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## ARTICLES

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### PUBLIC DEFENDERS AND APPOINTED COUNSEL IN CRIMINAL APPEALS: THE IOWA EXPERIENCE

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#### I. INTRODUCTION

In Iowa's criminal justice system, indigent defendants are represented by two separate and distinct groups: public defenders, who are salaried government employees, and court-appointed attorneys, who contract with the state on an hourly basis. This is an article about their performance on appeal.

Iowa's appellate courts decide roughly five hundred criminal appeals every year.<sup>1</sup> Most appeals, criminal and otherwise, are decided by the Court of Appeals, Iowa's

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1. As revealed in the study at the heart of this piece, the Iowa Court of Appeals decided 987 criminal appeals between 2012 and 2013, and the Iowa Supreme Court retained twenty-one criminal appeals during the same period. This works out to 1,008 cases over two years, or 504 cases per year.

intermediate appellate court.<sup>2</sup> In each criminal appeal, defense attorneys face off against assistant attorneys general from the state Department of Justice's criminal appeals division. One might wonder whether the type of criminal defense attorney—appellate defender, court-appointed attorney, or retained counsel—makes a difference. Until now, there has been almost no data to answer that question.

Only one existing study, focusing on New York appeals in the late 1980s, has meaningfully explored appellate outcomes based on type of counsel.<sup>3</sup> Two subsequent, more-limited studies found results inconsistent with the New York data.<sup>4</sup> Data about trial-level counsel are similarly a mixed bag, with some studies showing public defenders are more effective than court-appointed attorneys, some showing the opposite, and some showing that there are no significant differences.<sup>5</sup>

The original study contained in this article aims to break past the noise and provide a clear answer—at least for Iowans—as to whether the type of counsel matters in a criminal appeal. The study reports on objective measures of counsel's effectiveness: the number of cases in which defendants obtain favorable outcomes, the number of filings with procedural and technical problems, the rate at which counsel sought further review by the Iowa Supreme Court, and the rate at which further review was granted.

The data show that the appellate defenders generally perform better than court-appointed lawyers—they win more

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2. See generally 2012–2013 Iowa Appellate Courts Statistical Report (noting that the Court of Appeals disposed of approximately 3,000 appellate cases in the 2012–13 year, while the Iowa Supreme Court disposed of 213 cases) (on file with author). The numbers contained in the statistical report do not include cases disposed of by motion practice (e.g., a State's motion to dismiss an appeal or summarily reverse a conviction or sentence). See IOWA R. APP. P. 6.1006 (2015) (covering dispositional-motion practice), available at <https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/10-29-2015.6.pdf>.

3. DAVID T. WASSERMAN, A SWORD FOR THE CONVICTED: REPRESENTING INDIGENT DEFENDANTS ON APPEAL (1990).

4. Jimmy J. Williams, *Type of Counsel and the Outcome of Criminal Appeals: A Research Note*, 19 AM. J. CRIM. JUST. 275, 275 (1995) (noting that “type of counsel was nonsignificant in predicting the court's decision”); JOY A. CHAPPER & ROGER A. HANSON, UNDERSTANDING REVERSIBLE ERROR 27–28 (1989) (noting that “winning does not appear to be strongly associated with . . . the type of lawyer”) [hereinafter REVERSIBLE ERROR]. These studies are discussed in more detail in Part III.

5. See *infra* Part II.

cases, have fewer procedural and technical problems, seek further review in more cases, and obtain further review more often.<sup>6</sup> One particularly striking difference is that, over the course of two years, court-appointed appellate lawyers never had a further-review application granted; the appellate defenders convinced the Supreme Court to take eighteen unfavorable Court of Appeals decisions on further review. Looking in another direction, the data also show that representation provided by the appellate defenders was roughly comparable to that provided by privately retained defense counsel: Minor differences appear between the groups, but neither the appellate defenders nor retained counsel come out clearly ahead on the objective measures—except for the appellate defenders’ dramatically lower number of procedurally and technically defective filings.

There is no quick fix that can upgrade court-appointed attorneys’ performance. But the final section of this piece suggests a few places to start. Court-appointed attorneys need better training and better support. Existing prerequisites and continuing-legal-education requirements for court-appointed attorneys are not enough. Iowa should explore expanding the number of appellate defenders to give more defendants more consistent representation; or, if the present system of court appointments endures, the State Public Defender should consider giving the appellate defenders oversight over court-appointed attorneys’ work product. This article explains why.

## II. CRIMINAL APPEALS IN IOWA

The focus of this paper and study are relatively narrow: criminal appeals in the state courts of Iowa. But criminal appeals are not unique to Iowa—they are present in every state,<sup>7</sup> and at least some research suggests that the broad contours of criminal

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6. See *infra* Part III(B); Appendix C: Statistical Breakdowns for Outcomes (2012–2013, All Criminal Appeals).

7. Criminal appeals also occur at the federal level, but those federal cases fall outside the scope of this article. For a short and accessible introduction to federal criminal appeals, see Michael Heise, *Federal Criminal Appeals: A Brief Empirical Perspective*, 93 MARQUETTE L. REV. 825 (2009).

appeals have “[f]ew striking differences” among the states.<sup>8</sup> Because the institutional features of Iowa criminal appeals may have shaped the results contained in this study, an exploration of the distinctive make-up of Iowa’s appellate criminal-justice system is the starting point for understanding whether the type of counsel makes a difference.

### *A. The Courts: The Supreme Court and the Court of Appeals*

Unlike nearly all its sister states, Iowa has a deflective routing system in which all appeals originate in the Supreme Court, and the overwhelming majority are transferred to the Court of Appeals for disposition.<sup>9</sup> In 2012 and 2013, the Supreme Court decided<sup>10</sup> twenty-one criminal appeals through retention, while the remaining 987 criminal appeals were transferred to the Court of Appeals.<sup>11</sup> For the overwhelming majority of criminal defendants, the Court of Appeals is the state court of first and last resort. Only about five percent of criminal appeals see action by the Supreme Court: the retained cases amount to 2.15 percent of all criminal appeals, and another 2.82 percent of criminal appeals are granted further review by the Supreme Court.<sup>12</sup>

8. REVERSIBLE ERROR, *supra* note 4, at 4.

9. See generally IOWA CODE § 602.1102 (2013) (describing structure of judicial branch); § 602.4102 (2013) (describing jurisdiction of the supreme court, authority to transfer cases to the court of appeals, and procedure for further review); § 602.5103 (2013) (describing court of appeals jurisdiction), available at <https://www.legis.iowa.gov/docs/code/2013/602.pdf>. While the Supreme Court of Iowa is created by the Iowa Constitution, the Court of Appeals is purely a creature of statute. See IOWA CONST. art. V (creating supreme and district courts, authorizing general assembly to create new inferior courts).

10. When I use the word “decided,” I mean cases that are decided by opinion (published or unpublished) following formal submission to an appellate court. The figures contained in this article do not include cases that are disposed of before formal submission based on a dispositional motion, such as a motion to dismiss, affirm, or reverse.

11. At later points in this article, I refer to the total number of 2012–2013 criminal appeals as 975 (rather than 987). The statistics calculated in this study are based only on cases in which counsel appeared on behalf of a criminal defendant; pro se appeals, in which no counsel entered an appearance, were excluded.

12. In the 2012–2013 sample used in this study (excluding the twelve pro se appeals), 2.82 percent of all criminal appeals were reviewed by the Supreme Court on further review. See Table 8: Further Review Obtained Following Loss, *infra* p. 245. Out of 521 applications, just twenty-three were granted further review, for a rate of 4.41 percent. See *id.* No pro se applications were granted.

The court that hears an appeal matters. Iowa’s Supreme Court, at least according to its own rules, retains only a narrow band of cases—constitutional challenges to statutes or rules, cases concerning a conflict among lower courts, “substantial” issues of first impression, “fundamental and urgent issues of broad importance,” and cases presenting “substantial” questions of enunciating or changing legal principles.<sup>13</sup> As compared to Iowa’s Supreme Court, the Court of Appeals is an error-correcting court,<sup>14</sup> with mandatory rather than discretionary jurisdiction. The Court of Appeals must decide all cases transferred to it by the Supreme Court and—again, at least according to the rules—it ordinarily hears cases involving “the application of existing legal principles” and cases “that are appropriate for summary disposition.”<sup>15</sup>

This institutional structure means that the overwhelming majority of criminal appeals in Iowa have their first and only hearing before the Court of Appeals. And more than ninety percent of these cases are decided on the briefs, without oral argument.<sup>16</sup> For this reason, a study of Iowa’s criminal appeals properly focuses on dispositions before the Court of Appeals and evaluates features of the briefing process that can be discerned from publicly accessible documents.

### *B. The Players:*

#### *Varying Defense Counsel against the Attorney General*

The parties in Iowa criminal appeals are predictable: On one side is the State of Iowa, and on the other is an individual

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13. IOWA R. APP. P. 6.1101(2) (2013), available at <https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/06-30-2014.6.pdf>. The retention criteria also include lawyer-discipline appeals, which are not particularly relevant to the discussion of criminal appeals in this article. IOWA R. APP. P. 6.1101(2)(e).

14. For a broader discussion of appellate courts’ error-correcting function, see generally Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379 (1995); see also REVERSIBLE ERROR, *supra* note 4, at 27 (referring to “[t]he primary function of intermediate appellate courts . . . [as] error correction—examining lower court proceedings to determine the correctness of the law applied and the procedures followed”).

15. IOWA R. APP. P. 6.1101(3) (2013), available at <https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/06-30-2014.6.pdf>.

16. In the sample, only ninety out of 975 cases (9.23 percent) involved oral argument. See Table 21: Oral Argument, *infra* p. 249.

criminal defendant or inmate.<sup>17</sup> Most cases involve repeat players (among counsel and sometimes defendants). To understand the data contained in this article, necessary background includes the identity of recurring players in the criminal-appeals arena.

### *1. Defense Counsel*

In Iowa, criminal defendants and prisoners have a statutory right to counsel in most cases before the appellate courts.<sup>18</sup> But the statute does not guarantee a particular type of defense attorney. Most criminal defendants are indigent and receive counsel at public expense.<sup>19</sup> Whether a particular defendant is entitled to counsel at public expense turns on state administrative rules tied to federal poverty guidelines.<sup>20</sup>

Like in other states,<sup>21</sup> not all attorneys that represent Iowa's criminal defendants come from the same background or have the same attributes. Indigent defendants are represented by two categories of appellate counsel—either what I refer to as “appellate defenders” (the government employees dedicated

17. An extremely small number of criminal appeals involve briefs filed by amicus curiae. Only two cases in this study included an amicus brief. In one, the National Alliance of State and Territorial AIDS Directors, The Center For HIV Law and Policy, and the HIV Law Project filed a brief concerning Iowa's statute criminalizing the knowing failure to disclose one's HIV status. *Rhoades v. State*, 2013 WL 5498141 (Iowa Ct. App. 2013) *vacated and rev'd on further review*, 848 N.W.2d 22 (Iowa 2014). In the other, the Innocence Project of Iowa filed a brief urging changes in the law concerning the preservation of evidence. *Alexander v. State*, 2013 WL 5291938 at \*2 n.3 (Iowa Ct. App. 2013).

18. IOWA CODE § 814.11(1)–(2) (2013), available at <https://www.legis.iowa.gov/docs/code/2013/814.pdf>. As is true in the district courts, a criminal defendant is not entitled as a matter of right to counsel in the “appeal” (really discretionary review) of a simple-misdemeanor conviction.

19. In 2012 and 2013, 86.32 percent of criminal defendants were appointed counsel at public expense. Counsel was privately retained by 12.46 percent of criminal defendants, and 1.21 percent of criminal defendants represented themselves pro se. See Table 20: Type of Counsel Overall (Pro Se Included), *infra* p. 249.

20. IOWA ADMIN. CODE R. 493-10.5 (Dec. 25, 2013) (describing required affidavit of financial status and setting out procedure for calculating need), available at <https://www.legis.iowa.gov/docs/iac/agency/12-25-2013.493.pdf>.

21. For an overview of general approaches to appointment of counsel for indigent defendants, see Lauren M. Block, *Assignment of Counsel for Indigents*, in 1 THE ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 126 (Jay S. Albanese ed., 1st. ed., 2014) and Robert L. Spangeberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 L. & CONTEMP. PROB. 31 (1995).

full-time to indigent defense) or “court-appointed attorneys” (private lawyers who contract with the state to represent indigent defendants on a part-time hourly basis). Non-indigent defendants are represented by lawyers they pay for, whom I refer to in this paper as “retained attorneys.” As discussed below, the way these groups become involved in criminal appeals differs, as do their respective workloads. I explore these differences below because they may, at least in part, explain differences between the groups on the metrics measured in the original study.

#### a. The Appellate Defender’s Office

The genesis of the Iowa Appellate Defender’s Office was a 1979 report by the Iowa Supreme Court’s Litigation Committee, which recommended creation of a statewide appellate defense office.<sup>22</sup> Legislation to establish the office was overwhelmingly advanced by the Iowa General Assembly and signed by Governor Robert Ray in 1981.<sup>23</sup> The only clear point of contention in the initial legislation was over appointment of the State Appellate Defender: The Iowa Senate favored he be hired by a governor-appointed commission while the Iowa House favored direct appointment by the governor.<sup>24</sup> The House version prevailed and the office was made permanent by legislation in 1982.<sup>25</sup> The statutory scheme for the office today is similar to that at its origin, though a 1989 amendment provided for appointment of the State Appellate Defender by the governor-appointed (and state-senate-confirmed) State Public Defender, rather than direct appointment of the Appellate Defender by the governor.<sup>26</sup>

As explained in a report provided to Iowa’s governor after the office opened:

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22. NATIONAL LEGAL AID & DEFENDER ASSOCIATION, FINAL EVALUATION OF THE IOWA APPELLATE DEFENDER (1982) at 3, 5 [hereinafter IAD REPORT].

