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**Measuring the Effect of Defense Counsel on  
Homicide Case Outcomes**

Award Number 2009-IJ-CX-0013

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**INTRODUCTION**

Under nearly every normative theory of punishment or criminal responsibility, the characteristics of the offender's defense counsel should make no difference in the outcome of the process. Whether or not a defendant is found guilty and the extent to which the offender is sentenced to be punished should only depend upon facts about the offender and perhaps the possibility and need of deterring a particular crime. The effect of the individual lawyer is pure "noise." In this report, we take advantage of a natural experiment in Philadelphia to measure the difference that a lawyer makes to the outcome of a serious criminal case.

Past attempts to measure the effect of the lawyer have usually involved trying to control for case differences. This literature is substantial. For example, Harmon and Lofquest (2005) found that attorney skill affected the outcome of capital cases. Some research focused on whether retained counsel provided better outcomes than either appointed counsel or public defenders. Champion (1989) hypothesized that because of the closer working relationship that public defenders had with prosecutors, they might be able to obtain better outcomes for clients than privately retained attorneys. Others, expressed concern that public defenders might become co-opted by the courtroom work environment, e.g. Fleming et al. (1992).

Looking at these questions empirically, Sterling (1983), found that defendants with retained counsel did not obtain better outcomes than those with public defenders or appointed counsel. Stover and Eckart (1975) found generally comparable performance between public defenders and private attorneys. Houlden and Balkin (1985a) found that the method of assigning counsel made no difference in outcomes and, in Houlden and Balkin (1985b), they found little difference in performance of private and public attorneys. Similarly, Hartley et al (2010) found no difference in outcomes between defendants represented by public defenders as opposed to privately retained lawyers in Cook County, Illinois.

In contrast, Nagel (1973) generally found that retained counsel provided some benefits in outcomes compared to public defenders. Gitelman (1971) found that while the performance of particular lawyers did not differ depending on whether they were appointed or retained, defendants with appointed counsel had worse outcomes overall than defendants with retained counsel. Hanson et al (1992), found no statistically significant differences in outcomes between defendants represented by indigent defense providers compared to those who had privately retained counsel. Feeney and Jackson (1991) conducted an overview of then-existing empirical studies of the effect of counsel types on outcomes and noted that conclusions were mixed with approximately half of the studies finding no difference between counsel types. Shinall (2010) looked at the effect of prosecutors as well as defense counsel and concluded that skill of prosecutors made more difference in the outcomes than defense counsel. Most recently, Cohen (2011) concluded that defendants with appointed counsel have less favorable dispositions than defendants with either private counsel or public defenders.

The problem with these efforts is that because lawyers and clients select one another, it is very difficult to isolate the effect of the lawyer. It is difficult to determine whether the results obtained by a particular lawyer are attributable to the lawyer or simply to the characteristics of cases that the lawyer takes. Because of this selection effect it is usually impossible to isolate and measure the magnitude of the effect of the lawyer.

One way around this problem is to take advantage of a situation in which lawyers are randomly assigned to cases. In this case, the group of cases which each lawyer or category of lawyers has is identical and so outcomes can be compared. This methodology has been used by Abrams and Yoon (2007) who took advantage of random assignment within a public defender office and find that attorney experience has substantial outcomes on case outcomes. Radha Iyengar (2007) used random assignment between federal public defenders and appointed attorneys in federal court. She found that the federal public defender provided better outcomes.

We build on this methodology by using an instrumental variables approach and take advantage of a natural experiment that allows us to measure the difference that a lawyer makes in the most serious cases. In Philadelphia, since April 1993, every fifth murder case is sequentially assigned at the preliminary arraignment to the Defender Association of Philadelphia. The other four cases are assigned to appointed counsel. This allow us to isolate the effect of the "treatment" - cases with Defender Association attorneys with the "control" - cases with appointed counsel by using an instrumental variables approach.

The differences in outcome are striking. Compared to private appointed counsel, public defenders reduce the murder conviction rate by 19%. They reduce the probability that their clients receive a life sentence by 62%. Public defenders reduce overall expected time served in prison by 24%. This suggests that defense counsel makes an enormous difference in the outcome of cases.

To better understand the causes of the discrepancy in outcomes that we observed, we conducted 20 qualitative interviews with judges, appointed counsel, and public defenders in Philadelphia. We found that compared to the Defender Association attorneys, appointed counsel are impeded by conflicts of interest on the part of both the appointing judges and the appointed counsel, limited compensation, incentives created by that compensation, and relative isolation.

Our findings raise questions regarding the fundamental fairness of the criminal justice system and whether it provides equal justice under the law. It also raises questions as to whether current commonly-used methods for providing indigent defense satisfy Sixth Amendment guarantees of effective counsel. More generally, the strong impact of defense counsel suggests that the criminal justice system is quite sensitive to the characteristics of the individual professionals.

**EMPIRICAL ANALYSIS OF THE PERFORMANCE OF DEFENDER ASSOCIATION VERSUS APPOINTED COUNSEL**

**BACKGROUND ON INDIGENT DEFENSE IN PHILADELPHIA**

In 2000, Philadelphia had a murder rate of 21 per 100,000 people, 12th largest among large U.S. cities. (FBI, 2001) Most murder defendants, approximately 95%, are unable to afford to hire private counsel and are therefore provided counsel by the county. Pennsylvania is unique among the states in that the individual counties are solely responsible for the costs of indigent defense. In every other state, the state itself either funds a state-wide public defender program or contributes to the costs of county public defender programs (Stevens et al, 2010).

In Philadelphia, the Defender Association of Philadelphia has long represented nearly all indigent defendants charged with all offenses - except for murder. The origins of this division of cases is somewhat murky, but it apparently arose in the late 1960s or early 1970s as a way to maintain the private homicide defense bar and judges' power to appoint lawyers to these cases (Interview #7).<sup>1</sup> In the mid-1980s, the Defender Association proposed representing some defendants accused of homicide but the Philadelphia Bar Association opposed the measure and no change occurred (Interview #1). After a change in bar and court leadership, the existing system began, and, on April 1, 1993, the Defender Association began to represent one out of every five murder cases (Interview #3).

While some features of Philadelphia's indigent defense system are fairly unique, the basic approach of utilizing a mix of both public defenders and private counsel to represent indigent defendants is fairly common in the U.S. In 2000, a survey of indigent defense systems conducted by the Bureau of Justice Statistics revealed that 80%

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<sup>1</sup>In order to ensure candid responses and to protect the respondents, all interviews were conducted with the promise of confidentiality. Accordingly, all interviews will be referred to by number rather than by personal identifying information.

of large U.S. counties employed both public defenders and private attorneys as defense counsel in felony cases (DeFrances and Litras, 2001).

The homicide unit of the Defender Association consists of a group of ten experienced public defenders who have considerable experience practicing in the Philadelphia court system (Temin, 2008). Every case is staffed with teams of two lawyers and one or more investigators and mitigation specialists as needed. All staff are salaried. The unit also has its own limited set of funds to hire expert witnesses directly without having to seek approval from a judge (Freudenthal, 2001).

In contrast, defendants not represented by the Defender Association are assigned counsel by one of the judges from the Philadelphia Court of Common Pleas who each take turns assigning counsel in murder cases. Historically, the ability to assign counsel was considered an attractive "plum" to distribute among friends and political supporters. Counsel appointed in murder cases -- both capital and non-capital -- in Philadelphia receive flat fees for pre-trial preparation -- \$1333 if the case is resolved prior to trial and \$2000 if the case goes to trial. While on trial, lawyers receive \$200 for three hours of court time or less, and \$400/day for more than three hours (Interviews 1, 6, and 10). Court appearances for continuances are not reimbursable.

Philadelphia's reimbursement rates for appointed private attorneys are considered extremely low. Stephen Bright, former director of the Southern Center for Human Rights, called Philadelphia's fee schedule "outrageous, even by southern standards" (Slobodzian, 2011; Desilets, Spangenberg, and Riggs 2007). Both capital and non-capital murder cases take numerous hours to prepare (American Bar Association, 2003). One examination of non-capital murder cases in federal court found that the median number of hours to prepare was 436 hours and the attorney cost per case from 1998-2004 was \$42,148 (Gould and Greenman, 2010). In capital cases, during the same period, the median attorney hours were 2013 and cost was \$273,901 (Gould and Greenman, 2010).



Philadelphia's fee schedules have also been criticized for creating perverse incentives.<sup>2</sup> Counsel has no financial incentive to prepare for trial since there is a flat rate for preparation time. In addition, counsel may have an incentive to take a case to trial so that she can make as much in five days of trial as on all the time necessary for preparation. Numerous interviewees noted that because there is no cap on the number of cases that can be accepted by counsel, counsel who take appointed cases take on more cases than they could adequately prepare and then, in fact, do comparatively little preparation for them.

For reasons of local institutional history, the appointed counsel system seems very likely to result in comparatively poor defense representation and the public defender system comparatively strong representation. If we were to observe little difference in outcomes, this would suggest that, as one federal judge put it, "facts - not the lawyers... result in the substantially correct verdict" (Posner and Yoon, 2011).

