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ELIGIBILITY FOR COURT-APPOINTED COUNSEL IN FEDERAL CASES: A REVIEW OF LEGISLATION AND CASE LAW

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ABSTRACT

The Sixth Amendment right to counsel has been secured in theory for all criminal defendants facing loss of liberty, including those that cannot afford to pay for an attorney. However, no set of practical standards exists that indicates who is eligible for court-appointed counsel. In this vacuum, the country's federal and state legislatures and courts have developed their own distinct methods for determining eligibility. This article examines statutory and case law to determine how eligibility decisions are made for criminal defendants in federal cases. Findings suggest that neither federal statutes nor case law provides specific criteria for such decision-making, leaving broad discretion to federal magistrates and trial judges presenting risks for unequal treatment and discrimination to the detriment of defendants' rights.

I. INTRODUCTION

The Sixth Amendment's right to counsel has been a part of American constitutional law since 1791;[1] however, that right was not originally interpreted to mean that those who could not afford counsel would have it appointed for them and paid for by the

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[1] *See* U.S. CONST. amend. VI; *see also* Gideon v. Wainwright, 372 U.S. 335, 343 (1963) ("[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty.").

government.[2] In fact, the practical implications of the right to counsel for indigent criminal defendants did not begin to emerge until the Supreme Court's landmark decision in *Powell v. Alabama*,[3] which secured the Sixth Amendment right for defendants in state or federal proceedings accused of capital crimes.[4] The right to counsel, however, did not fully evolve until forty years later when the Court decided *Argersinger v. Hamlin*,[5] which secured the right for all criminal defendants facing potential loss of liberty by incarceration.[6]

The U.S. Supreme Court, however, has never provided practical guidance regarding which defendants are eligible for such protection at no cost to them.[7] With the right firmly established for both state and federal criminal defendants,[8] the work of fleshing out the details regarding how, when, and for whom the right should be afforded has been left to the federal and state legislatures and lower courts.[9] As a result, fifty-one separate public defender systems at the federal and state level have developed with little or no centralized guidance.[10]

A review of the extant literature regarding the right to counsel suggests that some jurisdictions have had more success than others

[2] *See* Betts v. Brady, 316 U.S. 455, 471 (1942) ("[T]he appointment of counsel [to indigent criminal defendants] is not a fundamental right, essential to a fair trial."); JEROLD H. ISRAEL ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION: LEADING SUPREME COURT CASES AND INTRODUCTORY TEXT 365–70 (2017) ("[The Betts] Court formulated a 'prejudice' or 'special circumstances' rule: [to get court-appointed counsel,] an indigent defendant in a non-capital case had to show specifically that he had been 'prejudiced' by the absence of a lawyer or that 'special circumstances' (e.g., the defendant's lack of education or intelligence or the gravity and complexity of the offense charged) rendered criminal proceedings . . . 'fundamentally unfair.'").

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

[4] *Id.* at 73.

[5] Argersinger v. Hamlin, 407 U.S. 25, 25 (1972).

[6] *Id.* at 40.

[7] *See* JOHN P. GROSS, NAT'L ASS'N OF CRIMINAL DEF. LAW, *GIDEON* AT 50: A THREE-PART EXAMINATION OF INDIGENT DEFENSE IN AMERICA: PART 2—REDEFINING INDIGENCE: FINANCIAL ELIGIBILITY GUIDELINES FOR ASSIGNED COUNSEL 9 (2014), http://www.nacdl.org/gideonat50/ ("The Supreme Court has devoted scant attention to the issue of who is 'indigent.' . . . No guidelines were proposed [by the Court in *Gideon*] as to how a trial court would make the determination that a defendant was unable to afford counsel.").

[8] *See* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

[9] *See id.* at 343–44; *see, e.g.*, COMM'N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 4–5, n.5 (2006) [hereinafter FINAL REPORT TO THE NYS CHIEF JUDGE].

[10] *See, e.g.*, AM. BAR ASS'N, *GIDEON'S* BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 24 (2004) [hereinafter *GIDEON'S* BROKEN PROMISE] (discussing many states' failures to follow the national standards that are recommended, as well as failures to follow Supreme Court decisions).

in implementing and maintaining these systems.[11] Unfortunately, the literature indicates that the nation's indigent defense systems are in a state of crisis,[12] and causes for the crisis are largely attributed to burgeoning caseloads, insufficient training and standards for court-appointed attorneys, and a lack of adequate funding to properly address these and other issues.[13] State public defender systems have been the target of most of the criticism,[14] while there is a relative dearth of research or commentary related to the federal system.[15] The commentary that does exist on the federal system is less conclusive than that regarding state systems.[16] One author cited similar problems in the federal system

[11] *See, e.g.*, FINAL REPORT TO THE NYS CHIEF JUDGE, *supra* note 9, at 15 (reporting on serious problems with the New York State indigent defense system and proposing several recommendations to address the problems identified by the Commission); Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 240–41, 312 (2010) (examining funding variations and the impact of those variations on public defender systems in five Arizona counties and concluding, in part, that nonmetropolitan areas face a larger risk of inadequate counsel as compared to metropolitan areas); Jessa DeSimone, Comment, *Bucking Conventional Wisdom: The Montana Public Defender Act*, 96 J. CRIM. L. & CRIMINOLOGY 1479, 1480, 1490, 1491, 1493, 1499 (2006) (reporting on the successful transformation of the Montana public defender system and also citing cases that highlight problems with indigent defense systems in Louisiana, Arizona, and Oklahoma); Justine Finney Guyer, Note, *Saving Missouri's Public Defender System: A Call for Adequate Legislative Funding*, 74 MO. L. REV. 335, 341–42 (2009) (discussing the shortcomings of Missouri's public defense delivery system).

[12] *See, e.g.*, *GIDEON'S* BROKEN PROMISE, *supra* note 10, at 38 ("Forty years after *Gideon v. Wainwright*, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction."); NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, FEDERAL INDIGENT DEFENSE 2015: THE INDEPENDENCE IMPERATIVE 5 (2015), http://www.nacdl.org/indigentdefense/federalcrisis/.

[13] *See* NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 50 (2009), http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf; *see also* Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor when Life and Liberty are at Stake*, 1997 ANN. SURV. AM. L. 783, 815–16, 818; Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150, 2152–53 (2013); Adam M. Gershowitz, *The Invisible Pillar of* Gideon, 80 IND. L.J. 571, 578 (2005); Rodney Uphoff, *Broke and Broken: Can We Fix our State Indigent Defense System?*, 75 MO. L. REV. 667, 667–68 (2010); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 337 (1995); Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1731–32, 1734 (2005) [hereinafter Note, *Effectively Ineffective*].

[14] *See, e.g.*, Bright, *supra* note 13, at 816, 818 (illustrating how burdened, and thus, dysfunctional, state public defender systems can be); Gershowitz, *supra* note 13, at 578.

[15] *See, e.g.*, John J. Cleary, *Federal Defender Services: Serving the System or the Client?*, 58 L. & CONTEMP. PROBS. 65, 67, 72, 77 (1995) (citing similar problems in the federal system that plague state systems); *but see* Inga L. Parsons, *"Making it a Federal Case": A Model for Indigent Representation*, 1997 ANN. SURV. AM. L. 837, 866 (arguing that the federal system exemplifies a model, or, best practice, approach).

[16] *See, e.g.*, Parsons, *supra* note 15, at 866; *see also* Susan L. Wynne & Michael S. Vaughn, *Eligibility for Court Appointed-Counsel in State Criminal Cases: An Analysis of State Indigency Statutes,* 5 TENN. J. RACE, GENDER, & SOC. JUST. 166, 166 (2016).

as those plaguing the state systems.[17] However, another author and former federal prosecutor pointed out that all public defender systems are not created equal, and that distinctions between the jurisdictions are important, particularly in light of her view that the federal system operates much more effectively than those in the states.[18] Regardless of the jurisdiction under consideration, the focus of the existing literature is almost exclusively the impact of the crisis on the effectiveness of counsel provided to indigent defendants.[19] Where solutions are proffered, many are aimed at adding funding,[20] increasing performance standards for indigent defense providers,[21] and increasing performance monitoring and oversight of public defender systems generally.[22]

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[17] Cleary, *supra* note 15, at 72, 77.

[18] Parsons, *supra* note 15, at 840–41.

[19] *See GIDEON'S* BROKEN PROMISE, *supra* note 10, at 7 ("*Gideon's* promise of effective legal representation for indigent defendants is not being kept . . . [rather], current indigent defense systems often operate at substandard levels and provide woefully inadequate representation."); NAT'L RIGHT TO COUNSEL COMM., *supra* note 13, at 52, 59; Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1169–70 (2003) (arguing generally that under-funding of indigent defense systems negatively impacts the quality of representation by court-appointed attorneys to the point that the representation often falls short of ethical standards required of attorneys); Rodger Citron, Note, *(Un)*Luckey v. Miller*: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 504 (1991) ("Inadequate funding denies lawyers who represent indigent criminal defendants the time and the resources to provide competent representation."); Note, *Effectively Ineffective*, *supra* note 13, at 1751–52.

[20] *See, e.g.*, *GIDEON'S* BROKEN PROMISE, *supra* note 10, at 41 ("To fulfill the constitutional guarantee of effective assistance of counsel, state governments should provide increased funding for the delivery of indigent defense services in criminal and juvenile delinquency proceedings at a level that ensures the provision of uniform, quality legal representation."); NAT'L RIGHT TO COUNSEL COMM., *supra* note 13, at 183 ("[L]egislators should appropriate adequate funds so that quality indigent defense services can be provided."); Green, *supra* note 19, at 1199 ("Prosecutors, courts, and disciplinary agencies should strongly urge legislatures to provide the necessary funding.").

[21] *See* NAT'L RIGHT TO COUNSEL COMM., *supra* note 13, at 191 ("[The State indigent defense] Board or Commission should establish and enforce qualification and performance standards for defense attorneys in criminal and juvenile cases who represent persons unable to afford counsel."); Citron, *supra* note 19, at 501–03 ("[S]etting a limit on the number of cases handled by a public defender, by requiring a minimum number of investigators to be assigned to each public defender, and by assuring that private attorneys appointed to represent indigent defendants receive adequate compensation."); Note, *Effectively Ineffective*, *supra* note 13, at 1751–52 ("The problem of underfunding for indigent defense is vast and complex . . . . [A] more definitive role for the courts in enforcing the right to effective assistance of counsel would involve specific recommendations designed to guide the legislature in formulating standards for effectiveness and would also require court-ordered expenditures of funds to make the implementation of those standards feasible.").

[22] *See, e.g.*, *GIDEON'S* BROKEN PROMISE, *supra* note 10, at 42 ("State governments should establish oversight organizations that ensure the delivery of independent, uniform, quality indigent defense representation in all criminal and juvenile delinquency proceedings."); NAT'L RIGHT TO COUNSEL COMM., *supra* note 13, at 185, 190 ("States should establish a statewide, independent, non-partisan agency. . . . [A] statewide task force or study commission should be

Yet very little attention in the existing literature is given to the mechanisms that control the entry point into the public defender system—i.e., the criterion used for determining eligibility for court-appointed counsel.[23] Understanding how determinations of eligibility are made is important because those decisions are the ones that play the most significant role in ensuring the right to counsel for defendants who cannot afford to hire their own attorneys. Thus, the implications for establishing a balanced and standard approach to eligibility determinations are significant. In the absence of relatively objective and uniform standards, eligibility determinations are made more subjectively, increasing the risk of inequality in the appointment of counsel.[24] A lack of uniformity in determining indigency could result in similarly situated defendants being treated differently with respect to their Sixth Amendment rights.[25] Further, without the ability to obtain counsel on their own, defendants may be forced to represent themselves,[26] leading to a risk of worse outcomes,[27] including more convictions and longer sentences, than defendants represented by counsel.[28] On the other

[tasked] to gather relevant data, assess its quality as measured by recognized national standards for the delivery of such services, and make recommendations for systemic improvements.").

[23] *But see* Gershowitz, *supra* note 13, at 581–84, 586 (reviewing eligibility criteria contained within state statutes and broadly categorizing the criteria contained in the statutes by the degree of discretion afforded to the court in making eligibility determinations and concluding that states have adopted a wide range of eligibility criteria—most troubling was the lack of a "constitutional floor" or minimum threshold for presumptive determinations of eligibility for court-appointed counsel); John P. Gross, *Too Poor to Hire a Lawyer but not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of their Sixth Amendment Right to Counsel*, 70 WASH. & LEE L. REV. 1173, 1218 (2013) ("Eligibility for assigned counsel . . . based on something as arbitrary as the Federal Poverty Guidelines . . . . [is] bad public policy."); Carrie Savage Phillips, *Oklahoma's Indigency Determination Scheme: A Call for Uniformity*, 66 OKLA. L. REV. 655, 662–64 (2014).

[24] *See, e.g.*, Phillips, *supra* note 23, at 663–64 ("Although flexibility may at times uphold the spirit of *Gideon*, it does so at a cost, . . . [as] discretionary determinations encourage—perhaps even require—judges to incorporate their own unique views in rendering a decision . . . [that] naturally results in a lack of uniformity among the decisions rendered.").

[25] *See, e.g.*, *id.* at 655.

[26] *See* Ben Kempinen, *Dealing Fairly with an Unrepresented Person*, 78 WIS. L. REV. 12, 13 (2005) ("In criminal matters, notwithstanding a right to counsel grounded in the U.S. and Wisconsin constitutions, many accused persons remain unrepresented because they cannot afford to retain private counsel and do not meet prevailing indigency standards."); *see also* Gross, *supra* note 23, at 1218.

[27] *See* George C. Thomas III, *How* Gideon v. Wainwright *Became Goldilocks*, 12 OHIO ST. J. CRIM. L. 307, 308 (2015) (arguing that "worse outcomes" at an instrumental level suggests fewer acquittals, fewer dismissals, and better plea deals with shorter sentences); Phillips, *supra* note 23, at 664–65.