23. *Id.* at 3–6; 81 Iowa Acts ch. 23 (69th G.A.).

24. IAD REPORT, *supra* note 22, at 6–7.

25. *Id.* at 6.

26. 1989 Acts. ch. 51, § 2 (73rd G.A.); *see generally* IOWA CODE Ch. 13B (2013), available at <https://www.legis.iowa.gov/docs/code/2013/13B.pdf>.

Major objectives of the [Appellate Defender] include reducing the cost of criminal appeals within the state, providing property tax relief to local counties by absorbing costs resulting from indigent criminal appeals, promoting greater judicial efficiency within the criminal justice system by reducing unnecessary delays in the administration of criminal appeals, and promoting the best interest of justice by providing high quality appellate representation to indigent criminal defendants.<sup>27</sup>

Today, the Appellate Defender (AD)'s Office largely pursues these same objectives, though its focus has narrowed to purely state appellate matters—rather than state-district-court litigation or federal litigation—in the intervening years.<sup>28</sup>

In terms of personnel, the AD's Office employed thirteen full-time attorneys in 2012 and fourteen full-time attorneys in 2013.<sup>29</sup> These attorneys, on average, had about twelve years of experience in the AD's office, and the amount of criminal-appellate experience ranged from two years to forty-one years.<sup>30</sup> Each assistant appellate defender is expected to handle between thirty-five and forty cases per year.<sup>31</sup> Appellate defenders are

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27. IAD REPORT, *supra* note 22, at App. F-3 p. 1.

28. Compare IAD REPORT, *supra* note 22, at 6 & 11 (requiring the AD's Office to handle postconviction matters before the district courts) with IOWA CODE § 13B.11 (2013) (requiring state appellate defender to "represent indigents on appeal in criminal cases and on appeal in proceedings to obtain postconviction relief when appointed to do so by the district court"), available at <https://www.legis.iowa.gov/docs/code/2013/13B.pdf>, and Email from Kurt Swaim, First Assistant State Public Defender, *Questions Re: AD for Law Review Article* (Dec. 12, 2014) (transmitting State Appellate Defender Mark Smith's responses to author's questions about State Appellate Defender's policies and practices) (on file with author) [hereinafter *Swaim December Email*] (both noting that, today, the AD's office represents criminal defendants only on direct or interlocutory appeals in criminal cases, appeals from a denial of a motion to correct an illegal sentence, appeals from probation or parole revocation proceedings, and appeals from the denial of an application for postconviction relief). The only time the AD's office appears in federal court would be United States Supreme Court certiorari review of a state-court decision. See *Attachment to Swaim December Email* (on file with author). The chief appellate defender reports that his office has only participated in one United States Supreme Court case over the last decade. See *id.*

29. *Swaim December Email*, *supra* note 28. For both years, the office also had four full-time support staff. See *id.*

30. *Id.*

31. *Id.*



salaried, rather than paid hourly, and the pay scale ranged from \$48,505 to \$111,820 as of June, 2013.<sup>32</sup>

Under the Iowa Code, the Appellate Defender is appointed to all criminal appeals originating in the district court, and then has the opportunity to withdraw.<sup>33</sup> Decisions about when to withdraw are not purely random. According to the chief appellate defender,<sup>34</sup> during the period explored in this study the office's practice was to "take all cases [it] can reasonably handle," other than conflicts.<sup>35</sup> The chief appellate defender reports that, when the office has to withdraw for workload reasons, the office will "generally withdraw from the less serious cases—driving offenses, OWI, simple possession."<sup>36</sup> He also indicated the office strives to avoid withdrawing from Class A felonies, other than for conflict reasons.<sup>37</sup> As discussed at length in Part V.D below, however, the chief appellate defender's description about the office's withdrawal practices is not entirely consistent with the data collected for 2012 and 2013.

#### b. Court-Appointed Attorneys

Indigent defendants who are not represented by the appellate defenders, and who do not elect to retain paid counsel, are represented by court-appointed attorneys. Under the State Public Defender (SPD)'s 2012–2013 rules, court-appointed attorneys in criminal appeals were paid \$60 an hour, unless a contract with the SPD specified otherwise.<sup>38</sup> Attorneys could not

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32. Email from Steven Ainger, Classification & Compensation Program Coordinator, Iowa Dep't of Admin. Servs., *Question about June, 2013 Asst. Appellate Defender Salary Range* (Jan. 29, 2016) (responding to author's request for confirmation of 2013 salary information no longer available on DAS website) (on file with author).

33. IOWA CODE § 814.11(3) (2013), available at <https://www.legis.iowa.gov/docs/code/2013/814.pdf>.

34. For clarity and consistency, I use "chief appellate defender" in this article to refer to the Iowa State Appellate Defender, who leads the Appellate Defender's Office and supervises assistant appellate defenders.

35. *Attachment to Swaim December Email*, *supra* note 28.

36. *Id.*

37. *Id.*

38. IOWA ADMIN. CODE R. 493-12.4 (addressing rates in general), R. 493-124.4(3) (excepting contracted-for appellate rates from limits imposed by rule) (Dec. 25, 2013), available at <https://www.legis.iowa.gov/docs/iac/agency/12-25-2013.493.pdf>. This same

bill for clerical work, overheard, preparation of indigent-defense fee claims, or challenges to the SPD's denial of a fee claim.<sup>39</sup> And travel time to visit a client was only payable when the travel was "reasonable and necessary" to the representation.<sup>40</sup> During the time period evaluated in this study, a fee cap of \$2,400 was imposed on criminal appeals.<sup>41</sup> An attorney could exceed this amount only after obtaining a court order authorizing a fee in excess of the cap.<sup>42</sup>

The State Public Defender did not maintain statistics concerning the experience of court-appointed attorneys during the period explored in this study.<sup>43</sup>

### c. Privately Retained Counsel

In Iowa, as is true elsewhere in the country, a small cadre of criminal defendants are represented by privately retained counsel, paid for by the defendant or his family. For purposes of this study, little information was available about the characteristics of this group of attorneys,<sup>44</sup> other than the relative infrequency at which retained counsel appears in the sample.<sup>45</sup>

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rate was applicable for the period of the study. See IOWA ADMIN. CODE R. 493-12.4 (May 30, 2012), available at <https://www.legis.iowa.gov/docs/iac/agency/05-30-2012.493.pdf>.

39. IOWA ADMIN. CODE R. 493-12.5(3) (June 25, 2014), available at <https://www.legis.iowa.gov/docs/iac/agency/06-25-2014.493.pdf>; accord IOWA ADMIN. CODE R. 493-7.1 (Apr. 6, 2011) (defining terms including "in-court time," "out-of-court time," and "paralegal time"), available at <https://www.legis.iowa.gov/docs/iac/agency/04-06-2011.493.pdf>.

40. IOWA ADMIN. CODE R. 493-12.5(4)(c) (June 25, 2014), available at <https://www.legis.iowa.gov/docs/iac/agency/06-25-2014.493.pdf>.

41. IOWA ADMIN. CODE R. 493-12.6(3) (May 30, 2012), available at <https://www.legis.iowa.gov/docs/iac/agency/05-30-2012.493.pdf>. The 2014 rule abolishes that limit. IOWA ADMIN. CODE R. 493-12.6(3) (June 25, 2014), available at <https://www.legis.iowa.gov/docs/iac/agency/06-25-2014.493.pdf>.

42. IOWA ADMIN. CODE R. 493-12.6(4) (May 30, 2012), available at <https://www.legis.iowa.gov/docs/iac/agency/05-30-2012.493.pdf>.

43. See *Attachment to Swaim December Email*, *supra* note 28.

44. For example, no entity tracks information about the experience and workload of retained counsel because retained counsel are not accountable to the State or the State Public Defender. Retained counsel are accountable only to their clients and to market forces.

45. Only 12.46 percent of all criminal defendants were represented by privately retained counsel in 2012–2013 appeals. See Table 20: Type of Counsel Overall (Pro Se Included), *infra* p. 249. Among the sample of appeals in which defendants were

## 2. *The Attorney General's Criminal Appeals Division*

Unlike defense counsel, who represent a number of different clients in the course of their careers, the State is represented in each and every criminal appeal by an assistant attorney general in the criminal appeals division of the Iowa Department of Justice.<sup>46</sup> Under the Iowa Code, the Attorney General has sole responsibility for all criminal appeals before Iowa's appellate courts.<sup>47</sup> County attorneys cannot and do not appear as counsel of record in these cases.<sup>48</sup>

The State's typical role in a criminal appeal is as the appellee, defending a district court judgment. The State is also authorized to appeal as a matter of right in certain limited circumstances, including dismissal or other legal judgment on an indictment, an order arresting judgment, or an order granting a new trial.<sup>49</sup> The State has authority to seek discretionary review in an array of cases, including orders dismissing an arrest or search warrant, an order suppressing evidence, an order granting or denying change of venue, or any final judgment or order "raising a question of law important to the judiciary and the

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represented by counsel, retained counsel appear in 12.62 percent of appeals. See Table 19: Type of Counsel Overall (Pro Se Excluded), *infra* p. 249.

46. As a result of increased workload during the period studied in this article, the State was represented by volunteer attorneys from other divisions of the Attorney General's office in approximately thirty-nine cases, or around four percent of criminal appeals in the sample. However, even when briefs were written by other-division volunteers (or division interns), briefs were reviewed by criminal-appeals staff before they were filed with the appellate courts.

47. IOWA CODE § 13.2(1)(a) (2013) (declaring that "[i]t shall be the duty of the attorney general, except as otherwise provided by law to . . . [p]rosecute and defend all causes in the appellate courts in which the state is a party or interested"), available at <https://www.legis.iowa.gov/docs/code/2013/13.pdf>.

48. *In re A.W.*, 741 N.W.2d 793, 801 (Iowa 2007) ("Absent a specific statutory directive to the contrary, county attorneys' appearances in the appellate courts are limited to representation of the interests of the county [rather than the State]."); *State v. Gill*, 143 N.W.2d 331, 332 (Iowa 1966) ("Ordinarily, a criminal case is under the control of the county attorney until the supreme court acquires jurisdiction, after which it is under the sole control of the attorney general.").

49. IOWA CODE § 814.5(1) (2013), available at <https://www.legis.iowa.gov/docs/code/2013/814.pdf>.

profession.”<sup>50</sup> The State may also appeal discretionary reductions of certain mandatory-minimum sentences.<sup>51</sup>

### *C. The Appeals: Direct Appeals of Convictions and Postconviction-Relief Appeals*

At least as it relates to this study,<sup>52</sup> there are two types of criminal appeals in Iowa: a direct appeal following conviction, and an appeal from the denial of postconviction relief following an unsuccessful application.

A direct appeal is initiated by a criminal defendant filing a notice of appeal in the district court and in the Supreme Court of Iowa within thirty days of a final judgment—usually sentencing.<sup>53</sup> All criminal convictions, other than a simple misdemeanor or ordinance-violation conviction, may be appealed as a matter of right.<sup>54</sup> Over the 2012 and 2013 calendar years, direct appeals made up a majority of criminal appeals: 768 out of 975 appeals included in this study, or 78.77 percent of criminal appeals.

A postconviction-relief (PCR) appeal is initiated by a convicted criminal defendant<sup>55</sup> filing a notice of appeal in the district court, also within thirty days of a final judgment—usually an order denying postconviction relief.<sup>56</sup> The right to

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50. IOWA CODE § 814.5(2) (2013), available at <https://www.legis.iowa.gov/docs/code/2013/814.pdf>.

51. IOWA CODE § 901.10(4) (2013), available at <https://www.legis.iowa.gov/docs/code/2013/901.pdf>.

52. As discussed in more detail in Part IV, the population of “criminal appeals” studied in this article includes both direct appeals of criminal convictions and sentences, and appeals of postconviction-relief actions that challenge criminal convictions, which are technically civil in nature. See *infra* Part IV: The Original Study.

53. See IOWA R. APP. P. 6.101(1)(b) (2013), available at <https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/06-30-2014.6.pdf>.

54. IOWA CODE § 814.6 (2013), available at <https://www.legis.iowa.gov/docs/code/2013/814.pdf>. A simple misdemeanor or ordinance violation may be “appealed” by seeking discretionary review. IOWA CODE § 814.6(2)(d) (2013).

55. These convicted criminal defendants are referred to as “applicants” in the captions of PCR cases. See generally IOWA CODE ch. 822 (2013) (describing application for postconviction relief and application process), available at <https://www.legis.iowa.gov/docs/code/2013/822.pdf>.

56. See IOWA R. APP. P. 6.101(1)(b) (2013).

postconviction relief in Iowa is purely a creature of statute<sup>57</sup> and the grounds specified in the Code include constitutional claims, sentencing issues, and newly discovered evidence, among others.<sup>58</sup> Importantly, and unlike the system in some other states, ineffective-assistance claims in Iowa are “ordinarily” preserved for postconviction relief.<sup>59</sup> An ineffective-assistance claim need not be raised on direct appeal and can be raised for the first time in an application for postconviction relief.<sup>60</sup> An unsuccessful postconviction-relief application may be appealed by the defendant/applicant, and the State may appeal the grant of postconviction relief as a matter of right.<sup>61</sup> Postconviction-relief appeals constitute a distinct minority of appeals included in this study: 207 out of 975 appeals, or 21.23 percent.