#### **DATA AND SAMPLE CONSTRUCTION**

Our basic dataset includes a sample of 3,412 defendants charged with murder (18 Pa C.S. § 2502, 2011) in municipal court between 1994 and 2005. These data were provided to us by the Philadelphia Courts (First Judicial District of Pennsylvania). For each record, we observed identity of the defendant, basic demographics (race, gender, and age), charges, attorney of record, and outcome. The Philadelphia Courts also provided us a separate database with similar information tracking Court of Common Pleas cases that corresponded to these municipal cases, and a database tracking changes in attorney

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<sup>2</sup> Motion to Require the Commonwealth to Provide Constitutionally Adequate Attorney Fees for the Defense of the Above-Captioned Capital Trials, or in the Alternative, to Precluded the Commonwealth from Seeking the Death Penalty, Commonwealth v. McGarrell CP-51-CR0014623-2009.

assignments over time for a subset of defendants.<sup>3</sup> We supplemented these databases by collecting both the Municipal Court and Court of Common Pleas dockets for all of the cases in our sample from the Pennsylvania Judiciary's on-line docket database (Pennsylvania's Unified Judicial System, 2011) and, as necessary, using data from the dockets to supplement information missing from the Philadelphia Court database. For example, one key variable available in the dockets (but not the files we received from the Philadelphia Courts) is the defendant's ZIP code of residence, which we use below to consider neighborhood characteristics.

After eliminating 46 defendants with missing data or ambiguous information on counsel assignment and 193 individuals (5%) of the sample who were ineligible for appointed counsel based on lack of indigency, we were left with 3,173 defendants. To identify individuals who were initially assigned to the Defender Association based on the 1-in-5 rule, we relied on case logs provided to us by the Defender Association tracking their murder cases, including both cases initially assigned to the Defender Association and replacement cases. Replacement cases were cases assigned to the Defender from court appointments to replace cases that were originally assigned to the Defender at preliminary arraignment but that the Defender could not represent because of a conflict of interest or because the defendant hired a private lawyer.

Of the 1043 individuals listed in the Defender Association logs, we were able to find matches for 1027 (98%) in the murder case records provided by the Philadelphia courts. Because the Defender Association case logs did not contain any unique identifiers present in our other databases, we matched cases based upon the name of the defendant and the timing of the case. We also eliminated 16 records involving cases that had not yet been resolved, that were missing Court of Common Pleas

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<sup>3</sup> Prior to 2003, the Philadelphia court records were maintained using a mainframe system that did not allow for the storage of complete attorney history records, meaning that we cannot track the full attorney history for most of our sample.

records, or that contained other data anomalies, leaving us with a total of 3,157 defendants.

One conceptual issue that arises in measuring the effects of representation is how to determine who represented a defendant who may have had multiple attorneys over the course of a case. One approach would be to count anyone who was represented by the Defender Association at any point in the process as having had Defender Association representation, but a drawback of that assignment rule is that it would include as Defender Association clients a large number of defendants initially assigned to the Defender Association who had essentially no interaction with Defender Association, because they were quickly reassigned once a conflict of interest was identified.

The best approach would be to assign representation based upon the identity of counsel at the time the murder charge was resolved. Unfortunately, because our attorney history data are incomplete for most of our defendants, our ability to identify who was representing a defendant at case resolution is limited. New counsel are almost always assigned to handle direct appeals and post-conviction litigation. As a result, data on the most current attorney may not properly capture the attorney assignment at the time of adjudication.

Moreover, if Defender Association attorneys represent defendants at earlier stages of the case, such as at a preliminary hearing, they can arguably exert some influence over the outcome of the case even when defendants are ultimately represented by other counsel. As a compromise, we measure representation by the public defender based upon the identity of the attorney at the preliminary hearing, which we can observe for all of our cases. This approach has the advantage of measuring representation at the same point of case progression for all cases and at a point at which the attorney could have influenced case outcomes. An obvious drawback is that, to the extent that defendants change attorneys subsequent to the preliminary hearing, our definition fails to account for such changes. This happens very infrequently so

representation at the preliminary hearing makes an excellent proxy for representation at disposition (Conway, 2011b).<sup>4</sup>

We also constructed synthetic criminal histories for each defendant by extracting information from the Pennsylvania Court of Common Pleas docket sheets for each prior case involving that defendant. The Pennsylvania Courts assign a unique identifier to each defendant, which allowed us to obtain prior case records for a given individual even when they involved an alias. These criminal histories are likely to be fairly complete, but they only include offenses that occurred in Pennsylvania, that generated a court record, and that occurred after electronic recordkeeping was instituted in each county in the state. For Philadelphia case records are available going back to 1968, and for most counties case records are available back to at least the early 1980's. Although it seems likely that there is at least some prior criminal activity that is not captured in available court dockets, we have no basis to suspect that the pattern of missing information would correlate with attorney assignment.

Our sentencing data report a maximum and/or minimum sentence for each defendant, and also identify life and death sentences.<sup>5</sup> Because life and death sentences are qualitatively different from other sentences, we consider these outcomes individually.

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<sup>4</sup> The Defender Association, by policy, refuses to accept cases in which appointed counsel handled the preliminary arraignment so there is almost no post-preliminary hearing crossover from appointed counsel to Defender Association. According to Paul Conway, the director of the Homicide Unit, there were two cases since the Unit was founded in which the Defender took over a case that was represented by appointed counsel at the preliminary hearing. Slightly more common, but still very rare is the case in which a defendant represented by the Defender Association at the preliminary hearing is represented at trial by either appointed counsel (if a conflict of interest is identified after the preliminary hearing) or privately retained counsel (if the defendant hires an attorney).

<sup>5</sup> For 172 individuals in the sample, information about the length of the sentence was missing. Incidence of missing sentencing information is uncorrelated with initial assignment to the Defender Association.

As a single, intuitive metric that applies to all defendants no matter their sentencing outcome, we also calculate expected time to be served in prison. To calculate expected time served for each defendant, we turn to data from the National Corrections Reporting Program (NCRP). The NCRP includes individual-level information about state prison admissions and releases (including deaths) for participating states, and includes information about alleged offenses, sentencing, and time served. Between 1999 and 2003, the NCRP includes records for 15,721 defendants who were released from prison after serving a sentence for a murder conviction. For each combination of age at prison admission/sentencing outcome, we compute the cell average time served across prisoners in our NCRP sample, and then apply that average to Philadelphia defendants who fall into that same age/sentence cell.<sup>6</sup> For example, among those in the NCRP with 30-year sentences imposed at age 22-24 who were released or died in prison between 1999 and 2003, the average actual time served was 16.1 years, suggesting a newly convicted 23-year-old murder defendant with a life sentence might expect to spend around 16 years behind bars.

For those receiving life sentences, we confine attention to prisoners who died in custody because life sentences in Pennsylvania do not carry the possibility of parole. We treat death verdicts as equivalent to life sentences for the purposes of these calculations. We recognize, of course, that death sentences are very different but we did this for ease of modeling. Since only 3 death row inmates have been executed in Pennsylvania since 1976, all of whom voluntarily waived their appeals, this treatment has some descriptive accuracy as well.

A drawback of using NCRP data to project actual time served is that because these projections require data on complete sentences, they require us to use individuals who were mostly sentenced during the

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<sup>6</sup> Sentencing outcomes are acquittal, life, death, or a maximum sentence of 0, 1, 2, ... 25 years, 26-29 years, 30 years, 31-34 years, 35 years, 36-39 years, 40 years, 41-49 years, 50 years, 51-59 years, 60 years, or 60+ years. Age cells are defined by defendants aged 18 and under, 19-21, 22-24, 25-27, 28-30, 31-35, 26-40, 41-45, 46-50, and 50+.

1980's and early 1990's.<sup>7</sup> Because of growth of truth-in-sentencing laws and improvements in mortality among prison inmates, the actual time served for individuals in our sample from Philadelphia will be greater than time served in the NCRP, meaning that our projections likely represent lower bounds on future time served. However, there is no reason to suspect that the bias towards under-projection of time served inherent in our approach will differentially affect defendants represented by appointed as compared to Defender Association counsel. As a result, we can use these projections to correctly measure the percentage difference in expected time served for defendants represented by the Defender Association.

#### **COUNSEL ASSIGNMENT AND THE PRELIMINARY ARRAIGNMENT PROCESS**

Shortly after arrest, defendants accused of murder receive a preliminary arraignment. This usually occurs by videoconference before an arraignment court magistrate. The magistrate reviews the information about the defendant compiled by court's pretrial unit to determine if the defendant can afford counsel (McSorley, 2011). If, in the magistrate's judgment, the defendant is unlikely to be able to afford counsel in a case with a murder charge, the magistrate appoints either the Defender Association of Philadelphia or a to-be-determined appointed counsel to represent the defendant. In most cases, approximately 90-95%, it is clear that the defendant cannot afford private counsel (McSorley, 2011). The default is to assign counsel. These hearings typically take approximately 2-3 minutes.

The Criminal Law Clerk maintains a log book. Every fifth case with a murder charge is assigned to the Defender Association of Philadelphia. The other four cases are not immediately assigned counsel but the cases are sent to court appointments for assignment to a court-appointed counsel (McSorley, 2011).

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<sup>7</sup> This drawback can potentially be overcome using a "life table" approach, but that approach requires more complicated statistical assumptions. Lynch and Sabol (1997) and Patterson and Preston (2008) provide more detail on the life table approach.