[28] Erwin Chemerinsky, *Lessons from* Gideon, 122 YALE L.J. 2676, 2678 (2013) ("In a criminal justice system where almost all convictions are gained by guilty pleas—ninety-seven percent in federal court and ninety-four percent in state court—the presence of defense

hand, if people capable of paying for their own counsel are found eligible for court-appointed counsel, unnecessary stresses will be added to already overloaded public defender systems.[29]

While it may be unclear how eligibility decisions for court-appointed counsel are made, it is clear that the "vast majority" of federal criminal defendants utilize court-appointed public defenders or "panel attorneys" at a substantial cost to taxpayers.[30] According to a published study analyzing federal court cases by the defendants' counsel type, over seventy-one percent of felony defendants in United States district courts were represented by court-appointed federal public defenders or panel attorneys in cases that terminated between 1996 and 2011.[31] According to the data compiled during the same study, the number of defendants represented by court-appointed attorneys increased by over 134 percent during that time; for cases terminated in 1996, 30,641 defendants were represented by court-appointed attorneys, and by 2011 the number had increased to 71,912.[32] Government expenditures for federal defender services for the same time

attorneys surely often makes an enormous difference in the nature of the plea deal and the length of the sentence."); Jona Goldschmidt & Don Stemen, *Patterns and Trends in Federal* pro se *Defense, 1996-2011: An Exploratory Study*, 8 FED. CTS. L. REV. 81, 107 (2015) (concluding that while *pro se* defendants in federal criminal cases were more likely to have their cases dismissed than those with appointed or retained counsel, *pro se* defendants were less likely to be acquitted than defendants with retained counsel and were more likely to be found guilty by a jury or trial court than defendants with appointed or retained counsel).

[29] *See* Gershowitz, *supra* note 13, at 578 (discussing how overburdened public defenders already are).

[30] *Defender Services*, U.S. CTS., http://www.uscourts.gov/services-forms/defender-services (last visited Oct. 3, 2017). The United States Courts, Defender Services, website describes federal defender services as being provided by a combination of "federal defender organizations" and private "panel attorneys." *Id.* There are two types of federal defender organizations, including public defender organizations, which are federal entities made up of federal government employees, and community defender organizations, which are non-profit defense counsel organizations incorporated under state laws that receive funds from the federal judiciary for their operations. *Id.* Panel attorneys, on the other hand, are private attorneys that accept case assignments under the federal CJA (described in detail later in this article) and are reimbursed by the federal government at hourly rates specified for non-capital or capital cases. *Id.* "Federal defender organizations, together with more than 10,000 private 'panel attorneys' who accept CJA assignments annually, represent the vast majority of individuals who are prosecuted in our nation's federal courts." *Id.* "Nationwide, federal defenders received approximately [sixty] percent of CJA appointments, and the remaining [forty] percent are assigned to the CJA panel [attorneys]." *Id.*

[31] Goldschmidt & Stemen, *supra* note 28, at 91–92 fig.1.

[32] *Id.* at 93, 93 tbl.3. The authors' Table 3, entitled: "Type of Representation at Felony Case Termination, by Year," shows that in 1996, 30,641 defendants were represented by court-appointed counsel—13,149 by federal public defenders, and 17,492 by panel attorneys. *Id.* By 2011, 71,912 defendants were represented by court-appointed counsel—36,201 by federal public defenders, and 35,711 by panel attorneys. *Id.* This reflects an increase of 134 percent in defendants represented by court-appointed counsel from 1996 to 2011. *Id.*

frame—1996 to 2011—show that publicly funded representations came at great expense. In 1996, the cost was $305 million,[33] and by 2011, the cost to taxpayers had skyrocketed to $1.027 billion.[34] The fiscal year 2016 budget for federal defender services was estimated to increase to $1.083 billion.[35]

The purpose of this article is to determine how eligibility decisions to appoint publicly funded counsel are made at the federal level. To accomplish this, the provisions of the federal Criminal Justice Act of 1964 ("CJA"),[36] which formalized the federal public defender program, are examined. In addition, federal case law interpreting the CJA is identified and analyzed. Findings suggest that neither federal legislation nor case law provides specific criteria for decisions about which defendants are eligible for court-appointed defense counsel. Instead, broad discretion is left to federal magistrates and trial judges. Such discretion presents risks for unequal treatment and discriminatory decisions that threaten defendants' equal protection guarantees and Sixth Amendment rights.

II. EVOLUTION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL

Though deriving from English common law, the concept that criminal defendants have a right to have an attorney assist them in their defense against government prosecution was formally born in the United States with the addition of the Bill of Rights to the

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[33] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1998: THE JUDICIARY 49 app. (1998), https://www.gpo.gov/fdsys/pkg/BUDGET-1998-APP/pdf/BUDGET-1998-APP-1-4.pdf [hereinafter JUDICIAL BUDGET 1998]. The fiscal year ("FY") 1998 budget for Defender Services (organized within the U.S. government judicial branch), shows that actual expenditures for federal public defenders, community defender organization (grants), panel attorneys, transcripts, and general administrative expenses in FY 1996 were $305 million. *Id.*

[34] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2013: JUDICIAL BRANCH 55 app. (2013), https://www.gpo.gov/fdsys/pkg/BUDGET-2013-APP/pdf/BUDGET-2013-APP-1-4.pdf [hereinafter JUDICIAL BUDGET 2013]. The fiscal year 2013 budget for Defender Services shows that actual expenditures for CJA representations and related expenses and program administrative expenses in FY 2011 were $1.027 billion. *Id.*

[35] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2016: JUDICIAL BRANCH 49 app. (2016), https://www.gpo.gov/fdsys/pkg/BUDGET-2016-APP/pdf/BUDGET-2016-APP-1-4.pdf [hereinafter JUDICIAL BUDGET 2016]. The fiscal year 2016 budget for Defender Services shows that estimated expenditures for direct program activity and program administrative expenses as $1.083 billion. *Id.*

[36] Criminal Justice Act of 1964, 78 Stat. 552 (1964) (codified as amended at 18 U.S.C. § 3006A (2012)).

Constitution in 1791.[37] The Sixth Amendment to the Constitution states, in part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."[38] The true connotation of that constitutional language did not take shape until the Supreme Court ruled that the Fourteenth Amendment extended the Sixth Amendment right to counsel to the states.[39] The Court's involvement in fleshing out the contours of the right to counsel began in 1932 with *Powell v. Alabama* followed in 1938 by *Johnson v. Zerbst*.[40] The Sixth Amendment right to counsel continued to expand through the procedural due process era of the Warren Court with *Gideon v. Wainwright* and *Argersinger v. Hamlin*.

The *Powell v. Alabama* case marked the first time that the Supreme Court dealt directly with the right to counsel, and it did so in the racially and politically charged South.[41] On appeal for violations of the Sixth Amendment, the Court reversed the convictions of eight black males convicted without assistance of counsel of raping two white girls.[42] The Court, with Justice Sutherland writing for the majority, found that "the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment."[43] While the Court limited the reach of the decision to defendants in state and federal capital cases,[44] *Powell* represented a monumental step toward procedural fairness through the Sixth Amendment right to counsel.

The next significant stop on the evolutionary map toward the maturation of the right to counsel was *Johnson v. Zerbst*. Defendant Johnson was tried and convicted without the assistance of counsel of possessing and passing counterfeit money.[45] Upon review of Johnson's habeas corpus petition, the Supreme Court concluded that the "Sixth Amendment constitutionally entitles one charged with [a] crime to the assistance of counsel, [and] compliance

[37] *See* U.S. CONST. amend. VI.

[38] *Id.*

[39] *See* Argersinger v. Hamlin, 407 U.S. 25, 27 (1972) (citing Duncan v. Louisiana, 391 U.S. 145, 159 (1968)).

[40] Johnson v. Zerbst, 304 U.S. 458 (1938).

[41] *See* Powell v. Alabama, 287 U.S. 45, 51–52 (1932).

[42] *See id.* at 50–52, 73.

[43] *Id.* at 71.

[44] *See id.* at 73.

[45] *See Zerbst*, 304 U.S. at 459–60.

with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty."[46] With its decision in this case, the Court extended the right to counsel established in *Powell* to all criminal defendants facing federal prosecution.[47]

The Court next got the chance to review the Sixth Amendment right to counsel and the incorporation of the right under the Fourteenth Amendment in *Betts v. Brady*.[48] Indicted for robbery, Betts' request for court-appointed counsel was denied by the state trial judge because the county only appointed counsel for defendants on trial for rape or murder.[49] Betts pled not guilty, represented himself, and the judge convicted him of robbery and sentenced him to eight years in prison.[50] Upon review of Betts' petition for habeas relief, the Supreme Court declined to extend the Sixth Amendment right to counsel via the Fourteenth Amendment's due process clause to non-capital state defendants.[51] In a strongly worded dissenting opinion, Justice Black noted: "Denial to the poor of the request for counsel in proceedings based on charges of serious crime has long been regarded as shocking to the 'universal sense of justice' throughout this country."[52] Further, Justice Black suggested that a judicially approved practice should "assure that no man . . . be deprived of counsel merely because of his poverty. Any other practice seems to . . . defeat the promise of our democratic society to provide equal justice under the law."[53]

Twelve years later in a case with very similar facts, Justice Black was vindicated through the Court's decision in *Gideon v. Wainwright*. Defendant Gideon was arrested and charged in a Florida state court with "br[eaking] and enter[ing] a poolroom with the intent to commit a misdemeanor"—a felony in Florida.[54] He appeared in court without an attorney and without funds to hire one, and he asked the judge to appoint one for him.[55] The trial judge, abiding by the Court's decision in *Betts*, denied the request,

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[46] *Id.* at 467.

[47] *See id.* at 463; *but see Powell*, 287 U.S. at 73 (holding a more limited view of the right to counsel).

[48] Betts v. Brady, 316 U.S. 455 (1942).

[49] *Id.* at 456–57.

[50] *Id.* at 457.

[51] *See id.* at 473.

[52] *Id.* at 476 (Black, J., dissenting).

[53] *Id.* at 477 (Black, J., dissenting).

[54] Gideon v. Wainwright, 372 U.S. 335, 336 (1963).

[55] *See id.* at 337.

citing that courts can only appoint counsel for defendants charged with capital crimes.[56] Gideon proceeded to represent himself, insisting that he was innocent, but the jury convicted him and he was sentenced to a five-year prison term.[57] Upon review of Gideon's writ of habeas corpus, a unanimous Supreme Court overruled *Betts* and reversed Gideon's conviction.[58] Justice Black authored the opinion, noting that the Court got it wrong in *Betts*, and in reversing that decision, held that the right to counsel is a fundamental right, which is essential to a fair trial.[59]

With the *Gideon* decision, the Sixth Amendment right to counsel was extended to state non-capital defendants through the Fourteenth Amendment,[60] and nine years later in *Argersinger v. Hamlin*, the Court confirmed that the right was not reserved only for felony defendants.[61] In *Argersinger*, the Court held that the right to counsel was not governed by the classification of the offense, and that any defendant who faces deprivation of liberty as the result of any criminal prosecution, whether felony or misdemeanor, has the right to assistance of counsel.[62]

Despite these landmark decisions, the Supreme Court has never addressed the issue of how eligibility of defendants for court-appointed counsel under the Sixth Amendment should be determined. Thus, that issue has been left to the legislatures and lower courts to consider.[63] This article aims to initiate an analysis of how the issue of eligibility for court-appointed counsel has been resolved, beginning with the federal public defender system. Specifically, the research examines both federal legislation and court decisions interpreting that legislation to discover how the determination of eligibility for court-appointed counsel is made at the federal level. Toward this end, in the following sections of this article, the federal CJA and its associated administrative guidelines are summarized, followed by a review and analysis of federal court decisions addressing the eligibility for court-appointed counsel.

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[56] *See id.*

[57] *See id.*

[58] *See id.* at 339, 345.

[59] *See id.* at 336, 342–44.

[60] *See id.* at 342.

[61] Argersinger v. Hamlin, 407 U.S. 25, 37–38 (1972) (quoting Stevenson v. Holzman, 458 P.2d 414, 418 (Or. 1969).

[62] *Id.*

[63] *See* GROSS, *supra* note 7, at 10 ("Following the Supreme Court's decision in *Gideon*, states began to devise systems for providing counsel to indigent defendants charged with crimes. Determining who was 'too poor to hire a lawyer' was something left to the individual states and, within the states, typically left to the discretion of the trial court.").

III. THE FEDERAL CRIMINAL JUSTICE ACT OF 1964

The first place to look for guidance regarding how eligibility for court-appointed counsel is determined at the federal level is to legislation enacted by the U.S. Congress. The relevant legislation is the CJA, which was enacted shortly following the Supreme Court's decision in *Gideon*.

A. The History, Purpose, and Administration of the Criminal Justice Act

The legislative history of the Act indicates that it was the result of several years of research and investigation conducted by a variety of players, including "Congress, the Judicial Conference of the United States, the Department of Justice, the American Bar Association . . . and [selected] legal scholars."[64] Thus, rather than the Act being in response to *Gideon*, per se, it seems better characterized as being one result of a national movement toward procedural due process and defendants' rights.[65] While the responsibility for appointing counsel for criminal defendants in federal courts has always rested with the federal judiciary, this responsibility was not formally funded or recognized outside of the judiciary until Congress passed the CJA in 1964.[66]

Broadly, the purpose of the CJA was "[t]o promote the cause of criminal justice by providing for the representation of defendants who are financially unable to obtain an adequate defense in criminal cases in the courts of the United States."[67] More specifically, the CJA served to "establish a comprehensive system for appointing and compensating lawyers" for eligible defendants.[68] From the beginning, the CJA authorized in-court and out-of-court expenses for attorneys as well as payment for investigative and expert services deemed necessary by the attorneys to wage an adequate defense.[69]

Responsibility for administering the CJA continues to rest with the federal judiciary in the Defender Services Program, which is

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[64] John S. Hastings, *The Criminal Justice Act of 1964*, 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 426, 426 (1966).

[65] *See id*. (stating that the purpose of the CJA is to provide legal representation for defendants in the criminal justice system).

[66] *See Defender Services*, *supra* note 30.

[67] *See* Hastings, *supra* note 64, at 426.

[68] *Defender Services*, *supra* note 30.

[69] *Id.*; *see also* Hastings, *supra* note 64, at 427, 428.

part of the Administrative Office of the United States Courts.[70] "The mission of the Defender Services Program is to ensure that the right to counsel guaranteed by the Sixth Amendment, the [CJA,] . . . and other congressional mandates[,] is enforced on behalf of those who cannot afford to retain counsel and other necessary defense services."[71] The Judicial Conference of the United States supervises the Director of the Administrative Office of the United States Courts, who is responsible for setting policy regarding the administration of the federal judiciary, including the establishment of guidelines for the administration of the CJA.[72]

B. Eligibility for Court-Appointed Counsel under the Criminal Justice Act

Entitled "Adequate Representation of Defendants," the CJA sets forth the administrative parameters for: requirements for district court representation plans; the types of cases for which counsel must be appointed; when counsel should be appointed; how appointed counsel will be paid; how other (e.g., expert, investigative) services should be obtained and compensated; the types of defender organizations that districts can create or compensate under the Act; and other minor administrative functions.[73] The discussion here is limited to summarizing the most relevant components of the CJA to the determination of eligibility for court-appointed counsel.