Before proceeding to the narrow focus of this study—the effect of appellate counsel on appeal outcomes—it is useful to place Iowa’s overall criminal-appeals statistics in a broader context. There is no systematic breakdown of criminal appeals nationwide that shows the type of appellate reversal and the rate at which each occurs. One of the few sources for a glimpse of this data comes from a report published in 1989 by the National Center for State Courts that looked at criminal appeals before four intermediate appellate courts (in California, Colorado, Illinois, and Maryland) and one state court of last resort (in Rhode Island, which lacks an intermediate appellate court).<sup>62</sup> The graph on the next page shows the differences and

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57. What is now Iowa Code Chapter 822, previously Chapter 663A, “supplanted” Iowa’s common-law habeas remedy for convicted persons. *See* *Davis v. State*, 443 N.W.2d 707, 709 (Iowa 1989).

58. IOWA CODE § 822. 2 (2013), available at <https://www.legis.iowa.gov/docs/code/2013/822.pdf>.

59. *E.g.*, *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012) (noting that the Iowa Supreme Court will “ordinarily preserve such claims for postconviction relief proceedings”); accord *State v. Liddell*, 672 N.W.2d 805, 809 (Iowa 2003) (“Ineffective assistance of counsel claims are generally preserved for post-conviction relief.”).

60. IOWA CODE § 814.7 (2013), available at <https://www.legis.iowa.gov/docs/code/2013/814.pdf>.

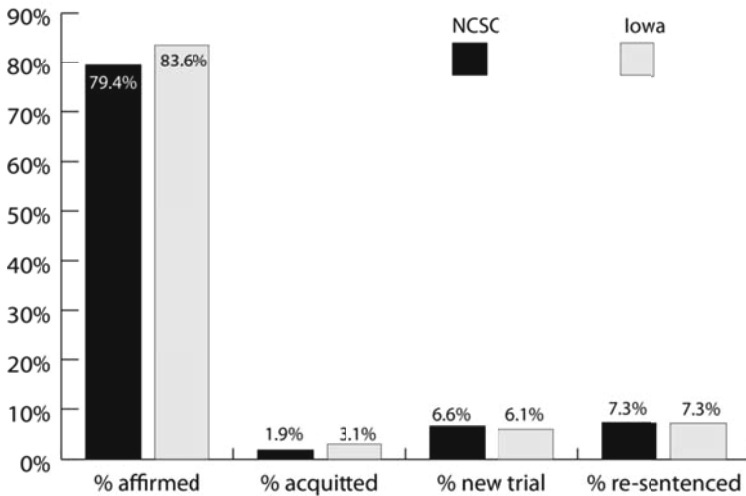
61. IOWA CODE § 822.9 (2013), available at <https://www.legis.iowa.gov/docs/code/2013/822.pdf>.

62. REVERSIBLE ERROR, *supra* note 4, at 3 n.\*; *see also* James W. Meeker, *Criminal Appeals Over the Last 100 Years*, 22 CRIMINOLOGY 551 (1984) (indicating that defendants in the early-to-mid twentieth century were less likely to “win” on appeal than in the mid-to-late nineteenth century).

similarities in the rate of appellate reversal between the NCSC data<sup>63</sup> and the data compiled in this study.<sup>64</sup>

In short, the data show that appellate outcomes in Iowa are generally consistent with the information on outcomes compiled by NCSC. The graph on the next page shows that Iowa defendants obtain favorable action on appeal somewhat less often than defendants in the five other states studied by the NCSC, and Iowa defendants obtain marginally more “acquitted” outcomes, while the other states grant marginally more new trials.

Comparison of National Criminal Appeals Data to Iowa



As discussed more in Part IV, not all types of favorable action for a defendant are created equal—some wins are big, like an acquittal, and some are small, like a sentencing

63. The NCSC data are tabulated differently from the data used in this study. About 4.8 percent of the outcomes reported in the NCSC report do not directly correspond to the sentencing-outcome coding used here. See REVERSIBLE ERROR, *supra* note 4, at 35–36 (including graph categories “Win nothing,” “Affirmed/reversed,” “Resentencing,” “Other,” “Reversed/dismissed,” and “Reversed/new trial”). For the data used to compile the graph on this page, see Table 22: Comparison of Iowa and NCSC Data, *infra* p. 250.

64. The research methodology for tabulating the type of reversal and its rate is discussed at length in Part IV.A.3.a and the coding rubric is included at pages 236 through 240 in Appendix A.

modification. Yet the breakdown on types of favorable action is also remarkably consistent between the Iowa data and the NCSC data. Though no statistical inferences can or should be drawn from this abbreviated comparison, the data suggest that criminal-appeal outcomes in Iowa are similar to those in other states. This, in turn, suggests that the data collected in the original study contained in Part IV may be applicable beyond Iowa's borders, given the similar baseline for overall appellate outcomes.

### III. EXISTING RESEARCH ON DIFFERENCES IN APPELLATE COUNSEL

One of few studies exploring the impact of different appellate counsel was Wasserman's 1990 New York study, which compared briefing and outcomes between cases handled by an institutional appellate defender—the Criminal Appeals Bureau—and the conflict cases handled by court-appointed attorneys.<sup>65</sup> Wasserman looked at 1,410 appellate cases,<sup>66</sup> and his study had two components: one based on a qualitative evaluation of the briefs and one based on a quantitative evaluation of appeal outcomes. As to the briefs, Wasserman had eight retired appellate judges blindly review briefs filed by both CAB and the appointed attorneys. The judges rated the CAB briefs “modestly but consistently higher” than appointed attorneys' briefs, and the judges found that as many as one quarter of the appointed attorneys' briefs failed to raise meritorious issues, compared to just one of the CAB briefs.<sup>67</sup> The judges also found that the appointed attorneys' briefs were more likely to raise frivolous issues than the CAB briefs.<sup>68</sup>

The quantitative data collected by Wasserman also supported a difference between defenders, with some nuance. Wasserman collected the total number of cases in which defenders of both types obtained “favorable action” for their

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65. WASSERMAN, *supra* note 3. CAB, an arm of New York City's Legal Aid Society, operated as the institutional appellate defender because its contract provided that it was appointed for all indigent appellate representation, except for conflict cases. *Id.* at 44.

66. *Id.* at 92.

67. *Id.* at 65, 81.

68. *Id.* at 81.

clients, including reversal and dismissal, the grant of a new trial, dismissal of lesser-included offenses, correction of sentencing error, and other remands.<sup>69</sup> He found that CAB obtained favorable action in 11.82 percent of cases, appointed attorneys obtained favorable action in 7.91 percent of cases, and privately retained counsel did so in 17.88 percent of cases.<sup>70</sup> The differences between CAB and the appointed attorneys were statistically significant, as were the differences between those attorneys and the privately retained attorneys.<sup>71</sup> The greatest differences between CAB and appointed attorneys were for the grant of a new trial and for re-sentencing, while CAB and appointed attorneys had identical rates of dismissals/acquittals.<sup>72</sup> For sentencing reductions, CAB actually outperformed retained counsel: 2.68 percent of CAB clients obtained sentencing modifications, compared to 2.1 percent of retained-counsel clients.<sup>73</sup>

Ultimately, Wasserman concluded that “a defendant was more likely to prevail on appeal if he was assigned to CAB, because of its superior representation.”<sup>74</sup> He devoted a chapter of his book to ruling out alternative causes for CAB’s success: He looked at CAB’s selection procedures and found no evidence of deliberate manipulation in case-screening, and limited support for any merit-based bias—such as an advantage possibly conveyed by the discretion accorded CAB in applying the conflict-of-interest rules—in selection of appeals.<sup>75</sup> Further, Wasserman’s analysis of the data established that, even if there was a bias in selection, this could not account for all the variance in the performance of CAB versus the appointed attorneys.<sup>76</sup>

As partial explanation for these findings, Wasserman’s investigation revealed that there was “much fuller support for the city’s institutional defenders than for its assigned defenders,”

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69. *Id.* at 90.

70. *Id.* at 97.

71. *Id.*

72. *Id.* at 98–99.

73. *Id.*

74. *Id.* at 65 (outlining study’s structure and summarizing its results).

75. *Id.* at 115–131, 130.

76. *Id.* at 131.



particularly in terms of a predictable salary, paid support staff, and covered office expenses.<sup>77</sup> In contrast to the CAB, appointed attorneys were paid at an hourly rate that worked out to significantly less than the institutional defenders' salary,<sup>78</sup> they were not reimbursed for rent or support staff, and they paid for their own office supplies.<sup>79</sup> He extrapolated from his data that the quality of advocacy makes a big difference in certain cases—like the grant of a new trial or sentencing correction—in which outcomes are “more dependent on skilled advocacy” than the “mechanical” type of analysis related to obtaining a dismissal of an indictment for a speedy-trial violation or other elementary reasons.<sup>80</sup>

When Wasserman wrote in 1990, “[e]mpirical research on the impact of appellate advocacy [was] virtually non-existent.”<sup>81</sup> The landscape has changed little since then. Only two notable additions appear in the literature, and they raise more questions than they provide answers. First, the National Center for State Courts study rejected Wasserman's claim that appellate counsel makes a difference in the overall rate of favorable action, and found “weak” statistical support for the notion that public defenders win “bigger” than court-appointed attorneys.<sup>82</sup> Second, a short study of Florida appellate decisions found that the assignment of counsel (whether a public defender or a court-appointed attorney) was not a significant factor in predicting appellate outcomes.<sup>83</sup>

Looking beyond the impact of counsel on appeal, there is a body of research exploring whether type of counsel makes a difference for criminal defendants at the trial level. The results of these studies, however, are mixed. A 1982 study of 48,000 trial-level case records in Virginia found that public defenders were more likely to obtain dismissals for their clients and that

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77. *Id.* at 44–45.

78. *Id.* at 44–45, 52.

79. *Id.* at 45.

80. *Id.* at 99.

81. *Id.* at 63.

82. REVERSIBLE ERROR, *supra* note 4, at 40

83. Williams, *supra* note 4. Based on his results, Williams reasoned that indigent defendants were not afforded inferior counsel, in part because the prevailing perception among judges is that most criminal appeals are “frivolous, hopeless, and routine.” *Id.* at 282 (citations omitted).

their trials were less likely to result in a guilty verdict.<sup>84</sup> That study also found that privately retained counsel performed better than either type of indigent counsel on the same measures.<sup>85</sup> Other studies have found that retained counsel are more likely to obtain deferred dispositions,<sup>86</sup> and that retained counsel take more cases to trial and obtain proportionally more acquittals.<sup>87</sup> Still other data show retained counsel filed more motions than court-appointed attorneys,<sup>88</sup> and that retained counsel visited clients sooner after arrest.<sup>89</sup>

A number of studies also explore whether sentencing outcomes vary across types of counsel. One 2005 study found the type of representation “slightly significant” (at ten percent confidence) between private and public-expense counsel, and found that public defenders obtain sentences that are 8.9 months shorter than those obtained by private counsel.<sup>90</sup> Another study, released the same year, found that public defenders underperformed retained counsel and court-appointed attorneys in sentencing outcomes.<sup>91</sup> The study attributed this difference to

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84. See LARRY J. COHEN, ET AL., ASSIGNED COUNSEL VS. PUBLIC DEFENDER SYSTEMS IN VIRGINIA (1982). Specifically, the study found that thirty-five percent of the public defenders’ cases involved a dismissal, while the rate was only twenty-six percent for court-appointed attorneys. *Id.* at 35. Of note, this statistic includes cases in which the prosecutor ultimately declined to file further charges or declined to proceed on the indictment. *Id.*

85. The study found that retained counsel obtained dismissals in 46.2 percent of cases and only 50 percent of cases with retained counsel resulted in a guilty verdict. *Id.*

86. Joyce S. Sterling, *Retained Counsel Versus the Public Defender: The Impact of Type of Counsel on Charge Bargaining*, in THE DEFENSE COUNSEL 151, 160–62 (William McDonald, ed., 1983). The same research shows, however, that public defenders obtain more charge reductions. See *id.* at 161–62.

87. Dean J. Champion, *Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records, and Leniency in Bargaining*, 17 J. CRIM. JUST. 253 (1989).

88. Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 766–70 (1986–87).

89. See ROGER A. HANSON ET AL., INDIGENT DEFENDERS: GET THE JOB DONE AND DONE WELL (1992).

90. Elaine L. Hill, *Does the Type of Legal Representation Affect Sentencing Outcomes?* 1 UNDERGRAD. ECON. REV. 17 (2005).

91. Morris B. Hoffman, Paul H. Rubin, & Joanna M. Shepherd, *An Empirical Study of Public Defender Effectiveness: Self-Selection by the “Marginally Indigent”*, 3 OHIO ST. J. CRIM. L. 223, 242 (2005) (including figures 4 and 5). Like the study presented in this article, the Hoffman, Rubin, & Shepherd piece divides counsel into three groups: public defenders, court-appointed attorneys, and retained counsel. *Id.* at 233–34. The specific findings of the study were that public defenders’ clients received nearly five years longer

“marginally indigent” defendants retaining counsel in cases in which representation might affect the outcome.<sup>92</sup>

An unpublished study from 2007 explored differences in trial-level outcomes in the federal arena, where representation was essentially random.<sup>93</sup> The study found that clients of attorneys appointed under the Criminal Justice Act were found guilty 2.6 percent more often than clients represented by the federal public defender,<sup>94</sup> and those court-appointed attorneys’ clients received prison terms that were seven months longer on average.<sup>95</sup> In other words, the study found that federal public defenders obtain better outcomes. The author of this study posited that, at least in part, these differences can be explained by the federal public defenders having stronger academic credentials, more experience, and better wages.<sup>96</sup>

Another study, from 2011, showed similar results.<sup>97</sup> The 2011 study looked at an assortment of counties and controlled for variables that were not consistent between states, like offense type.<sup>98</sup> The study found that clients of court-appointed attorneys were 2.8 percent more likely to be found guilty, were 5.2 percent more likely to be convicted on the most serious count of the indictment, and were on average sentenced to longer terms of incarceration.<sup>99</sup> Their cases also took longer to resolve from arrest to adjudication.<sup>100</sup> This study also found that a one-dollar increase in the hourly pay of some types of court-appointed-attorneys correlated with shorter expected sentences.<sup>101</sup>

More recently, a 2012 study explored differences in outcomes between court-appointed attorneys and public

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terms of imprisonment than the average private attorneys’ clients and court-appointed attorneys’ clients. *Id.* at 241–44.