There are two important exceptions to this procedure. The public defender cannot represent multiple co-defendants in the same case or defendants with whom the public defender has had certain prior interactions (such as defending a victim or witness) because of conflict of interest rules. If one defendant is processed through preliminary arraignment court and assigned to the public defender, and then a co-defendant on the same charge later comes through and would be assigned to the public defender, that assignment is skipped. Similarly, if at the time of preliminary arraignment the public defender identifies another conflict of interest, the case is reassigned. The public defender is also sometimes assigned appeals cases from the Capital Habeas Unit; when one of these cases is assigned, the public defender's next turn in the assignment rotation for new cases is skipped. This explains why the data show less than 20% of murder cases as being assigned to the public defender at the preliminary arraignment.

After assignment, there is some "crossover" between "treatment" (Defender Association defense counsel) and "control" ("appointed counsel") groups. Some defendants hire private defense counsel who replace either appointed counsel or the public defender. In some cases assigned to the public defender, it is determined subsequent to the initial assignment that there is a conflict of interest and that the public defender cannot represent the defendant. When that occurs, the case is assigned to appointed counsel and the Defender Association receives another "replacement" case that had been assigned to appointed counsel at the preliminary arraignment.

If compliance with random assignment were perfect, so that everyone initially assigned private counsel was ultimately represented by private counsel, and similarly for the Defender Association, the impact of Defender Association representation could be computed simply as the difference in mean outcomes across those represented by Defender Association versus those with assigned private counsel. However, in actual practice later representation varies from the assignment for numerous reasons. In some situations, such as cases involving multiple defendants, individuals initially assigned to the Defender Association

must be assigned private counsel to avoid conflicts of interest. It is common for defendants to progress partway through the adjudication process before being able to assemble the financial means to pay for a private attorney, at which point they replace their appointed counsel with hired counsel.

To deal with this crossover (or imperfect compliance as it would be called in a medical trial), we employ an instrumental variables (IV) analysis. We use the initial random assignment as an instrumental variable for the later representation. The IV method permits us to exploit the randomness of initial assignment to estimate the causal impact of public defender representation (Imbens and Angrist, 1994). An important feature of the IV approach is that it allows us to estimate the impact of public defender representation even when there is non-random sorting of defendants across different types of attorneys subsequent to the initial assignment. For example, even if defendants with worse cases are more likely to switch from their assigned public defender to hired counsel, the IV approach can still properly estimate the causal impact of public defender representation. Because of the randomization, even when certain defendants switch counsel after the initial step in the process, we can still identify two groups of defendants--namely, those who were and were not initially assigned to the Defender Association--for whom the expected average sentence is the same except for the fact that they end up with different types of counsel. Essentially the IV approach compares the average outcomes across these groups (rather than groups based upon actual realized representation) and then scales this difference by the groups' difference in representation.

The key requirement required for the IV analysis to deliver valid casual estimates is that the instrumental variable--in this case, initial counsel assignment--affects eventual representation but is otherwise uncorrelated with case outcomes. If the initial assignment of counsel is truly random, as we assume, this requirement will be satisfied. Fortunately, it is possible to examine the validity of this assumption directly using available data. In particular, if counsel is assigned randomly, we would expect those assigned to private counsel



and those assigned to the Defender Association to appear similar on observable characteristics determined prior to counsel assignment.

In Table 1, we summarize the characteristics of our sample, reporting average characteristics of those initially assigned to private counsel (column I) and the Defender Association (column II).

**Table 1: Characteristics of Indigent Philadelphia Homicide Defendants  
 by Initial Representation Assignment**

Characteristic	Average for Individuals Assigned Private Counsel (N=2677)	Average for Individuals Assigned Defender Association (N=480)	T-Stat (I) - (II)	P- Value
	(I)	(II)		
Defended by public defender	.155	.592	-18.58	.000
Defendant Demographics				
Male	.929	.948	-1.70	.089
Black	.732	.744	-0.53	.594
Age (years)	25.7	26.3	-1.10	.271
ZIP Code Characteristics (N=1764)				
% living in Philadelphia	95.3	94.1	0.86	.389
Total population	43,462	44,755	-1.27	.206
% Black	58.1	57.7	0.23	.819
% Hispanic	11.7	10.9	0.77	.445
% female-headed households	55.7	54.9	0.91	.363
% of adults with less than HS	35.3	34.6	0.91	.363
% veterans	16.2	16.3	-0.56	.576
Unemployment rate	14.8	14.5	0.82	.415
Median household income	25,918	26,631	-1.15	.252
Poverty rate	29.8	28.8	1.28	.203
Median rent	429	435	-1.22	.224
Median home value	48,470	49,745	-0.66	.508
% renter	42.1	40.7	1.64	.101
% recent mover	37.1	37.0	0.21	.830
Missing ZIP code data	32.3	29.8	1.09	.276
Prior Criminal History				
Number of prior counts for:				
All crimes	9.98	10.57	-0.92	.358
Aggravated assault	0.52	0.47	1.16	.247
Robbery	0.38	0.44	-1.28	.200
Simple assault	0.85	0.89	-0.68	.500

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Weapons offenses	1.81	1.82	-0.05	.961
Burglary	0.20	0.21	-0.33	.744
Theft	1.54	1.87	-1.90	.058
Drug offenses	1.43	1.45	-0.15	.878
Ever charged with:				
Any offense	.648	.679	-1.32	.188
Aggravated assault	.309	.314	-0.25	.801
Robbery	.238	.252	-0.65	.516
Simple assault	.418	.444	-1.08	.279
Weapons offenses	.432	.447	-0.61	.545
Burglary	.130	.149	-1.07	.286
Theft	.385	.440	-2.23	.026
Drug offenses	.379	.371	0.34	.732
Current Case Characteristics				
Number of charges filed	5.13	4.94	1.75	.080
Number of murder counts	1.07	1.05	1.34	.181
Any weapons charge	.833	.773	2.94	.003
Any conspiracy charge	.468	.421	1.91	.057
Number of defendants in case	1.69	1.70	-0.15	.880
Case Outcomes (N=3133)				
Found guilty of any charge	.801	.792	0.43	.664
Number of guilty charges	2.36	2.24	1.31	.189
Found guilty of murder	.565	.543	0.89	.371
Minimum sentence (conditional)	8.45	7.67	1.46	.145
Maximum sentence (conditional)	18.6	17.0	1.37	.172
Life sentence	.262	.195	3.32	.001
Death sentence	.013	.013	0.04	.968
Expected time served (years)	10.97	9.81	3.05	.002
Case Handling (N=3133)				
Waiver trial	.263	.270	-0.33	.742
Plead guilty	.281	.384	-4.28	.000

We also report the t-statistic and associated p-value for a test of the null hypothesis of equal means across the two groups. The first row of the table indicates that of those who were initially assigned private counsel, 15% were ultimately represented by the public defender at

their municipal court arraignment. Many of these cases represent individuals who normally would have been given court-assigned private counsel based on the one-in-five assignment rule but who were instead diverted to the public defender in order to provide replacement cases for clients initially assigned the Defender Association who had subsequently found other representation. Only 59% of those initially assigned Defender Association attorneys retained their public defenders through the municipal court arraignment. In other words, almost half of those assigned Defender Association attorneys ultimately were represented by other attorneys, either due to conflicts or voluntary hiring of an outside attorney. Although substitutions away from the initial assignment were fairly commonplace, the t-test indicates that the initial assignment satisfies the first requirement of an instrument, namely, that it affects eventual representation.

The next rows of Table 1 report average demographics by initial assignment. Age, race, and gender are comparable across the two groups of defendants.

Although available case records contain no additional direct demographic information, another way to assess the comparability of the background characteristics of defendants is to examine the population characteristics of the ZIP codes in which they reside. The next rows of Table 1 compare economic and social characteristics of the residential ZIPs of indigent defendants using data drawn from the 2000 Census. If the randomization is compromised so that certain types of defendants are more likely to receive Defender Association attorneys, we might expect to observe different neighborhood backgrounds for these defendants. A drawback of examining ZIP code characteristics is that ZIP information is missing for almost a third of the sample, although, as indicated in Table 1, rates of data availability are similar across the two groups.

Indigent homicide defendants are drawn disproportionately from disadvantaged areas. For example, 56% of households in the ZIP code of a typical defendant were female-headed, versus 22% for the city as a whole and 12% nationally. Unemployment rates in the defendants' ZIPs were more than 2-1/2 times the city average. Although homicide

defendants are clearly drawn from an unrepresentative sample of the city's neighborhoods, differences in the neighborhood characteristics of those assigned private versus public attorneys are negligible.

Our criminal history data provide another way to assess the comparability of the two groups of defendants. As indicated in Table 1, average criminal involvement appears slightly higher among those assigned to the Defender Association, although none of the differences is statistically significant except for that for prior theft charges. Given that prior criminal history is one of the strongest predictors of case outcomes (Johnson, 2006; Kramer and Steffensmeir, 1993), the fact that the two groups of defendants appear largely balanced in their prior criminal involvement is reassuring.