The language found within the CJA itself is not very helpful in discerning exactly how determinations of eligibility for court-appointed counsel are made. The CJA does, however, provide parameters within which the federal defender system is intended to operate.[74] Specifically, the CJA sets forth the mandate that every federal judicial district establish a plan to provide and compensate attorneys for eligible defendants who come before the court facing the potential for the loss of liberty and who are "financially unable" to obtain their own counsel.[75] The CJA also makes clear that it is

[70] *See Defender Services*, *supra* note 30.

[71] *Mission—Defender Services*, U.S. CTS., http://www.uscourts.gov/services-forms/defender-services/mission-defender-services (last visited Oct. 7, 2016).

[72] *See Defender Services*, *supra* note 30.

[73] 18 U.S.C. § 3006A (2012).

[74] *See id.*

[75] *Id.* § 3006A(a) ("Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section.").

the court's responsibility to conduct an "appropriate inquiry" into the financial ability of the defendant to obtain counsel or to obtain other services necessary for an adequate defense.[76] In addition, the CJA stipulates that if the court finds, after such an inquiry, that the defendant is unable to obtain his own counsel, the court must appoint and compensate one on his behalf.[77]

Finally, the CJA acknowledges that a defendant's financial condition may change over the course of the judicial proceedings and that courts are expected to recognize that and be flexible in the application of the CJA.[78] If a defendant, who at the outset of the proceedings is financially unable to obtain counsel, somehow becomes able to do so either completely or in part, the court can make arrangements to withdraw the appointment of counsel or to require the defendant to make partial payments for his representation.[79] Alternatively, if a defendant retains his own counsel, and later becomes unable to compensate him, the court is obligated to appoint counsel for him.[80]

C. Guidelines for the Administration of the Criminal Justice Act

While the text of the CJA itself provides only broad parameters for determining eligibility for the appointment of counsel, the CJA Guidelines ("Guidelines"), issued by the Judicial Conference of the United States, provide more detailed guidance.[81] Specifically, the Guidelines describe the timing, roles, and responsibilities for obtaining and verifying the facts used by the court to ascertain eligibility for court-appointed counsel.[82] With respect to timing, the Guidelines state that "[a] person financially eligible for representation should be provided with counsel as soon as feasible after being taken into custody, when first appearing before the court or U.S. magistrate judge, when formally charged, or when otherwise

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[76] *See id.* § 3006A(b).

[77] *See id.* ("The United States magistrate judge or the court shall advise the person that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel.").

[78] *See id.* § 3006A(c).

[79] *See id.*

[80] *See id.*

[81] JUDICIAL CONFERENCE OF THE U.S., 7 GUIDE TO JUDICIARY POLICY, DEFENDER SERVICES: PART A: GUIDELINES FOR ADMINISTERING THE CJA AND RELATED STATUTES, http://www.uscourts.gov/file/guide-judiciary-policy-parta (last updated Jan. 28, 2016) [hereinafter CJA GUIDELINES].

[82] *See id.* §§ 210.40.10, 210.40.20.

entitled to counsel under the CJA, whichever occurs earliest."[83]

The Guidelines also stipulate that unless it causes an "undue delay," the gathering of facts to determine a "person's eligibility for appointment of counsel should be completed prior to the person's first appearance in court."[84] The responsibility for this fact-based determination clearly lies with the judge presiding over the proceedings: "The determination of eligibility for representation under the CJA is a judicial function to be performed by the court or U.S. magistrate judge after making appropriate inquiries concerning the person's financial condition."[85]

Judges have the responsibility for making the eligibility determination; however, "[t]he person seeking appointment of counsel has the responsibility of providing the court with sufficient and accurate information upon which" the determination can be based.[86] According to the Guidelines, this information should be provided by the defendant on "CJA Form 23," which is a financial affidavit that is to be completed and executed by the defendant in the presence of a judicial employee.[87] The responsibility for verifying those facts can be delegated by the judge to an officer or employee of the court.[88] The Guidelines also make clear that no employee or officer of the U.S. Attorneys Office may participate in the completion or review of the information provided by the defendant.[89] Though the prosecution and other interested witnesses may provide information to the court regarding the defendant's eligibility for court-appointed counsel, "the judicial inquiry into financial eligibility must not be utilized as a forum to discover whether the person has assets [for] . . . purposes not related to the appointment of counsel."[90]

The Guidelines broadly describe the factors that judges should consider when making the determination regarding defendants' eligibility for court-appointed counsel. Specifically, "[a] person is 'financially unable to obtain counsel' within the meaning of [the CJA] if the person's net financial resources and income are insufficient to obtain qualified counsel."[91] Furthermore, in

[83] *Id.* § 210.40.10.
[84] *Id.* § 210.40.20(b).
[85] *Id.* § 210.40.20(a).
[86] *Id.* § 210.40.20(f).
[87] *See id.* § 210.40.20(d).
[88] *Id.* § 210.40.20(c).
[89] *See id.* § 210.40.20(e).
[90] *Id.* § 210.40.20(g).
[91] *Id.* § 210.40.30(a).

assessing the defendant's financial condition, the judge should consider the cost of the "necessities of life" for the defendant and his dependents as well as the effects of the cost of his bail or deposit on bond on his overall financial condition.[92] Upon conducting the inquiry, if there are doubts regarding the defendant's eligibility, the Guidelines direct that they "should be resolved in the person's favor" and "erroneous determinations of eligibility may be corrected at a later time."[93] According to the Guidelines, "the court or U.S. magistrate judge should inform the person of the penalties for making a false statement, and of the obligation to inform the court and the appointed attorney of any change in financial status."[94]

The Guideline*s* also set forth expectations for defendants that can afford a portion, but not all, of the costs of counsel.[95] In such a case, the court, according to the Guidelines, should find the defendant eligible for a court-appointed attorney, but should direct the person to pay "available excess funds to the clerk of the court at the time of such appointment or from time to time thereafter."[96] Finally, the Guidelines state that "[t]he initial determination of eligibility should be made without regard to the financial ability of the person's family unless the family indicates willingness and financial ability to retain counsel promptly."[97]

In sum, federal legislation in the form of the CJA established the broad structure of a system, whereby financially eligible defendants could be assigned court-appointed counsel and provided the means by which the counsel would be compensated. The CJA itself, however, provides no definition of, or criteria for, determining which defendants are financially eligible for appointments. Nor does the CJA set forth the process that should be used to assess eligibility. Overall, as one observer noted: "The Act is broad and general in its provisions and leaves its basic implementation to the courts."[98] The Guideline*s* that accompany the CJA, however, better elucidate the roles, responsibilities, and process for determining eligibility for court-appointed counsel in federal criminal proceedings. Despite this, the responsibility for filling in the contours of the Sixth Amendment right to counsel and the eligibility for court-appointed

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92 *Id.* § 210.40.30(a)(1)–(2).
93 *Id.* § 210.40.30(b).
94 *Id.* § 210.40.30(c).
95 *See id.* § 210.40.40.
96 *Id.*
97 *Id.* § 210.40.50.
98 Hastings, *supra* note 64, at 427.

counsel under the federal CJA has been within the purview of the judicial branch. This is the focus of the next section of this article.

IV. FEDERAL CASE LAW AND APPOINTMENT OF COUNSEL

As expanded upon in the below sub-sections, issues addressed by the federal courts related to the determination of eligibility for court-appointed counsel can be grouped into six categories: (1) broad standards for eligibility; (2) the defendant's burden of proof; (3) the court's duty to inquire about the financial condition of the defendant; (4) decisions of eligibility are based on judicial discretion; (5) court findings of partial eligibility or requirements to repay government for defense-related costs; and (6) the potential conflict of defendants' Fifth and Sixth Amendment rights during the determination process.

A. The Broad Standards for Eligibility for Court-Appointed Counsel

Recognizing that the purpose of the CJA was "to redress the imbalance in the criminal process when the resources of the United States Government are pitted against an indigent defendant,"[99] federal courts have adopted a broad standard of eligibility for court-appointed counsel. Specifically, courts have held that the Act's threshold inquiry is whether defendant is "financially unable to obtain adequate representation . . . [which] means something less than indigency or destitution."[100]

Despite an apparent consensus that indigency is not the proper standard for decisions involving the appointment of counsel in federal cases, a review of court decisions reveals that, at times, terms such as "indigency" and "indigent" continue to be used as a type of short hand for a defendant's inability to obtain counsel.[101] This has caused confusion for some defendants, as depicted by *United States v. Foster*, where the judge mistakenly used the term "indigency" instead of "financial ability" when inquiring about the

[99] United States v. Durant, 545 F.2d 823, 827 (2d Cir. 1976).

[100] United States v. Jenkins, 130 F. Supp. 3d 700, 704 (N.D.N.Y. 2015) (quoting United States v. Harris, 707 F.2d 653, 660 (2d Cir. 1983)). *See also, e.g.*, United States v. Brockman, 183 F.3d 891, 897 (8th Cir. 1999); United States v. Osuna, 141 F.3d 1412, 1414 (10th Cir. 1998); United States v. Nichols, 841 F.2d 1485, 1506 (10th Cir. 1988); United States v. De Hernandez, 745 F.2d 1305, 1310 (10th Cir. 1984); United States v. Cameron, 697 F. Supp. 2d 126, 128 (D. Me. 2010).

[101] *See, e.g.*, United States v. Foster, 867 F.2d 838, 839 (5th Cir. 1989).

defendant's financial status.[102] Foster claimed that he was not indigent, so the court did not appoint counsel for him.[103] On appeal, Foster claimed a violation of his Sixth Amendment right to counsel based upon the argument that the court should have looked further into his financial condition and that he was confused by the judge's use of the term "indigency."[104] The U.S. Court of Appeals for the Fifth Circuit, however, declined to reverse the conviction, finding that Foster did not appear to be confused by the judge's interchangeable use of terms.[105]

Some confusion of terms notwithstanding, courts have acknowledged that to qualify for appointment of counsel under the CJA, defendants should be evaluated based on broad financial standards. In *Hardy v. United States*,[106] Supreme Court Justice Goldberg noted: "Indigence 'must be conceived as a relative concept'" because "[a]n impoverished accused is not necessarily one totally devoid of means."[107] Also, in *Barry v. Brower*,[108] the U.S. Court of Appeals for the Third Circuit agreed that defendants' needs should be considered broadly, finding that "[i]ndigence is not equivalent to total destitution."[109] Rather, "[a]n accused with assets may be indigent."[110] Several other courts have similarly held that destitution of defendants is not required for eligibility for court-appointed counsel; rather, the *inability to pay for adequate counsel* is the paramount consideration.[111]

Where narrower standards have been applied and defendants have been denied the appointment of counsel by state courts or lower federal courts, appellate courts have judged those standards to be unconstitutional under the Sixth Amendment. In *United States v. De Hernandez*, the trial court granted the prosecution's

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[102] *See id.*

[103] *See id.*

[104] *See id.*

[105] *See id.* at 839–41.

[106] Hardy v. United States, 375 U.S. 277 (1964).

[107] *Id.* at 289 n.7 (Goldberg, J., concurring); *see also Cameron*, 697 F. Supp. 2d at 128 ("In the context of the right to appointed counsel, 'financial inability' is a 'relative concept.'" (quoting *Hardy*, 375 U.S. at 289 n.7 (Goldberg, J., concurring))); United States v. Knott, 142 F. Supp. 2d 469, 469 (S.D.N.Y. 2001) ("To qualify for the appointment of counsel, one need not be totally without means. In this context, indigence is a 'relative concept.'" (quoting *Hardy*, 375 U.S. at 289 n.7 (Goldberg, J., concurring))).

[108] Barry v. Brower, 864 F.2d 294 (3d Cir. 1988).

[109] *Id.* at 299.

[110] *Id.*

[111] *See, e.g.*, United States v. Anderson, 400 F. Supp. 2d 32, 34–35 (D.C. Cir. 2005); United States v. Quinlan, 223 F. Supp. 2d 816, 817 (E.D. Mich. 2002); United States v. Robinson, 718 F. Supp. 1582, 1583 (M.D. Ga. 1989).

motion to terminate the defendant's appointment of counsel on the grounds that he was not "indigent."[112] However, the U.S. Court of Appeals for the Tenth Circuit found a Sixth Amendment violation and reversed defendant's conviction for transporting illegal aliens, noting, in part, that "18 U.S.C. § 3006A(b) looks not to the indigency of the accused but whether he is 'financially unable to obtain counsel.' This standard was not applied by the magistrate nor at trial as it should have been."[113]

In habeas corpus proceedings, federal courts have also struck down state statutes or standards that are more restrictive than what the CJA and the Sixth Amendment allow. For example, in *Anaya v. Baker*,[114] the Tenth Circuit considered a habeas corpus petition where a New Mexico state trial court denied appointment of counsel at an arraignment because defendant Anaya was not a "pauper," defined as "a man with no property or means or money or any way to get any."[115] The federal appellate court concluded that the standard used by the state court's limited determination of eligibility "under the standard of pauperism does not conform to [the] constitutional mandate."[116] Similarly, in *Perry v. Chief of Police*,[117] the federal district court struck down the "able-bodied and educated" test used by the Arkansas Supreme Court when denying a habeas petitioner the right to pursue his appeal with appointed counsel.[118] The court noted that the correct standard for granting or denying counsel in a criminal case "is the defendant's present ability to pay" for counsel, instead of whether the defendant is able-bodied or educated.[119]

In sum, courts have adopted a broad standard for assessing defendants' eligibility for court-appointed counsel under the CJA, and the threshold inquiry is whether the defendant is "financially unable to obtain adequate representation," which means something less than destitution. Further, the courts agree that the concept of indigence must be treated as a "relative concept," so an accused with assets may be eligible for counsel because an accused that is financial unable to afford adequate counsel is not necessarily one totally without means. Where narrower standards have been

[112] *See* United States v. De Hernandez, 745 F.2d 1305, 1310 (10th Cir. 1984).
[113] *Id.* (setting aside the judgment and remanding the case to the trial court).
[114] Anaya v. Baker, 427 F.2d 73 (10th Cir. 1970).
[115] *Id.* at 73–74.
[116] *Id.* at 75.
[117] Perry v. Chief of Police, 660 F. Supp. 1546 (E.D. Ark. 1987).
[118] *See id.* at 1552–53.
[119] *Id.* at 1552.

applied, either by trial courts or by state statutes, and defendants have been denied the appointment of counsel, appellate courts have judged those standards to be unconstitutional under the Sixth Amendment.