92. *See id.* at 245–50.

93. Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* 8–11 (Nat’l Bureau of Econ. Research, Working Paper No. 13187, 2007), available at [http://personal.lse.ac.uk/iyengarr/indigent\\_defense.pdf](http://personal.lse.ac.uk/iyengarr/indigent_defense.pdf).

94. *Id.* at 23.

95. *Id.* at 24.

96. *Id.* at 28.

97. Michael A. Roach, *Indigent Defense Counsel, Attorney Quality, and Defendant Outcomes*, 16 AM. L. & ECON. REV. 577 (2014).

98. *Id.* at 598.

99. *Id.* at 602.

100. *Id.*

101. *Id.* at 607.

defenders in Philadelphia.<sup>102</sup> The Philadelphia study provides one of the better analyses, as it's based on a system that is almost purely random: Every fifth person charged with murder in Philadelphia is assigned to the public defender's office at arraignment, while the remainder are represented by court-appointed attorneys.<sup>103</sup> The results "suggest that defense counsel makes an enormous difference in the outcomes of cases, even in the most serious cases—in which one might hope that the particular type of defense lawyer would matter least."<sup>104</sup> Contrasted with appointed counsel, the public defenders' clients were nineteen percent less likely to be convicted of murder, their clients were sixty-two percent less likely to receive a life sentence, and their clients who received prison sentences served twenty-four percent less time.<sup>105</sup>

These studies, and others not cited here, fail to paint a clear picture.<sup>106</sup> If anything, the take-away from the existing research is that the data are inconsistent and any meta-analysis would be muddled. Some studies find public defenders are more "effective" (measured in various ways) than court-appointed attorneys and public defenders, while others come to the opposite conclusion or express inconsistent findings. These studies, almost universally, focus on trial-level results. No study, other than Wasserman's in 1990, has conclusively explored the effectiveness of indigent counsel at the appellate level and differentiated among types of appellate outcomes. The original study discussed in the next part aims to fill this gap using data from cases before the Iowa Court of Appeals.

#### IV. THE ORIGINAL STUDY

To explore whether the type of representation makes a difference in Iowa criminal appeals, I designed an original

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102. James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154 (2012).

103. *Id.* at 159.

104. *Id.*

105. *Id.* at 159, 179–84.

106. See Ronald F. Wright & Ralph A. Peeples, *Criminal Defense Lawyer Moneyball: A Demonstration Project*, 70 WASH. & LEE L. REV. 1221, 1240 (2013) (describing the results of existing research as "varied" and "conflicting").

empirical study to compare litigation conducted by appellate defenders, court-appointed attorneys, and retained counsel. I lay out the methodology and coding scheme below, and I include the coding rubric in the appendix, to enable replication.

### *A. Methodology*

From the outset, I confess I was not designing an experiment on a blank slate. The variables I chose to measure, and the formation of my initial hypotheses, were no doubt colored by my anecdotal experience as an appellate prosecutor. I frequently prosecute cases in which I face different types of counsel, and it would be disingenuous to suggest that some bias did not pre-dispose my views when conducting the study. To mitigate any preconceptions I may have had, the measures relied on in completing this study are only those that can be empirically verified and objectively demonstrated by a search of publicly available court dockets and opinions available on the Iowa judicial branch website.

I designed the study to encompass two calendar years of criminal cases before the Iowa Court of Appeals, including direct criminal appeals and postconviction cases. As described below, I relied on publicly available sources to collect data related to each individual case included in the study.

#### *1. Sample Selection*

In defining the parameters of the study, I relied on the Iowa judicial branch website to create a list of decisions issued by the Court of Appeals between January 1, 2012 and December 31, 2013.<sup>107</sup> I removed duplicate cases from my sample, after reviewing both opinions.<sup>108</sup> I reviewed all cases that listed the

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107. Slip opinions dating back to 1998 are available on the judicial branch website. *See Opinion Archive*, IOWA JUDICIAL BRANCH (Dec. 10, 2015), [http://www.iowacourts.gov/About\\_the\\_Courts/Court\\_of\\_Appeals/Court\\_of\\_Appeals\\_Opinions/Opinions\\_Archive/](http://www.iowacourts.gov/About_the_Courts/Court_of_Appeals/Court_of_Appeals_Opinions/Opinions_Archive/) (accessed Dec. 10, 2015; copy of main search page on file with Journal of Appellate Practice and Process). I did not use a “term” system (as compared to a “calendar” system) to determine the sample because Iowa’s Court of Appeals does not follow a publicly announced term system.

108. Some cases were posted twice following a successful petition for rehearing; in that situation, only the final disposition of the case is accounted for in the study’s data.

State of Iowa as a party and omitted non-criminal cases, such as tort cases against the State, disputes related to Department of Corrections policy or procedures, and juvenile cases. I also removed appeals by the State<sup>109</sup> and cases that solely concerned commitments of persons as sexually violent predators (SVPs), even though SVP cases are handled in the district court by the Attorney General's area prosecutions division, and later defended by the criminal appeals division after a verdict.<sup>110</sup>

## 2. Hypotheses

Based on the available data, and the limited number of non-subjective potential metrics, I formed hypotheses in four areas concerning the effectiveness of appellate counsel. First, the number of favorable outcomes—the bottom line for defendants who want a “win” on appeal to obtain a new trial, reduce their sentencing exposure, or obtain an acquittal. Second, the number of technical or procedural defects in the parties' filings, as reflected in public docket entries. Third, whether counsel fully exhausted the appellate process, preserving potential federal habeas claims for their clients by seeking further review. And fourth, whether lawyers that received unfavorable outcomes before the Court of Appeals were able to successfully obtain further review by the Supreme Court.

Based on my desire to investigate these four areas, I made the following hypotheses comparing the appellate defenders and court-appointed attorneys:

1. The appellate defenders more frequently obtain favorable outcomes for clients.

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109. See generally Table 23: State/Attorney General as Litigant, *infra* p. 250, for some relevant statistics concerning State's appeals.

110. No SVPs obtained favorable outcomes before the Court of Appeals in 2012 or 2013. In all seventeen SVP appeals, respondents facing commitment as sexually violent predators were represented by attorneys from the State Public Defender's Special Defense Unit. And in all seventeen cases, the jury verdict or court judgment was affirmed. As relevant to the statistics compiled for this study, the public defenders sought further review in 11.76 percent of cases and obtained further review in none. The rates of stricken filings and defaults were both 5.88 percent in SVP cases. Although the comparison is not neat—SVP cases differ from criminal appeals in a number of ways—these data points put the Special Defense Unit lawyers' performance much closer to the performance of court-appointed attorneys than to that of the appellate defenders. See *infra* Parts IV.B.1–IV.B.4.

2. The appellate defenders have fewer technical and procedural problems litigating before the appellate courts.
3. The appellate defenders more frequently exhaust the state appellate process by seeking further review.
4. The appellate defenders more frequently obtain further review by the Supreme Court following an unfavorable outcome.

I did not form a specific hypothesis about the performance of the appellate defenders as compared to retained counsel (given that I expected comparatively few retained-counsel appeals in the sample period). However, my expectation before completing the study was in line with Wasserman's findings and the conventional wisdom that retained counsel generally perform better than indigent counsel, whether court-appointed or part of an institutional defender system.<sup>111</sup>

### 3. Coding

To compile the statistics at the heart of this piece, I designed a coding rubric to use while reviewing individual judicial opinions and Iowa appellate-court dockets. The full coding rubric is included as Appendix A.<sup>112</sup> The rubric was used to record raw data into a Microsoft Excel spreadsheet, which

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111. The comparatively higher performance of retained counsel could be based on a variety of factors including that their cases involve “fewer violent crimes, more sympathetic clients, and greater possibilities for error in more complex cases.” WASSERMAN, *supra* note 3, at 89. Wasserman posits, I think correctly, that the greatest advantage for retained counsel is the self-selection of cases by both attorney and client: Retained attorneys can turn down hopeless cases and their clients are unlikely to pay potentially substantial legal fees for appeals that do not have at least some probability of success. *See id.* at 89.

112. The rubric included at Appendix A is substantially similar to the rubric used during the coding process, with better proofreading and without handwritten reminders in the margin. The only exception is in the coding rules for the severity of the offense; this was done separately and subsequent to the initial coding, based on additional information from the chief appellate defender. *See Attachment to Swaim December Email, supra* note 28.

was later reviewed for data cleanup—misspellings, data recorded in the wrong column, and the like.<sup>113</sup>

Coding in the individual areas is explained in broad strokes below. This information, combined with the rubric in Appendix A, should be sufficient for any independent researcher to verify my findings.

#### a. Coding for Outcome

Outcomes were coded in two ways: once broadly and once narrowly. The broad categorization was for whether the outcome was favorable or unfavorable to the defendant. Unfavorable outcomes, from the perspective of a criminal defendant, include cases in which the judgment is either affirmed in whole or the appeal is dismissed.<sup>114</sup> All other outcomes were classified as favorable.

The basis for the outcome-coding decision was the full text of the judicial opinion published on the judicial branch website. All opinions include a bolded directive concerning outcome at the end of the opinion, though often this is abbreviated and only makes sense in the context of the preceding language in the opinion. Coding for the particular type of favorable outcome was governed by the rules set forth in the coding rubric. In short, three types of outcomes were coded: “acquitted” if the Court of Appeals reversed for dismissal or otherwise vacated a conviction with jeopardy; “new trial” if a new trial was ordered or a reversal was ordered without the attachment of jeopardy;<sup>115</sup> and “re-sentenced” if a sentence was modified or remanded for a new sentencing hearing.<sup>116</sup>

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113. The raw data spreadsheet is on file with the author.

114. A dismissal is equivalent to an affirmance because they have the same practical effect: The original judgment (conviction or sentence) is left intact.

115. “New trial” is the default coding for any non-sentencing reversal because the Iowa Code provides that, “[i]f a judgment against the defendant is reversed, such reversal shall be deemed an order for a new trial, unless the appellate court shall direct a different disposition.” IOWA CODE § 814.22 (2013), available at <https://www.legis.iowa.gov/docs/code/2013/814.pdf>. Consistent with this section, I coded outcomes as “acquittals” only if that outcome was directed by the Court of Appeals opinion.

116. Iowa’s appellate courts have authority to either directly modify a sentence on appeal (to reduce it) or remand the case for a district court judge to enter an order modifying a sentence. See IOWA CODE § 814.20 (2013) (“The appellate court, after an examination of the entire record, may dispose of the case by affirmation, reversal or



## b. Coding for Procedural and Technical Defects

There is generally no clear statement in judicial opinions as to whether a party has failed to comply with procedural rules concerning appellate practice,<sup>117</sup> but the Iowa Courts Online docket for appeals does contain several cues that provide a barometer for these deficiencies. Based on the information available in the online docketing system, I tracked cases in which the clerk of appellate courts or a single-justice order<sup>118</sup> struck defense filings, required defense counsel to re-file documents, or entered a default and fine for failure to comply with the rules. For purposes of coding, documents were coded as “stricken” if they were stricken by an order or if a letter from the clerk compelled counsel to file amended documents. A default was coded only in circumstances in which the court formally entered an order of default, and a default was not coded when the default was formally withdrawn by a subsequent order or notation by the clerk’s staff.

## c. Coding for Further-Review Applications and Further-Review Grants and Denials

Coding for data concerning applications for further review was based solely on the online appellate docket. The docketing system records when an application is filed and who files the application. These records allow for coding based on whether an application was filed by counsel or by a defendant pro se. Only applications made by counsel were recorded. The docketing system also records the disposition of an application through an

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modification of the district court judgment. The appellate court may also . . . reduce the punishment, but shall not increase it.”), *available at* <https://www.legis.iowa.gov/docs/code/2013/814.pdf>.

117. On occasion, opinions do include a comment about procedural and technical defects. *See, e.g., State v. Lange*, 831 N.W.2d 844, 847 (Iowa Ct. App. 2013) (“Rule infractions are not a trivial matter.”).

118. The overwhelming majority of non-dispositional orders before the Iowa Supreme Court are single-justice orders. *See IOWA R. APP. P. 6.1002(5)* (2013) (providing that “a single justice or senior judge of the supreme court may entertain any motion in an appeal or original proceeding in the supreme court and grant or deny any relief which may properly be sought by motion, except that a single justice or senior judge may not dismiss, affirm, reverse, or otherwise determine an appeal or original proceeding”), *available at* <https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/06-30-2014.6.pdf>.

order issued by the chief justice—it will list the application as either “granted” or “denied,” and the data was coded accordingly.

#### d. Coding for Offense Severity

Given the chief appellate defender’s statement about the office’s withdrawal process,<sup>119</sup> I also coded each appeal for offense severity. Because many criminal defendants are convicted of multiple crimes, I based offense-severity coding on the top count (most severe offense) for which a defendant was originally convicted in the district court.

