney when he appeared in court. He could not afford to hire counsel himself, and he informed the court that "[t]he United States Supreme Court says I am entitled to be represented by Counsel."\textsuperscript{7} However, Florida law only allowed the appointment of counsel when a criminal defendant was charged with a capital crime, so the trial court denied Gideon's request.\textsuperscript{8} Gideon defended himself "about as well as could be expected from a layman."\textsuperscript{9} Nonetheless, the jury found him guilty, and Gideon received a sentence of five years in state prison. He filed a petition for habeas corpus, claiming the refusal of the trial court to appoint counsel to represent him violated his constitutional rights under the Fourth, Fifth, and Fourteenth Amendments. The Florida Supreme Court denied relief.\textsuperscript{10} The United States Supreme Court granted certiorari to resolve "the problem of a defendant's federal constitutional right to counsel in a state court" by deciding whether \textit{Betts v. Brady}\textsuperscript{11} should be overturned.\textsuperscript{12} The Supreme Court appointed counsel for Gideon for the appeal.\textsuperscript{13}

The Court began its analysis by noting that the facts of \textit{Betts} and \textit{Gideon} are "strikingly" similar.\textsuperscript{14} At his arraignment, Betts had

\begin{itemize}
\item \textsuperscript{4} Complaint for Injunctive and Declaratory Relief, N.P. \textit{ex rel.} Darden v. Georgia, No. 2014CV241025 (Fulton Cnty. Superior Ct., Jan. 7, 2014) [hereinafter Complaint].
\item \textsuperscript{5} 372 U.S. 335 (1963).
\item \textsuperscript{6} \textit{See id.} at 344 ("[I]n 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.").
\item \textsuperscript{7} \textit{Id.} at 336-37.
\item \textsuperscript{8} \textit{Id.}
\item \textsuperscript{9} \textit{Id.} at 337.
\item \textsuperscript{10} \textit{Id.} at 337 & n.1.
\item \textsuperscript{11} 316 U.S. 455 (1942).
\item \textsuperscript{12} \textit{Gideon}, 372 U.S. at 337-38.
\item \textsuperscript{13} \textit{Id.} at 338.
\item \textsuperscript{14} \textit{Id.}
\end{itemize}
requested that the judge appoint an attorney for him because he could not afford one. The court did not comply with this request because, at the time, that county only appointed counsel for indigent defendants accused of murder or rape. Betts pled not guilty and defended himself at his bench trial. The judge found him guilty and sentenced him to eight years in prison. Betts filed a petition for habeas corpus, but he was denied relief by the Maryland Court of Appeals as well as the United States Supreme Court. The Supreme Court had held in Betts "that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment." Twenty-one years later in Gideon, the Supreme Court overruled Betts.

In so doing, the Court began its analysis with the Sixth Amendment, which it has construed as giving criminal defendants in federal courts the right to appointed counsel if they cannot afford to engage an attorney for their defense. The Court had declined to extend this right to criminal defendants in state courts via the Fourteenth Amendment in Betts, basing its decision on "historical data" and concluding that "appointment of counsel is not a fundamental right, essential to a fair trial." In Gideon, the Court disagreed with this conclusion.

The Court surveyed a number of prior decisions in which it had held that the right to counsel is, in fact, a fundamental right. In Powell v. Alabama, which was decided ten years prior to Betts, the Court had concluded that "the right to the the aid of counsel is of this fundamental character." While the Court in Powell had limited its holding to the facts of that case, in Gideon the Court noted that this check does not change the conclusion that the right to counsel is a fundamental one. Four years later, the Court reaffirmed this assessment in Grosjean v. American Press Co. when it observed that the Due Process Clause of

15. Id.
16. See id. at 339; Betts, 316 U.S. at 457.
18. Id.
19. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.").
21. Id. at 340 (quoting Betts, 316 U.S. at 471).
22. Id. at 342 ("We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.").
23. Id. at 342-45.
24. 287 U.S. 45 (1932).
25. Id. at 68 (emphasis added).
27. 297 U.S. 233 (1936).
the Fourteenth Amendment protected "the fundamental right of the accused to the aid of counsel in a criminal prosecution" against state action. Four years after Grosjean, the Court, in Johnson v. Zerbst, once again stated that having the assistance of counsel "is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." Observing that the Court in Betts had broken with this long line of precedent when it held that the assistance of counsel was not a fundamental right protected by the Sixth and Fourteenth Amendments, the Court in Gideon overturned Betts to "restore constitutional principles established to achieve a fair system of justice." The Court noted the "obvious truth" that counsel must be provided for a person who cannot afford it to ensure a fair trial, observing that the government spends large sums of money to prosecute crimes, and defendants who are able to hire defense attorneys do as well. The "noble ideal" of the founding fathers that every defendant will stand equal before an impartial tribunal cannot be attained if the poorest defendants are not afforded the opportunity to be represented by counsel. Quoting Justice Sutherland, the Court closed by reflecting that every laymen needs "the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." Since Gideon, the Supreme Court has extended the Sixth Amendment right to counsel to include representation at many pretrial proceedings and on appeal, and, sometimes, a right to expert witnesses. In Georgia, the state constitution has included a right-to-counsel provision since 1868. This right had become "firmly entrenched" in state law by 1874. Georgia's constitution grants "[e]very person charged with

28. U.S. CONST. amend XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").
29. Gideon, 372 U.S. at 343 (emphasis added) (quoting Grosjean, 297 U.S. at 244).
30. 304 U.S. 458 (1938).
31. Id. at 462 (emphasis added).
32. Gideon, 372 U.S. at 343-44.
33. Id. at 344.
34. Id.
35. Id. at 345 (quoting Powell, 287 U.S. at 69).
38. Id. at 350-51, 138 S.E.2d at 872.
an offense against the laws of this state . . . the privilege and benefit of counsel.\footnote{39}

The Georgia General Assembly began addressing the federal and state constitutional mandates in 1968 with the Georgia Criminal Justice Act,\footnote{40} which burdened each of the state's 159 counties with establishing and funding local indigent defense programs.\footnote{41} This county-by-county approach led to inconsistent development of indigent defense in Georgia.\footnote{42} The next legislation addressing indigent defense was passed eleven years later.\footnote{43} The Georgia Indigent Defense Act of 1979\footnote{44} created a judicial agency called the Georgia Indigent Defense Counsel (GIDC) to dispense taxpayer funds to county indigent defense programs and to make recommendations to the Georgia Supreme Court regarding guidelines for operating these programs.\footnote{45} The GIDC was supposed to oversee the county systems at the state level, but it did not have sufficient authority over county systems to make changes or improvements.\footnote{46}

In December of 2000, the Georgia Supreme Court established the Chief Justice's Commission on Indigent Defense (the Commission) in an effort to improve the quality of indigent defense in Georgia.\footnote{47} The Commission worked with an independent research firm that specializes in indigent defense to conduct research, develop a plan for improving services in Georgia, and create a timetable for implementation of the Commission's recommendations.\footnote{48} After working for two years on this project, the Commission delivered its report to the Georgia Supreme

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\item \footnote{39} GA. CONST. art. 1, § 1, para. XIV.
\item \footnote{40} Ga. H.R. Bill 130, Reg. Sess., 1968 Ga. Laws 999.
\item \footnote{41} Chief Justice's Commission on Indigent Defense Issues Findings, supra note 36, at 35.
\item \footnote{43} Chief Justice's Commission on Indigent Defense Issues Findings, supra note 36, at 35-36.
\item \footnote{44} Ga. H.R. Bill 185, Reg. Sess., 1979 Ga. Laws 367.
\item \footnote{45} Chief Justice's Commission on Indigent Defense Issues Findings, supra note 36, at 35-36.
\item \footnote{47} Chief Justice's Commission on Indigent Defense Issues Findings, supra note 36, at 34.
\item \footnote{48} Id.; STATUS OF INDIGENT DEFENSE IN GEORGIA: A STUDY FOR THE CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE, PART I, supra note 42, at i.
\end{itemize}
Court on December 12, 2002.\textsuperscript{49} At the time, county governments overwhelmingly funded indigent defense in Georgia; the state was only underwriting 11.6\% of the total cost.\textsuperscript{50} In each county, the county government, the superior court, and the local bar association operated the indigent defense program.\textsuperscript{51} There were three different systems in place statewide.\textsuperscript{52} Seventy-three counties used a panel system in which an attorney would be appointed from a panel of defense attorneys.\textsuperscript{53} Fifty-nine counties used a contract system in which a defense attorney was paid a flat fee to represent some or all of the county's indigent defendants.\textsuperscript{54} Twenty counties used a public defender system with a full-time government employee acting as public defender.\textsuperscript{55}