B. The Defendant Bears the Burden of Proving Eligibility for Court-Appointed Counsel

While the standard for eligibility for court-appointed counsel in federal criminal cases is relatively broad, courts have recognized that reasonable limits on eligibility must be imposed to prevent abuse of the privilege.[120] The process used by courts to set these limits and determine eligibility is usually an adversarial one in which the defendant has the burden of proving his financial inability to obtain counsel.[121] Courts have held that a defendant's standard of proof was by a preponderance of the evidence.[122]

Normally, defendants seeking court-appointed counsel in federal cases complete and file a financial affidavit (i.e., the CJA Form 23), or similar sworn statement, which requests detailed financial information, and in some cases supporting documents or testimony from defendants to aid the court in making an eligibility determination.[123] The failure of defendants to provide the court with relevant, sufficient financial information has resulted in denials of appointed counsel. For example, in *United States v. Kaufman*,[124] the defendant, convicted on various fraud-related charges, refused to file the financial form to establish that he was unable to obtain his own counsel and was denied court-appointed counsel.[125] Upon appeal for a Sixth Amendment right to counsel violation, the U.S. Court of Appeals for the Fourth Circuit held that because he "ha[d] not shown either by testimony or by way of an affidavit" that he could not afford counsel, the defendant was not entitled to court-appointed representation in the district court or on appeal.[126]

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120 *See, e.g.*, United States v. Harris, 707 F.2d 653, 659–60, 661 (2d Cir. 1983).

121 *See, e.g.*, *id.* at 661.

122 *See, e.g.*, *id.* ("If a defendant fails to come forward with additional evidence instead of relying on a terse form affidavit, and fails to prove by a preponderance of the evidence that he is financially unable to afford counsel, appointed counsel may be terminated."); *see also* Buelow v. Dickey, 622 F. Supp. 761, 766 (E.D. Wis. 1985) (rejecting the defendant's assertion that he should not have to prove his own indigency).

123 *See* CJA GUIDELINES, *supra* note 81, § 210.40.20(d).

124 United States v. Kaufman, 452 F.2d 1202 (4th Cir. 1971).

125 *See id.*

126 *Id.*

Similarly, in *United States v. Ellsworth*,[127] the defendant, on trial for tax evasion, failed to submit all of the required information requested on the affidavit form.[128] The court refused to appoint counsel for him, so he represented himself and was convicted.[129] On appeal, the U.S. Court of Appeals for the Ninth Circuit noted that "Form [23 of the] CJA was developed as a useful tool for appropriate inquiry into one's ability to obtain legal assistance," and where defendant "refused to comply with the court's request to complete its Financial Affidavit form . . . as proof of indigency . . . [he] was not impermissibly denied counsel."[130] In a case of similar relevant facts, the U.S. Court of Appeals for the Sixth Circuit held that the district court properly refused to appoint counsel for defendant on tax evasion charges until defendant demonstrated his inability to obtain counsel by supplying requested information on the financial affidavit.[131]

Though the CJA Form 23 is, as the *Ellsworth* court noted, "a useful tool,"[132] more recently, courts have opined that the completion and submission of that form is not required. In fact, courts have concluded that requiring a defendant to complete any particular form is an abuse of discretion,[133] and as such, is improper.[134] However, if no CJA Form 23 or affidavit is filed, some form of verifiable personal attestation by the defendant must occur. According to *United States v. Kodzis*,[135] "There is . . . no particular format required for the submission of financial information" by a defendant seeking appointment of free counsel; rather, "the method of proof of a defendant's financial inability to obtain counsel 'necessarily varies with the circumstances presented.'"[136] However, the court concluded that without some type of a personal statement

[127] United States v. Ellsworth, 547 F.2d 1096 (9th Cir. 1976).

[128] *See id.* at 1097.

[129] *See id.* at 1098–99.

[130] *Id.* at 1097.

[131] *See* United States v. Krzyske, 836 F.2d 1013, 1015, 1018 (6th Cir. 1988).

[132] *Ellsworth*, 547 F.2d at 1097; *see, e.g.*, United States v. Moore, 671 F.2d 139, 141 (5th Cir. 1982).

[133] *Moore*, 671 F.2d at 141 ("CJA Form 23 is not a required statutory form. [Rather, i]t is an administrative tool used to assist the court in appointing counsel.").

[134] *See id.*; *see also* United States v. Auen, 846 F.2d 872, 879 (2d Cir. 1988) ("[C]onditioning the assignment of court-appointed attorneys on the execution of financial affidavits has been found to be improper.").

[135] United States v. Kodzis, 255 F. Supp. 2d 1140 (S.D. Cal. 2003).

[136] *Id.* at 1143; *see also* United States v. Barcelon, 833 F.2d 894, 897 (10th Cir. 1987) ("'Appropriate inquiry' [into a defendant's financial ability to obtain counsel] necessarily varies with the circumstances presented, and no one method or combination of methods is required.").

from the defendant, such as CJA Form 23 or a sworn affidavit, it was not possible to conclusively determine that the defendant could not afford to retain counsel.[137]

Even when defendants complete and submit financial information via a sworn affidavit, which demonstrates eligibility on its face, courts may deny the appointment of counsel when that information is insufficient or inconclusive and when supportive information cannot be obtained. In *United States v. Bauer*,[138] for example, the U.S. Court of Appeals for the Seventh Circuit held that, where the defendant refused to authorize the court to review his financial records to verify information provided by him on an affidavit, the district court's decision to not grant court-appointed counsel was appropriate.[139]

Courts have concluded that "due consideration" must be given "to the public policy implications" related to court-appointed counsel, specifically, that funds used to pay for such appointments are "necessarily [a] limited resource."[140] Therefore, in *United States v. Jenkins*, when a defendant not only refused to complete the CJA Form 23 or a sworn affidavit, but also refused to provide relevant information regarding the nature of his retirement accounts from which the court could assess his financial ability or inability to obtain counsel, the court ruled that he was not financially eligible for court-appointed counsel under the CJA.[141]

Upon a request from a defendant for court-appointed counsel, the court may not only seek written and documentary information but also testimony from the defendant to support the claim of financial inability.[142] The failure of a defendant to satisfactorily answer the court's questions regarding his financial situation is likely to result in the denial of the counsel request. For instance, in *United States v. Binder*, after representing himself at trial when the court refused to appoint counsel for him, the defendant was convicted of various racketeering and fraud charges.[143] On appeal for Sixth Amendment violations, the Seventh Circuit held that since the defendant was

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[137] *See Kodzis*, 255 F. Supp. 2d at 1146.

[138] United States v. Bauer, 956 F.2d 693 (7th Cir. 1992).

[139] *See id.* at 694–95.

[140] United States v. Jenkins, 130 F. Supp. 3d 700, 707 (N.D.N.Y. 2015) (quoting United States v. Parker, 439 F.3d 81, 109 (2d Cir. 2006)).

[141] *See Jenkins*, 130 F. Supp. 3d at 705, 707.

[142] *See* United States v. Binder, 794 F.2d 1195, 1201 (7th Cir. 1986) (discussing the court's requirement that Binder testify to his financial status before being eligible to receive court-appointed counsel).

[143] *See id.* at 1196–97, 1201.

"evasive and disingenuous" in his testimony to the court regarding his financial situation, he failed to meet his burden of proof of financial inability and was not entitled to court-appointed counsel.[144] Similarly, in *United States v. Castano*,[145] the defendant charged with drug trafficking violations was denied a mid-case appointment of counsel when he refused to answer questions about his finances, particularly ones regarding the source of funds used for compensating his original privately retained counsel.[146] Also, in *United States v. Davis*,[147] the Fourth Circuit reviewed the defendant's conviction on Sixth Amendment grounds and affirmed "because he stubbornly refused to answer any meaningful questions" about his financial condition.[148] In doing so, the court held that "a defendant cannot block legitimate inquiry into his ability to afford counsel and then complain if counsel is not appointed."[149]

The information that a defendant provides to support a request for court-appointed counsel can normally be rebutted by the prosecution before, during, or even after, trial in an adversarial hearing.[150] And when the court becomes aware of information that casts doubt upon the defendant's inability to afford counsel, the defendant must take additional steps to convince the court of his eligibility.[151] In *United States v. Harris*, for example, a defendant indicted on various fraud charges was appointed counsel by the court based on financial information contained in an affidavit.[152]

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[144] *See id.* at 1202.

[145] United States v. Castano, 659 F. Supp. 577 (E.D. Tex. 1987).

[146] *See id.* at 578, 579.

[147] United States v. Davis, 958 F.2d 47 (4th Cir. 1992).

[148] *Id.* at 47, 48–49.

[149] *Id.* at 49.

[150] *See* United States v. Wilson, 597 F.3d 353, 356 (6th Cir. 2010) (discussing the eligibility hearing during jury deliberations of a six-week jury trial); *Davis*, 958 F.2d at 47 (discussing the request for court-appointed counsel post-conviction through an appeal); United States v. Sarsoun, 834 F.2d 1358, 1364 (7th Cir. 1987) ("[A] trial court may prefer an adversarial, rather than *ex parte*, hearing so that the government has an opportunity to object to the statements by the defendant." (citing United States v. Harris, 707 F.2d 653, 663 (2d Cir. 1983))); United States v. Jenkins, 130 F. Supp. 3d 700, 702 (N.D.N.Y. 2015) (conducting the appointed counsel hearing after a jury conviction but before the sentencing of the defendant); *Castano*, 659 F. Supp. at 578 (discussing the request for a court-appointed attorney prior to the commencement of trial). The cases cited here demonstrate that the inquiry into a defendant's financial ability to obtain counsel is an adversarial process. *But see Wilson*, 597 F.3d at 358 ("A thorough inquiry into the defendant's finances, *though not a full adversarial hearing*, should precede any [judicial decision to terminate or modify a court appointment]." (emphasis added) (citing United States v. Hoover, 175 F.3d 564, 569 (7th Cir. 1999))).

[151] *See* United States v. Barcelon, 833 F.2d 894, 896 (10th Cir. 1987).

[152] *Harris*, 707 F.2d at 654–55.

After arraignment and before trial, however, the prosecution presented evidence that the defendant could afford his own attorney, and absent sufficient rebuttal proof from the defendant, the trial court terminated the appointment of the federal defender under the CJA.[153] Upon appeal to the U.S. Court of Appeals for the Second Circuit, that decision was affirmed, with the court holding that:

> [W]here [the] defendant's inability to afford counsel has been put into doubt, he has the burden of coming forward with evidence to rebut the government's evidence of ability to afford counsel. If a defendant fails to come forward with additional evidence instead of relying on [a] terse form affidavit, and fails to prove by preponderance of evidence that he is financially unable to afford counsel, appointed counsel may be terminated.[154]

Other courts have addressed the government's presentation of evidence rebutting a defendant's financial inability to obtain counsel, and have similarly held that where the prosecution raises doubt about a defendant's inability to pay, it is the defendant's burden to refute that evidence and convince the court of the need for appointed counsel.[155]

In sum, a defendant has the burden of proving his or her financial inability to obtain counsel based on a preponderance of the evidence standard. While the particular form that the evidence takes varies with the circumstances at hand, defendants must provide sufficient documentary and testimonial evidence for the court to assess his or her financial situation. The defendant's evidence can be rebutted by the prosecution before, during, or even after, trial in an adversarial hearing, and where the prosecution raises doubts about a defendant's inability to pay, it is the defendant's burden to refute that evidence and convince the court of the need for appointed counsel.

C. The Court Must Conduct an "Appropriate Inquiry" into Defendant's Financial Condition

Though defendants bear the burden of submitting information demonstrating eligibility for court-appointed counsel under the

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[153] *See id.* at 661.

[154] *Id.*

[155] *See, e.g.*, United States v. Lefkowitz, 125 F.3d 608, 621 (8th Cir. 1997); United States v. Celani, 748 F.2d 363, 365 (7th Cir. 1984).

CJA, appellate courts have held that federal magistrates and trial judges have an obligation to conduct an "appropriate inquiry" into defendants' financial conditions.[156] When courts fail to conduct an adequate inquiry and deny appointment of counsel, defendants' Sixth Amendment rights are violated.[157] In fact, some courts have held that the court's duty to conduct an inquiry exists even when the defendant fails to meet his burden of proof.[158] In *United States v. Moore*, the Fifth Circuit found that the defendant who was undergoing prosecution for tax evasion and refused to fill out a financial affidavit was prejudiced at trial because the district court refused to appoint counsel without making an adequate inquiry into the need to appoint counsel.[159] Courts have a duty to conduct an inquiry regardless of the prospective outcome.[160] The failure to conduct an appropriate inquiry regarding a defendant's financial condition—particularly when the defendant appears before the court with no attorney or expresses an inability to afford an attorney—has been deemed per se prejudicial and reversible even when such an inquiry would have resulted in the denial of court-appointed counsel.[161]

Further, a defendant's demonstration of some financial capacity, such as the ability to post bail, does not necessarily justify the denial of appointed counsel without further inquiry by the court.[162] In *Cuevas v. Wilson*, a federal district court granted habeas corpus after finding that the trial court in which he was convicted failed to inquire about his financial ability to retain counsel.[163] The federal court had to make its own inquiry because the state trial court relied solely on the fact that Cuevas had posted bail to determine

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[156] *See, e.g.*, United States v. Martin-Trigona, 684 F.2d 485, 489–90 (7th Cir. 1982) (citing 18 U.S.C. § 3006A(b) (1982)).

[157] *See Martin-Trigona*, 684 F.2d at 489–90.

[158] *See, e.g.*, United States v. Moore, 671 F.2d 139, 141 (5th Cir. 1982); United States v. Anderson, 567 F.2d 839, 840 (8th Cir. 1977).

[159] *See Moore*, 671 F.2d at 140–41.

[160] *See id.* at 141.