Coding was based on the hierarchy of offenses laid out in the Iowa Code. Iowa has four broad classifications of felonies—Class A, Class B, Class C, and Class D—that generally correspond to the punishments of life in prison, twenty-five years in prison, ten years in prison, and five years in prison, respectively.<sup>120</sup> There are three classifications of misdemeanors—aggravated, serious, and simple—that generally correspond to two years in prison, one year in the county jail, and thirty days in the county jail, respectively.<sup>121</sup> The coding for this study does not reflect the handful of offenses that deviate from these general punishments,<sup>122</sup> or crimes that potentially carry enhancements, unless the enhancement elevates the felony

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119. See *supra* Part II.B.1.a; see also *Attachment to Swaim December Email*, *supra* note 28 (noting the AD withdrew from Class A felonies only when the office could not undertake representation due to a conflict, that the AD staff “try to keep the more serious cases,” and that the office tries to “generally withdraw from the less serious cases—driving offenses, OWI, simple possession”).

120. IOWA CODE § 902.9 (2013), available at <https://www.legis.iowa.gov/docs/code/2013/902.pdf>.

121. IOWA CODE § 903.1 (2013), available at <https://www.legis.iowa.gov/docs/code/2013/903.pdf>.

122. For example, while second-degree murder is a Class B felony, it carries a punishment of fifty years in prison, rather than twenty-five years. See IOWA CODE § 707.3(2) (2013), available at <https://www.legis.iowa.gov/docs/code/2013/707.pdf>. On the other end of the spectrum, possession of marijuana (first offense) is a serious misdemeanor with a reduced maximum sentence of six months in jail, rather than one year. See IOWA CODE § 124.401(5) (2013), available at <https://www.legis.iowa.gov/docs/code/2013/124.pdf>.

classification (rather than only modifying the applicable penalty).<sup>123</sup>

I caution the reader that, if reliability concerns are present anywhere in my data, it is likely here. Unlike the procedure that involves following relatively explicit cues for the other coding segments, coding for offense severity takes some detective work. Judicial opinions rarely contain an explicit statement that a criminal defendant has been convicted of Crime X, a Class Y felony. I based my coding on this information where it was available. For opinions that included a clear statement of the conviction at issue without identifying the severity of the offense, I used the sentencing charts utilized by Iowa practitioners to look up the corresponding offense's severity based on code section and the name of the crime.<sup>124</sup> Where there was ambiguity as to the offense at issue or where the name of the offense alone was not sufficient to determine an offense level,<sup>125</sup> I used *Iowa Courts Online*<sup>126</sup> to find how the district court clerk had docketed the adjudication on the top count and used that information.<sup>127</sup> For a handful of postconviction cases, district court dockets were not clear or incomplete,<sup>128</sup> and I

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123. Compare IOWA CODE § 902.14 (2013) (elevated penalty classification for sex-crime offenders), available at <https://www.legis.iowa.gov/docs/code/2013/902.pdf> with IOWA CODE ch. 901A (2013) (enhanced penalties for sexually predatory offenses, no increase in offense classification), available at <https://www.legis.iowa.gov/docs/code/2013/901A.pdf>.

124. See Michael Mullins, J., Iowa Ct. App., *Sentencing Summary Chart*, OFFICE OF THE STATE PUBLIC DEFENDER (2007–2014), <https://spd.iowa.gov/defense-resources/sentencing-summary-chart>. If the code year was available in an opinion, I used the corresponding year's chart. If the offense date was not clear, I relied on the 2012 chart.

125. For example, identity theft under Iowa Code section 715A.8(3) could be a Class D felony or an aggravated misdemeanor depending on the amount fraudulently obtained. See IOWA CODE § 715A.8(3) (2013), available at <https://www.legis.iowa.gov/docs/code/2013/715A.pdf>. Both types of convictions would be entered under the same code section.

126. See Iowa Courts, *Online Search* (n.d.), <https://www.iowacourts.state.ia.us> (offering online search function for appellate cases).

127. Specifically, for these cases, I used the Supreme Court number (e.g., 12-1234) to look up the appellate docket for the appeal and then locate the district-court case number. I then looked up the district court docket and navigated to “criminal charges/disposition.”

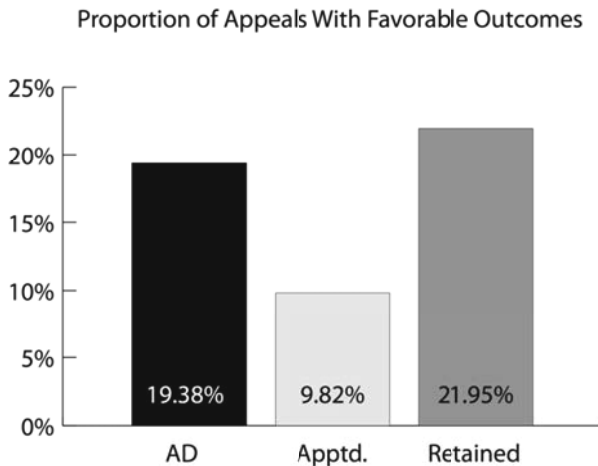
128. Cases that involve appeals of a deferred judgment are particularly difficult to reconstruct from district-court records because, by statute, a deferred judgment drops off the publicly accessible docket after the defendant's term on probation is complete. See IOWA CODE § 907.1(1) (2013) (describing the deferred judgment process); § 907.4 (2013) (explaining the deferred judgment docket), both available at <https://www.legis.iowa.gov/docs/code/2013/907.pdf>.

based my coding on the information contained in the State's appellate brief.<sup>129</sup>

### *B. Results*

The study's results, as detailed in the following graphs and text, support my hypotheses: The appellate defenders obtain more favorable outcomes, have fewer procedural problems, seek further review more consistently, and obtain further review by the Supreme Court more often than their court-appointed counterparts. It is less clear who comes out on top between the appellate defenders and privately retained counsel. As explained below, appellate defenders outperform retained counsel on some measures, and underperform on others.

#### *1. Outcomes: Appellate Defenders Obtain More Favorable Outcomes than Court Appointed Attorneys, and Slightly Fewer than Retained Counsel.*



The results concerning the first hypothesis—that appellate defenders win more cases than court-appointed attorneys—was supported by the data, as demonstrated in the graph above. In

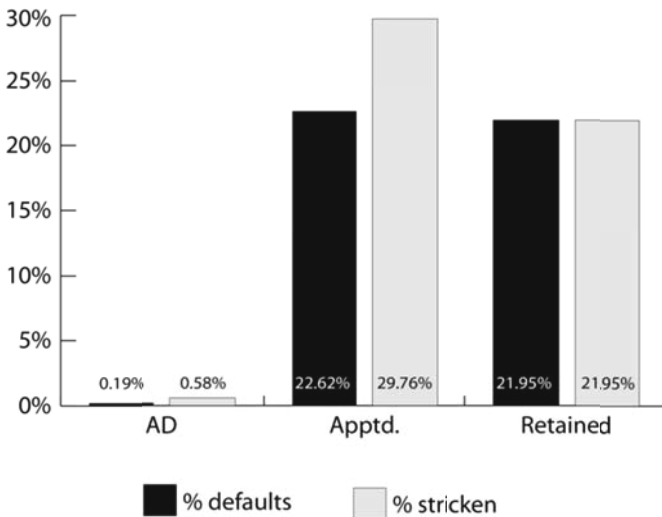
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129. Appellate briefs are public records in Iowa. IOWA R. APP. P. 6.110(5)(a) (2013) (“Briefs filed with the clerk of the supreme court shall not be confidential.”), available at <https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/06-30-2014.6.pdf>.

the 2012–2013 sample, the appellate defenders obtained favorable action in 19.38 percent of their cases.<sup>130</sup> In comparison, court-appointed attorneys won only 9.82 percent of their cases.<sup>131</sup> This puts the rate of obtaining favorable action by the appellate defender at roughly twice that of court-appointed attorneys.<sup>132</sup> Privately retained counsel obtained favorable action more often than both groups, obtaining at least a partial victory in 21.95 percent of cases.<sup>133</sup>

*2. Defective Filings: Appellate Defenders Have Fewer Filings Stricken and Are Defaulted Far Less Often than Both Court-Appointed Attorneys and Retained Counsel.*

Proportion of Appeals With Procedural Defects



130. The appellate defenders obtained favorable action in 100 out of 516 appeals.

131. Court-appointed attorneys obtained favorable action in 33 out of 336 appeals.

132. Technically, the appellate defenders obtained favorable outcomes 1.9735 times more often than court-appointed attorneys.

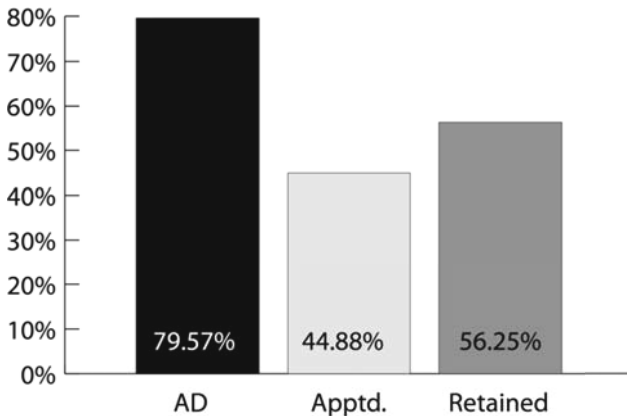
133. Retained counsel obtained favorable action in 27 out of 123 appeals. For purposes of comparison, in the study period the State obtained favorable action in 77.78 percent of State's appeals (or fourteen out of eighteen). See Table 23: State/Attorney General as Litigant, *infra* p. 250. This is between four and five times the mean rate for favorable action in defendants' appeals.

As the preceding graph indicates, the data also show that appellate defenders have far fewer problems with their pleadings and briefs before the appellate courts, which supports the second hypothesis. The appellate defenders were defaulted in just 0.19 percent of their cases—one out of 516 appeals. Court-appointed attorneys did not fare nearly as well: At least one default and penalty was entered in 22.62 percent of appeals.<sup>134</sup> Retained counsel were defaulted at roughly the same rate as court-appointed attorneys, in 21.95 percent of their cases.<sup>135</sup>

The data also favor the appellate defenders based on the rate of stricken pleadings. The appellate defenders saw documents stricken by the clerk or a court order in only 0.58 percent of their cases, or three out of 516 appeals. In contrast, court-appointed attorneys' filings were stricken in nearly a third of cases—29.76 percent of appeals, or 100 out of 336. Privately retained counsel did slightly better, though their filings were still stricken far in excess of the appellate defenders: 21.95 percent of cases handled by retained counsel—twenty-seven out of 123 appeals—involved stricken documents.

### *3. Exhausting the Appellate Process: Appellate Defenders Seek Further Review More Often than Court-Appointed Attorneys and Retained Counsel.*

Proportion of Appeals Where Further Review Sought



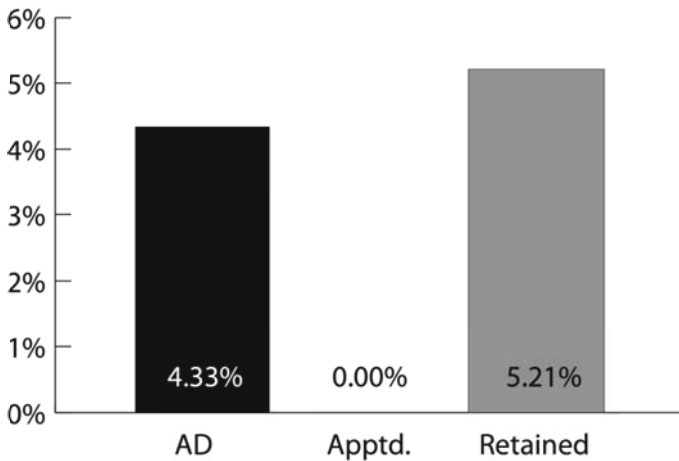
134. Court-appointed attorneys were defaulted in 76 of 336 appeals.

135. Retained counsel were defaulted in 27 of 123 appeals.

The third hypothesis, that appellate defenders better exhaust the appellate process, was also supported by the data, as can be seen in the preceding graph.<sup>136</sup> The appellate defenders filed applications for further review in 79.57 percent of cases they lost.<sup>137</sup> For court-appointed attorneys, that number was just 44.88 percent.<sup>138</sup> Retained counsel fell in between the appellate defenders and court-appointed attorneys; private lawyers sought further review in 56.25 percent of their criminal appeals.<sup>139</sup>

*4. Further Review: Retained Counsel Obtain Further Review of Adverse Decisions Slightly More Often than Appellate Defenders, Who Do Much Better than Appointed Counsel.*

Proportion of Appeals Further Review Obtained



136. In contrast to criminal defendants, the data show that the State is a highly selective litigant: The Attorney General sought further review in only twenty of 160 losses, for a rate of 12.50 percent, compared to the overall rate of 63.93 percent for defense counsel. *See* Table 23: State/Attorney General as Litigant, *infra* p. 250; Table 7: Further Review Sought Following Loss, *infra* p. 245.

137. The appellate defenders filed applications for further review in 331 of 416 cases that were affirmed in whole.

138. Court-appointed attorneys filed applications for further review in 136 out of 303 cases that were affirmed in whole.