After evaluating their research, the Commission found that Georgia's system failed to fulfill the constitutional mandate to provide the assistance of counsel to criminal defendants.\textsuperscript{56} It gave two main reasons for this shortfall.\textsuperscript{57} First, Georgia was not adequately funding the indigent defense systems in place.\textsuperscript{58} This constitutional obligation is imposed on the state, and therefore the state should subsidize these legal services.\textsuperscript{59} Second, Georgia needed a statewide system to oversee public defense services statewide that would require accountability from indigent defense programs.\textsuperscript{60} This conclusion had several sub-parts.\textsuperscript{61}

\textsuperscript{49} Chief Justice's Commission on Indigent Defense Issues Findings, supra note 36, at 34. The researchers studied reports and data about the state's indigent defense system from a number of sources and compared Georgia's system to those in other states. See STATUS OF INDIGENT DEFENSE IN GEORGIA: A STUDY FOR THE CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE, PART I, supra note 42, at i. They also selected nineteen representative counties in which to conduct on-site evaluations of indigent defense programs, spending over 100 days interviewing hundreds of people involved in indigent defense services. \textit{Id.} In each county, the researchers met with judges, district attorneys, public defenders, administrators, private counsel providing indigent defense services, county commissioners, and members of law enforcement acquainted with local indigent defense programs. \textit{Id.} Researchers also interviewed indigent defendants and recorded their opinions about the defense services these counties provided. \textit{Id.} In most counties, the researchers also observed criminal court sessions. \textit{Id.} at 1.

\textsuperscript{50} Chief Justice's Commission on Indigent Defense Issues Findings, supra note 36, at 36.

\textsuperscript{51} \textit{Id.}

\textsuperscript{52} \textit{Id.}

\textsuperscript{53} \textit{Id.}

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} \textit{Id.}

\textsuperscript{56} \textit{Id.}

\textsuperscript{57} \textit{Id.} at 36-37.

\textsuperscript{58} \textit{Id.} at 36.

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} \textit{Id.} at 36-37.
Lack of funding and oversight from the state meant that the fragmented system in place was unable to sustain the mandate of adequate assistance of counsel. Furthermore, no one was monitoring or enforcing local indigent defense programs for compliance with the rules that the Georgia Supreme Court had set out to govern them. Additionally, criminal defense needed to be independent of the judiciary as well as the local county governments; funding for indigent defense from the counties may result in political tangles and conflicts of interest. These functions could only be accomplished with funding at the state level rather than the local level.

The Commission also found that the systems in place had serious deficiencies in the defense services they provided and warned that the judiciary would need to implement reforms if the legislature did not act. For instance, lack of funding for expert witnesses and investigators often rendered existing defense services unconstitutional. Additionally, the state needed a procedure for identifying indigent defendants with mental disabilities and guidelines for their defense. Georgia's system for representing indigent juvenile defendants was also found lacking. The Commission recommended implementing a data collection system to record information about the defense services provided in the state to track progress in addressing these issues. It concluded that a statewide public defender system would be the best vehicle for providing effective representation.

The Commission recommended a number of steps to resolve the problems it discovered. First and foremost, it proposed that the General Assembly appropriate adequate funding to support indigent defense. Second, it suggested reorganizing indigent defense services to ensure constitutional representation as well as statewide accountability, uniform quality, and enforceable standards. To accomplish this

61. Id. at 37.
62. Id.
63. Id.
64. Id.
65. See id.
66. See id. at 38.
67. Id. at 37.
68. Id.
69. Id.
70. Id. at 38.
71. Id. at 37.
72. Id. at 38.
73. Id.
74. Id.
goal, the Commission suggested three changes: (1) indigent defense services should be delivered at the circuit level as opposed to the county level; (2) a full-time public defender with adequate support staff should be responsible for indigent defense; and (3) a statewide board should have the power to operate the system, including the ability to hire and fire public defenders and to define guidelines under which a public defense panel will operate. The Board should also review local systems and shoulder the responsibility of conducting training programs for attorneys involved in indigent defense. The Commission also advised the state to adopt performance standards with which to evaluate attorneys representing indigent defendants. Furthermore, Georgia needed to establish procedures for working with indigent defendants with mental disabilities and with juveniles. Finally, the Commission recommended that the state implement a data collection system that would convey an accurate representation of how indigent defense services are provided throughout the state. Because making these sweeping changes would require a significant increase in funding, the Commission suggested establishing a transition plan to begin remedying current shortcomings.

A. Southern Center for Human Rights Suit Against the Cordele Judicial Circuit in 2003

In 2003, the Southern Center for Human Rights (SCHR) sued the Cordele Judicial Circuit alleging inadequate representation of indigent defendants. The suit contended that heavy caseloads and insufficient compensation resulted in adjudications in which indigent defendants did not receive meaningful representation of counsel. At the time, two part-time attorneys represented indigent defendants in the circuit. The suit alleged that a number of indigent defendants spent months in

75. Id.
76. Id.
77. Id.
78. Id.
79. Id.
80. Id.
81. Second Amended Complaint, Hampton v. Forrester, No. 2003-V-118 (Crisp Cnty. Superior Ct. 2003) (alleging that the county governments in the Cordele Judicial Circuit failed to provide adequate funding to provide counsel for indigent defendants in the circuit, that indigent defendants were not being informed of their rights, and that some of the courtrooms in the jail were illegally closed to the public).
82. Id. at ¶¶ 84-89.
83. Id. at ¶ 5.
jail before even meeting one of the contract attorneys. The plaintiffs asserted that the circuit’s “meet ‘em and plead ‘em” approach meant that the attorneys’ presence merely lent an “appearance of legitimacy to the proceedings.” Counsel usually met with clients just before or at arraignment, and defendants usually pled guilty after a short conversation with their attorneys about the plea offers from the prosecution. Defendants rarely had any contact with counsel beyond this setting. Because of this structure, the defense often did not include motions practice. In a particularly vivid example of the shortcomings of this system, one named plaintiff remained in jail for four months after the charges against him were dismissed because he did not have the assistance of counsel and because of the inattention of the court. SCHR voluntarily dropped the suit when the public defender’s office was established.

B. The Indigent Defense Act of 2003

In response to this lawsuit and the Commission’s report, the General Assembly passed the Indigent Defense Act of 2003 (the Act), creating a public defender system in Georgia. Under the Act, funding for local public defender offices is shared by the state and the counties in each circuit. The State funds one public defender for each judicial circuit and “[o]ne assistant public defender for each superior court judge authorized for the circuit, excluding the chief judge and senior judges.” County governments pay for additional defenders. The Act makes special provisions for juvenile defendants. Section 17-12-23(c) of the Official Code of Georgia Annotated (O.C.G.A.) mandates the establishment of a juvenile division within each circuit’s

84. Id. at ¶ 6.
85. Id. at ¶ 65.
86. Id.
87. Id.
88. Id. at ¶ 137.
89. Complaint, supra note 4, at 37.
90. Email from Atteeyah Hollie, Staff Attorney, S. Ctr. for Human Rights, to author (Oct. 13, 2014, 11:00 EDT) (on file with author).
92. Complaint, supra note 4, at 36.
93. Id.
95. See O.C.G.A. § 17-12-31(a) (2013).
96. See, e.g., O.C.G.A. § 17-12-23(a)(3), (c) (2013).
97. O.C.G.A. § 17-12-2(c) (2013).
These specialists are necessary because O.C.G.A. § 17-12-23(a)(3) requires representation by a public defender in "[a]ny juvenile court case where the juvenile may face a disposition of confinement, commitment, or probation." Presumably, these attorneys should be conversant with the unique issues that arise in juvenile proceedings and the consequences for children who are adjudicated delinquent.

The status of indigent defense in Georgia has improved dramatically in the years since this legislation was passed, but public defender offices in some parts of the state still struggle to provide effective representation.

C. Cordele Judicial Circuit’s Public Defender’s Office

A public defender office replaced the Cordele Judicial Circuit’s contract system in 2004 as a result of the Act. At first, both the state and the counties in the circuit funded the office. However, in 2009, the counties in the Cordele Judicial Circuit eliminated funding for assistant public defenders, including the attorney who was responsible for juvenile cases. Earlier that year, Public Defender Timothy Edison had written a letter to the Crisp County Board of Commissioners requesting money to hire an additional assistant public defender for the office. He explained that the office was understaffed because its caseload “far exceed[ed] what [its] standards suggest[ed]” and that he was asking each county in the circuit to contribute to his requested budget based on the percentage of cases from each county. Edison attached a “Justification Statement” to his letter in which he explained that if the county cut funding for the one county-paid assistant public defender, the office would be unable to “adequately[ly] represent juvenile defendants.”