The next rows of Table 1 summarize the characteristics of the current case, including number and nature of charges and number of defendants involved in the case. Because attorney assignments are made prior to the formal arraignment, in theory the charge composition could adjust based on attorney characteristics. For example, if prosecutors believe that Defender Association attorneys are likely to beat weapons or conspiracy charges, they may drop or decline to file such charges once they see that a particular defendant is represented by the Defender Association. As a practical matter we see little evidence of important differences in case characteristics by initial assignment, although there appears to be a slightly lower rate of weapons charges for Defender Association attorneys.

There are statistically significant differences across the two populations across a handful of characteristics, such as prior theft, but even in the absence of true differences, looking across this many characteristics we would expect to observe some statistically significant differences due to sampling variation alone. One way to assess whether the overall pattern of group differences shown in Table 1 provides evidence of non-random assignment to examine the distribution of p-values in the table. Under the null hypothesis of random assignment we would expect these p-values to be uniformly distributed between 0 and 1. A Kolmogorov-Smirnov test applied to the 35 defendant characteristics listed in Table 1 that were determined

prior to assignment of counsel yields a p-value of .17, indicating that we cannot reject the null hypothesis of random assignment.<sup>8</sup>

Of course, data-based tests of the independence of an instrument are limited to the available data. It is always possible that the proposed instrument is actually related to the outcome in other ways. It is therefore important to examine the actual mechanism of the instrument.

Here, interviews with the Philadelphia court staff indicate that the assignment process is almost completely mechanical and ministerial - little human judgment (and possible conscious or unconscious biases) are involved (McSorley, 2011). A log book is kept by the clerk of the arraignment court and every 5<sup>th</sup> case with a murder charge that comes through is assigned to the Defender Association. This is additional evidence of the independence of our instrument.

## **RESULTS**

The final rows of Table 1 turn to a comparison of case outcomes. Given that the two groups of defendants appear largely similar in terms of demographics, prior criminal involvement, and observable case characteristics, absent any differences in counsel it seems reasonable to expect similar case outcomes across the two groups. However, we observe statistically significant and practically large disparities in some outcomes across the two groups. Approximately 4 out of every 5 murder defendants pleas to or is found guilty of at least one charge, and although the overall guilty rate is slightly lower among individuals randomized to the Defender Association, these differences are not statistically significant. However, for all of the sentencing measures except for death verdicts--which, even among this population, are quite rare--those assigned to the Defender Association achieved better outcomes for the defendants they represented. Particularly notable is the seven percentage point difference in the likelihood of

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<sup>8</sup> The Kolmogorov-Smirnov test is a non-parametric statistical test designed to test whether the observed cumulative distribution of a random variable corresponds to a hypothesized reference distribution.

receiving a life sentence and the two groups' over one year difference in expected time served. This disparity is large relative to the expected time served of around 11 years.

One potential explanation for these differences in outcomes is that Defender Association attorneys might use different strategies for determining whether to advise defendants to take cases to trial than private attorneys, particularly given that these two sets of attorneys have different financial incentives for trial work. The bottom rows of Table 1 indicate that defendants randomized to the Defender Association are appreciably more likely to plead guilty in their cases than those initially assigned private attorneys.

The simple comparisons in Table 1 strongly suggest that Defender Association representation is associated with improved case outcomes. To more formally estimate the impact of representation by the public defender, we turn to the instrumental variable (IV) analysis. In Table 2 we report IV regression estimates of the impact of public defender representation on a range of outcomes.<sup>9</sup>

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<sup>9</sup> We also estimated non-linear version of these specifications (IV Poisson models for count outcomes and bivariate probit models for binary outcomes) and obtained similar results. We report results from linear models for simplicity.

**Table 2: Estimated Impacts of Defender Association Representation on Case Outcomes**

Outcome	Average for Those Assigned Appointed Counsel	Estimated Effect of Public Defender Representation on Outcome			
		(IV1)	(IV2)	(IV3)	(OLS)
Guilty of any charge	.801	-.020 (.046)	-.037 (.046)	-.070 (.073)	-.030 (.018)
Number of guilty charges	2.36	-.271 (.206)	-.243 (.200)	-.436 (.301)	-.202** (.079)
Guilty of murder	.565	-.051 (.057)	-.110* (.056)	-.111 (.071)	.011 (.021)
Life sentence	.262	-.153** (.046)	-.161** (.046)	-.209** (.062)	-.046* (.018)
Death sentence	.013	-.001 (.013)	-.001 (.013)	-.005 (.019)	-.009 (.005)
Average sentence length (years)	20.9	-6.53** (1.99)	-6.42** (1.92)	-3.10 (2.70)	-1.93** (0.73)
Minimum sentence, conditional (years)	8.45	-1.72 (1.18)	-1.55 (1.17)	-1.49 (1.92)	-0.13 (0.47)
Maximum sentence, conditional (years)	18.6	-3.52 (2.56)	-3.03 (2.57)	-5.35 (4.59)	-0.32 (1.01)
Expected time served (years)	11.0	-2.63** (0.86)	-2.61** (0.85)	-0.75 (1.35)	-0.68* (0.33)
Include controls?		N	Y	Y	Y
Include case fixed effects?		N	N	Y	N

Each entry in the table reports the results from a separate regression. Column IV1 estimates a simple linear IV model with no controls; this is equivalent to dividing the mean difference in outcomes reported in Table 1 by the mean difference in representation (.44). Column IV2 adds to the IV regressions controls for defendant race, gender, age and age squared; year of case; and indicators for the number of defendants; total number of charges; presence of a weapons or conspiracy charge; and total prior charges and prior arrest for assault, aggravated assault, weapons offenses, drug offenses, burglary, robbery, and theft.



If randomization was successful, as is suggested by Table 1, inclusion of additional controls in the regression model is not strictly required to obtain an unbiased estimate of impact of Defender Association representation. However, controlling for additional covariates may yield more precise estimates of attorney impacts, and the controls may also be helpful for addressing any unrecognized departures from randomization. In general we obtain similar effects estimates whether we do or do not control for other factors.

Column IV3 adds a set of indicator variables for each case as additional controls. This essentially identifies the impact of Defender Association representation by comparing the outcomes for co-defendants who were involved in the same case, where one defendant was assigned to the Defender Association and other defendants were assigned private counsel. The main advantage of such a within-case analysis is that it ensures balance of factors determined at the case level—such as the quality of witnesses, investigative effort by the police, etc.—across those with different types of representation, even when such factors may be unobservable. The primary drawback of the models with case-level indicators is that these models appreciably reduce our sample size, since in essence this approach excludes the 2,061 cases involving a single defendant from the analysis and focuses only on those cases with several defendants who differ in their initial assignment. Because of the smaller sample, these estimates are less precise than those using the full sample.

We first consider a series of outcome measures that capture guilt—namely, whether the defendant was judged guilty of any charge, the number of guilty charges, and whether the defendant was found guilty of murder. Although estimates of the impact of public defender representation on guilt for any charge are negative, these estimates are modest relative to the overall guilt rate of about 80%, and none are statistically significant. More striking are disparities in murder conviction rates—specification IV2, our preferred specification, demonstrates that those represented by Defender Association attorneys are 11 percentage points, or 19%, less likely to be convicted of murder, a difference that is statistically significant.

We next turn to sentencing outcomes. The two most severe penalties for murder are life in prison, which in Pennsylvania carries no possibility of parole, and death. Representation by the Defender Association reduces the probability of receiving a life sentence by 16 percentage points (column IV2), or a remarkable 62%. This reduction in life sentences can be observed in both the full sample and when limiting the analysis to trials with multiple defendants.

One illustration of the effectiveness of the Defender Association attorneys is the fact that, in the 89 cases involving two defendants, one of whom was represented by the Defender Association and one of whom had private counsel, 16 defendants represented by the private attorneys were acquitted of all charges, versus 25 among those represented by the Defender Association.

While no defendant represented by the Defender Association at trial has ever received the death sentence, our estimates of the effect of Defender being assigned the Defender at preliminary arraignment on receiving the death sentence are small. However, because fewer than 2% of defendants receive a death sentence, our estimates are highly imprecise.<sup>10</sup> The 95% confidence interval for these estimates encompasses values that would imply either a substantial reduction or a substantial increase in the probability of receiving a death sentence due to Defender Association representation. Thus, these data preclude drawing strong conclusions about the efficacy of Defender Association attorneys in avoiding death sentences.<sup>11</sup>

For those who are not sentenced to life imprisonment or death, we can also examine minimum and maximum sentences. The IV point estimates for these outcomes are negative and sizable, but only marginally statistically significant. The magnitudes of the estimated impacts,

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<sup>10</sup> This is not simply a result of using a linear model; similar results are obtained with a bivariate probit analysis.

<sup>11</sup> Because no client represented by the Defender Association at trial has ever been sentenced to death and because more than seventy-four defendants represented by private or appointed counsel have been sentenced to death since 1994, most interviewees with whom we discussed this were surprised by this finding.

however, are large, implying a greater than 1 year reduction in minimum sentences and a more than 3 year reduction in maximum sentences. It appears that Defender Association attorneys are successful at both reducing the likelihood of the most extreme sanctions and reducing the severity of less extreme sentences.

The final row of Table 2 uses expected time served as the outcome, where expected time served is calculated using the NCRP as described above. Our analysis reveals statistically significant and practically large impacts of public defender representation on expected time served--the IV2 estimate of -2.6 implies that individuals represented by Defender Association are expected to spend more than 2-1/2 fewer years in prison than otherwise similar defendants represented by private counsel.<sup>12</sup> This represents a 24% reduction in expected sentence.