139. Retained counsel filed applications for further review in 54 of 96 cases that were affirmed in whole.

The fourth hypothesis revealed perhaps the most striking difference between types of counsel.<sup>140</sup> As seen on the preceding graph, the appellate defenders obtained further review by the Supreme Court in eighteen cases during the sample period, which works out to 4.33 percent of their cases that were affirmed in whole.<sup>141</sup> In stark contrast, court-appointed attorneys obtained further review in zero cases, failing to garner Supreme Court review with any of their 136 applications for further review. Retained counsel just slightly outpaced the appellate defenders, obtaining further review in five cases—5.21 percent of the cases they lost.<sup>142</sup>

## V. ANALYSIS

The analytic component of this piece includes both the expected exploration of whether the data supported or refuted my hypotheses, as well as some unexpected findings. The empirical data ultimately support the notion that appellate defenders provide better representation—at least on the metrics explored in this study. The data also put the appellate defenders roughly on par with privately retained counsel, suggesting that even wealthy defendants cannot purchase an advantage much beyond counsel provided at public expense by government employees.

Moving away from the hypothesized results, the data also support the unexpected finding that appellate defenders not only win more, but win differently—they excel at obtaining sentencing reductions, have charges acquitted with prejudice slightly more often than court-appointed attorneys, and they obtain new trials more often than court-appointed attorneys but far less often than their privately retained counterparts. The final

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140. As with the rate of favorable outcomes, the State's rate of obtaining further review differs significantly from that of criminal defendants: The State obtained further review in seven of twenty applications during the study, for a rate of 35.00 percent. *See* Table 23: State/Attorney General as Litigant, *infra* p. 250.

141. Presented differently, appellate defenders succeeded on 5.44 percent of their applications for further review, securing review in 18 of 331 cases. *See* Table 9: Proportion of Further-Review Applications Granted, *infra* p. 245.

142. Presented differently, retained counsel succeeded on 9.26 percent of their applications for further review (five of fifty-four). *See id.*



piece of analysis returns to the case-assignment discussion from Part II.B.1.a and calls into question whether, as the chief appellate defender reported, his office keeps more serious cases: The overall data show that court-appointed attorneys and appellate defenders handled cases of almost identical offense severity during the period studied.

*A. On All Four Objective Measures, Appellate Defenders Provide Better Representation than Court-Appointed Attorneys.*

This study was designed to measure empirical data in four areas in which the quality of counsel was thought to make a difference: outcomes, procedures, exhausting the appellate process, and obtaining further review. In all four areas, lawyers from the Iowa Appellate Defender's Office outperformed court-appointed attorneys for indigent defendants. As explained at greater length below, the data on these measures suggest that the appellate defenders have an institutional advantage and provide better representation to their clients than most court-appointed attorneys.

As to the first measure, the appellate defenders produced nearly twice as many "wins" for their clients than court-appointed attorneys. For a criminal defendant, one might expect that obtaining favorable action on appeal is the most important metric for assessing whether counsel was effective.<sup>143</sup> Criminal defendants file notices of appeal hoping for a reduction in sentence, to have their convictions set aside, or for a new trial—and the data suggest the appellate defenders are better at achieving these goals than appointed attorneys.

The second measure provides a more indirect rating of counsel's effectiveness, though the difference between types of counsel on this measure suggests a profound difference in the documents filed by public defenders (who specialize in appeals) and court-appointed attorneys (who may or may not have extensive appellate experience). The appellate defenders' filings were basically without problems—just one assistant appellate defender was defaulted for missing a deadline, and only three

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143. See Hoffman et al., *supra* note 91, at 225 ("What criminal defendants care most about . . . is the actual outcome of the case.").

cases involved stricken filings. Even combining defaults and stricken filings, the appellate defenders had procedural problems in 0.78 percent of the cases they handled. Court-appointed attorneys' cases were plagued by problems: They were defaulted in 22.62 percent of appeals and their filings were stricken in 29.76 percent of appeals. Do these data prove that better filings—at least in the sense that they comply with appellate rules, or come close enough to survive a motion to strike—lead to better representation? Not causally. One would expect that, if increased compensation led to better representation, retained counsel would have the fewest number of procedural and technical defects; instead, the appellate defenders far outperformed retained counsel on this process metric and retained counsel performed nearly as poorly as the court-appointed attorneys on the rate of defaults.<sup>144</sup> All this being said, the disparity between the appellate defenders' filings, and the concomitant higher rate of favorable outcomes compared to court-appointed attorneys, suggests this is a distinction that may make a difference.

Third, the appellate defenders sought further review in a much greater proportion of their losses before the Court of Appeals. This matters for purposes of seeking federal habeas corpus relief, as “an Iowa prisoner whose appeal is deflected to the Iowa Court of Appeals must file an application for further review in the Supreme Court of Iowa to exhaust his claims properly in the state courts.”<sup>145</sup> Prisoners who do not exhaust state appeals are procedurally barred and effectively locked out of federal habeas.<sup>146</sup> As a result of these legal rules, the appellate defenders—by filing more applications for further review—provide clients a second and third bite at the apple: once in front of the Iowa Supreme Court and then another (if there are viable federal constitutional issues) in the federal district courts.

Fourth, the appellate defenders were able to get cases to the Supreme Court with some regularity, whereas court-appointed attorneys failed to do so with any of their more than 100

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144. Retained counsel were defaulted in 21.95 percent of cases (compared to 22.62 percent for court-appointed attorneys) and their pleadings were stricken in 21.95 percent of cases (compared to 29.76 percent of cases for court-appointed attorneys).

145. *Welch v. Lund*, 616 F.3d 756, 759 (8th Cir. 2010).

146. *See id.* at 759–60.

applications during the sample period.<sup>147</sup> On eighteen occasions, the appellate defenders brought issues to the Supreme Court on further review from the Court of Appeals.<sup>148</sup> This statistic matters for both speculative and concrete reasons. If the other measures are to be believed—and appellate defenders are better advocates than court-appointed lawyers—this fourth metric, concerning grants of further review, may be an indirect barometer of how the Iowa Supreme Court perceives counsel’s performance. A detailed report concerning the United States Supreme Court argues that those Justices favor granting certiorari to petitions filed by leading Supreme Court advocates because the cases will be better argued, because good issues have been identified,<sup>149</sup> and—as a different commentator has described it—because these appellate specialists “speak the court’s language.”<sup>150</sup> Given that the data here show appellate-defender applications are granted about four percent of the time, and that number is zero for court-appointed attorneys, one might speculate that a similar bias in selection toward “better” lawyering is present at Iowa’s Supreme Court.

The concrete reason that success on further-review applications matters for criminal defendants is that Iowa’s Court

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147. Pronounced differences between types of counsel are not unheard of. In the Philadelphia study comparing public defenders and appointed counsel for murder defendants, the public defenders had a striking record: None of their clients ever received the death penalty, compared to two percent of all criminal defendants. *See* Anderson & Heaton, *supra* note 102, at 182–83.

148. The appellate defenders’ rate of obtaining discretionary further review in criminal appeals is in line with the data in other states. The appellate defenders obtained further review 4.33 percent of the time (and retained counsel obtained further review 5.21 percent of the time), compared to the overall rates of 4.1 percent in California, 5.6 percent in Illinois, and 6.7 percent in Maryland. *See* REVERSIBLE ERROR, *supra* note 4, at 43 n.3.

149. *See generally* Joan Biskupic, Janet Roberts and John Shiffman, *The Echo Chamber: At America’s Court of Last Resort, A Handful of Lawyers Now Dominates the Docket*, <http://www.reuters.com/investigates/special-report/scotus/> (Dec. 8, 2014) (indicating that Justice Scalia will “in some instances . . . vote against hearing a case if he fears it will be presented poorly and he expects another opportunity to rule on the issues the case presents”). If Iowa’s Supreme Court justices engage in a similar analysis when a court-appointed further-review application presents an issue poorly, they may deny that application and instead grant an appellate-defender application that they know will be better argued.

150. *See* Dahlia Lithwick, *Amicus: The Super Lawyers* (Slate podcast, Jan. 10, 2015), [http://www.slate.com/articles/podcasts/amicus/2015/01/dahlia\\_lithwick\\_speaks\\_with\\_joan\\_biskupic\\_about\\_supreme\\_court\\_bar\\_s\\_lack.html](http://www.slate.com/articles/podcasts/amicus/2015/01/dahlia_lithwick_speaks_with_joan_biskupic_about_supreme_court_bar_s_lack.html) (Jan. 2015) (discussing Biskupic et al., *supra* note 149).

of Appeals is bound by Supreme Court decisions.<sup>151</sup> On any issue for which the defendant has urged a change—or even an expansion—of the law, the only viable opportunity to obtain a victory is before the Supreme Court, and the data show that is an opportunity unlikely to present itself when a defendant is represented by court-appointed attorneys.<sup>152</sup> Also, defendants fare better before the Supreme Court than the Court of Appeals, winning about half of granted further-review applications.<sup>153</sup> This suggests that criminal defendants who cannot get in front of the Supreme Court are missing out on a meaningful opportunity for relief.

*B. The Appellate Defenders and Privately Retained Counsel Provide Comparable Representation, Given the Mixed Results on the Objective Measures.*

When compared to privately retained counsel, the data are a mixed bag for the appellate defenders. Retained counsel obtained favorable outcomes slightly more often.<sup>154</sup> Appellate defenders sought further review more often,<sup>155</sup> but retained

151. *E.g.*, *State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990) (“We are not at liberty to overturn Iowa Supreme Court precedent.”). The Court of Appeals is also bound by its own published opinions, which can only be overturned en banc or by the Supreme Court. *See* IOWA R. APP. P. 6.904(2)(c) (2013) (noting that unpublished opinions, in contrast to published opinions, “shall not constitute controlling legal authority”), available at <https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/06-30-2014.6.pdf>.

152. One might wonder whether court-appointed attorneys’ low number of successful further-reviews applications is mitigated by cases retained by the Supreme Court. During 2012–2013, the Supreme Court retained seventeen criminal appeals by defendants: seven by appellate defenders (41.18 percent), six by court-appointed attorneys (35.29 percent), and four by retained counsel (25.53 percent). *See* Table 24: Retained Cases (2012–2013), *infra* p. 251. This is in line with the court-appointed attorneys’ overall representation rate (34.46 percent) before the Court of Appeals. *Compare id. with* Table 19: Type of Counsel Overall (Pro Se Excluded), *infra* p. 249.

153. Of the twenty-three further-review applications filed by defendants and granted in 2012 and 2013, 52.17 percent of defendants (twelve) obtained favorable action; 39.13 percent (nine) had their convictions affirmed outright; and two defendants died, mooting two appeals (8.70 percent of cases granted further review). *See* Table 25: Outcomes of Cases Granted Further Review (2012–2013), *infra* p. 251.

154. Retained counsel obtained favorable action in 21.9 percent of appeals, compared to 19.38 percent for the appellate defenders. *See* Table 1: Favorable Action, *infra* p. 242.

155. Appellate defenders sought further review in 79.57 percent of appeals, compared to retained counsel’s seeking further review in 56.25 percent of appeals. *See* Table 7: Further Review Sought Following Loss, *infra* p. 245.

counsel had a higher proportion of granted applications.<sup>156</sup> Appellate defenders' favorable outcomes included a greater proportion of charges acquitted with prejudice, while retained counsel obtained new trials more often than sentencing reductions.<sup>157</sup> The only area in which the appellate defenders significantly outpaced retained counsel was on procedural and technical defects.<sup>158</sup>

It's hard to declare a clear winner of this particular comparison—other than the victory of the appellate defenders on the technical niceties of appellate practice. Given the makeup and economic motivation of each group, that disparity makes some sense: Appellate defenders practice criminal-appellate law full-time on a salary and are familiar with the ins and outs of appellate procedure; it's unlikely that any privately retained attorneys can do the same, given the small number of criminal appellants who can afford to pay.<sup>159</sup> The other, more-mixed results suggest that neither appellate defenders nor retained counsel have a clear advantage. Wasserman, the author of the New York criminal-appeals study, reasoned that the grant of a new trial or sentencing correction was the type of outcome “more dependent on skilled advocacy” than the “mechanical” analysis related to obtaining a dismissal on speedy-trial grounds;<sup>160</sup> if he is right, the data still split the difference—retained counsel obtain proportionally more new trials, while

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156. Retained counsel succeeded on 9.26 percent of applications, while appellate defenders succeeded on 5.44 percent. See Table 9: Proportion of Further-Review Applications Granted, *infra* p. 245. In the total percentage of losses in which further review was granted, retained counsel still come out slightly ahead with 5.21 percent of their appeals, compared to 4.33 percent for appellate defenders. See Table 8: Further Review Obtained Following Loss, *infra* p. 245.

157. See Table 2: Acquitted, *infra* p. 242; Table 3: New Trial, *infra* p. 242; Table 4: Re-Sentenced, *infra* p. 243.

158. Just 0.19 percent of appellate-defender appeals involved a default, compared to 21.95 percent of retained-counsel appeals, and just 0.58 percent of appellate-defender filings were stricken, compared to 21.95 percent of retained-counsel filings. See Table 5: Defaults, *infra* p. 244; Table 6: Stricken Filings, *infra* p. 244.

159. Among privately retained counsel, the greatest number of appeals handled in 2012 and 2013 was seven appeals by Alfredo Parrish. It seems unlikely that 3.5 criminal appeals per year could sustain any law practice, though some lawyers may also practice appellate law in other areas. Because Iowa does not certify “specialists” for purposes of lawyer advertising, it is difficult to gauge the prevalence (or scarcity) of full-time appellate practitioners.

160. WASSERMAN, *supra* note 3, at 99.

appellate defenders obtain more re-sentencings. One could puzzle out whether a slight edge on any particular metric truly makes appellate defenders or court-appointed lawyers better for criminal defendants, but the easier—and perhaps more accurate—conclusion is that the performance of the two groups is comparable.