[161] *See id.*; United States v. Johnson, 659 F.2d 415, 418–19 (4th Cir. 1981) (concluding that when the defendant persistently insisted that he could not afford counsel, the court should have conducted an inquiry into his current financial status, and reversing the conviction because, in the absence of such an inquiry, the appeals court could not conclude that defendant waived his right to counsel); *see also* United States v. Wadsworth, 830 F.2d 1500, 1503, 1505 (9th Cir. 1987) ("The failure of the magistrate to inquire whether the defendant was financially able to afford counsel was a direct violation of the explicit requirements of section 3006A(b). . . . The failure to appoint counsel for this indigent defendant compels reversal.").

[162] *See* Cuevas v. Wilson, 264 F. Supp. 65, 73 (N.D. Cal. 1966) (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[163] *See Cuevas*, 264 F. Supp. at 72, 73.

that he was not entitled to representation by a public defender.[164] Upon inquiry, the federal court found that petitioner Cuevas could not afford to hire an attorney and that when he changed his plea without the benefit of counsel to advise him, he was denied his constitutional right to counsel at a critical stage of criminal proceedings, mandating habeas relief.[165]

Further, when defendants possess some level of equity in non-cash assets, courts have a duty to inquire as to whether that equity can reasonably be converted to cash for attorney retainer and fees.[166] In *United States v. Cohen*, the defendant appealed his conviction on Sixth Amendment grounds after the trial court refused to grant his request for a court-appointed attorney.[167] The U.S. Court of Appeals for the Eighth Circuit found that the trial court's assumption that Cohen could afford an attorney because he claimed he had equity in 1,520 acres of land in an area with land values familiar to the judge did not constitute an "adequate inquiry."[168] The court stated:

> [When Cohen testified that his] assets were then 'committed' . . . the district court was under a duty to make further inquiry, by whatever means appropriate, into appellant's financial condition in order to satisfactorily determine whether his apparent assets in the form of an unspecified interest in real estate so exceeded his outstanding liabilities that he could *in fact* afford to employ an attorney.[169]

The failure of the court to do so was a violation of Cohen's right to counsel, resulting in a reversal of his conviction.[170] Other cases also demonstrate the court's duty to inquire about the nature of encumbered or illiquid assets, and when courts fail to do so, convictions can be overturned for reversible error.[171]

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[164] *See id.* at 71–72 (citing Townsend v. Sain, 372 U.S. 293 (1963)).

[165] *See Cuevas*, 264 F. Supp. at 73.

[166] *See, e.g.*, United States v. Cohen, 419 F.2d 1124, 1127 (8th Cir. 1969).

[167] *Id.* at 1125.

[168] *See id.* at 1126–27.

[169] *Id.* at 1127.

[170] *See id.*

[171] *See, e.g.*, United States v. Barcelon, 833 F.2d 894, 895, 897, 899 (10th Cir. 1987) (explaining that the trial court failed to make an "appropriate inquiry" into defendant's ability to pay attorney fees before denying his request for appointed counsel under the CJA; it was later found out that the defendant's principal asset was $20,000 owed to him from gambling, his original attorney withdrew $6,650, he was presently unemployed, and he had other obligations); United States v. Martin-Trigona, 684 F.2d 485, 490 (7th Cir. 1982) (finding that where the defendant informed the court before trial that he was not represented by

On the other hand, when the court conducts an appropriate and good-faith inquiry and determines that the defendant has sufficient assets to privately retain an attorney, that decision can withstand appeal even if it turns out to be faulty. In *Douglas v. Hendricks,*[172] the state trial court denied appointment of counsel upon an inquiry that revealed that the defendant owned a home with a potential market value of between $70,000 and $110,000, and was also due a monetary settlement in a civil case.[173] The defendant represented himself, was convicted, and petitioned for habeas relief on grounds that his right to counsel was violated.[174] Specifically, the defendant submitted evidence that contrary to the court's earlier findings, his home was worthless and his civil settlement was only $3,500.[175] Despite this, the federal court held that where the trial court conducted an appropriate inquiry, even if that inquiry turned out to be based on faulty information, there was no Sixth Amendment violation.[176]

Other cases demonstrate that the court's duty to conduct an inquiry prior to trial has practical limits. For example, acknowledging the limits to the court's ability to conduct financial inquiries prior to trial in *United States v. Anderson*, the court decided to err on the side of protecting the defendant's right to counsel.[177] The prosecution in this case attempted to present evidence showing that defendant Anderson was concealing hidden assets.[178] However, the court decided that the defendant had demonstrated his financial inability to retain adequate counsel and that further investigation into secret assets was beyond the scope and resources of the court.[179] Therefore, the court decided that it would be in the "interests of justice" to appoint counsel for Anderson under the provisions of the CJA.[180]

In sum, courts have an obligation to conduct an "appropriate inquiry" into a defendant's financial condition regardless of the prospective outcome. The failure to conduct an appropriate inquiry

counsel, that he desired to be represented by counsel, and that he was financially unable to obtain counsel because his assets were encumbered, the trial court's failure to conduct an appropriate inquiry into defendant's financial ability to retain counsel was reversible error).

[172] Douglas v. Hendricks, 236 F. Supp. 2d 412 (D.N.J. 2002).

[173] *Id.* at 429.

[174] *See id.* at 417.

[175] *Id.* at 429.

[176] *Id.* at 428–29.

[177] United States v. Anderson, 400 F. Supp. 2d 32, 35, 37 (D.D.C. 2005).

[178] *See id.* at 35.

[179] *See id.* at 35, 37.

[180] *Id.* at 37.

regarding a defendant's financial condition has been deemed *per se* prejudicial and reversible, regardless of the prospective outcome of the inquiry. The inquiry must go beyond finding that the defendant has some financial capacity; rather, courts have a duty to inquire as to whether the defendant has assets available that can be converted to cash for attorney retainer and fees. On the other hand, courts have recognized the practical limits of such inquiries, and appropriate and good-faith inquiries can generally withstand appeal.

D. Judicial Discretion Determines Eligibility for Court-Appointed Counsel

Ultimately, after a defendant has provided financial information and the court has conducted an appropriate inquiry, the decision to grant court-appointed counsel falls squarely within the sound discretion of the court.[181] Because eligibility decisions are made based on the discretion of judges with very little specific guidance, no one method or combination of methods for determining eligibility has evolved.[182] The determinations of defendants' financial eligibility for appointment of counsel under the CJA necessarily vary with the circumstances presented and, as such, is approached on a case-by-case basis. Broadly, court determinations of eligibility have focused upon the defendant's individual financial condition, with the finances of his family or other sources only considered in limited circumstances.[183]

1. Defendant's Financial Condition

As previously discussed, the CJA requires that public defenders be appointed for defendants facing loss of liberty who are "financially unable to obtain adequate representation."[184] Further, the Guidelines specify that a person is financially unable to obtain counsel if his "net financial resources and income are insufficient [to enable him] to obtain . . . counsel," when considering "the cost of . . . the necessities of life" as well as the effects of "the cost of [his] bail

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[181] *See, e.g.*, Williams v. Estelle, 681 F.2d 946, 947 (5th Cir. 1982) ("The decision of whether to grant a request to proceed *in forma pauperis* is committed to the sound discretion of the district court.").

[182] *See id.*

[183] *See* CJA GUIDELINES, *supra* note 81, § 210.40.50.

[184] 18 U.S.C. § 3006A(a) (2012).

. . . or . . . deposit . . . on bond" on his overall financial condition.[185]

Federal courts have avoided establishing criteria much more specific than what is set forth in the Guidelines, instead opting to leave consideration of a defendant's financial condition subjective and inclusive of financial obligations beyond defense costs. For instance, in *United States v. Harris*, the court noted that the consideration of a defendant's ability to afford counsel should be made "in light of [the] economic realities" that they face by balancing the impact of the cost of a criminal defense with the cost of providing for the defendant and his dependents.[186] Similarly, in *United States v. Bracewell*,[187] the court, when considering whether defendants could afford to retain private counsel, favored broad considerations such as whether "the defendant will . . . suffer extreme hardship . . . [if] deprived of his funds[;] . . . the needs of the defendant himself[;] . . . [his potential] prison term[;] . . . [and] the defendant's responsibilities to his family."[188] Another court noted that the ability of a defendant to pay for counsel "must be evaluated in light of the liquidity of the individual's finances, his personal and familial needs, or changes in his financial circumstances."[189]

Other courts have provided slightly more explicit guidance. For example, in *Bramlett v. Peterson*,[190] the court noted that a finding that a defendant is unable to retain private counsel should be made based on considerations such as:

> [W]hether the accused has a family or other dependents and how many, if the accused is presently employed or is on welfare, whether he has income while he is in custody, what amount, if any, he has in checking or savings accounts, the extent of any indebtedness, whether he is incarcerated or free on bond, and whether he has adequate assets not presently encumbered or otherwise unavailable.[191]

Thus, while courts tend to agree that determinations of eligibility for court-appointed counsel should be made based on several financial indicators, "district court[s] need not make an 'explicit finding' that the defendant 'presently has an X amount of money' to

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[185] *See* CJA GUIDELINES, *supra* note 81, § 210.40.30(a).

[186] United States v. Harris, 707 F.2d 653, 661–62 (2d Cir. 1983).

[187] United States v. Bracewell, 569 F.2d 1194 (2d Cir. 1977).

[188] *Id.* at 1199.

[189] Museitef v. United States, 131 F.3d 714, 716 (8th Cir. 1997) (first citing United States v. Simmers, 911 F. Supp. 483, 486 (D. Kan. 1995); then citing United States v. Cohen, 419 F.2d 1124, 1127 (8th Cir. 1969)).

[190] Bramlett v. Peterson, 307 F. Supp. 1311 (M.D. Fla. 1969).

[191] *Id.* at 1323.

pay for his representation" before granting or denying counsel.[192]

Cases in which appellate courts have overturned district court rulings of ineligibility for court-appointed counsel illustrate how the perspectives of individual judges play a huge role in their determinations. In *Samuel v. United States*,[193] the Fifth Circuit considered the district court's conviction without counsel of a defendant employed as a truck driver who had a weekly salary of between $85 and $90, had no property or money, and repeatedly asked for court-appointed representation.[194] In vacating the conviction and remanding for a new trial, the court held that Samuel was financially unable to obtain counsel and that counsel should have been appointed for him.[195] In *Barry v. Brower*, the Third Circuit ruled that, contrary to the district court's findings, a defendant's joint interest in a valuable equity in a family residence does not necessarily negate his eligibility for court-appointed counsel.[196]

Other decisions indicate how courts tend to consider a variety of factors other than a defendant's bare financial status when deciding to appoint counsel. In *United States v. Knott*, the federal district court acknowledged that the defendant could afford to hire an attorney.[197] However, when considering the financial resources available to defendant, along with the estimated length and complexity of trial, the court determined that any attorney that the defendant could have afforded would not have been as skilled as an attorney appointed by the court, so counsel was provided for the defendant.[198]

Some courts have even attempted to apply existing judicial criteria from other settings to determinations of eligibility for counsel. For example, in *United States v. Lexin*,[199] the court considered criteria used in bankruptcy proceedings when deciding what financial factors should be included in an eligibility assessment.[200] In doing so, the court held that a defendant's individual retirement accounts could not be considered in

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[192] United States v. Parker, 439 F.3d 81, 95 (2d Cir. 2006) (citing United States v. Harris, 707 F.2d 653, 661 (2d Cir. 1983)).

[193] Samuel v. United States, 420 F.2d 371 (5th Cir. 1969).

[194] *Id.* at 372.

[195] *See id.*

[196] *See* Barry v. Brower, 864 F.2d 294, 296 (3d Cir. 1988).

[197] *See* United States v. Knott, 142 F. Supp. 2d 468, 470 (S.D.N.Y. 2001).

[198] *See id.* at 469–71.

[199] United States v. Lexin, 434 F. Supp. 2d 836 (S.D. Cal. 2006).

[200] *See id.* at 838, 840, 841, 842, 845.

determining his or her eligibility for appointed counsel.[201] However, in later cases, courts have disagreed that such funds should not be considered, when, for example, a defendant who had retirement accounts totaling about $90,000 in value was found ineligible for court-appointed counsel.[202]

Decisions regarding eligibility for court-appointed counsel are reviewable only for clear error and abuse of judicial discretion.[203] Despite evidence that they have done so, appellate courts have indicated reluctance to overturn decisions related to the appointment of counsel.[204] According to the court in *United States v. Parker*, a review of a district court's determination of a defendant's financial eligibility for appointment of counsel under the CJA requires a three-fold determination: (1) whether "the district court conduct[ed] an 'appropriate inquiry' into the defendant's financial eligibility;" (2) the correctness of the "ultimate conclusion of financial eligibility;" and (3) whether "the district court err[ed] in its weighing of the 'interests of justice.'"[205]

In habeas proceedings in *Buelow v. Dickey*, the defendants argued that since they were unable to liquidate their assets including a six-hundred-acre farm and substantial farm equipment, the court erred in finding them financially able to retain counsel.[206] The federal district court, however, absent sufficient evidence from the defendants to rebut the presumption of correctness accorded state court findings of fact, was unwilling to overturn decisions by both the state trial and appellate courts that concluded that the

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[201] *Id.* at 845.

[202] *See* United States v. Jenkins, 130 F. Supp. 3d 700, 702, 706 (N.D.N.Y. 2015) ("Even assuming that the moneys in this account are pre-tax dollars, and that Defendant would have to pay income taxes on any withdrawn funds, the moneys are plainly available to Defendant and more than sufficient to retain counsel for this sentencing proceeding. . . . Defendant's failure to demonstrate his eligibility for appointed counsel is only further buttressed by Defendant's refusal to provide information to the Court concerning the Ameriprise accounts, instead simply claiming in a conclusory fashion that he does not want to withdraw the moneys because of unspecified fees and taxes."); *see also* United States v. Konrad, 730 F.3d 343, 345 (3d Cir. 2013) (holding that individual retirement accounts and jointly held bank accounts can be "available funds" to pay for court-appointed legal counsel under the CJA).

[203] *See* United States v. Bracewell, 569 F.2d 1194, 1200 (2d Cir. 1978); United States v. Kelly, 467 F.2d 262, 266 (7th Cir. 1972).