As a comparison, Iyengar finds that public defenders in federal cases reduce expected sentences by 16% relative to private assigned counsel (Iyengar, 2007). Abrams and Yoon, who exploit the random assignment of defense attorneys to felony cases in Clark County, NV, find that attorneys with ten years of experience obtain sentences that are 1.2 months (17%) shorter (Abrams and Yoon, 2007). Although both papers provide persuasive evidence that more experienced public defenders improve outcomes, our analysis suggests that, at least in murder cases in Philadelphia, attorneys may have an even larger impact than is suggested by past results.

By way of contrast, the final column of Table 2, labeled OLS, presents estimates of the impact of Defender Association representation on outcomes that use ordinary least-squares (OLS) regression analysis that adjusts for observable differences in characteristics between those with private appointed counsel versus those with public defenders. This is the primary approach used in past studies of the impacts of public versus private counsel (Harmon and Lofquest, 2005;

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<sup>12</sup> Although the specification including case fixed effects is not statistically significant, it is also somewhat imprecise, and indeed we cannot statistically reject equivalence between this estimate and the estimates in columns IV1 and IV2.

Sterling, 1983; Stover and Eckart, 1975; Houlden and Balkin, 1985a; Houlden and Balkin, 1985b; Nagel, 1973; Gitelman, 1971; Shinall, 2010). The OLS approach does provide some evidence that public defenders attain superior outcomes to their private counterparts—for example, using OLS public defenders are estimated to reduce the number of guilty charges by .2 and reduce the probability of receiving a life sentence by 5 percentage points. However, differences between the OLS and IV estimates are noticeable for many outcomes. For example, properly accounting for non-random sorting to attorneys triples the estimated impacts of public defender representation on life sentences and increases the reduction in expected time served by 2 years. OLS estimates suggest public defenders do not affect murder convictions, whereas the more credible IV results show a strong effect.

To provide further insight into why OLS and IV estimates differ, in Table 3 we report coefficient estimates from a regression model where the dependent variable is an indicator for whether a defendant was represented by a Defender Association attorney at trial and the explanatory variables capture defendant demographics and prior criminal history.<sup>13</sup>

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<sup>13</sup> We employ a probit regression model and report average marginal effects in the table. Estimation using a linear model provides very similar results.

**Table 3: Predictors of Eventual Defender Association Representation**

Explanatory Variable	Estimate
Male	-.018 (.032)
Black	-.014 (.017)
Age	.002* (.001)
# charges in current case	.007 (.004)
Current case includes weapons charge	-.086** (.023)
Current case includes conspiracy charge	-.154** (.018)
# defendants in current case	-.009 (.008)
# prior criminal charges for defendant	-.001 (.001)
Defendant had prior assault charge	.060* (.028)
Defendant had prior aggravated assault charge	-.023 (.024)
Defendant had prior weapons charge	-.058** (.020)
Defendant had prior drug charge	-.006 (.017)
Defendant had prior robbery charge	.027 (.027)
Defendant had prior theft charge	.031 (.022)
Defendant had prior burglary charge	.043 (.026)

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Note: This table reports marginal effect coefficient estimates from a probit regression where the outcome variable is a 0-1 indicator for a defendant who was ultimately represented by a Defender Association attorney (mean=.221) and the explanatory variables are defendant demographics and prior criminal history and current case characteristics. The regression also includes year fixed effects as additional unreported controls. The sample size is 3157.

These regressions provide insight into which types of defendants are ultimately most likely to retain their Defender Association attorneys through their cases. The appendix table demonstrates that those ultimately represented by Defender Association attorneys are indeed a non-random subset of the total population—for example, older defendants are more likely to retain the public defenders, while defendants with past or current weapons charges are less likely to be ultimately represented by Defender Association attorneys. Given the clear evidence of sorting based on observable characteristics, it seems reasonable to expect that sorting may also occur along dimensions that are unobservable to us but that may affect how cases are ultimately decided.<sup>14</sup> These patterns demonstrate the difficulty of cleanly measuring attorney effects using traditional regression methods that cannot readily account for defendant sorting behavior.

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<sup>14</sup> For example, defendant characteristics may affect both choice of attorney and the quality of his case.



**EXPLANATIONS FOR THE DIFFERENCE IN OUTCOMES**

Why the stark difference in outcomes? The causes of the difference can be understood as ranging from longer-term systemic/institutional causes and more immediate differences in the treatment of cases.

Appointed counsel have comparatively few resources, face more complex incentives, and are more isolated than public defenders. The low pay reduces the pool of attorneys willing to take the appointments and makes doing preparation uneconomical. Moreover, the judges selecting counsel are often doing so for reasons partly unrelated to counsel's efficacy. In contrast, the Defender Association attorney's financial and institutional independence from judges, the steady salaries provided to attorneys and investigators, and the team approach they adopt avoid many of these problems. These institutional differences lead to the more immediate cause of the difference in outcomes - less preparation on the part of appointed counsel.

These problems are not new. For more than twenty years, commentators have noted many of the same problems with the representation provided by appointed counsel in Philadelphia. In a series of ten newspaper articles in 1992 and 1993, journalist Frederic Tulsy documented a system of providing indigent defense in murder cases in Philadelphia that was flawed by (1) conflicts of interest, (2) lack of compensation, (3) poor training, and (4) few standards (Tulsy, 1992a; 1992b; 1992c; 1992d; 1992e; 1992f; 1992g; 1993a; 1993b; 1993c). Ten years later, in 2001, Hilary Freudenthal conducted a series of quantitative analyses and qualitative interviews and chronicled a similarly dysfunctional system in an unpublished undergraduate paper (Freudenthal, 2001).

To understand whether the situation has meaningfully changed since this previous research, we conducted structured qualitative interviews with twenty appointed counsel, judges, current and former Defender



Association attorneys<sup>15</sup> and reviewed cases in which Philadelphia counsel were found ineffective in capital murder cases. We found that while the situation has improved recently in some respects, many of the same underlying problems remain and are the most probable explanation for our finding of a sharp difference in the outcomes of cases during our study period (1994-2005).

#### **CONFLICTS OF INTEREST**

An adversarial system of criminal justice relies upon zealous representation of the parties in order to reach a reliable outcome. Hence the traditional ethical obligations of counsel to avoid any direct conflict of interest or anything that might impair the lawyer's independence and ability to zealously advocate the client's interests (American Bar Association, 2008). For example, the prohibition on outside investment in law firms in Rule 5.4 is justified on the grounds that it might impair the independent decision making of attorneys. Similarly, the ABA recommends that appointed counsel systems be independent of judges in order to protect the zealous advocacy of counsel: "The public defense function, including the selection, funding and payment of defense counsel is independent...Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense" (American Bar Association, 2002).

Unfortunately, both judges and defense counsel face potential conflicts of interest in the appointment, payment and representation

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<sup>15</sup> We identified subjects by the "snowball" method by asking respondents for the names of other attorneys and judges. Overall, we interviewed three judges, four current or recent Defender Association lawyers, and thirteen counsel who took appointments during the study period. On most topics, there was general agreement on the reasons that defender-represented defendants were likely to fair better than those represented by appointed counsel and we are confident that we achieved saturation within the population of respondents. Of course, more interviews might have revealed additional nuances or explanations for the disparities we observed.

process that help explain why the defender-represented defendants fared better (Bright, 2001).<sup>16</sup>

Appointments in Philadelphia have long been controlled by the judges of the Philadelphia Court of Common Pleas. When a lawyer is needed, court administration determines whose turn it is to next appoint the attorney and contacts that judges' chambers. That judge provides the name of the attorney. This appointment "wheel" is unrelated to the system by which a case is assigned to a judge for trial. The appointing judges include those who are assigned to the civil division and thus do not try criminal cases.

Respondents indicate that judges face several potential conflicts of interest. The first is fiscal. Because Pennsylvania is the only state in which each county is solely responsible for funding indigent defense without any assistance from the state (Stevens, et al, 2010), every dollar that is spent on indigent defense by the county comes directly from the court budget. Judges must therefore weigh indigent defense costs against many needs, including probation officers, and treatment courts (Interview #17).

According to some lawyers, judges would use unspent funds for indigent defense on other judicial branch needs (Interview #9). Apart from the direct pecuniary costs of paying for defense counsel, judges also face conflicts of interest in appointing counsel that will require too much judicial time and energy. Thus judges have incentives to appoint counsel who file fewer pre-trial motions, ask fewer questions during voir dire, raise fewer objections, and present fewer witnesses. Freudenthal (2001) noted a "broad perception that judges prefer lawyers who move cases along without spending 'excessive' time on motions and requests" and quoted a lawyer who explained, "we've got a huge backlog

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<sup>16</sup> Stephen Bright noted the endemic conflicts of interest in appointed counsel systems: "This is a system riddled with conflicts. A judge's desire for efficiency conflicts with the duty to appoint indigent defense counsel who can provide adequate representation; a lawyer's need for business...[discourages effective] advocacy. And later, if there is a claim of [in]effective assistance, the judge who appointed the lawyer is the one to decide the claim.

problem here, and many of the judges just want you moving cases." Quite apart from reducing the expenditures paid to counsel, this also allows judges to process more cases in less time (Interviews 15 and 16). Several interviewees noted that judges are under considerable pressure to move cases and one noted that "nobody wants to rock the boat" (Interview #15) by appointing lawyers who are too aggressive.