98. Id.
99. O.C.G.A. § 17-12-23(a)(3).
100. Id.
101. See Complaint, supra note 4, at 44.
102. Bill Rankin, Landmark Ruling: Public Defender System Struggles Decades Later, ATLANTA J.-CONST., Mar. 18, 2013, at 1A. Legal experts cite “glaring failings” that include “meet-and-plead processing” of defendants and disparities in the quality of representation between the judicial districts resulting from the level of funding that counties provide to their local public defender offices. Id.
103. Complaint, supra note 4, at 38.
104. Id.
105. Id. at 37 n.1, 38-39.
106. Id. at Exhibit A.
107. Id.
108. Id.
Furthermore, Edison warned that "[w]ithout the county paid assistant public defender, the office would cease to function in a manner that would be able to adequately handle indigent representation in the county. . . . The office would be subject to the same constitutional infirmities as were alleged in regard to the old contract system."¹⁰⁹ Four months later, the position had been cut.¹¹⁰

III. DISCUSSION

A. Southern Center for Human Rights Sues the Cordele Judicial Circuit in 2014

On January 7, 2014 SCHR filed suit on behalf of eight indigent defendants against the State of Georgia, Governor Nathan Deal, the Georgia Public Defender Standards Council (GPDSC) and several of its officials, officials in the Cordele Judicial Circuit, judges in the Cordele Judicial Circuit, the public defenders in the Cordele Judicial Circuit, and the district attorneys in the Cordele Judicial Circuit.¹¹¹ The suit alleges that the Cordele Judicial Circuit is not meeting its constitutional mandate to provide counsel for indigent defendants in a number of ways.¹¹² For instance, the complaint asserts that juvenile defendants often arrive in court to find that there is no public defender available to represent them, that impoverished adults may be incarcerated for months before they meet with a public defender, and that indigent defendants in general "do not receive the most basic elements of legal representation."¹¹³ The suit contends that the reason for this shortfall is that the public defender's office in the circuit is both critically

¹⁰⁹. Id.
¹¹⁰. Id. at 39. Sufficiently funding public defenders became a hot button issue at the conclusion of Brian Nichols' trial in 2008. In 2005, Nichols killed four people—a judge, a court reporter, a deputy, and a federal agent—during the course of a shooting spree that began when he appeared for his rape trial. By the time his trial ended, his legal fees exceeded $2 million. Public outrage at spending this amount of taxpayer money on public defense, especially when the defendant had offered to plead guilty in exchange for a life sentence, made it politically unpopular to allocate public funds for indigent defense. This may have harmed the state's fledgling public defender system, which was still establishing itself at the time. See generally, Rankin, supra note 101; Jury Spares Nichols a Death Sentence, CNN (Dec. 12, 2008), http://www.cnn.com/2008/CRIME/12/12/nichols.sentence/index.html?ref=rss_latest.
¹¹². Complaint, supra note 4, at 5.
¹¹³. Id.
underfunded and understaffed with only three full-time attorneys and a fourth contract attorney who works a maximum of 75 hours per month.\textsuperscript{114} The circuit has three superior court judges and a juvenile court judge, meaning that there are not enough public defenders to appear in each courtroom in the circuit at any given time.\textsuperscript{115} Additionally, there is no juvenile division within the office as required by O.C.G.A. § 17-2-23(c).\textsuperscript{116}

The Cordele Judicial Circuit has the only circuit public defender office in the State of Georgia that does not receive county funding.\textsuperscript{117} The suit asserts that this problem has saddled each public defender with excessive case loads, rendering them unable to provide meaningful representation to their clients.\textsuperscript{118} Because of the disproportionate number of clients to attorneys, the complaint alleges that the superior court judges try to resolve as many cases as they can at arraignments, despite the fact that many defendants have their initial, and perhaps only, contact with an attorney that day.\textsuperscript{119} At the arraignments, there is a recess during which the public defenders can meet with defendants, often for the first time, regarding plea offers that must be accepted promptly.\textsuperscript{120} Alternatively, the suit contends that judges tell defendants they may speak to the prosecutors directly about their cases, but the judges do not warn them of the dangers of proceeding without counsel.\textsuperscript{121} The complaint asserts that this system does not allow public defenders to provide meaningful representation to their clients because

\begin{itemize}
  \item \textsuperscript{114} Id.
  \item \textsuperscript{115} Id. at 6.
  \item \textsuperscript{116} Id. at 7.
  \item \textsuperscript{117} Id. at 6.
  \item \textsuperscript{118} Id.
  \item \textsuperscript{119} Id. at 8. This practice means that the public defenders have violated their statutory duty under O.C.G.A. § 17-12-23(b) to begin representing indigent clients within three business days of their arrest and application for representation. Id. at 10; see also O.C.G.A. § 17-12-23(b) (2013). The amended complaint adds a new plaintiff, James Steverson, who had been jailed since June 3, 2014. He submitted four written requests to the public defender's office and one written request to the district attorney's office before a jail employee provided him with an application for assistance from the public defender's office. A week after he submitted the application, he asked his girlfriend to follow up with the office. The next day, a representative from the office met with Steverson briefly to fill out a second public defender application. This representative informed Steverson that the Ben Hill County grand jury meets in October, and Steverson probably would not go to court before the indictment. At the time the amended complaint was filed, Steverson had been in jail for four months, and no one from the public defender's office had interviewed him. He did not know if the office was representing him. Amended Complaint, supra note 111, at 17-18.
  \item \textsuperscript{120} Complaint, supra note 4, at 8.
  \item \textsuperscript{121} Id.
\end{itemize}
there is no time to assess each defendant's individual case or to make proper investigations into the merits of the case before a decision about a plea offer must be considered and either accepted or rejected. 122

The complaint also lists myriad other ways that the public defenders in the Cordele Judicial Circuit are not providing effective representation to indigent defendants. Although defendants held in custody or released on bond with restrictive conditions have the right to a preliminary hearing, the public defenders seldom request them. 123 The lack of support staff also means that defendants are often required to conduct their own investigations into their cases if they choose to plead not guilty at the arraignment. 124 Perhaps most distressing, the suit also alleges that defendants who are represented by the public defender's office in the circuit do not know which public defender is their attorney or if an attorney will show up to court proceedings to represent them at all. 125

These allegations of subpar representation on the part of the public defender's office in the circuit are grim. A number of alarming stories in the complaint about the levels of representation that the named plaintiffs have received illustrates the situation. 126 A few are below.

1. Juvenile Plaintiffs. A.J. is thirteen years old and has been charged in four separate cases. She requested an attorney on the day she appeared for her arraignment, and she spoke to the public defender present in court that day. She denied the allegations against her and was told that she would be able to present evidence at a future court date. No one from the public defender's office contacted A.J. in the weeks between her arraignment and her next hearing. When A.J. and her mother arrived at the courthouse for the hearing (they walked about a mile), they discovered that A.J.'s case had been continued for a week because all of the public defenders were in a different court that day. No one from the public defender's office had informed A.J. or her mother of the continuance, or that there would not be a public defender present in court that day to represent her. When A.J. came back the next week to appear in court, a public defender was present, and he advised A.J. that the prosecutor was seeking detention time. A.J. had planned to

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122. Id. at 9.
123. Id. at 10; see also O.C.G.A. §§ 17-7-20 to -34 (2013). The complaint incredulously notes one incident in which the public defender asked the client to explain why the attorney should request a preliminary hearing. Complaint, supra note 4, at 10.
124. Id.
125. See id. at 7.
126. Id. at 13-25.
deny the charges, but she did not feel that her attorney was prepared to defend her, so she admitted them instead. The court ordered fourteen days of detention and twelve months of probation. A.J. was also required to pay $50 in court fees and $50 in public defender application fees for each of her four cases, for a total of $400. A.J. cannot pay these fees.\footnote{127} Although the court gave A.J. the option of serving her detention time after the Christmas holidays, she elected to begin her sentence immediately to avoid missing school.\footnote{128}

Seventeen-year-old W.M. appeared in juvenile court charged with shoplifting Halloween fangs worth $2.97 from Wal-Mart. Because there was not a public defender in juvenile court that day, the judge asked him if he wanted to go forward that day without the assistance of counsel or if he wanted to return to court when a public defender would be available to represent him. W.M. elected to proceed without an attorney, and he admitted to shoplifting the Halloween fangs. He was sentenced to probation, community service, and a daily curfew, and he must pay $2.97 in restitution.\footnote{129} In his affidavit, W.M. states that he proceeded without an attorney because he did not know how long it would take to meet with one, and he did not “want to have a case hanging over [his] head and [he] didn’t want to miss school.”\footnote{130} He asserts that he did not realize what an attorney does or how one could help him when he made the decision to proceed unrepresented.\footnote{131} W.M. also stated that he did not always understand what the judge and the attorneys were talking about during the proceedings and that he “did not have an opportunity to say anything except to answer the judge’s questions.”\footnote{132} He further maintains that he admitted the charge because he thought that denying the charge and requesting a hearing would result in a longer probation sentence or incarceration. Had he known what an attorney does, he would have requested the assistance of counsel.\footnote{133}