[204] *See*, *e.g.*, United States v. Parker, 439 F.3d 81, 92–93 (2d Cir. 2006) (setting forth a three-step process for evaluating trial courts' decisions regarding eligibility for court-appointed counsel); United States v. Harris, 707 F.2d 653, 660 (2d Cir. 1983) ("A district court decision to terminate counsel under the Act will not be lightly overturned."); *Bracewell*, 569 F.2d at 1200 ("In the absence of a serious abuse of discretion, a district judge's findings as to 'availability' of funds, if supported by an 'adequate inquiry,' will not be disturbed on appeal.").

[205] *Parker*, 439 F.3d at 92–93.

[206] *See* Buelow v. Dickey, 622 F. Supp. 761, 762, 766 (E.D. Wis. 1985).

defendants were able to afford private counsel.[207] Similarly, the Fourth Circuit in *United States v. Caudle*,[208] declined to find the district court's denial of court-appointed counsel clearly erroneous for defendants whose monthly earnings of around $1,000 were reflected on their financial affidavits and used by the district court to deny appointment of counsel.[209] In *United States v. O'Neil*,[210] a federal district court denied a request for court-appointed counsel for a defendant who had a $15,000 business investment and who traveled out of town at his own expense just days before the request.[211] The Second Circuit affirmed the district court's decision after learning of the defendant's statements that he could afford counsel, just not the counsel of his choice.[212]

Appellate courts are reluctant to overrule district court decisions even when based on less specific grounds. For example, in *United States v. Kelly*, the Seventh Circuit upheld the district court's denial of court-appointed counsel due to various misstatements by the defendant, which brought his credibility into question.[213] The court held that in view of the lack of the defendant's credibility and absent substantial evidence to support the inference that the defendant was not financially unable to obtain an attorney, the district court's decisions to refuse to appoint counsel for the defendant was not clearly erroneous.[214] The Seventh Circuit made a similar decision in *United States v. Bauer*, where the lower court found the defendant's testimony less than credible.[215] Specifically, the Seventh Circuit held that the lower court's decision, though adverse to Bauer, was not clearly erroneous because "the magistrate judge listened to Bauer but did not believe him . . . . Bauer told his story[, but] he elected to be vague and withhold access to his financial records; [one] do[es] not need a legal education to recognize the consequences of such decisions."[216]

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[207] *See id.* at 766 ("On habeas review, the factual findings arising out of state court proceedings are entitled to a presumption of correctness." (citing 28 U.S.C. § 2254(d) (2012))).

[208] United States v. Caudle, 758 F.2d 994 (4th Cir. 1985).

[209] *See id.* at 996.

[210] United States v. O'Neil, 118 F.3d 65 (2d Cir. 1997).

[211] *See id.* at 74.

[212] *See id.* at 74, 76.

[213] *See* United States v. Kelly, 467 F.2d 262, 266 (7th Cir. 1978).

[214] *See id.*

[215] *See* United States v. Bauer, 956 F.2d 693, 694 (7th Cir. 1992).

[216] *Id.* at 694–95.

2. Consideration of Assets of Family and Friends

Though the CJA itself is silent on the issue, the Guidelines state that the "initial determination of eligibility should be made without regard to the financial ability of the person's family unless the family indicates willingness and financial ability to retain counsel promptly."[217] Based on this broad guidance, courts have acknowledged that determinations of eligibility for court-appointed counsel may include consideration of the results of an inquiry into the availability of funds from other sources such as family, friends, trusts, estates, or defense funds.[218] Courts have held that a defendant should not be denied appointment of counsel, however, solely because other members of his family have assets and income. For example, in *United States v. Lexin*, the court held that the defendant's spouse's assets would not be considered in determining the defendant's eligibility for appointed counsel.[219] However, the court noted that to the extent community property assets, including salary and savings or checking accounts, were jointly held and individually disposable by either spouse without advance consent, such assets could be considered in determining one spouse's eligibility for appointed counsel.[220]

While generally the focus of the eligibility determination should be the defendant's own funds not withstanding those of his family, courts have rejected defendants' claims of inability to afford counsel when the defendant puts his own assets into his relatives' names and those assets remain at his disposal. In *United States v. Rubinson*,[221] for example, a defendant was denied his request for court-appointed counsel when the court learned that he had secreted his own wealth with that of his wife, his son, and other relatives.[222] The Second Circuit affirmed the denial of court-appointed counsel for the defendant after learning that he "lived in a large house in a wealthy community, shared a Rolls Royce and Maserati with his son, [and] had substantial interests in a number

[217] *See* CJA GUIDELINES, *supra* note 81, § 210.40.50.

[218] *See, e.g.*, United States v. Schmitz, 525 F.2d 793, 794–95 (9th Cir. 1975); United States v. Salemme, 985 F. Supp. 197, 203 (D. Mass. 1997); United States v. Robinson, 718 F. Supp. 1582, 1583 (M.D. Ga. 1989) (citing United States v. Martinez-Torres, 556 F. Supp. 1275, 1279 (S.D.N.Y. 1983)).

[219] *See* United States v. Lexin, 434 F. Supp. 2d 836, 842–43 (S.D. Cal. 2006).

[220] *See id.* at 843.

[221] United States v. Rubinson, 543 F.2d 951 (2d Cir. 1976).

[222] *See id.* at 962–64.

of corporations."[223]

The Fifth Circuit similarly affirmed the district court's denial of court-appointed counsel in *United States v. Deutsch*.[224] In this case, the appellate court found substantial evidence to support the district court's findings that two years prior to indictment, the defendant and his wife had filed a financial statement in connection with a bank loan listing a net worth of $981,089, and that since that time, the defendant had engaged in the practice of transferring his assets to both his wife and a Swiss bank account.[225] Also, in *United States v. Quinlan*, the court held that a defendant who had "purposefully divested himself of all his assets by giving them to his wife and children so as to hide his assets from his creditors and become 'judgment proof,'" was not entitled to appointment of counsel.[226] Courts have held that court-appointed counsel can also be denied when the source of certain funds paid on behalf of the defendant cannot be determined. For example, in *United States v. Robinson*, the court determined that the defendant was not eligible for appointed counsel on appeal because an unidentified person had paid $9,000 in cash to the defendant's trial counsel on his behalf.[227]

In sum, the decision to grant court-appointed counsel is at the discretion of the court, and no one method for determining eligibility has evolved. Instead, the determinations vary with the circumstances of each case, focusing broadly upon the defendant's individual financial condition without establishing specific income or asset value parameters. Assessments generally do not include consideration of family assets, except when the defendant puts his own assets into his relatives' names and those assets remain at his disposal. Decisions regarding eligibility for court-appointed counsel are reviewable only for clear error and abuse of judicial discretion, and appellate courts have been reluctant to overturn trial court decisions appointing or denying counsel.

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[223] *Id.* at 962.
[224] United States v. Deutsch, 599 F.2d 46, 48 (5th Cir. 1979).
[225] *Id.* at 49.
[226] United States v. Quinlan, 223 F. Supp. 2d 816, 818, 819 (E.D. Mich. 2002).
[227] United States v. Robinson, 718 F. Supp. 1582, 1583 (M.D. Ga. 1989).

E. Partial Eligibility, Post-Appointment Availability of Funds, Seized Funds, and False Statements

1. Partial Eligibility for Court-Appointed Counsel

Questions regarding eligibility for court-appointed counsel should be resolved in favor of defendants' rights.[228] With this in mind, the CJA contains a provision for defendants who have some financial resources to be granted partial eligibility for court-appointed counsel.[229] In such cases, upon appointment of a public defender, the court establishes what the defendant can afford to pay and issues an order for the defendant to make designated payments.[230] Therefore, the test is not only whether the defendant can afford to pay *all* of the costs for the defense and qualify for full eligibility, but whether he has *any* funds that can be contributed while still remaining partially eligible for court-appointed counsel.[231]

In *United States v. Hennessey*,[232] for example, the defendant's anticipated income was in excess of that necessary to provide he and his family with life's necessities but was insufficient to pay fully for retained counsel.[233] Based on this finding, the defendant was found eligible for appointment of counsel, provided that his available excess funds would be paid to the court clerk to reimburse the government for a portion or all of the costs ultimately paid to assigned counsel.[234]

The defendant in *United States v. Coniam*[235] was also granted partial eligibility under the CJA when the court found that he did not have sufficient cash to afford an expensive up-front retainer fee for an attorney, but he did have enough income to reimburse the government for some or all of the costs of his representation.[236] Likewise, the court in *United States v. Knott* granted partial eligibility to a defendant who could afford to hire an attorney, but given the combination of his financial resources and the estimated length and complexity of trial, could not afford an attorney as

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[228] *See, e.g.*, United States v. Harris, 707 F.2d 653, 663 (2d Cir. 1983) ("[D]oubts as to eligibility should be resolved in a defendant's favor.").

[229] *See* 18 U.S.C. § 3006A(c) (2012).

[230] *See id.* § 3006A(f).

[231] United States v. Pinckney, 491 F. Supp. 82, 84 (E.D. Mo. 1980).

[232] United States v. Hennessey, 575 F. Supp. 119 (N.D.N.Y. 1983).

[233] *See id.* at 121.

[234] *See id.*

[235] United States v. Coniam, 574 F. Supp. 615 (D. Conn. 1983).

[236] *See id.* at 618.

skilled as one appointed by the court.[237] Upon appointing the public defender, the court ordered the defendant to pay whatever he could afford toward the costs of his defense.[238]

2. Post-Appointment Availability of Funds

Courts have held that at any time during or even after the proceedings, the court can conduct an inquiry to determine whether the defendant has sufficient funds to defray some or all of the costs for his defense.[239] If the court finds that funds are available, either because the defendant's financial situation has changed or because the appointment was made in error, the court can take steps to resolve the issues.[240] As noted below, relevant court cases suggest that this resolution can take different forms—from ordering the defendant to reimburse all or a portion of the public defender costs, to filing criminal charges against the defendant when the application for counsel was made in bad faith.[241] However, the Eighth Circuit held in *Hanson v. Passer*[242] that while defendants can be ordered to reimburse the costs of their defense when funds are available, the appointment of counsel cannot be based on preconditions or prepayment because such an arrangement is contrary to the Sixth Amendment guarantee of counsel, which attaches regardless of financial capability.[243]

After the appointment of counsel, if the court finds that funds are available for reimbursing all of the costs of the defense, the defendant can be ordered to do so, and the appointment of the public defender can be terminated without violation of his right to counsel.[244] In *United States v. Allen*, the Seventh Circuit affirmed the district court's order that appointed counsel be terminated and the defendant repay the full cost of his defense.[245] In doing so, the appellate court held that the district court's order, which was based

[237] United States v. Knott, 142 F. Supp. 2d 468, 469–70 (S.D.N.Y. 2001).

[238] *See id.* at 470.

[239] *See, e.g.*, United States v. Gates, 777 F. Supp. 1294, 1294–95 (E.D. Va. 1991) (quoting 18 U.S.C. § 3006(A)(c) (2012)).

[240] *See, e.g.*, *Gates*, 777 F. Supp. at 1295 (citing 28 U.S.C. § 1918(b)).

[241] *See, e.g.*, United States v. Jenkins, 130 F. Supp. 3d 700, 702 (N.D.N.Y. 2015); *Gates*, 777 F. Supp. at 1297.

[242] Hanson v. Passer, 13 F.3d 275 (8th Cir. 1994).

[243] *Id.* at 280.

[244] *See generally* United States v. Allen, 596 F.2d 227, 232 (7th Cir. 1979) (holding that a court can terminate the legal services of the public defender and require repayment by the defendant when the defendant is found to have funds available to pay for legal services).

[245] *See id.*

on evidence obtained by the court that the defendant was earning over $25,000 a year, was not unauthorized by statute, was not violative of equal protection and due process guarantees, and did not violate defendant's right to counsel.[246] Similarly, in *Ybarra v. Wolff*,[247] it was brought to the attention of the trial court that the petitioner might have adequate funds to reimburse the government for all or part of his defense after his wife admitted that she was holding one-half of everything that she had in her possession for him.[248] Upon review of the government's motion to order reimbursement, the court held that the petitioner had adequate funds to reimburse the government for counsel appointed to him, and the petitioner was not entitled to continued representation by appointed counsel.[249]

Other courts have similarly ordered defendants to reimburse the cost for their defense where assets were identified post-trial.[250] At least one court granted a defendant's request for court-appointed counsel, while admittedly not fully resolving the matter of the defendant's financial ability, in part, to "move [the] criminal case to fruition" after years of delays.[251] However, acknowledging that the situation could change after trial, the court concluded that whether the defendant "sequestered assets or misrepresented his financial condition could become an issue at sentencing."[252]

However, before the court can order reimbursement of public defender costs, it must be sure that the funds are available for that purpose.[253] This was not the case in *United States v. Bursey*,[254] when, following the dismissal of the indictment against the defendant without notice or a hearing, the district court directed the court clerk to transmit the cash on deposit for the defendant's appearance bond to the administrative office of the court for use toward costs of the defense.[255] The Fifth Circuit held that the district court erred in doing so because funds made available for deposit on an appearance bond are not necessarily also available

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[246] *See id.*

[247] Ybarra v. Wolff, 571 F. Supp. 209 (D. Nev. 1983).

[248] *Id.* at 212.

[249] *See id.* at 212–13.

[250] *See, e.g.*, United States v. Lefkowitz, 125 F.3d 608, 621 (8th Cir. 1997); United States v. Gates, 777 F. Supp. 1294, 1295–97 (E.D. Va. 1991); United States v. Thomas, 630 F. Supp. 820, 820–22 (E.D. Mich. 1986).

[251] United States v. Cameron, 697 F. Supp. 2d 126, 130 (D. Me. 2010).

[252] *Id.*

[253] *See, e.g.*, United States v. Moore, 666 F.3d 313, 321–22 (4th Cir. 2012).

[254] United States v. Bursey, 515 F.2d 1228 (5th Cir. 1975).