Historically, judges have also purportedly assigned cases to lawyers with whom they had political connections (Tulsky, 1992g, p.2; 1993a). A former chairman of the Philadelphia Bar Association criminal justice section explained that the system of appointments had developed because "judges wanted to pay back supporters for their political help" (Tulsky, 1992a, p. 3). Another lawyer explained, "The homicide appointment system is largely a patronage system" (Tulsky, 19992a, p. 5, quoting Robert E. Welsh). In 2001, Freudenthal made similar findings, noting that appointments are used by judges as political favors (Freudenthal, 2001, p. 67).

Today, opinion is mixed with respect to whether political considerations continue to play a role in the appointments. One interviewee explained: "The appointments process is still political. If the judge is Republican, they appoint the next guy on the list they get from the party. Democratic judges aren't any better" (Interview #8).

This occurs even for lawyers that other judges identify as clearly incompetent:

In one case, the homicide calendar judge saw that the lawyer was hopeless and contacted the judge who appointed the guy and told him not to appoint him again. It didn't make any difference. The [judge] appointed the same guy again.  
(Interview #8)

However, most interviewees thought that blatant political considerations in the appointment of counsel were much less common today, in part because fewer attorneys wanted the appointments (Interview #15). Most interviewees thought that most judges tried to appoint reasonably competent lawyers, but even the most positive about

the system admitted that not every appointed counsel did a good job (Interview #17).

This system of appointment also creates incentives on the part of lawyers who wish to continue to receive appointments. Aware of the caseload and fiscal pressures faced by judges, appointed lawyers may be more hesitant to request numerous experts or to represent defendants in time-consuming ways (Interview #16). Freudenthal quoted one lawyer as explaining that some appointed lawyers are routinely appointed because "they don't make trouble, they try cases quickly, they don't do a huge amount of prep, they don't bill huge. They've figured out what's acceptable to the court." Appointed lawyers generally denied that their actions were influenced by these considerations.

In contrast, Defender Association attorneys, on a fixed salary and not beholden to judges for future appointments, lack these incentives (Interview #8).

#### **Compensation for Lawyers, Investigators, and Experts**

Another ongoing problem, also documented by both Tulskey, in 1992 and Freudenthal, in 2001, is the compensation paid to appointed attorneys for representation, investigators, and experts in murder cases. Counsel appointed in murder cases --both capital and non-capital -- receive flat fees for pre-trial preparation -- \$1333 if the case is resolved prior to trial and \$2000 if the case goes to trial. While on trial, lawyers receive \$200 for three hours of court time or less, and \$400/day for more than three hours (Interviews 1,6, and 10).

These compensation amounts and structure creates several problems. First, the overall amounts of compensation are very low compared to other jurisdictions, and compared to what most attorneys could earn in the private sector. By contrast, attorneys appointed to criminal cases in federal court earn \$125/hour in non-capital cases and \$185/hour in capital cases. As a result, many criminal defense attorneys refuse to accept court appointments. Interviewees, including appointed counsel, note that while some of the lawyers taking appointments are good, some are not (Interview #4 (noting that "mostly political hacks" get appointments; noting that many of these lawyers

are "hopeless" and despite required training, "they make the same mistakes, again and again.")

Freudenthal made similar observations, quoting a lawyer as noting "There are a lot of lawyers I know who would be good advocates in these cases who won't take it because it's too much time and almost no money, in terms of the time you have to spend."

Consistent with microeconomic theory, some counsel that take appointed cases do it either because it makes up for the lack of other work or because they received other benefits from it. For example, one respondent noted that while private clients are more lucrative, the appointed work is steady income (Interview #12). For many appointed counsel, this other benefit is an enjoyment of murder trials and being involved in what one lawyer called "significant" cases (Interview #11). One explained: "I'd do it for next to nothing, and the judges know this" (Interview #15).

But these incentives can lead to behavior that is not necessarily in the best interest of the client. Some appointed counsel were critical of the Defender Association for meeting frequently with clients in an effort to persuade defendants to plead guilty rather than take the case to trial (Interview #11). One appointed lawyer said that he thought "time with the client was highly overrated" (Interview #11). He contrasted the Defender's time-intensive efforts to persuade clients to plead to his general willingness to accept a client's desire to go to trial at face value (Interview #11).

Second, as a result of the compensation being low in each case, attorneys who do take homicide appointments, take many more of them than it would be possible to handle well. One interviewee explained: "The way the system is built, it is very difficult for someone who wants to do a good job to get the money and time to be able to use best practices. Very hard for them to bill all that and get paid for it" (Interview #4). Freudenthal quoted a lawyer as explaining that "Anyone who takes a capital case under the Philadelphia system of paying lawyers basically has to commit ethical violations and go into court basically unprepared in many areas."

Another respondent who formerly took appointments explained that, "I think of [appointed counsel] as dray horses. You crack the whip they pull the wagon. Some better than others, but none at the level I think is required" (Interview #16).

The American Bar Association Guidelines for Counsel in Capital Cases noted that a study of federal capital trials found that "total hours per representation in capital cases that actually preceded trial averaged 1889" (American Bar Association, 2003, p. 40). If two appointed counsel in Philadelphia worked similar hours, they would receive compensation of just over \$2 an hour. In death-eligible federal cases in which the death penalty was not sought, Gould and Greenman (2010) found that the median number hours per representation worked was 436.

Finally, the fee structure, a flat rate for preparation with additional payments for trial, creates no marginal incentives to prepare for trial and incentives to take cases to trial. As a result, some interviewees note that appointed counsel do very little preparation and are more likely to take cases to trial (Interviews 19, 11, and 4). Ten years ago, Freudenthal noted the same dynamic and quoted one lawyer explaining why he doesn't spend time convincing defendants to accept a plea: "It could be hours and hours and hours with them, with the family, because you have to get the family involved. I mean, talk about preparation time - that could eat up your \$1700 right there" (Freudenthal, 2001, p. 76).

In particular, interviewees note that Defender Association counsel spend much more time with defendants building trust. This trust is important for developing a defense, particularly in the penalty phase of a capital case, which often requires the defendant to candidly discuss personal family background, including neglect and abuse (Interview #4). The trust also increases the ability of an attorney to convince an often young defendant that the best course of action is to agree to a plea bargain or at least to waive a jury. Freudenthal noted this in her interviews ten years ago (Freudenthal, 2001).

Compared to the Defender Association, appointed lawyers are also limited in their ability to hire expert witnesses, investigators, and mitigation specialists. The ABA recommends that in a capital case, a defense team is formed that includes lawyers, investigators, mitigation specialists, and expert witnesses. "The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist" (American Bar Association, 2003, p. 28). Expert testimony is critical, particularly in the penalty phase of a capital trial, to present and explain the life-long mental health significance of trauma that is often found in the background of capital defendants. Mitigation specialists, often trained social workers, are also an important part of a capital team and are specialists at identifying and documenting mitigating evidence about the defendant's life.

At the Defender Association, mitigation specialists are part of the defense team from the start, meeting with the client and the client's family. Similarly, the Defender Association does not require court approval in order to hire an expert. Every homicide client is routinely examined by a defense mental health expert to help the lawyers understand whether there is an affirmative defense and develop mitigating evidence.

In contrast, appointed counsel have to seek judicial permission to hire experts or investigators. While interviewees indicate that this is now much more freely granted, in the past, judges sometimes denied these requests. Freudenthal quoted one interviewee explaining: "The courts are often willing to give you an expert for \$500. You can get two experts total for various things, so you sort of have to pick and choose. You might get an investigator for \$500 - and you might be able to get a little more money, but they'll give a fight - it's not guaranteed. And maybe, let's say you need a pathologist. Maybe they'll give you a pathologist for another nickel. I don't know which doctor - we're talking a pathologist is going to do any significant amount of work for \$500 or even \$1000. I mean, any good medical expert is a minimum of \$2500 per day, and the court will never give that to you - ever. It's just not going to happen. But let's say you've got a

case in which you need a pathologist, you need an investigator, you need a ballistics expert, you need a fingerprint expert - I've had cases like that. They're just not going to do it." (Freudenthal, 2001, p. 77).

### **Isolation**

Another factor that distinguishes the Defender Association attorneys from the appointed counsel is the degree of isolation on the part of the appointed counsel. Most are sole practitioners, operating out of single-person law offices. In non-capital cases, they represent the defendant alone. In contrast, the Defender Association's homicide unit is a group of twelve attorneys, three investigators, and three mitigation specialists, housed in an office of approximately 215 attorneys (Conway, 2011a). In each case, capital and non-capital, two lawyers work the case up together. This reduces the risk of the inevitable human error on the part of one attorney affecting the overall representation in a way that is detrimental to the client.

One appointed attorney described one way this could manifest itself: "you get defense lawyer syndrome - you think your defense theory of the case is much stronger than it actually is" (Interview #14). As a result, appointed counsel could be more eager to take the case to trial than was justified by the actual strength of the defense case. The Defender Association's team approach to representation reduces the risk of these errors because no individual professional is solely responsible for the case.