Mykenzic Phillips is sixteen years old and facing multiple felony charges in two superior courts. The charges originated in the juvenile courts, and Phillips was represented by a public defender at the hearing to transfer his cases to the superior courts. However, when he went to

\footnotesize{127. \textit{Id.} at 15-18. A.J.’s family cannot afford a car, so these fees surely amount to a hardship for her family. There is no evidence that anyone has discussed whether they can waive this fee. \textit{See id.} at 16, 17-18.}

\footnotesize{128. \textit{Id.} at 17.}

\footnotesize{129. \textit{Id.} at 18-19.}

\footnotesize{130. \textit{Id.} at Exhibit I.}

\footnotesize{131. \textit{Id.}}

\footnotesize{132. \textit{Id.}}

\footnotesize{133. \textit{Id.}}
the public defender's office to discuss his case after this hearing, he
discovered that he would have to reapply for counsel because his case
had been transferred to the superior court. The next time Phillips had
a hearing in juvenile court, a public defender was not present. Judge
Pack informed him that public defenders were not able to be in juvenile
court that day and gave him the option of waiting until he could speak
to an attorney or proceeding unrepresented. Phillips elected to proceed
without counsel. Judge Pack decided to transfer Phillips's remaining
juvenile cases to superior court, and she told Phillips that he was
entitled to a hearing on the transfer if he objected to her decision.
Without consulting an attorney about the purpose of the hearing or its
advantages and disadvantages, Phillips informed the court that he did
not object. Then, putting Phillips under oath, Judge Pack asked him if
he wanted to respond to the court's decision to transfer his cases.
Phillips responded by explaining what he knew about the offenses with
which he was charged. Before he could finish, Judge Pack interrupted
because it was not the appropriate time to explain mitigating circum-
stances. At the time the complaint was filed, Phillips's cases in superior
court were pending. 134

Fifteen-year-old A.P. was charged with battery and criminal damage
to property. She requested a public defender, and she met with the
attorney before court on the date of her first appearance. The public
defender advised A.P. of the consequences of admitting the charged
offenses. A.P. admitted to the battery charge and denied the charge for
criminal damage to property. She was sentenced for the admitted
battery, but she had to return to court for trial on the criminal damage
to property charge. After the hearing, A.P. provided her attorney with
the name of a witness who could testify on her behalf regarding the
denied charge. After that, A.P. did not hear from her public defender
again. At her next court date, the attorney did not appear, and the trial
proceeded without defense counsel. In her affidavit, A.P. states that the
judge did not give her the option of continuing the case until her
attorney could be present. Judge Pack and a probation officer ques-
tioned A.P. and her witness, and A.P. was adjudicated delinquent. The
public defender did not appear at A.P.'s restitution hearing two months
later, either. A.P. must pay $380 in restitution, $50 in court fees, and
the $50 public defender application fee for a crime of which she claims
she is innocent. In her affidavit, she wonders if her failure to pay the

134. Id. at 20-22. In the meantime, Phillips has pleaded guilty to burglary charges in
superior court, and he has been sentenced for those crimes. Amended Complaint, supra
note 111, at 16.
public defender's application fee after her initial hearing resulted in her attorney not attending her later court appearances.\textsuperscript{135}

Sixteen-year-old A.L., charged with terroristic threats, elected to proceed without counsel when she arrived at court to find that there was not a public defender present to represent her. Judge Pack informed A.L. that if she wanted to proceed with her case that day, she could raise her hand to ask the court questions about the proceedings or, in the alternative, she could ask her mother. Otherwise, she would have to return to court when a public defender would be available to represent her. A.L. elected to proceed without counsel. She was adjudicated guilty and ordered to perform community service, to serve probation, and to pay a court fee.\textsuperscript{136}

Fifteen-year-old N.P. was charged with burglary. He has had two hearings, and a different public defender was present at each. At the time the complaint was filed, he had been in detention for about a month, and he did not know which public defender represented him.\textsuperscript{137}

S.C. is also fifteen years old and charged with burglary. He applied for and spoke to a public defender on the day of his arraignment in juvenile court. The court adjudicated him delinquent and ordered that he serve probation, perform community service, and pay $50 in court fees as well as a $50 public defender application fee. At the time the complaint was filed, three months after the arraignment, his restitution hearing was still pending, and S.C. had not heard from the public defender's office.\textsuperscript{138}

These plaintiffs' cases illustrate SCHR's contention that children are often faced with the choice of continuing their hearings until a public defender is available or proceeding unrepresented to resolve their cases that day.\textsuperscript{139} Children often decide to proceed without the assistance of counsel because of the uncertainty of when an attorney will be available in juvenile court to represent them.\textsuperscript{140} Repeatedly returning to court is costly, and children miss school when they must appear before

\begin{itemize}
  \item \textsuperscript{135} Complaint, supra note 4, at 47, Exhibit J.
  \item \textsuperscript{136} Id. at Exhibit K.
  \item \textsuperscript{137} Id. at 13-14. The amended complaint follows up with the information that N.P. spoke to a third lawyer in March 2014, who was assigned as conflict counsel. He was adjudicated delinquent after he admitted to six of the nine counts against him. He owes $300 in public defender application fees for the six cases. Amended Complaint, supra note 111, at 10.
  \item \textsuperscript{138} Complaint, supra note 4, at 14-15. The date for the restitution hearing had not been set by the time the amended complaint was filed either. Amended Complaint, supra note 111, at 14.
  \item \textsuperscript{139} Complaint, supra note 4, at 45.
  \item \textsuperscript{140} Id.
\end{itemize}
Moreover, juvenile defendants may not understand the role an attorney would play or the disadvantages of representing themselves. The complaint states that there were 681 delinquency and unruly cases filed in the circuit's juvenile courts in 2012, but the public defenders reported only handling 52 juvenile cases that year. Since there is an average poverty rate of 28% in the circuit, the complaint suggests that a large percentage of children are electing to proceed without the assistance of counsel, possibly without a full understanding of the constitutional right they waived.

2. Adult Plaintiffs. The complaint also describes dire circumstances for adult defendants in the Cordele Judicial Circuit. Richard Young, jailed for selling cocaine, filled out a form requesting a public defender about a week after his arrest. He did not meet his public defender until he appeared in court for his bond hearing a few weeks later. They spoke for a few minutes before the hearing, and the court denied bond. At the time SCHR filed the complaint about a month later, Young had not had any further contact with his public defender.

Roderick Morgan, nineteen, was jailed and charged with a number of counts, including two counts of burglary and one count of trespass. After his bond hearing, where bond was set at $50,000, Morgan requested that the public defender file a motion for bond reduction. The attorney informed Morgan that forms for a bond reduction were available at the jail, so he could file the motion himself. However, Morgan does not know how to obtain the forms, and he cannot call his attorney because calls to the public defender's office from the jail are not free. A bond reduction has not been filed by Morgan or his attorney, and, two months after the bond hearing, Morgan had not heard from his attorney again. He was still in jail awaiting arraignment when the complaint was filed.

Wesley Harper was charged with multiple drug felonies in August of 2013. He first met his public defender at his bond hearing, but they did not speak before the hearing, and the attorney sat silently beside Harper while the judge denied bond. About a month later, a public defender met with Harper at the jail to convey the prosecution's plea offer, which

141. *Id.; see also id.* at Exhibit I. The parents who accompany them to court may also be missing work, which could result in a hardship for the family.
142. *Id.* at 45-46.
143. *Id.* at 46.
144. *Id.* at 46 n.12.
145. *Id.* at 22-23.
146. *Id.* at 23-24.
Harper rejected. Despite writing to the public defender's office several times to request information about his case, a preliminary hearing, and a reduction of bond, he has not received an answer. He remained in jail awaiting arraignment when the complaint was filed in January 2014.147

B. Standards for Representation

The complaint contends that the Georgia Supreme Court adopted standards for limiting caseloads by full-time public defenders in 1998 and that GPDSC, in accordance with O.C.G.A. § 17-12-8(b),148 adopted these standards in 2004.149 However, the complaint also states that the GPDSC no longer claims these standards.150 The GPDSC has moved from the judicial branch to the executive branch, and the current agency claims that this move made all prior rulemaking null and void.151 The standards that had been adopted in 2004 were the following:

150 Felonies (excluding those in which the death penalty is being sought) per attorney per year, or

300 Misdemeanor Cases per attorney per year, or

250 Misdemeanor Juvenile Offender Cases per attorney per year, or

60 Juvenile Dependency Clients per attorney per year, or

250 Civil Commitment Cases per attorney per year, or

25 Appeals to the Georgia Supreme Court or the Georgia Court of Appeals per attorney per year.152

These standards were not cumulative; they were to be weighted and applied proportionally.153