[255] *Id.* at 1231.

under the CJA for counsel fees.[256] In a similar way, where payments are advanced from a third party, including the defendant's mother, solely for payment of a defendant's private counsel but never intended to be directly available for the defendant, those funds cannot be assumed to be "available" within the meaning of the statute for reimbursement of appointed counsel.[257] Even when the court finds that the defendant does have direct control of funds after appointment of counsel, courts cannot assume the funds are available under the CJA for the purpose of reimbursing public defender fees.[258] First, courts must make an inquiry into the defendant's financial condition to ensure that the funds are available for payment of counsel fees.[259]

3. Seized Funds and Discovery of Available Funds at Trial

When funds are seized by the government upon arrest, courts may allow them to be used to reimburse costs of public defenders. In *United States v. Bracewell*, however, the Second Circuit would not allow the district court to apply funds seized from the defendant upon arrest toward reimbursement until it conducted an appropriate inquiry regarding whether the funds were "available" for payment within the meaning of the statute.[260] On the other hand, in *United States v. Palmer,*[261] the Ninth Circuit held that justice required that the government assert a lien on $763, which was taken from a defendant upon arrest, to pay a portion of the cost of the defense provided by the government.[262]

Additionally, if the court discovers, based on facts presented at trial, that a defendant with a court-appointed attorney has funds to assist with the costs of his defense, it may order reimbursement of those costs.[263] For instance, the Eighth Circuit affirmed an order of reimbursement in *United States v. Wetzel*, where information at trial revealed that the defendant had received over $19,000 for the illegal sale of cattle and real estate.[264]

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[256] *Id.* at 1239.

[257] *See, e.g.*, United States v. Crosby, 602 F.2d 24, 28–29 (2d Cir. 1979).

[258] *See, e.g.*, United States v. Bracewell, 569 F.2d 1194, 1197, 1199 (2d Cir. 1977).

[259] *See, e.g.*, United States v. Seminole, 882 F.2d 441, 443 (9th Cir. 1989).

[260] *See Bracewell*, 569 F.2d at 1197–98.

[261] United States v. Palmer, 588 F.2d 732 (9th Cir. 1978).

[262] *See id.* at 733.

[263] *See generally* United States v. Wetzel, 488 F.2d 153, 157 (8th Cir. 1973) (providing an example of when a court found a defendant's financial status to warrant reimbursement of costs for defense).

[264] *See id.* at 156–57.

4. False Statements

When the decision of the court to appoint counsel for a defendant was based on information provided by the defendant in bad faith, the court can turn to legal remedies.[265] Specifically, if the court appoints a public defender to represent a defendant and later discovers that the defendant provided false information on financial affidavits or in oral testimony upon which the court relied in making its decision, the defendant may be subject to perjury charges.[266] Further, when a court discovered after trial that a defendant acted with fraudulent intent to convey property to his family members that could have been liquidated to pay for costs of his defense, the trial court ordered, and the appellate court affirmed, a judgment requiring full reimbursement for the legal services provided under the CJA.[267]

In sum, defendants that cannot afford the entire cost of defense, but that can contribute some funds, can be found partially eligible for court-appointed counsel. Any time during or even after the proceedings, the court can conduct an inquiry to determine whether the defendant has sufficient funds to defray some or all of the costs for his defense. Where funds are available, either because the defendant's financial situation has changed or because the appointment was made in error, the court can order the defendant to reimburse all or a portion of the costs. Further, when the decision to appoint counsel for a defendant was based on information provided by the defendant in bad faith, the court can seek reimbursement of costs and/or pursue perjury charges.

F. Conflicts between Defendants' Fifth and Sixth Amendment Rights

In some cases, the financial information requested by the court from criminal defendants for consideration of eligibility for court-appointed counsel may contain evidence of their crimes.[268] For this reason, in the process of applying for court-appointed counsel,

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[265] *See, e.g.*, United States v. Jenkins, 120 F. Supp. 3d 700, 702, 704–05, 708 (N.D.N.Y. 2015).

[266] *See, e.g.*, *id.*; United States v. Birrell, 470 F.2d 113, 114–15 (2d Cir. 1972); *see generally* United States v. Wright, 478 F. Supp. 1178, 1179 (S.D.N.Y. 1979) (describing how the defendant acted in bad faith because his financial statements submitted to the court were not credible).

[267] United States v. Fincher, 593 F.3d 702, 703–05, 707 (8th Cir. 2010).

[268] *See, e.g.*, United States v. Anderson, 567 F.2d 839, 840 (8th Cir. 1977).

conflicts may arise between defendants' Sixth Amendment right to counsel and Fifth Amendment protections from self-incrimination.[269] Because forcing defendants to choose between the two rights would be "constitutionally impermissible," courts have adopted ways to reconcile them.[270]

Courts have typically relied upon one of two methods to reconcile defendants' Fifth and Sixth Amendment rights. First, following the approach prescribed in *United States v. Anderson*, the court may allow the defendant to provide the required sensitive information to the trial court for an *in camera* review, after which, the information would be sealed by the court and not made available to the prosecution.[271] Further, "if the trial court [determines that] an adversar[ial] hearing [regarding the] defendant's request for appointment of counsel [is most] appropriate, the court may grant use immunity to the defendant's testimony at that hearing."[272] Perhaps predictably, the defense tends to favor *in camera*, *ex parte* proceedings, while prosecutors prefer adversarial hearings and the option of use immunity.[273] Ultimately, "[t]he selection of the most appropriate method of resolving the tension between the Fifth and Sixth Amendment rights of a defendant seeking the appointment of counsel is committed to the district court's sound discretion."[274]

In *Anderson*, the defendant refused to fill out the standard CJA Form 23 because he feared that some of the information requested might be used against him in a future tax prosecution.[275] The court refused to grant his request for court-appointed counsel; he was convicted, and on appeal he claimed that his right to counsel was violated.[276] The Eighth Circuit agreed, holding that the trial court should have given him an opportunity to disclose the required financial information to the trial court for it to review *in camera*, after which it should have been sealed and not made available for the purpose of tax prosecution.[277] In *United States v. Gravatt*, the

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[269] *See id.* at 840–41.

[270] *Id.* (citing United States v. Branker, 418 F.2d 378, 380 (2d Cir. 1969)).

[271] *Anderson*, 567 F.2d at 840.

[272] *See* United States v. Gravatt, 868 F.2d 585, 590 (3d Cir. 1989) (citing *Branker*, 418 F.2d at 380).

[273] *See, e.g.*, United States v. Salemme, 985 F. Supp. 197, 200 (D. Mass. 1997).

[274] *Id.* at 202 (citing *Gravatt*, 868 F.2d at 591); *see also Gravatt*, 868 F.2d at 591 ("Because selection of methods may involve consideration of a variety of factors best known to the district court, [the appellate court] will commit the choice to the sound discretion of that court.").

[275] *Anderson*, 567 F.2d at 840.

[276] *Id.*

[277] *Id.* at 840–41.

Third Circuit agreed that the risks of self-incrimination are sometimes significant.[278] Thus, the court held that trial courts cannot adopt an unconditional requirement that defendants complete the CJA Form 23 in order for applications for court-appointed counsel to be considered.[279]

However, not all courts have adopted the formal safeguards noted above, and even where they exist, not all defendants take advantage of them. In fact, in *United States v. Branker*, evidence supporting the defendant's request for court-appointed counsel was used in his prosecution.[280] The Second Circuit held that although the government should not have used the testimony for its direct case, under the circumstances it did not believe that the good-faith use of the evidence by the prosecution was an error requiring the reversal of defendant's conviction.[281] In *United States v. Ellsworth*, the Ninth Circuit held that the defendant—who was given written assurance by the court that information disclosed on the financial affidavit form could not be used for further tax prosecution, but refused to provide the information relative to employment and other income anyway—was not entitled to assistance of court-appointed counsel.[282] In *United States v. Sarsoun*,[283] the Seventh Circuit affirmed the trial court's denial of court-appointed counsel for a defendant who failed to execute a financial affidavit after being assured that it would not be used to incriminate him in a tax evasion prosecution.[284] In doing so, the Seventh Circuit recognized that while "trial judges [can] choose to offer defendants who fear self-incrimination additional safeguards," where an adversarial hearing is preferred, courts "are not required to conduct *ex parte*, *in camera* hearings to determine whether a defendant is eligible for appointed counsel."[285]

Despite the fact that courts are not required to do so, some continue to hold *ex parte* hearings out of an abundance of caution for defendants' rights. In *United States v. Davis*, for example, the Fourth Circuit "note[d] that the district court avoided any serious

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[278] *Gravatt*, 868 F.2d at 589.

[279] *Id.*

[280] *See* United States v. Branker, 418 F.2d 378, 379 (2d Cir. 1969).

[281] *Id.* at 380, 381 (citing United States v. Indiviglio, 352 F.2d 276, 279 (2d Cir. 1965)).

[282] United States v. Ellsworth, 547 F.2d 1096, 1097, 1098 (9th Cir. 1976).

[283] United States v. Sarsoun, 834 F.2d 1358 (7th Cir. 1987).

[284] *Id.* at 1359, 1360, 1364.

[285] *Id.* at 1363–64 (first citing United States v. Harris, 707 F.2d 653, 662, 663 (2d Cir. 1983); then citing United States v. Kaufman, 452 F.2d 1202, 1202 (4th Cir. 1971); then citing *Ellsworth*, 547 F.2d at 1098).

Fifth Amendment challenge by conducting an *ex parte* examination" of the defendant's financial information submitted as a part of a request for court-appointed counsel.[286] The appellate court affirmed the trial court's denial of counsel in part because the judge conducted "a careful and patient *in camera* hearing," which "she was not compelled to do . . . [and] the evidence failed to establish that Davis lacked sufficient means to retain counsel."[287]

Recognizing that not all cases present significant risks to defendants' Fifth Amendment rights, some courts have restricted the requirement for *ex parte*, *in camera* safeguards. For example, the court in *United States v. Hickey*[288] noted that to claim the Fifth Amendment privilege against self-incrimination, claimants must be confronted by "substantial and real"—not merely "trifling or imaginary"—risks of incrimination.[289] The court concluded that when such risks are present, defendants' financial affidavits should be sealed and a hearing conducted *in camera*.[290] Other courts have similarly held that in order to invoke the Fifth Amendment privilege, defendants must be faced with a "'real and appreciable,' and not merely 'imaginary and unsubstantial' threat of self-incrimination."[291] Along the same lines, courts have concluded that risks to Fifth Amendment protections by supplying financial information for assessing eligibility for court-appointed counsel are only "speculative and prospective" until the time that the prosecution chooses to use that information at trial.[292] Courts addressing this have noted that it is at that point that protections should be initiated; as such, those courts have been unwilling to require *ex parte*, *in camera* considerations of financial information every time a defendant claims a Fifth Amendment threat.[293] When defendants disclose financial information, such as on a financial affidavit, in order to establish eligibility for court-appointed counsel,

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[286] *See* United States v. Davis, 958 F.2d 47, 48–49, 49 n.4 (4th Cir. 1992).

[287] *Id.* at 49.

[288] United States v. Hickey, 997 F. Supp. 1206 (N.D. Cal. 1998).

[289] *Id.* at 1207 (quoting Marchetti v. United States, 390 U.S. 39, 53 (1968)).

[290] *Hickey*, 997 F. Supp. at 1210 (first citing United States v. Gravatt, 868 F.2d 585, 590 (3d Cir. 1989); then citing United States v. Anderson, 567 F.2d 839, 840 (8th Cir. 1977); then citing *Davis*, 958 F.2d at 49 n.4; then citing United States v. Hardwell, 80 F.3d 1471, 1483, 1484 (10th Cir. 1996)).

[291] United States v. Madrzyk, 990 F. Supp. 1004, 1007 (N.D. Ill. 1998) (citing *Marchetti*, 390 U.S. at 48); *see, e.g.*, United States v. Kodzis, 255 F. Supp. 2d 1140, 1145 (S.D. Cal. 2003).

[292] United States v. Sarsoun, 834 F.2d 1358, 1364 (7th Cir. 1987) (citing United States v. Peister, 631 F.2d 658, 662 (10th Cir. 1980)).

[293] *See, e.g.*, United States v. Murphy, 469 F.3d 1130, 1135–36 (7th Cir. 2006) (citing *Sarsoun*, 834 F.2d at 1363–64); *Kodzis*, 255 F. Supp. 2d at 1146; *Madrzyk*, 990 F. Supp. at 1007; *Sarsoun*, 834 F.2d at 1363–64; *Peister*, 631 F.2d at 662.

"that information may not thereafter be admitted against him at trial on the issue of guilt."[294] However, even if the government errs and uses the information against the defendant to establish guilt, the error does not necessarily lead to reversal.[295]

In sum, conflicts between defendants' Sixth Amendment right to counsel and Fifth Amendment protections from self-incrimination have been addressed by applying safeguards that prevent the prosecution from using the defendant's financial information to establish guilt at trial. However, not all cases present significant risks to defendants' Fifth Amendment rights, and courts have held that there must be a "substantial and real," risk of incrimination before courts apply the safeguards. Generally, the risks do not emerge until the prosecution chooses to use the information at trial, and even then the evidence must be material to the state's case before its introduction at trial causes a reversible error.

V. SUMMARY OF CASE LAW

Federal courts have adopted a broad standard of eligibility for court-appointed counsel by which defendants need not be destitute or indigent, but must simply lack the ability to obtain adequate representation.[296] Where courts have applied a more stringent standard, defendants have successfully argued violations of the Sixth Amendment right to counsel.[297] While the standard for eligibility for court-appointed counsel in federal criminal cases is relatively broad, courts have recognized that reasonable limits on eligibility must be imposed in order to prevent abuse of the privilege.[298] The process used by courts to set these limits and determine eligibility is usually an adversarial one in which the defendant has the burden of proving his financial inability to obtain

[294] United States v. Aguirre, 605 F.3d 351, 358 (6th Cir. 2010).

[295] *Id.* at 358–59 ("[E]ven though the district court erred in admitting the [defendant's] financial affidavit, the error was not plain. The financial affidavit was used briefly on redirect and at closing. . . . [Therefore, w]hen viewed against the other evidence found in this case, the district court's error in admitting the financial affidavit does not amount to reversible error.").

[296] *See, e.g.*, United States v. Jenkins, 130 F. Supp. 3d 700, 704 (N.D.N.Y. 2015) (quoting United States v. Harris, 707 F.2d 653, 660 (2d Cir. 1983)).

[297] *See, e.g.*, United States v. De Hernandez, 745 F.2d 1305, 1310 (10th Cir. 1984).