*C. An Unexpected Result: Appellate Defenders Win Differently and Outperform Court-Appointed Attorneys Most Significantly on Sentencing Issues.*

The hypotheses for this study correctly anticipated that the appellate defenders' overall number of "wins" would substantially outpace court-appointed attorneys, but drilling down into the type of victory reveals still more differences between the two groups. The divide between appellate defenders and court-appointed attorneys is greatest on sentencing issues. Appellate defenders obtained favorable action on a sentencing issue in 9.49 percent of all their appeals, while for court-appointed attorneys that number was just 3.87 percent. The appellate defenders' performance on sentencing exceeded retained counsel as well, with privately retained attorneys obtaining a favorable sentencing outcome in 7.32 percent of appeals.

The difference among type of counsel for other subtypes of favorable action is more limited. For "acquitted" outcomes, in which at least one conviction was eliminated with prejudice, all three groups were fairly similar: 3.68 percent for the appellate defenders, 2.38 percent for court-appointed attorneys, and 2.44 percent for privately retained counsel. For new trials, appellate defenders outperformed court-appointed attorneys (6.20 percent for the appellate defenders and 3.57 percent for court-appointed attorneys), and private counsel outperformed both groups by a wide margin, obtaining a new trial in 12.19 percent of their appeals.

Wasserman suggested in his book that "[s]entence appeals may depend on the attorneys' skill in making an apparently recalcitrant and dangerous offender appear sinned against as

well as sinning.”<sup>161</sup> This would be consistent with the appellate defenders, who specialize in criminal-appellate law, outperforming more generalist court-appointed and privately retained lawyers on sentencing issues. But Wasserman’s logic is harder to follow in Iowa, which has an indeterminate sentencing scheme and highly deferential sentencing review for sentences within statutory limits.<sup>162</sup> Although I have no empirical data to prove it, I suspect that many more sentencing appeals (particularly successful appeals that result in a re-sentencing) turn on procedural problems, like failing to state reasons for a sentence,<sup>163</sup> failing to notify a defendant of his rights under the rules of criminal procedure,<sup>164</sup> or imposing an improper fine or surcharge.<sup>165</sup> In those cases, the appellate defenders likely have an issue-spotting advantage, given the complexities of Iowa’s sentencing code and the frequency with which certain issues recur.

*D. The Appellate Defenders and Court-Appointed Attorneys Represented Similar Percentages of Felons and Misdemeanants in 2012–2013.*

As mentioned in Part II.B.1.a, the assignment of cases between the AD’s Office and court-appointed attorneys is not

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161. *Id.* at 99.

162. *See* IOWA CODE § 902.3 (2013) (providing for indeterminate sentencing for all felonies other than Class A felonies), available at <https://www.legis.iowa.gov/docs/code/2013/902.pdf>; IOWA CODE § 903.1(2) (2013) (providing that all aggravated misdemeanants sentenced to a term of incarceration greater than one year shall serve indeterminate sentences), available at <https://www.legis.iowa.gov/docs/code/2013/903.pdf>; *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002) (“[T]he decision of the district court to impose a particular sentence within the statutory limits is cloaked with a strong presumption in its favor, and will only be overturned for an abuse of discretion or the consideration of inappropriate matters.”).

163. *See, e.g., State v. Argueta-Rivas*, No. 11-1135, 2012 WL 837260, at \*2 (Iowa Ct. App. Mar. 4, 2012) (remanding for re-sentencing because the reasons for sentencing were “not apparent”).

164. *See, e.g., State v. McLachlan*, No. 12-2040, 2013 WL 5498059, at \*4 (Iowa Ct. App. Oct. 2, 2013) (remanding for re-sentencing because the district court did not grant a defendant the right to allocution).

165. *See, e.g., State v. Pike*, No. 13-0051, 2013 WL 5951192, at \*6 (Iowa Ct. App. Nov. 6, 2013) (remanding for re-sentencing to correct imposition of improper fine); *State v. Robinson*, 841 N.W.2d 615, 617 (Iowa Ct. App. 2013) (remanding for re-sentencing to correct imposition of unauthorized domestic-violence surcharge).



purely random. This matters because it could potentially affect my data—if the AD can screen out “loser” cases and keep “winners,” this would skew the AD’s rate of favorable outcomes. I tentatively rule out this confounding variable for two reasons. First, even if we accept the premise that a screening attorney can predict outcomes based on a cursory review of the record, I am skeptical that can be done at the stage when screening decisions are made: pre-briefing and before any detailed review of the record.<sup>166</sup> Without any transcripts or a complete record, it seems virtually impossible for anyone to “game the system” and determine which cases present a viable issue with a likelihood of success versus which cases are likely to be summarily affirmed. This militates against the likelihood that the chief appellate defender has put his thumb on the scale or used some sort of selection bias to skew his office’s numbers.

That said, the second reason I rule out selection bias is because my data don’t reflect even the limited selection biases described by the chief appellate defender. The chief appellate defender told me that the non-random component focused on offense severity—the AD only withdrew from Class A felonies when it could not undertake representation due to a conflict, they “try to keep the more serious cases,” and the office tries to “generally withdraw from the less serious cases—driving offenses, OWI, simple possession.”<sup>167</sup> The data displayed in the graph on the following page, looking at the whole population of criminal appeals in the study, do not support this description of the office’s practices.

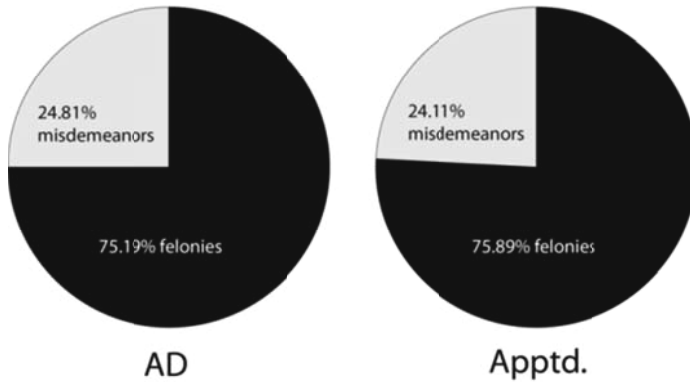
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166. The AD actually withdraws before filing a combined certificate, which means that there are no transcripts to review at the point of screening because none have been prepared yet. See IOWA R. APP. P. 6.804 (2013) (describing form and use of combined certificate), available at <https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/06-30-2014.6.pdf>; see also, e.g., State v. Lange Online Docket, <https://www.iowacourts.state.ia.us/ESAWebApp/AIndexFrm> (application to withdraw on 06/01/2012, court-appointed attorneys appointed on 06/11/2012 and 07/16/2012, combined certificate filed 07/26/2012).

167. Attachment to Swaim December Email, *supra* note 28.



### Offense Severity Across 2012–2013 Sample



The appellate defenders and court-appointed attorneys, as groups, handled almost identical proportions of felonies and misdemeanors in the 2012–2013 period: 75.19 percent felonies for the AD’s office and 75.89 percent for court-appointed attorneys.<sup>168</sup> This is rather the opposite of the chief appellate defender’s description—court-appointed attorneys handled marginally *more* serious cases, rather than less. In terms of Class A felonies, the data do not mirror the chief appellate defender’s description either: Thirty of the AD’s cases (5.81 percent) involved Class A felonies, compared to thirty-six (10.71 percent) of the court-appointed attorneys’ cases.<sup>169</sup> Interestingly, this data for all criminal appeals—roughly seventy-five percent felonies, twenty-five percent misdemeanors—tracks precisely with the breakdown of appeals in fourteen other states.<sup>170</sup>

Support for the chief appellate defender’s description can be found by eliminating postconviction appeals and considering only direct appeals. Looking at the numbers this way (as

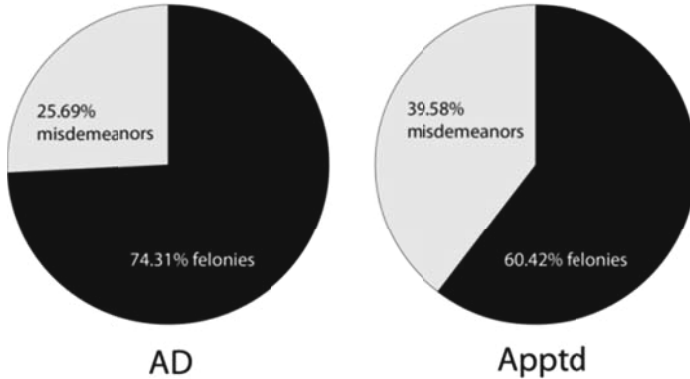
168. See Table 10: Offense Severity: Felony Appeals, *infra* p. 246.

169. See Table 11: Offense Severity: Class A Felonies, *infra* p. 246.

170. See Jennifer M. Saubermann & Marea L. Beeman, *Summary of Findings from The Spangenberg Group’s Appellate Defender Survey: Timing Requirements for Filing Appeals 3* (Apr. 2005), available at [http://www.americanbar.org/content/dam/aba/migrated/legal\\_services/downloads/sclaid/indigentdefense/appdefsurvey2005.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legal_services/downloads/sclaid/indigentdefense/appdefsurvey2005.authcheckdam.pdf) (revealing caseload of 75 percent felonies and 25 percent misdemeanors among surveyed appellate-defender offices).

displayed in the graph below), the AD represents a greater proportion of felonies: 74.31 percent for the AD's office, compared to 60.42 percent for court-appointed attorneys.<sup>171</sup>

### Offense Severity For Direct Appeals Only



The AD, when the sample is limited to direct appeals, also represents significantly more Class A felons than court-appointed attorneys: 5.10 percent (AD) to 2.60 percent (appointed).<sup>172</sup>

Any divergences based on the type of appeal (direct versus postconviction) give me little pause. Statistics for the direct-appeal-only sample generally paint the same picture as the combined direct-appeal and postconviction sample.<sup>173</sup> In both samples, the AD obtains favorable action at a greater rate than court-appointed attorneys: 1.6144 times more likely in the direct-appeal-only sample, versus 1.9735 times more likely in the combined sample.<sup>174</sup> Also in both samples, the AD has far fewer procedural defects than court-appointed attorneys: Both

171. See Table 31: Offense Severity: Felony Appeals (Direct Appeals), *infra* p. 254.

172. See *id.*

173. For a comparison that includes data for retained counsel, as well as the appellate defenders and court-appointed attorneys, see the clustered and stacked bar chart at Appendix I, *infra* p. 255.

174. Compare Table 1: Favorable Action, *infra* p. 242, with Table 26: Favorable Action (Direct Appeals), *infra* p. 252.

the level of defaults<sup>175</sup> and the level of stricken filings<sup>176</sup> are relatively consistent. So too for the very similar rates at which further review was sought<sup>177</sup> and granted.<sup>178</sup> In short, whether you limit the study to direct appeals or consider both direct appeals and postconviction appeals, the findings outlined above hold up: The appellate defenders generally perform better than court-appointed attorneys.<sup>179</sup>

## VI. RECOMMENDATIONS FOR THE FUTURE

Numbers and graphs never tell the whole story. Every study, no matter how empirical or objective its source data, has limitations. As described below, the study here is limited—most notably in terms of time-period, jurisdiction, and potential

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175. On direct appeal, the AD was defaulted in 0.21 percent of appeals, compared to 0.19 percent in the combined sample. *Compare* Table 27: Defaults (Direct Appeals), *infra* p. 252, *with* Table 5: Defaults, *infra* p. 244. Court-appointed attorneys were defaulted 21.88 percent of the time in the direct-appeal sample and 22.62 percent in the combined sample. *See id.*

176. On direct appeal, AD filings were stricken in 0.64 percent of appeals, compared to 0.58 percent of appeals in the combined sample. *Compare* Table 28: Stricken Filings (Direct Appeals), *infra* p. 252, *with* Table 6: Stricken Filings, *infra* p. 244. Court-appointed attorneys' filings were stricken 31.77 percent of the time on direct appeal, compared to 29.75 percent of the time in the combined sample. *See id.*

177. The AD sought further review 79.03 percent of the time on direct appeal, and 79.57 percent of the time in the combined sample. *Compare* Table 29: Further Review Sought Following Loss (Direct Appeals), *infra* p. 253, *with* Table 7: Further Review Sought Following Loss, *infra* p. 245. Court-appointed attorneys sought further review in 38.92 percent of direct appeals, compared to 44.88 percent in the combined sample. *See id.*

178. The AD's further-review applications were granted 4.84 percent of the time on direct appeal, compared to 4.33 percent of the time in the combined sample. *Compare* Table 30: Further Review Obtained Following Loss (Direct Appeals), *infra* p. 253, *with* Table 8: Further Review Obtained Following Loss, *infra* p. 245. Court-appointed attorneys did not obtain further review in either sample. *See id.*

179. Some research, presented as an aside in the NCSC study of five state appellate courts, indicates that "winning big" occurs more frequently in appeals of the least severe offenses, while the most severe offenses result in "winning little." REVERSIBLE ERROR, *supra* note 4, at 6 (indicating, however, that the relationships between sentence length and outcome on appeal are statistically weak). If the appellate defender successfully screened out low-severity cases and kept high-severity cases, one would then expect the appellate defender to have more "little" wins and court-appointed attorneys to have more "big" wins. The study reveals that, in Iowa, appellate defenders have far more "little" wins (around three times as many re-sentencing outcomes) and somewhat more "big" wins (between 1.5 and twice as many acquittals and new trials) than do court-appointed attorneys. *See* Table 2: Acquitted, *infra* p. 242; Table 3: New Trial, *infra* p. 242; Table 4: Re-Sentenced, *infra* p. 243.

confounding variables. With those limitations in mind, the data are still compelling and the suggestion that some indigent defendants get better lawyers than others should worry observers of the criminal justice system. So what can be done about it? I make two proposals below: expanding the AD's office and reforming certain aspects of the court-appointed-attorney system. I conclude by addressing the lingering question of whether the data showing comparatively weak performance by court-appointed attorneys amounts to ineffective assistance.