147. Id. at 24-25.
148. O.C.G.A. 17-12-8(b) (2013).
149. Complaint, supra note 4, at 43 & n.9, Exhibit G. Exhibit G of the complaint, titled “Standard for Limiting Case Loads and Determining the Size of Legal Staff in Circuit Public Defender Offices,” refers to paragraphs (1) and (3) of O.C.G.A. § 17-12-8(b). However, the current version of the statute does not have these subsections. See O.C.G.A. § 17-12-8(b). Current subsection (b) states: “The council shall approve and implement programs, services, policies, and standards as may be necessary to fulfill the purposes and provisions of this chapter and to comply with all applicable laws governing the rights of indigent persons accused of violations of criminal law.” Id.
150. Complaint, supra note 4, at 43.
152. Complaint, supra note 4, at Exhibit G.
153. Id.
National standards for caseloads are similar to those adopted in Georgia. The National Advisory Commission on Criminal Justice Standards and Goals has adopted caseload limits of no more than “150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals” per year. Caseloads for public defenders should “reflect” these limits; “under no circumstances” should caseloads exceed them. While the number of cases that an attorney can handle is fact-sensitive, grossly exceeding these caseload standards means that defendants are being denied the assistance of counsel—in those instances, “[i]t is not that there is no counsel; it is that there is no assistance.”

The three public defenders in the Cordele Judicial Circuit are handling significantly more cases than the standards recommend. In 2012, the three public defenders handled a total of 1,384 cases. One of the attorneys was on maternity leave for part of the year, and it does not appear that the office hired anyone to take on her caseload while she was out. The other two attorneys handled 694 and 628 cases respectively. More than 300 of each of these attorney’s cases were felonies. This is more than double the recommended limit per year for attorneys who are not handling anything else, and these public defenders are also responsible for hundreds of other cases.

IV. POSSIBLE SOLUTIONS

A. Assistance of the Private Bar

In 2002, the ABA Standing Committee on Legal Aid and Indigent Defendants published Ten Principles of a Public Defense Delivery System. These principles are helpful in theory, but their successful implementation will take a cooperative, statewide effort from the bar association, the legislature, and the judiciary, especially when it comes to public defender offices in poor, rural areas. For instance, the second principle states, “Where the caseload is sufficiently high, the public
defense delivery system consists of both a defender office and the active participation of the private bar." While this guideline makes sense in the abstract, it ignores the practical realities of the availability of the private bar in some rural areas. Seventy percent of the lawyers in Georgia practice in the Atlanta area, even though only thirty-five percent of the population lives there. In Georgia, there are six counties that do not have any attorneys at all. Of the counties in the Cordele Judicial Circuit, only Crisp and Ben Hill Counties have more than ten lawyers, including judges, prosecutors, public defenders, and city and county attorneys. Wilcox County has one to five lawyers, and Dooly County has six to ten. Most or all of these attorneys could be judges, prosecutors, or other lawyers who are ineligible to assist with indigent defense.

In 2014, Chief Justice Hugh Thompson raised the disparity between urban and rural attorney populations in his annual State of the Judiciary Address to the Georgia General Assembly. He urged both the General Assembly and the judiciary to "take steps to correct this imbalance." Georgia State Bar President Patrise Perkins-Hooker has also taken up the cause, calling for increased donations to Georgia Legal Services and proposing the Rural Lawyer Assistance Program to encourage more attorneys to open a practice in underrepresented counties, especially those with no lawyers at all. Her goal is to provide access to basic civil services, such as probating a will and petitioning for guardianship, in rural communities as part of the state bar's duty to serve the public interest. To do so, she plans to ask the legislature to offer debt forgiveness to law school graduates who are willing to practice in underserved areas as part of the proposed Rural

162. Id. at 1.
165. Id.
166. Id.
167. Tucker, Lawyer Shortage, supra note 163.
Areas Assistance Act. She also intends to work with local officials to provide free office space for these practices.

The poverty level in many of these sparsely populated counties can make it challenging for an attorney to make a living. Right now, lawyers who would like to practice in these small communities find that there is not enough work to support a practice; local citizens often cannot afford to pay for legal services. This is where asking the private bar to assist with indigent defense can help fill the gap. The three public defenders in the Cordele Judicial Circuit currently defend over 1,100 cases per year, and there are simply not enough private attorneys in the area to alleviate that caseload. However, if new attorneys move to rural areas as part of Perkins-Hooker’s initiative to bring them there, they could supplement their practices with criminal defense work. Right now, there are not enough private attorneys in many south Georgia counties to adequately assist the public defenders with their overwhelming caseloads. If rural attorneys could count on regular state-funded criminal defense work, it would be easier to open up a practice in impoverished areas.

The need for attorneys in criminal and civil matters seems to be two sides of the same coin, and lawmakers should consider how they can achieve solutions for both problems together. Although his address focused mainly on the need for civil services, Chief Justice Thompson pointed out that “we must guarantee access to justice for all people, as

171. Tucker, Lawyer Shortage, supra note 163. Similar programs are in place in Colorado, Nebraska, North Dakota, South Dakota, Texas, Kansas, Iowa, and Utah. Id.
172. See id.
173. See id.; Tucker, Six Georgia Counties, supra note 164.
174. Katheryn Hayes Tucker, If It’s Friday, Fort Gaines Has a Lawyer, DAILY REP., Jan. 8, 2015, www.dailyreportonline.com/id=1202714395232/If-Its-Friday-Fort-Gaines-Has-a-Lawyer [hereinafter Tucker, If It’s Friday]. Katheryn Hayes Tucker profiled Terry Marlowe, who lives in Fort Gaines but commutes to Albany four days a week to practice law. He has an office in Fort Gaines that is open on Fridays, even though he usually does not have any clients. When he does, he often performs simple legal services for no charge, such as drafting a will for a terminally ill man. Fort Gaines is in Clay County, one of the six counties listed in the recent report as having no attorneys at all. Id. Marlowe says that “[t]he lack of lawyers in rural counties is in direct proportion to the lack of money in rural counties.” Id. He would practice full time in Fort Gaines or in the Pataula Circuit if he could make a living doing so. Id.
175. See Complaint, supra note 4, at 41; Tucker, Six Georgia Counties, supra note 164.
176. See Tucker, If It’s Friday, supra note 174; see also Tucker, Six Georgia Counties, supra note 164.
177. The caseload for indigent defense has remained fairly steady in the Cordele Judicial Circuit over the past few years, so it is reasonable to assume that these attorneys could count on continuing criminal defense work. See Complaint, supra note 4, at Exhibits B-D.
our laws were not made for just a few.\textsuperscript{178} Similarly, Perkins-Hooker focused on civil legal assistance and does not mention indigent defense in her description of the Rural Lawyer Assistance Program, but she clearly wants to make legal assistance available to all of Georgia's citizens.\textsuperscript{179} Georgia's poor need both civil and criminal legal services, and there should be a way to make both accessible in rural areas.

Increased state funding for indigent defense will be a critical aspect of any legislation in the General Assembly to address this problem, whether it enacts the Rural Lawyer Assistance Program or conceives of an alternative solution. States ultimately have the responsibility to deliver defense services, and thus they carry the burden of funding a system that offers defense services of uniform quality statewide.\textsuperscript{180} While statewide funding for indigent defense has increased in recent years,\textsuperscript{181} the situation in the Cordele Judicial Circuit illustrates that more money is needed to bring statewide uniformity to Georgia's system.