[298] *See, e.g.*, *Harris*, 707 F.2d at 661 ("If a defendant fails to come forward with additional evidence instead of relying on a terse form affidavit, and fails to prove by a preponderance of the evidence that he is financially unable to afford counsel, appointed counsel may be terminated."); Buelow v. Dickey, 622 F. Supp. 761, 766 (E.D. Wis. 1985) ("The . . . contention that they should not have been required to prove their own indigency is rejected.").

counsel.[299] Defendants that fail to meet the burden can be denied counsel without sustaining rights violations.[300] Though defendants bear the burden of submitting information demonstrating eligibility for court-appointed counsel under the CJA, appellate courts have held that federal magistrates and trial judges have an obligation to conduct an "appropriate inquiry" into defendants' financial conditions.[301] Such an inquiry is often required notwithstanding the defendant's success at meeting his burden of proof or the prospective outcome of the inquiry.[302] When an appropriate inquiry is not conducted by the court, defendants may sustain Sixth Amendment right to counsel violations.[303]

Ultimately, after the defendant has provided financial information and the court has conducted an appropriate inquiry, the decision to grant court-appointed counsel falls within the discretion of the trial court.[304] When the decisions are reviewed, they are reviewed only for clear error, which amounts to an "abuse of judicial discretion" standard.[305] In making eligibility decisions, judges take into consideration the defendant's personal finances and the potential impact that paying for an attorney may have on the defendant's ability to provide for his or her family.[306] Sometimes the willingness to pay for counsel of family, friends, and other third

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[299] *See, e.g.*, *Harris*, 707 F.2d at 661.

[300] *See, e.g.*, United States v. Ellsworth, 547 F.2d 1096, 1098 (9th Cir. 1976); United States v. Kaufman, 452 F.2d 1202, 1202 (4th Cir. 1971).

[301] *See, e.g.*, United States v. Moore, 671 F.2d 139, 141 (5th Cir. 1982).

[302] *See, e.g.*, *id.*

[303] *See, e.g.*, United States v. Wadsworth, 830 F.2d 1500, 1503, 1504, 1505 (9th Cir. 1987) ("The failure of the magistrate to inquire whether the defendant was financially able to afford counsel was a direct violation of the explicit requirements of [§] 3006A(b) . . . [and subsequent] failure to appoint counsel for this indigent defendant compels reversal."); *Moore*, 671 F.2d at 140, 141; United States v. Johnson, 659 F.2d 415, 418–19 (4th Cir. 1981) (holding that when the defendant persistently insisted that he could not afford counsel, the court should have conducted an inquiry into his current financial status, and reversing his conviction because, in the absence of such an inquiry, the appeals court could not conclude that defendant waived his right to counsel in an intelligent manner).

[304] *See, e.g.*, Williams v. Estelle, 681 F.2d 946, 947 (5th Cir. 1982) ("The decision whether to grant a request to proceed *in forma pauperis* is committed to the discretion of the district court." (emphasis added) (citing Green v. Estelle, 649 F.2d 298, 302 (5th Cir. 1981))).

[305] *See, e.g.*, United States v. Bracewell, 569 F.2d 1194, 1200 (2d Cir. 1978) ("In the absence of a serious abuse of discretion, a district judge's findings as to 'availability' of funds, if supported by an 'adequate inquiry,' will not be disturbed on appeal."); *see also* United States v. Parker, 439 F.3d 81, 92–93 (2d Cir. 2006) (setting forth a three-step process for evaluating trial courts' decisions regarding eligibility for court-appointed counsel); United States v. Harris, 707 F.2d 653, 660 (2d Cir. 1983) ("A district court decision to terminate counsel under the Act will not be lightly overturned.").

[306] *See, e.g.*, Museitef v. United States, 131 F.3d 714, 716 (8th Cir. 1997) (first citing United States v. Simmers, 911 F. Supp. 483, 486 (D. Kan. 1995); then citing United States v. Cohen, 419 F.2d 1124, 1127 (8th Cir. 1969)).

parties is considered; however, courts have held that a defendant should not be denied appointment of counsel solely because other members of his family have assets and income.[307] Generally, the focus of the eligibility determination is the defendant's own ability to pay, but courts have rejected defendants' claims of inability to afford counsel when it learns that the defendant put his own assets into his relatives' names and those assets remain at his disposal.[308]

Defendants who can afford to pay some, but not all, of their defense costs can be appointed counsel and be ordered to pay whatever portion of the costs that they can afford.[309] If the court becomes aware that funds are available for defense costs after a public defender has been appointed, the court can order reimbursement of all or a portion of those costs.[310] Where the defendant supplies false information in bad faith regarding his or her inability to afford counsel, he or she can be charged with perjury.[311]

Finally, where financial information requested from criminal defendants for consideration of eligibility for court-appointed counsel is potentially incriminating, conflicts may arise between defendants' Sixth Amendment right to counsel and Fifth Amendment right against self-incrimination.[312] Because forcing defendants to choose between the two rights would be "constitutionally impermissible," courts have adopted ways to reconcile these issues.[313] However, courts have held that conciliatory safeguards may only be required when the risks to defendants' Fifth Amendment protections are "real and appreciable," instead of merely speculative.[314]

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[307] *See, e.g.*, United States v. Salemme, 985 F. Supp. 197, 201 (D. Mass. 1997).

[308] *See, e.g.*, United States v. Rubinson, 543 F.2d 951, 964 (2d Cir. 1976).

[309] *See, e.g.*, United States v. Knott, 142 F. Supp. 2d 468, 469–70 (S.D.N.Y. 2001).

[310] *See, e.g.*, Ybarra v. Wolff, 571 F. Supp. 209, 212–13 (D. Nev. 1983) (citing United States v. Allen, 596 F.2d 227, 232 n.6 (7th Cir. 1979)) (noting that defendant could afford to pay for counsel, and therefore should be required to fully reimburse the Government for monies paid for his appointed counsel by the CJA panel).

[311] *See, e.g.*, United States v. Birrell, 470 F.2d 113, 114–16 (2d Cir. 1972); United States v. Jenkins, 130 F. Supp. 3d 700, 702, 704–05 (N.D.N.Y. 2015) (discussing a defendant's conviction for perjury for falsifying his assets on a CJA form).

[312] *See, e.g.*, United States v. Anderson, 567 F.2d 839, 840–41 (8th Cir. 1977) (citing United States v. Branker, 418 F.2d 378, 380 (2d Cir. 1969)); *see also Salemme*, 985 F. Supp. at 199–200 (explaining how there can be a conflict between financial requests and the Fifth Amendment).

[313] *See, e.g.*, *Anderson*, 567 F.2d at 840–41 (citing *Branker*, 418 F.2d at 380).

[314] *See, e.g.*, Seattle Times Co. v. U.S. Dist. Ct. for W. Dist., 845 F.2d 1513, 1518–19 (9th Cir. 1988) (citing United States v. Neff, 615 F.2d 1235, 1239 (9th Cir. 1980)); United States v. Kodzis, 255 F. Supp. 2d 1140, 1144 (S.D. Cal. 2003); United States v. Madrzyk, 990 F. Supp. 1004, 1007 (N.D. Ill. 1998).

VI. CONCLUSION

The CJA is the federal statute that enabled the formal implementation and operation of the federal public defender system. While the statute and the accompanying Guidelines set forth some of the roles and responsibilities for determining defendants' eligibility for counsel under the CJA, they offer only very broad guidance to federal courts tasked with making such determinations. As established, a review of federal case law reveals some additional detail regarding factors considered by the courts as well as other issues related to the appointment of counsel. Ultimately, however, it is clear that specific criteria do not exist at the federal level, and that determinations for the eligibility of court-appointed counsel are made on a case-by-case basis at the discretion of federal magistrates and trial judges.

The lack of more specific eligibility criteria affords very broad discretion to individual federal judges, which can be abused to the detriment of particular classes of defendants.[315] This is because leaving such broad discretion to federal magistrates and trial court judges can lead to arbitrary and potentially biased decision-making.[316] Mistaken decisions that result in the denial of court-appointed counsel for a defendant who cannot afford to hire his or her own have potentially monumental implications—the most notable of which is wrongful conviction.[317] While courts' discretionary decisions can normally be reviewed for clear error and abuse of discretion, those standards are often difficult to meet.[318] This would particularly be the case for defendants who do not have the assistance of an attorney to file an appeal. Too much unfettered judicial discretion increases the risk that decisions will be made based on personal prejudices or biases.[319] Discriminatory decisions

[315] *See* Phillips, *supra* note 23, at 662, 663 (noting that in Oklahoma, judicial discretion in determining whether defendants are entitled to court-appointed attorneys often takes into account the judges' personal beliefs in the decision-making process, which makes the appointment of counsel not uniform among individual defendants).

[316] *See id.* at 663 (observing that affording judges the ability to use their discretion can lead to, and possibly encourage, bias in the form of a judge's personal convictions being imputed onto a case).

[317] *See GIDEON'S* BROKEN PROMISE, *supra* note 10, at 38 ("Forty years after *Gideon v. Wainwright*, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.").

[318] *See* United States v. Bracewell, 569 F.2d 1194, 1200 (2d Cir. 1978); United States v. Kelly, 467 F.2d 262, 266 (7th Cir. 1972).

[319] *See* Phillips, *supra* note 23, at 663.

clearly could lead to violations of defendants' Sixth and Fourteenth Amendment rights.[320] Here, the federal government should learn from problems with judicial discretion in the area of criminal sentencing. Sentencing disparities caused by discriminatory and prejudicial practices have led to substantive changes in the way sentences are determined by significantly reducing judicial discretion through sentencing guidelines and mandatory minimum sentencing structures.[321] Clearly, the criminal justice system has seen the effects of a lack of objective standards on particular classes of defendants;[322] as such, Congress should take note and apply those lessons learned in other areas, including the appointment of counsel.

Despite the risks presented by the lack of explicit controls over judicial discretion, the literature (or lack thereof) suggests that the federal public defender system has been less criticized than state systems. Additional research is needed to understand whether the federal system represents a best-practice system compared to those existing in the states, and further, which components of the system account for the better performance. For example, future research should attempt to determine whether the federal system is better funded (e.g., dollars per defendant), better staffed (e.g., attorneys per defendant), or otherwise better managed. To accomplish this, research is needed that analyzes state statutes and case law regarding state-level decisions to grant court-appointed counsel to needy defendants.[323] Additionally, data should be collected regarding the inputs, outputs, and outcomes of federal versus state public defender cases.

Ultimately, however, the ability of needy defendants to access the federal public defender system is critical to the maintenance of a fair and just legal system and to the rights of criminal defendants. Yet, when defendants exercise this fundamental right, the federal government must take on the role of adequately managing and funding the system. As noted above, the cost of managing the huge caseload required to defend two-thirds of all federal criminal

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[320] *See* Gideon v. Wainwright, 372 U.S. 335, 342–44 (1963) (holding that a decision to force a poor defendant to face his accusers without adequate counsel would be a violation of the defendants Sixth and Fourteenth Amendment rights).

[321] *See generally* Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 10–11 (2010) (stating how judges can have unguided discretion).

[322] *See generally id.* (discussing that sentences in the past may have turned on factors such as race and class due to unguided discretion).

[323] *See* Wynne & Vaughn, *supra* note 16, at 184.

defendants is significant.[324] Yet the caseload should not be decreased by denying counsel to those that need it and are facing a loss of liberty. However, a different approach may be warranted. Specifically, by examining a different way to control inputs into the system, costs to the federal budget, and to defendants' procedural rights, can likely be reduced.[325] This nation's paramount criminal justice paradigm of the last forty years has no doubt contributed to the huge public defender workloads by increasing the demand on the federal criminal justice system.

More specifically, the "get tough on crime" philosophy accompanied by the wars on crime, drugs, and terror, has led to increased criminalization of offenses once considered minor.[326] One of the results of this phenomenon has been an increase in the number of offenses for which loss of liberty is a potential sanction.[327] This is particularly evident when the impact of "Three Strikes" laws and mandatory minimum sentencing schemes are considered.[328] In addition, while crime was historically considered a state and local problem, beginning with late 1960s, the federal government began to get more involved in issues related to crime and punishment.[329] Over the years, the federal government has continued to expand its jurisdiction over criminal justice issues.[330] One important consequence of increased federalization of the crime problem and the expansion of criminal laws and sanctions for breaking those laws is the increased demand on both the federal and state-level

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[324] *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2017: JUDICIAL BRANCH 49 app. (2017), https://www.gpo.gov/fdsys/pkg/BUDGET-2017-APP/pdf/BUDGET-2017-APP-1-4.pdf [hereinafter JUDICIAL BUDGET 2017] (estimating that the direct cost for defender services in the year 2016 would be $1.066 billion and in 2017, $1.106 billion).

[325] *See* Lisa C. Wood et al., *Meet-and-Plead the Inevitable Consequence of Crushing Defender Workloads*, 42 LITIG. 20, 25 (2016) (discussing that judges and prosecutors are also responsible for controlling the workload given to defenders).

[326] *See* Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 294–96 (2015) (discussing the increase in the number of people incarcerated due to nonviolent drug offenses); *cf.* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1105–07 (2015) (arguing the need for the decriminalization of minor offenses, which has led to mass incarceration in the United States).

[327] *See* Baradaran, *supra* note 326, at 295.

[328] *See, e.g.*, Sara Steen & Rachel Bandy, *When the Policy Becomes the Problem: Criminal Justice in the New Millennium*, 58 PUNISHMENT & SOC'Y 5, 6, 9, 10 (2007) (examining the nature and impact of the nation's retributive sentencing practices).

[329] *See, e.g.*, NANCY E. MARION & WILLARD M. OLIVER, PUBLIC POLICY OF CRIME AND CRIMINAL JUSTICE 150–54 (2006); Greg Hollon, *After the Federalization Binge: A Civil Liberties Hangover*, 31 HARV. C.R. & C.L. L. REV. 499, 499–500 (1996); Nancy E. Marion, *Symbolic Policies in Clinton's Crime Control Agenda*, 1 BUFF. CRIM. L. REV. 67, 67 (1997).

[330] *See* Marion, *supra* note 329, at 67.

public defender systems.[331]

The workload on the federal and state public defender systems and the concomitant drain on federal and state budgets are just two of the many unpleasant effects of the criminalization trend of the last three decades. The other numerous harmful effects need not be itemized here; however, their combined impact on the justice system, government as a whole, and society, indicates that a change is needed. It is time for the proverbial pendulum of criminal justice ideology to swing decisively left—away from criminalization. The focus of the justice system should be more on identifying and addressing front-end factors related to the root causes of crime and less on increased criminalization and retribution. In doing so, beneficial results beyond decreasing the public defender caseload would likely be experienced across all facets of society.

[331] *See* Hollon, *supra* note 329, at 525–26.