The anecdotal notion raised by our interviewees that appointed defense counsel might be more willing to advise their clients to take cases to trial--either due to differences in financial incentives, isolation or inclination--is borne out in the data. Table 4 presents estimates of the impact of Defender Association representation on two measures of case handling--whether or not the defendant waives a jury trial--a strategy typically used to reduce the likelihood of a death sentence--and whether the defendant pleads guilty to at least some



charges.<sup>17</sup> In light of docket pressures, it is also possible that judges may penalize defendants for taking cases to trial.

**Table 4: Estimated Impacts of Defender Association Representation on Case Handling**

Outcome	IV1	IV2	IV3	OLS
Waived jury trial	.017 (.051)	-.018 (.049)	-.038 (.057)	-.017 (.020)
Plead guilty	.236** (.055)	.213** (.053)	.176* (.073)	.135** (.021)
Include controls?	N	Y	Y	Y
Include case fixed effects?	N	N	Y	N

While use of waiver trials does not vary across the two types of attorneys, clients of Defender Association attorneys are 21 percentage points (or 76%) more likely to plead guilty than clients of appointed private attorneys. These differences in willingness to plea bargain may at least in part explain the shorter sentences obtained by Defender Association attorneys for their clients.

Some interviewees also suggest that appointed counsel are slow to adopt new strategies or keep up with relevant case law developments, patterns that might also arise from isolation.<sup>18</sup> One interviewee reports that at a Department of Justice funded national capital case seminar that occurred in Philadelphia and that attracted lawyers from all over the country, none of the lawyers who accepted homicide appointments in Philadelphia attended (Interview #4). Even on the same case, the two lawyers who are now appointed to potentially capital cases don't always communicate with one another to develop a central consistent theme for the case (Interview #4). Ten years ago, Freudenthal noted a similar isolation among appointed counsel (Freudenthal, 2001, p. 63). However,

<sup>17</sup> These estimates have been obtained using the same methods and control variables as those in Table 2.

<sup>18</sup> Interview #4 (describing an attempt to train appointed counsel on new jury voir dire techniques and noted that appointed counsel were making the same mistakes over and over again.)

some appointed counsel interviewed for this study disputed the suggestion that they were isolated and suggested that they maintained networks of colleagues with whom they discussed cases (Interviews #10 and 16).

Some interviewees believed that appointed counsels' skill as trial lawyers was equal or greater to that of the Defender Association lawyers whom they criticized as elitist (Interviews #10 and 11). Yet even these interviewees admitted that not every lawyer taking appointments was as qualified or able as themselves and that the payment scale made spending much time preparing cases thoroughly uneconomical. On this view, the appointed counsel's pride as professionals and skill as lawyers made up for the failure of the courts to pay them to adequately prepare (Interview #10).

Concerns expressed by other commentators that public defenders might be co-opted by the system more than private counsel (e.g. Fleming, et al. 1992) were not borne out in our interviews.

### **Case Review**

We also find failure to prepare in our review of 38 capital cases in which appointed counsel has been found ineffective from Philadelphia over the last 16 years. While some of these cases were tried prior to our study period, they serve as additional evidence of a longstanding pattern of appointed counsels' failure to prepare. So, for example in *Bond v. Beard*, 539 F.3d 256 (3d Cir. 2008), the court explained that defense counsel waited until the eve of the penalty phase to begin preparing for it. Similarly, in *Commonwealth v. Brooks*, 839 A.2d 245 (Pa. 2003), the court noted that appointed counsel never met with the defendant prior to the trial and the sole interaction was a pretrial phone conversation that was less than a half-hour. See Appendix A for list of cases and case summaries.

In short, longitudinal qualitative evidence over the last twenty years identifies several systemic and institutional reasons for the difference in outcomes observed in Section 2. Compared to the Defender Association attorneys, appointed counsel are impeded by conflicts of interest on the part of both the appointing judges and the appointed

counsel, extremely limited compensation, incentives created by that compensation, and relative isolation. As a result of these systemic causes, appointed counsel spent less time with defendants and investigate and prepare cases less thoroughly. Moreover, the inevitable human error in judgment is less likely to be caught by another member of the defense team because appointed counsel are primarily operating individually.

**IMPLICATIONS OF THE PERFORMANCE DISPARITY BETWEEN THE PUBLIC DEFENDER AND APPOINTED  
COUNSEL**

**CONSTITUTIONAL IMPLICATIONS**

The Sixth Amendment theoretically guarantees the effective assistance of counsel. In *Strickland vs. Washington*, 466 U.S. 668 (1984) the Supreme Court held that in order to show a violation of this right, a defendant must show that (1) his attorney at trial provided (1) deficient performance; and (2) there was a reasonable likelihood that he was prejudiced by his attorney's deficient performance. Our findings show that it permits an enormous and troubling chasm between different types of counsel.

The Eighth Amendment, unlike the Sixth Amendment, has been interpreted to prohibit arbitrariness. In *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*), the Supreme Court held that all existing capital punishment statutes were unconstitutional because the arbitrariness of the use of the death penalty violated the Eighth Amendment. One particularly disturbing aspect of our analysis is the fact that we identify a factor--whether or not a defendant is initially assigned to the Defender Association--that has an important impact on case outcomes but that is completely unrelated to the culpability of the defendant. The fact that in expectation one's time imprisoned shifts by simply as a result of the ordering in which cases are brought before the Arraignment Court Magistrate raises troubling questions about whether the current system for assigning representation in

Philadelphia meets constitutional guarantees prohibiting cruel and unusual punishment.

**METHOD OF PROVIDING COUNSEL TO INDIGENTS**

Our findings also bear on the questions of the best way to provide indigent defense. While ostensibly these results might seem to imply that public defenders are superior to private counsel in handling murder cases, in interpreting these results it is important to recognize that in this analysis public representation is confounded with a number of additional factors, such as differences in attorney compensation, which may themselves independently affect the quality of counsel and therefore the disparity in outcomes. We cannot separately disentangle the effects of public versus private defense from the other differences in characteristics across these two types of attorneys. Unfortunately, we were unable to determine the costs of the public defender system in Philadelphia in order to calculate a cost-per-case figure.

For example, two factors that were cited by interviewees as important differentiators between Defender Association attorneys and appointed private counsel in Philadelphia were the use of attorney teams rather than individual attorneys by the Defender Association and the larger amount of case preparation by Defender Association attorneys, which is in part related to their financial incentives. In theory one could organize an indigent defense system that relies solely on private appointed attorneys but that requires attorney teams in more serious cases and offers incentives for careful case preparation, which might allow private attorneys in such a system to achieve results comparable to those of public defenders. Similarly, the private versus public distinction is not necessarily relevant for providing access to dedicated funds beyond the discretion of judges for investigators, psychologists, and other case support personnel. An indigent defense system could provide such funds no matter the type of attorney used for defense. A better understanding of the cost structures and economies to scale that might be realized by public defender offices would be helpful to understanding these issues.

Nevertheless, some factors that may contribute to disparity in case outcomes are likely to be directly affected by the choice to organize indigent defense through a public defender's office. It seems plausible to expect that the isolation experienced by private attorneys noted above by interviewees seems less likely to occur in public defender offices, where opportunities to share information among colleagues and engage in collective training activities are likely to be greater. Thus, along some dimensions it seems reasonable to expect that the choice of whether to organize an indigent defense system using private versus public defenders will have direct impacts on the quality of counsel.

**CONCLUSION**

Consider the following thought experiment: suppose the 2,459 defendants in our sample represented by appointed counsel had been represented instead by Defender Association counsel? Based on the results in Table 2, we would expect 270 defendants who were convicted of murder to have been entirely acquitted of this charge with Defender Association representation, and 396 individuals who received life sentences would have been spared a life sentence. In aggregate we would expect the time served by the 2,459 defendants for the crimes observed in our data to decrease by a staggering 6,400 years!

Recent estimates place the cost of incarcerating a prisoner for one year in Pennsylvania at roughly \$32,000 (Wagner, 2011), so a decrease of 6,400 years would have reduced prison costs for these crimes by over \$200 million. However, it is unclear at this point whether Defender Association representation affects lifetime incarceration and therefore reduces or increases overall prison costs, because incarceration may itself affect future crime through deterrence or incapacitation.

*A priori*, we might have expected defense counsel to make the *least* difference in murder cases because the state expends the most resources and has the highest stakes in a reliable outcome. In fact, we find that counsel makes a vast difference in the outcome of murder cases. Our qualitative interviews suggest that the causes of this disparity are incentive structures created by the appointment system and a resulting failure of appointed counsel to prepare cases as thoroughly as the Defender Association.

Effective counsel is a prerequisite to the assertion of nearly every other right. As the Supreme Court observed, "it is through counsel that all other rights of the accused are protected: Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other right he may have" (*Penon v. Ohio*, 488 U.S. 75, 84, 1988). In that respect, it is the right of all other rights. To provide

a concrete example of this in Philadelphia, the Supreme Court has provided the capital defendant the theoretical right to "life-qualify" the jury to ensure that every juror is able to consider and give effect to mitigating evidence in the penalty phase of a capital trial (*Morgan v. Illinois*, 504 U.S. 719, 1992). Yet one interviewee noted that many appointed counsel, unlike Defender Association counsel, did not regularly do so (Interview #10).