B. Accountability Courts

Chief Justice Thompson also praised the success of the statewide network of accountability courts, calling them one of the "crowning achievements" of recent criminal justice reform in Georgia.\textsuperscript{182}

Access to justice also means giving those who break the law the sentence they deserve. It means not automatically sending some people to prison when their true crime is being addicted to drugs, or failing to take medication for their schizophrenia, or not paying child support because they've lost their job.\textsuperscript{183}

Across the state, counties are establishing mental health courts, veterans' courts, drug courts, family dependency treatment courts, juvenile drug courts, and DUI courts as an alternative to incarceration for non-violent offenders.\textsuperscript{184} These courts have a team consisting of a

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\begin{enumerate}
\item[178.] Thompson, \textit{supra} note 168, at 2.
\item[179.] See Perkins-Hooker, \textit{supra} note 169, at 5.
\item[180.] ABA, \textit{TEN PRINCIPLES}, \textit{supra} note 3, at 2 ("Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.").
\item[181.] Rankin, \textit{supra} note 102 ("State lawmakers have increased annual appropriations to the defender council during a time many agencies endured budget cuts... Moreover, lawmakers have steadily increased the proportion of money the agency receives from a collection mechanism set up to finance the public defender system.").
\item[182.] Thompson, \textit{supra} note 168, at 4.
\item[183.] \textit{Id.}
\item[184.] \textit{Id.}; see also Accountability Court, CRIMINAL JUSTICE COORDINATING COUNCIL, http://cjcc.georgia.gov/accountability-court (last visited Jan. 11, 2015).
\end{enumerate}
\end{flushright}
coordinator, a judge, a prosecutor, a defender, a member of law enforcement, a probation officer, and a therapist to assist program participants in a non-adversarial setting.\textsuperscript{185} The vast majority of accountability court graduates are employed upon graduation and remain free of criminal charges for at least three years afterwards.\textsuperscript{186} Since their inception, these courts have saved the state $20 million each year in prison costs.\textsuperscript{187}

Establishing one or more of these specialty courts in the Cordele Judicial Circuit could be a way to relieve some of the burden on the public defenders, allowing them to spend more of their time focusing on the cases of defendants accused of violent crimes.\textsuperscript{188} Several counties near the Cordele Judicial Circuit already have adult felony drug courts\textsuperscript{189} and child support problem-solving courts\textsuperscript{190} in place, so the accountability court model is an alternative to incarceration that can work in rural as well as urban and suburban communities. Studies have shown that it costs less to have offenders in accountability court programs than in prison.\textsuperscript{191} If the poverty levels in these counties make it problematic for indigent defendants to pay any fees associated with participation in these programs, the money saved by putting some non-violent offenders in accountability court rather than prison could be re-allocated to help indigent offenders receive the benefits of these programs.\textsuperscript{192} In the long run, decreased rates of recidivism should also reduce the overall cost of incarceration.\textsuperscript{193

\begin{footnotes}
\item[186.] Thompson, supra note 168, at 5.
\item[187.] Id.
\item[188.] The General Assembly has appropriated $15.3 million for the 2015 fiscal year to fund these specialty courts, so the funding is potentially available for establishing specialty courts in the circuit. Accountability Court, supra note 184.
\item[191.] See Bill Rankin & Carrie Teegardin, Drug Court: Saving Money, Saving Lives, ATLANTA J.-CONST., Mar. 5, 2012, at 1A. In 2010, an audit found that drug court participation cost the state $20 a day while incarceration cost $51 a day. Id.
\item[193.] See Thompson, supra note 168, at 5 ("Three years after graduation, 93 percent of all accountability court participants remain free of criminal charges.").
\end{footnotes}
C. Equal Funding for the Prosecution and Defense

The eighth of the ABA's Ten Principles of a Public Defense Delivery System may provide a partial solution that could be easier to implement in the short term while larger, statewide reforms are being discussed. This principle requires "parity between defense counsel and the prosecution with respect to resources," allowing "defense counsel [to be] included as an equal partner in the justice system." This means that the workload, salaries, and resources of the prosecution and the public defense should be comparable. According to the complaint, there are half as many public defenders as district attorneys in the Cordele Judicial Circuit. Moreover, the public defender's office only has one investigator, and the complaint contends that the investigator's job is simply to assist potential clients in filling out the public defender eligibility application. By contrast, the district attorney's office has the investigative support of local and state law enforcement agencies. Therefore, one solution could be to re-allocate some of the resources currently earmarked for the district attorney's office to the public defender's office to achieve the equality that the ABA advocates. This could mean that the district attorney's office must reduce its staff when some of the money is re-allocated to the local public defender's office, an unpopular political position when voters want their elected officials to be "tough on crime." However, studies have shown that 2.3% to 5% of prisoners in the United States are innocent. If defense counsel has the time and resources to advocate for these defendants, theoretically that percentage could be reduced, and taxpayer

194. ABA, TEN PRINCIPLES, supra note 3, at 3.
195. Id. Resources include "benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts." Id.
196. Complaint, supra note 4, at 5-6.
197. Id. at 6.
198. Id.
199. See generally, NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 70 (2009), available at http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf ("For some years, there has been a national movement in the United States to get 'tough on crime.' For more than a decade, state legislatures have joined the federal government in creating many more mandatory sentencing and 'three-strikes' laws that have greatly increased the stakes for the accused in criminal cases. Championing a reduction in criminal sanctions, like championing indigent defense, is a risky move for most politicians.").
dollars that would have been spent incarcerating an innocent person could be put to better use.\textsuperscript{201}

D. ABA Eight Guidelines of Public Defense Related to Excessive Workloads

In 2009, the ABA Standing Committee on Legal Aid and Indigent Defense followed up on the Ten Principles of a Public Defense Delivery System by publishing Eight Guidelines of Public Defense Related to Excessive Workloads.\textsuperscript{202} These guidelines present methods of addressing excessive workloads so that a public defender may fulfill his or her ethical responsibility to provide competent and diligent representation to clients.\textsuperscript{203} They put the onus on the jurisdiction’s “Public Defense Provider” to prevent excessive workloads and thus the “adverse impact that such workloads have on providing quality legal representation to all clients.”\textsuperscript{204} The Public Defense Provider in these Guidelines refers to “public defender agencies and . . . programs that furnish assigned lawyers and contract lawyers.”\textsuperscript{205} In Georgia, the GPDSC is the Public Defense Provider.\textsuperscript{206}

Upon reading the first Guideline, it is apparent that the public defenders in the Cordele Judicial Circuit are suffering from excessive caseloads. Indicia of excessive caseloads include the following:

Whether sufficient time is devoted to interviewing and counseling clients;

Whether prompt interviews are conducted of detained clients and of those who are released from custody;

Whether pretrial release of incarcerated clients is sought;

Whether representation is continuously provided by the same lawyer from initial court appearance through trial, sentencing, or dismissal;

Whether necessary investigations are conducted;


\textsuperscript{202} ABA, Eight Guidelines of Public Defense Related to Excessive Workloads (2009) [hereinafter ABA, Eight Guidelines]. The introduction notes that the goal of quality representation for indigent defendants espoused by the ABA “is not achievable . . . when the lawyers providing the defense representation have too many cases, which frequently occurs throughout the United States.” Id. at 1.

\textsuperscript{203} Id.

\textsuperscript{204} Id. at 4.

\textsuperscript{205} Id.

\textsuperscript{206} See O.C.G.A. § 17-12-1 (2013).
Whether formal and informal discovery from the prosecution is pursued;
Whether sufficient legal research is undertaken;
Whether sufficient preparations are made for pretrial hearings and trials; and
Whether sufficient preparations are made for hearings at which clients are sentenced.

The complaint filed by the SCHR alleges incidences of each of these indicia. These circumstances force public defenders to violate the rules of professional conduct, which require competent representation. "Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Excessive caseloads prevent attorneys from providing competent representation because, while they may have the knowledge and skill necessary to represent their clients, they do not have the time to thoroughly prepare: they cannot perform such essential functions as interviewing clients, engaging in motions practice, and performing investigations, all of which are necessary to mount a defense on behalf of the client.

Public defenders have an ethical responsibility to notify "appropriate persons" within the public defender system when they feel that their workload is preventing them from providing competent representation. The Model Rules of Professional Conduct intend for supervisors to ensure that subordinate attorneys are providing competent and diligent service. If public defenders do not find relief from excessive workloads from an immediate supervisor, the Guidelines instruct them to report up the chain of command until relief is granted. Those in authority, in turn, may not retaliate against an attorney who has reported that an excessive workload has prevented the attorney from providing competent and diligent representation.

While this seems like excellent advice, this guideline does not solve the problem at the heart of the matter—lack of state funding. If an overburdened public defender in the Cordele Judicial Circuit reported all the way up the chain of command to the GPDSC, the GPDSC will not

207. ABA, EIGHT GUIDELINES, supra note 202, at 4.
208. See Amended Complaint, supra note 111, at 39, 45-64.
209. See ABA, EIGHT GUIDELINES, supra note 202, at 4.
210. GA. R. PROF'L CONDUCT 1.1.
211. ABA, EIGHT GUIDELINES, supra note 202, at 7.
212. Id.; Model Rules of Prof'l Conduct R. 5.1(b).
213. ABA, EIGHT GUIDELINES, supra note 202, at 7 & n.23.
214. Id. at 7-8.
have the funds to hire additional staff to relieve the excessive workload because the statute requires counties to fund additional public defenders. Similarly, reporting to the O.C.G.A. § 17-12-20 supervisory panel may not afford relief, either, unless it can allocate more money to the program. With such high poverty rates across much of south Georgia, it seems unlikely that these counties have the ability to appropriate sufficient funds to provide relief. Someone must have the duty to provide relief to overburdened public defenders or the reporting requirement does nothing more than put a number of people on notice that poor defendants in the circuit are not being competently represented. This does not provide recourse for the overworked defender, nor does it help indigent defendants gain the assistance to which they are entitled. Therefore, the General Assembly should mandate the party responsible for covering the shortfall to ensure that impoverished defendants receive the representation the Constitution guarantees.

The last four Guidelines address what should happen after a public defender has reported an excessive workload. The Public Defense Provider has the burden of determining when a public defender's workload is excessive. Providers should be monitoring workloads of public defenders under their supervision, but concerns about overload could also come from the attorneys or from client complaints. However the possible overload comes to the supervisor's attention, the supervisor must determine if the attorney's workload is preventing the public defender from providing the competent and diligent representation espoused in the Rules of Professional Conduct. This assessment includes evaluating the nature of the attorney's cases and how complicated they are, the lawyer's experience and strengths, the availability of support staff and resources, and the non-representational tasks for which the attorney is responsible. The supervisor may make a "reasonable resolution of an arguable question of professional duty" in assessing caseloads; however, if the public defender does not believe that the solution provided by the supervisor is reasonable, he or she has a duty to continue trying to reduce his or her caseload. This might

215. See O.C.G.A. § 17-12-27(a) (limiting funding to cover only one assistant public defender per superior court judge in a circuit).
216. ABA, EIGHT GUIDELINES, supra note 202, at 8.
217. See id.
218. Id.
219. Id. at 8 n.25. The availability of support staff plays an essential role in this review; if support staff is insufficient or if staff members are also suffering under excessive caseloads, an attorney cannot be responsible for as many cases. Id.
220. Id. at 8 (quoting MODEL RULES OF PROF'L CONDUCT R. 5.2(b)); see also id. at 12 ("Continued representation in the face of excessive workloads imposes a mandatory duty
include filing motions to withdraw from some cases to achieve a workload more in line with suggested workload standards.\textsuperscript{221}

1. Unavailability and Withdrawal. Some attorneys have found success by filing a declaration of “unavailability,” informing the court and other officials that the public defender or office is not available for new appointments at that time.\textsuperscript{222} The rationale of this declaration is that “governments, which establish and fund providers of public defense, never intended that the lawyers who furnish the representation would be asked to do so if it meant violating their ethical duties pursuant to professional conduct rules.”\textsuperscript{223} If this is not an option or does not solve the workload problem, the attorney and the Public Defense Provider may be required to resort to the more extreme solution in Guideline 6: filing a motion requesting that the court stop assigning new cases as well as withdrawing from some current cases.\textsuperscript{224}

Filing a motion to withdraw or a declaration of unavailability is a drastic measure for a public defender to take, but if a motion to stop appointments is denied, an attorney will find himself in a difficult position, forced to choose between violating the Rules of Professional Conduct by providing inadequate representation or being found in contempt of court for refusing to proceed without adequate time to prepare. Using such motions successfully to achieve caseload relief requires the cooperation of the judiciary. “Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.”\textsuperscript{225} Because a defender should only file a motion to withdraw if prior attempts to resolve the excessive workload have failed, these motions may be accompanied by a request to dismiss the charges against some clients because the government has failed in its constitutional duty to provide effective assistance of counsel.\textsuperscript{226}

\textsuperscript{221} Id. at 8 & n.28.
\textsuperscript{222} Id. at 11.
\textsuperscript{223} Id.
\textsuperscript{224} Id. at 12.
\textsuperscript{225} Id. at 14 (quoting ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Std. 5-5.3(b) (3d ed. 1992)).
\textsuperscript{226} Id. at 12 n.42; see also NORMAN LEFSTEIN, ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, EXECUTIVE SUMMARY AND RECOMMENDATIONS: SECURING REASONABLE CASELOADS 25-26 (2012) (describing a 2008 Kentucky lawsuit in which the Public Defense Provider asked for additional appropriations to allow the office to provide competent service or, in the alternative, to dismiss all criminal charges).
This request may be the only way that the overburdened public defender can fulfill his or her ethical duty to competently represent his clients. However the attorney or Public Defense Provider presents the case to the court, if they have complied with the first four Guidelines, the court should accept the representations regarding workloads presented. The Public Defense Provider can support its case by providing additional evidence of the excessive workload, such as statistical data.

Although it is unusual for public defenders to keep time, doing so can supply powerful evidence that an attorney is overburdened. For instance, a timekeeping program would record the number of cases in which public defenders could not conduct an investigation for their clients because their time, resources, or both, were inadequate. Over time, the program’s reports could demonstrate that attorneys have been overworked for months or years and that their caseloads need to be adjusted accordingly. Past litigation filed by overburdened defenders has not had the benefit of this data, and this kind of hard evidence may make a difference in the outcome of these motions.

The attorney’s duty of diligence imparts an obligation to appeal if the court denies motions to halt appointments or to withdraw from pending cases. There is a tension in this guideline, though, because of the requirement that an attorney must continue to represent clients if a motion to withdraw is denied, even though the attorney knows that he cannot provide competent representation due to an excessive workload. The attorney and the Public Defense Provider are also advised to continue pursuing alternative solutions until the appeal is resolved. Furthermore, the public defender is encouraged to document his inability to provide adequate representation for the client because of

227. See ABA, EIGHT GUIDELINES, supra note 202, at 12.
228. Id. The Supreme Court has recognized that because attorneys are officers of the court, “when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath” and thus should be taken seriously. Id. at 13 (quoting Holloway v. Arkansas, 435 U.S. 475, 486 (1978)).
229. Id. at 12.
230. LEFSTEIN, supra note 226, at 21-22.
231. See id. at 22.
232. Id. The data that a timekeeping program would produce could be very beneficial for a public defense program in the long run, justifying the expense of purchasing the program and the time that the attorneys would need to commit to both learning how to use it and entering their time. See id.
233. See id.
234. ABA EIGHT GUIDELINES, supra note 202, at 14.
235. Id. at 14-15.
236. Id. at 15.
the excessive workload, which could also be time-consuming in a
situation where time is already scarce.\textsuperscript{237} These notes could be used
by an appellate attorney to support an argument that a defendant was
convicted because of ineffective assistance of counsel. However, this does
not help the client in the short term; the client will likely remain
incarcerated while the case works its way through the system.

Guideline 7 addresses the concern that a judge presented with a
motion to stop the assignment of new cases and to withdraw may feel
that it is incumbent upon the court to micromanage the public defender’s
office.\textsuperscript{238} Public defenders and Public Defense Providers should oppose
judicial management of public defense programs if it interferes with
their professional responsibilities to their clients.\textsuperscript{239} To preserve the
integrity of the judicial system, defense services should remain
independent of the judiciary.\textsuperscript{240} This does not mean, however, that
both the judge and the prosecutor should not be concerned when a public
defender reports being burdened with an excessive workload.\textsuperscript{241} The
ABA Code of Judicial Conduct notes the judiciary’s central role in
“preserving the principles of justice and the rule of law,” which should
include competent representation for both the prosecution and de-
defense.\textsuperscript{242} Similarly, the ABA Standards for Criminal Justice impart a
duty on prosecutors “to seek justice . . . [and] to reform and improve the
administration of criminal justice.”\textsuperscript{243} Thus, even though it is to the
prosecution’s advantage when its opponent is overburdened and cannot
mount a competent defense, the prosecution has a higher duty to seek
justice beyond merely seeking convictions.\textsuperscript{244} The Georgia Rules of
Professional Conduct burden the prosecutor with the “responsibility of
a minister of justice and not simply that of an advocate. This respon-
sibility carries with it specific obligations to see that the defendant is
accorded procedural justice and that guilt is decided upon the basis of

\textsuperscript{237} Id.
\textsuperscript{238} Id. at 13.
\textsuperscript{239} See id.
\textsuperscript{240} Id. at 14.
\textsuperscript{241} See id.
\textsuperscript{242} See id. at 13 n.52 (quoting ABA MODEL CODE OF JUDICIAL CONDUCT, Preamble
(2007)). Chief Justice Thompson noted the concern that judges throughout Georgia have
expressed about the increasing number of pro se litigants in their courts: “Judges worry
not only about clogged dockets as a result of these pro se litigants, but more importantly,
about unfair trials and unjust results.” Thompson, supra note 168, at 2.
\textsuperscript{243} ABA, EIGHT GUIDELINES, supra note 20, at 13 n.52 (alteration in original) (quoting
ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION STANDARDS, Std. 3-1.2(c),
(d) (3d ed. 1993)).
\textsuperscript{244} See id.
sufficient evidence." Thus, it may be unethical for the prosecution to proceed knowing that a public defender has not been able to mount a competent defense due to inadequacies in time and resources beyond the public defender’s control.