As such, legislatures, (or here local government, including the courts), can effectively undermine Supreme Court-mandated procedural rights by failing to provide resources to enforce them. In this way, as Stuntz (1997) has noted, the legislature can profoundly shape the actual practice of constitutional criminal procedure despite it nominally being the province of the Supreme Court. Our findings can be understood as a rough measure of the results of this strategy.

We often claim, in the words of John Adams, to be "a government of laws, not of men" (Massachusetts Constitution, ARTICLE XXX, 1780). To further this end, *Gideon* extended the right of counsel so that "every defendant stands equal before the law" (*Gideon v. Wainwright*, 372 U.S. 335, 344, 1963). Ideally, the vagaries of counsel should make no difference in the outcome of a proceeding in our justice system. Our findings show how far from this goal we are.

Further research in other jurisdictions would be useful to extend this research and to determine how generalizable the findings might be.

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APPENDIX A

PHILADELPHIA CAPITAL MURDER CASES IN WHICH APPOINTED COUNSEL HAVE BEEN FOUND  
CONSTITUTIONALLY INEFFECTIVE

Kindler v. Horn, Nos. 03-9010 & 03-9011, 542 F.3d (3d Cir. Sep. 3, 2008) (Philadelphia, habeas appeal) (reversing district court's denial of relief for penalty-phase ineffectiveness assistance of counsel in failing to investigate and present mitigating evidence relating to defendant's mental and emotional disturbance, brain damage, and history of abuse and neglect).

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Commonwealth v. Ramos, Jan. Term, 1999, No. 0089 (Phila. C.P. Apr. 17, 2008) (Philadelphia, PCRA) (stipulation to penalty-phase relief for ineffective assistance of counsel for failing to investigate and present mitigating evidence).

Commonwealth v. Carson, Feb. Term, 1994, Nos. 2837-2840, May Term, 1994, Nos. 1841-1848 (Phila. C.P. Apr. 1, 2008) (Philadelphia, PCRA remand) (stipulation to penalty-phase relief for ineffective assistance of counsel for failing to investigate and present mitigating evidence).

Holland v. Horn, No. 01-9002, 519 F.3d 107 (3d Cir. March 6, 2008) (Philadelphia, habeas appeal) (granting a new sentencing hearing as a result of counsel's ineffectiveness in failing to obtain the appointment of a mental health expert and present available mental health mitigating evidence), *aff'g*, 150 F. Supp. 2d 706 (E.D. Pa. Apr. 25, 2001).

Commonwealth v. Jones (Damon), Sept. Term, 1992, Nos. 714 *et. seq.* (Phila. C.P. Aug. 3, 2007) (Philadelphia, PCRA remand) (stipulated relief for direct appeal counsel's ineffectiveness in failing to

investigate and present claim that trial counsel was ineffective in failing to investigate and present available mitigating evidence).

Morris v. Beard, No. 01-3070, 2007 WL 1795689, 2007 U.S. Dist. LEXIS 44707 (E.D. Pa. June 20, 2007) (Philadelphia, habeas) (death sentence reversed for ineffective assistance of counsel in penalty phase for failing to investigate and present available mitigating evidence).

Commonwealth v. Thomas (LeRoy) a/k/a John Wayne, Dec. Term, 1994, No. 700 (Phila. C.P. Jan. 11, 2007) (Philadelphia, PCRA) (stipulated penalty-phase relief for counsel's ineffectiveness in failing to investigate and present mitigating evidence).

Marshall v. Beard, No. 03-CV-795 (E.D. Pa. Jan. 10, 2007) (Philadelphia, habeas) (stipulation to grant of penalty-phase relief on petitioner's claim of penalty-phase ineffectiveness for failing to investigate and present mitigating evidence).

Lewis v. Horn, No. 00-CV-802, 2006 WL 2338409 (E.D. Pa. Aug. 9, 2006) (Philadelphia, habeas) (death penalty reversed for penalty-phase counsel's ineffectiveness in failing to investigate and present available mitigating evidence).

Commonwealth v. Sneed, No. 366 Cap. App. Dkt., 587 Pa. 318, 899 A.2d 1067 (Pa. June 19, 2006) (Philadelphia, PCRA appeal) (trial counsel ineffective for failing to investigate and present social history and mental health mitigating evidence).

Commonwealth v. Gibson (Ronald), Jan. Term 1991, No. 2809 (Phila. C.P. Apr. 26, 2006) (Philadelphia, PCRA) (death sentence reversed for trial counsel's ineffectiveness "in failing to conduct any investigation at all regarding mitigating evidence").

Bond v. Beard, No. 02-cv-08592-JF, 2006 WL 1117862 (E.D. Pa. Apr. 24, 2006) (Philadelphia, habeas) (death sentence reversed for counsel's ineffectiveness in failing to investigate and present available mitigating evidence where "if counsel had fulfilled their obligation of conducting a reasonable investigation, very significant evidence could have been presented to the jury in mitigation").

Commonwealth v. Collins (Ronald), Nos. 372 & 373 CAP, 585 Pa. 45, 888 A.2d 564 (Pa. Dec. 27, 2005) (Philadelphia, PCRA appeal) (affirmed

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Commonwealth v. Peoples, Oct. Term, 1989, Nos. 4498-4502 (Phila. C.P., Crim. Div., June 29, 2005) (Philadelphia, PCRA) (new trial granted for ineffectiveness of counsel in failing to investigate and present a diminished capacity, voluntary intoxication, or heat of passion defense to reduce the degree of murder).

Commonwealth v. Ligons, May Term, 1998, No 0086 (Phila. C.P., Crim. Div., June 23, 2005) (Philadelphia, PCRA) (death sentence reversed for trial counsel's ineffectiveness in failing to investigate and present mitigating evidence from institutional records).

Rivers v. Horn, No. 02-1600 (E.D. Pa. May 10, 2005) (Philadelphia, habeas) (stipulated grant of penalty phase relief for ineffective assistance of counsel for failing to investigate and present mitigating evidence).

Commonwealth v. Collins (Rodney), Aug. Term, 1992, Nos. 1588-1590 (Phila. C.P. Feb. 16, 2005) (Philadelphia, PCRA) (sentencing-stage counsel was ineffective in failing to investigate and present available mitigating evidence).

Commonwealth v. Peoples, Oct. Term, 1989, Nos. 4498-4502 (Phila. C.P., Crim. Div., Nov. 23, 2004) (Philadelphia, PCRA) (stipulated



relief for ineffective assistance of counsel in failing to investigate and present available mitigating evidence).

Rolan v. Vaughn, No. 01-CV-81, 2004 WL 2297407 (E.D. Pa. Oct. 13, 2004) (Philadelphia, habeas) (new trial granted for trial counsel's ineffectiveness in failing to interview and present eyewitness in support of claim of self-defense), *aff'd*, - F.3d --, 2006 WL 997383 (3d Cir. Apr. 18, 2006).

Commonwealth v. Thompson (Andre), Feb. Term, 1993, Nos. 2193-2200 (Phila. C.P. June 1, 2004) (Philadelphia, PCRA) (new trial granted for counsel's ineffectiveness in failing to investigate and present alibi defense and in failing to investigate and challenge questionable eyewitness identification).

Commonwealth v. Walker, May Term, 1991, Nos. 2770-2776, bench order (Phila. C.P. Apr. 21, 2004) (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence).

Commonwealth v. Fletcher, March Term, 1992, Nos. 6001-04 (Phila. C.P. Feb. 26, 2004) (Philadelphia, PCRA, new trial) (new trial granted for ineffectiveness of trial counsel).

Commonwealth v. Brooks, No. 369 Cap. App. Dkt., 839 A.2d 245 (Pa. Dec. 30, 2003) (Philadelphia, direct appeal, new trial) (new trial granted for ineffectiveness of counsel in failing to prepare for trial where appointed counsel never met with defendant prior to trial and sole contact was a single pretrial telephone conversation of less than ½-hour; court said trial counsel *per se* ineffective for failing to meet with a capital client before trial).

Commonwealth v. Clark, Dec. Term, 1993, Nos. 4115-19 (Phila. C.P. March 17, 2003), bench order (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence).

Commonwealth v. Cook, Aug. Term, 1987, No. 2651 2/2 (Phila. C.P. March 13, 2003), bench order (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence).

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Holloway v. Horn, 161 F. Supp. 2d 452 (E.D. Pa. Aug 27, 2001) (Philadelphia, habeas corpus) (new sentencing hearing granted as a result of trial counsel's ineffectiveness for failing to investigate and present mitigating evidence).

Commonwealth v. Jones (James), Oct. Term, 1980, Nos. 2486, 2487, 2491 (Phila. C.P. June 12, 2001) (*Jones II*) (Philadelphia, PCRA) (new sentencing hearing for ineffective assistance of counsel for failing to investigate and present family background).

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Commonwealth v. Moran, Nov. Term, 1981, Nos. 3091 & 3092 (Phila. C.P. 1999) (Jan. 25, 1999) (Philadelphia, PCRA) (conviction overturned for counsel's ineffectiveness in failing to communicate plea offer to defendant).

Commonwealth v. Perry, 537 Pa. 385, 644 A.2d 705 (Pa. July 1, 1994) (Philadelphia, direct appeal) (new trial granted for "inexcusably derelict representation by defense counsel").