The comment to Guideline 7 notes that sometimes the public defender does not have too many cases but merely has not had enough time to prepare an adequate defense. For example, in Ohio, a public defender had been held in contempt of court for refusing to proceed to trial with a case to which he had been appointed the same day. An appellate court reversed, concluding that the trial court "improperly placed an administrative objective of controlling the court’s docket above its supervisory imperative of facilitating effective, prepared representation." Therefore, perhaps another solution would be to reduce the number of cases on the dockets in the various courts in the Cordele Judicial Circuit to a volume that would allow the public defenders to provide the representation required by the Rules of Professional Conduct. This is not likely to be a viable long-term solution, but it might work as a stop-gap until a more permanent fix can be achieved. It also seems like a reasonable short-term solution in a jurisdiction in which a sudden influx of indigent defendants temporarily overburdens the public defender’s office.

2. Other Options. Guideline 5 outlines all actions that a Public Defense Provider can take to mitigate excessive workloads, some more drastic than others:

Providing additional resources to assist the affected lawyers;
Curtailing new case assignments to the affected lawyers;
Reassigning new cases to different lawyers within the defense program, with court approval, if necessary;
Arranging for some cases to be assigned to private lawyers in return for reasonable compensation for their services;

245. GA. RULES PROF’L CONDUCT R. 3.8 cmt 1.
246. See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION STANDARDS, Std. 3-1.2 (d) ("It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor’s attention, he or she should stimulate efforts for remedial action.").
247. ABA, EIGHT GUIDELINES, supra note 202, at 14 n.53.
248. Id.
Urging prosecutors not to initiate criminal prosecutions when civil remedies are adequate to address conduct and public safety does not require prosecution;
Seeking emergency resources to deal with excessive workloads or exemptions from funding reductions;
Negotiating formal and informal arrangements with courts or other appointing authorities respecting case assignments; and
Notifying courts or other appointing authorities that the Provider is unavailable to accept additional appointments.\(^{250}\)

These actions are only appropriate if they may be implemented as soon as workloads become excessive or if they may be pursued when excessive workloads are imminent but are still manageable.\(^{251}\) If immediate relief is not available by these steps, either the public defender or the Public Defense Provider should file a motion requesting that the court stop assigning new cases and, if necessary, asking to withdraw from some current cases.\(^{252}\)

Public Defense Providers should try to avoid filing suit for caseload relief if they can.\(^{253}\) Litigation will be expensive and time-consuming without a predictable result.\(^{254}\) An office that is already suffering from an excessive caseload cannot reasonably undertake additional litigation without diverting resources away from clients. Therefore, it is critical that the options outlined in Guideline 5 be thoroughly exhausted before resorting to litigation.\(^{255}\) Ideally, a private firm would step in to assist the overburdened public defender pro bono, providing both the expertise in civil litigation and additional resources that the public defender’s office lacks.\(^{256}\) Because that is not always an option, it is important for public defenders to make the best possible use of the resources at their disposal by exhausting less extreme solutions first.

Unsurprisingly, several of the proposed resolutions involve supplementing the funding for public defenders or shifting some of the workload to the private bar.\(^{257}\) The ABA has long recommended that jurisdictions employ a “mixed system” of public defense that includes the active participation of private attorneys.\(^{258}\) However, the ABA acknowledges that despite its recognition that the “government has the

\(^{250}\) Id. at 9.
\(^{251}\) Id. at 9-10.
\(^{252}\) Id. at 12.
\(^{253}\) Id. at 11.
\(^{254}\) Id.
\(^{255}\) Id.
\(^{256}\) Id. at 12.
\(^{257}\) Id. at 10.
\(^{258}\) See LEFSTEIN, supra note 226, at 30.
responsibility to fund the full cost of quality legal representation for all eligible persons," additional money may not be immediately available to shift some of the cases to outside attorneys, rendering several of the steps suggested impractical.259 It is not reasonable to ask outside attorneys to represent indigent clients without compensating them—doing so constitutes a taking of property for which just compensation must be paid.260

Therefore, the comment to Guideline 5 suggests alternative solutions.261 Unfortunately, none of these alternatives will provide immediate relief, and some cannot be achieved by the public defender or the Public Defense Provider; instead, the state legislature or city council must fully participate before these suggestions can resolve the problem. One suggestion is to limit the volume and types of cases annually assigned to an attorney—regulated by contract or legislation.262 This might take the form of contracts with non-profit organizations or city ordinances that control how many cases an attorney may take on each year.263 For example, in New Hampshire, a non-profit organization has a contract with the state Judicial Council under which the state public defender program notifies the courts before caseloads become overwhelming, and the court begins appointing private attorneys instead.264 Another solution that has worked in Seattle is a city ordinance that limits the number of cases assigned to an attorney.265

In 2009, two national studies recommended that legislatures change the classification of certain crimes to make them civil offenses, thus removing the requirement to provide counsel.266 The cost of adjudicating misdemeanors is astounding, estimated to be at least $1000 each.267 Considering that any number of misdemeanants may be innocent, this cost could easily become a drain on taxpayer dollars. Moreover, if misdemeanants are incarcerated, it costs taxpayers an

259. See ABA, EIGHT GUIDELINES, supra note 202, at 10 n.35 (alteration in original) (quoting ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Std. 5-1.6).
260. See id.
261. Id. at 9-11.
262. Id. at 10.
263. Id. at 10 n.37.
264. Id.
265. Id.
266. Id. at 11.
average of $80 per day.\textsuperscript{268} By reclassifying victimless crimes, such as possession of marijuana, as non-criminal violations, the legislature could potentially save the state millions of dollars that could be allocated instead to public defender offices desperately in need of additional funding.\textsuperscript{269} The downside of this solution is that while it would remove the burden of representing certain clients from the public defense system, the defendants in these situations may actually feel they are in a worse predicament; instead of having even unsatisfactory representation of counsel, these defendants would find themselves without the “guiding hand of counsel” at all. Even so, on balance, this seems like a reasonable place to consider reallocating scarce resources.

E. Client Selection of Counsel

In other countries, indigent defendants have the opportunity to choose their own counsel.\textsuperscript{270} This system ensures the independence of public defenders from the judiciary and incentivizes attorneys to serve the best interests of their clients by providing high-quality representation.\textsuperscript{271} This arrangement puts public defenders on equal footing with private defense attorneys: satisfied clients recommend their attorneys to family and friends, thus generating future business for defense attorneys.\textsuperscript{272} In Scotland, the public defenders requested that the indigent defense system be modified to allow clients to select their attorney because it enhances a client's trust and the loyalty of the attorney.\textsuperscript{273}

V. CONCLUSION

“Most of us grew up saying the Pledge of Allegiance at school, in which we promised ‘liberty and justice for all.’ I don’t believe we ever meant, ‘liberty and justice only for those who can afford it.’”\textsuperscript{274} Granting indigent defendants their constitutional right to effective assistance of counsel is a complex problem, and implementing necessary reforms will require the joint efforts and co-operation of all three branches of government.\textsuperscript{275} First and foremost, the Georgia General Assembly

\textsuperscript{268} Id.
\textsuperscript{269} See id.
\textsuperscript{270} LEFSTEIN, supra note 226, at 32. This system is in place in Australia, Canada, England, New Zealand, and Scotland. Id.
\textsuperscript{271} Id.
\textsuperscript{272} Id.
\textsuperscript{273} Id.
\textsuperscript{274} Thompson, supra note 168, at 1.
\textsuperscript{275} See id. (“As Georgia continues to grow in population and diversity, access to justice is a challenge requiring the commitment and hard work of us all.”).
must explore ways in which it can increase funding for public defenders in poor counties without the ability to hire additional public defenders. In these areas, the need for indigent defense is the greatest and the resources are the scarcest. Because it is the state's responsibility to provide counsel for criminal defendants in need, the solution must come at the state level. The good news is that Chief Justice Thompson raised access to justice for indigents as a critical issue facing the state when he spoke to the General Assembly last year. As lawmakers work to address increasing access to civil legal services for the state's poor, they should also consider ways they can provide caseload relief for public defenders as part of the solution.

In the meantime, county and state officials should look at alternative, short-term solutions to immediately relieve the heavy caseload under which public defenders in the Cordele Judicial Circuit are laboring, whether it be reallocating some resources or reclassifying some victimless crimes. Even the most dedicated public defenders can only do so much for their clients when they must take on over 500 cases per year. This is not the competent, meaningful representation promised by the federal and state constitutions and guaranteed by the United States Supreme Court in \textit{Gideon v. Wainright} more than fifty years ago. Reform is necessary to prevent constitutional violations.

\textsc{Lesley Rowe}

276. See ABA, \textsc{TEN PRINCIPLES}, supra note 3, at 2 ("Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.").

277. See Complaint, supra note 4, at Exhibit D.