### *A. Limitations on the Study.*

Before looking at the data for its relevance to public policy and understanding the criminal justice system, it is important to acknowledge the limitations of this study and the data it contains.

First, the study in this article captures a narrow snapshot in time: calendar years 2012 and 2013. It would be a mistake to assume that the data collected here necessarily mirror the numbers for other years. Courts change, as do criminal statutes, constitutional issues, and the particular attorneys involved. One area that jumps out as a potential source of variance is change in an appellate court: Over the course of 2012–2013, one judge retired<sup>180</sup> and the Court of Appeals saw three different chief judges discharge the duties of that office.<sup>181</sup> There is little doubt

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180. When Chief Judge Larry Eisenhauer retired in 2013, Iowa's governor appointed Judge Christopher M. McDonald to the Court of Appeals. See Office of the Governor of Iowa, News Release: *Branstad Appoints Christopher L. McDonald to the Iowa Court of Appeals*, Sept. 19, 2013, available at <https://governor.iowa.gov/2013/09/branstad-appoints-christopher-l-mcdonald-to-the-iowa-court-of-appeals/>.

181. Following Chief Judge Rosemary Sackett's retirement, the Court of Appeals elected Judge Larry Eisenhauer as chief judge. See Iowa Judicial Branch, News Release: *Iowa Court of Appeals Elects Eisenhauer as Chief Judge*, Feb. 10, 2012, available at [http://www.iowacourts.gov/For\\_the\\_Media/news\\_releases/NewsItem508/index.asp](http://www.iowacourts.gov/For_the_Media/news_releases/NewsItem508/index.asp). Following Chief Judge Eisenhauer's retirement in 2013, Judge David Danilson was elected chief judge. See Iowa Judicial Branch, News Release: *Iowa Court of Appeals Elects Danilson as Chief Judge*, Dec. 12, 2013, available at [http://www.iowacourts.gov/For\\_the\\_Media/news\\_releases/NewsItem15/index.asp](http://www.iowacourts.gov/For_the_Media/news_releases/NewsItem15/index.asp) (Dec. 12, 2013). During the period between the retirements and election of a new chief judge, Judge Gayle Nelson Vogel served as acting chief judge. Cf. IOWA CT. R. 21.1 (providing procedures for selecting acting chief justice in the absence of the chief justice of the Iowa supreme court), available at <https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/10-29-2015.21.pdf>.

that different judges come to different decisions, and this change in membership may have impacted the data.

Second, it is possible that a variable not tracked by this study bears more strongly on appellate outcomes than the type of appellate lawyer. For example, the issues raised—regardless of whether they are raised by the appellate defenders or court-appointed attorneys—might drive outcomes. But this study did not track the issues raised on appeal, largely because briefs<sup>182</sup> that pre-date e-filing are difficult for the public to access (limiting the ability to replicate this study) and because qualitatively assessing the issues raised is more subjective than quantitatively assessing the type of counsel assigned to an appeal. Put simply, tracking issues would have required the kind of subjectivity that I strove to avoid when compiling the data for this piece. In addition to the issues raised on appeal, other potential variables affecting outcomes might have been the composition of Court of Appeals panels,<sup>183</sup> whether error was preserved by trial counsel,<sup>184</sup> or whether the case involved a guilty plea or trial.<sup>185</sup> The aim of my study was not to conduct a regression to reject hypotheses of potential variables behind appellate outcomes—instead, I aimed to paint a picture of the differences between types of counsel in criminal appeals. I hope

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182. Opinions alone are not sufficient to track raised issues because some cases are affirmed without opinion or by memorandum opinion. See IOWA CT. R. 21.26, available at <https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/10-29-2015.21.pdf>; IOWA R. APP. P. 6.1203 (2013), available at <https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/06-30-2014.6.pdf>.

183. There appears to be high variability among judges. Although my dataset tracked only the opinion author—and not the participating judges—in each opinion, the rates of granting a defendant favorable action on appeal ranged from a high of 22.22 percent (Judge Vaitheswaran) to a low of 7.84 percent (Judge Vogel).

184. Iowa, unlike states that recognize “plain error,” has a longstanding tradition of strictly enforcing the rules of error preservation. See *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) (“We do not subscribe to the plain error rule in Iowa, have been persistent and resolute in rejecting it, and are not at all inclined to yield on the point.”); *Danforth, Davis & Co. v. Carter*, 1 Iowa 546, 552–53 (1855) (clearly stating the requirement of “specifically stated” objections to preserve error, and noting that the error-preservation rules are “eminently just and reasonable”).

185. In Iowa, a guilty plea waives all challenges to a conviction that are not intrinsic to the plea—so only claims that bear on the decision to plead, like whether the plea is knowing and voluntary, remain viable. See, e.g., *State v. LaRue*, 619 N.W.2d 395, 398 (Iowa 2000); *State v. Culbert*, 188 N.W.2d 325, 326 (Iowa 1971).

to have done that and I would remind readers not to take this study for more than it is.

Third, the data gathered here may not necessarily be ripe for extrapolation to other jurisdictions. The method of assigning cases between appellate defenders and court-appointed attorneys is not entirely clear in Iowa—I concede that assignment is not purely random, but it’s hard to reconcile the chief appellate defender’s explanation with the data.<sup>186</sup> Other states have their own methodology for assigning cases and the traits of appellate defenders and court-appointed attorneys may also differ significantly from the picture painted in Part IV.B. These differences would likely affect the four metrics used to rate effectiveness if the study was transplanted to another jurisdiction.

Keeping in mind the limitations discussed above, the narrative that emerges from the data collected in this study is still fairly straightforward: Appellate defenders, on most measures, perform better than court-appointed attorneys and roughly as well as privately retained counsel. But what does this mean for Iowa’s legal community and the development of public policy?

### *B. Policymakers Should Expand the Iowa Appellate Defender’s Office.*

The most straightforward take-away from these data is that it makes sense to hire more appellate defenders and increase the proportion of defendants represented by the AD’s Office rather than court-appointed attorneys. I would not be the first writer to suggest expanding public-defender offices.<sup>187</sup> Notably, the State

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186. See *supra* Part V.D.

187. See, e.g., Dru Stevenson, *Monopsony Problems with Court-Appointed Counsel*, 99 IOWA L. REV. 2273, 2293 (2014) (noting that a public-defender system “has efficiency advantages in terms of economies of scale” and that public defenders “tend to have more public-service motivation and higher levels of relevant skills, compared to their counterparts on lists of court-appointed independent contractors”); Texas Fair Defense Project, *Benefits of a Public Defender Office* 1 (Sept. 2009) (arguing that a public-defender office will provide better representation, and do it more cost-effectively, than the existing court-appointment system), available at [http://www.texasfairdefenseproject.org/pdf/harris\\_county\\_pd\\_white\\_paper.pdf](http://www.texasfairdefenseproject.org/pdf/harris_county_pd_white_paper.pdf); Ronald W. Schneider, Jr., Comment, *A Measure of Our Justice System: A Look at Maine’s Indigent Criminal Defense Delivery System*, 48 ME. L. REV. 335, 396–98 (1996) (asserting that a public-defender system would provide better

Public Defender's data show that, at least for combined trial- and appellate-level costs, public defenders are significantly cheaper on a per-case basis.<sup>188</sup> If my data show that appellate defenders achieve better outcomes, and the State Public Defender's data show that they do so more cost-effectively, it is difficult to imagine a sound rebuttal to expanding the appellate defender's staff.<sup>189</sup>

### *C. Reforming the Existing Court-Appointed Attorney System.*

Even if Iowa does not expand the ranks of its appellate defenders, the State Public Defender can take action to ensure that contract attorneys more closely approximate appellate defenders—at least in terms of training and experience. The SPD promulgated new rules (effective January 1, 2015) that impose minimum qualifications on future court-appointed attorneys.<sup>190</sup> To represent a criminal defendant on direct appeal or a postconviction appeal, the new rules require participation in a “basic criminal appeals training” put on by the SPD Office, unless the attorney has already handled a criminal appeal,<sup>191</sup> as well as three hours of CLE courses related to criminal law each year in which the attorney handles criminal appeals.<sup>192</sup> While these rules might be a good start, the data here suggest they are

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representation than the existing court-appointment system). While not the first writer to make this suggestion, I may well be the first prosecutor to do so.

188. See Office of the State Public Defender, *Fiscal Year 2015 Budget Presentation 3–4* (comparing case-costs, highlighting “savings” from expanding the number of public defenders, and including a table displaying relevant data captioned “Savings to Indigent Defense Fund from FY11 Expansion”), available at <https://www.legis.iowa.gov/docs/publications/SD/2014/24872/24872.pdf>.

189. Even following a massive expansion of the appellate defender corps, court-appointed attorneys would likely still be desirable for conflicts cases. However, at least in theory, a secondary conflicts office could be established, and 100 percent of Iowa's criminal defendants could be represented by appellate defenders from either the home office or the conflicts office. This is part of the rationale for the State Public Defender's Special Defense Unit, which handles certain conflicts cases statewide, as well as representing indigents facing civil commitment as sexually violent predators.

190. See generally IOWA ADMIN. CODE R.493-11.3 (Jan. 7, 2015), available at <https://www.legis.iowa.gov/docs/iac/agency/01-07-2015.493.pdf>.

191. IOWA ADMIN. CODE. R. 493-11.3(2)(a), available at <https://www.legis.iowa.gov/docs/iac/agency/01-07-2015.493.pdf>.

192. IOWA ADMIN. CODE R. 493-11.3(2)(b), available at <https://www.legis.iowa.gov/docs/iac/agency/01-07-2015.493.pdf>.



not enough. To start with, exempting attorneys who have previously completed only one criminal appeal will do little to remedy the repeated and persistent failure of court-appointed attorneys to comply with the rules of appellate procedure in filings before the appellate courts. All of the attorneys included in this study would be exempt from the 2015 administrative rule, yet court-appointed attorneys materially and substantially failed to comply with the rules of appellate procedure in about one quarter of cases<sup>193</sup>—often repeatedly and in spite of monetary fines issued by the Supreme Court. These attorneys require remedial training, if not ongoing monitoring by experienced appellate defense counsel.

Developing and providing a support network for court-appointed attorneys might also improve effectiveness. Public defenders, including the appellate defenders, work in multi-attorney offices with colleagues they can collaborate with, bounce ideas off of, and obtain assistance from during briefing and preparation for oral arguments. In contrast, at least one study has found that the vast majority of court-appointed attorneys are solo practitioners, and even those in a group practice work in relatively small firms of less than five lawyers.<sup>194</sup> Building on existing infrastructure, like web forums,<sup>195</sup> can help mitigate some of this difference in office environments. So can developing additional support tools, like a brief bank or an appellate-defense-specific practice guide. But providing true support for a solo-practice contract attorney will be difficult. Court-appointed attorneys are spread across Iowa's ninety-nine counties and the lack of mentoring relationships, especially in rural counties, has been noted by the Iowa Bar.<sup>196</sup>

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193. Specifically, court-appointed attorneys were defaulted in 22.62 percent of cases and at least one of their filings was stricken in 29.76 percent of cases.

194. Rachel Brooks, *Job Satisfaction Among Court-Appointed Attorneys* 45–46 (Aug. 2012) (unpublished manuscript), available at <https://digital.library.txstate.edu/bitstream/handle/10877/4803/RBrooks%20Thesis%20may%2024%202012.pdf?sequence=1> (looking at court-appointed attorneys in a Texas county).

195. See Office of the State Public Defender, *SPD-Indigent Defense Discussion Forum*, available at <https://spd.iowa.gov/defense-resources/spd-indigent-defense-discussion-forum> (describing the forum as “a meeting place that provides indigent defense attorneys discussion forums, member profiles, file storage and more”).

196. Jennifer Zwagerman, *Needed: A Mentor Program for Young Lawyers*, IOWA LAWYER 8 (Dec. 2014) (noting a need for a mentoring program, particularly now, when



Iowa should pay attention to the approach taken by some other states, where institutional defenders review and provide input to the work product of court-appointed lawyers. For example, California's system provides a network of staff defenders who provide support to court-appointed attorneys, including consultation, pre-filing review of briefs, and routine evaluations of appointed-counsel work product.<sup>197</sup> Adopting a similar approach in Iowa would allow the expertise of the appellate defenders to inform the work of court-appointed attorneys and provide a mechanism for routinely monitoring and evaluating brief quality without eliminating court-appointed attorneys altogether.

Given the comparatively poor performance by court-appointed attorneys as compared to both the appellate defenders and privately retained lawyers, some might suggest increasing pay for court-appointed attorneys. The data make me somewhat skeptical that this would improve the quality of representation. Retained counsel, at least in theory, are paid at a market rate that likely exceeds the government salaries of the appellate defenders.<sup>198</sup> Yet retained counsel's performance on the measures explored in this study were mixed: They only marginally outperformed the appellate defenders in outcomes and obtaining further review, and the appellate defenders outperformed retained counsel on procedural defects and seeking further review. One expects that, if increased pay

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fewer young attorneys set foot in the physical courthouse due to e-filing), *available at* <http://digital.turn-page.com/i/426134>.

197. *See, e.g.,* APPELLATE DEFENDERS, INC., CALIFORNIA CRIMINAL APPELLATE PRACTICE MANUAL, 5–7, 45–57 (2014) (addressing, respectively, “assisted cases” and “classification and matching of cases and attorneys”), *available at* [http://www.adi-sandiego.com/panel/manual/California\\_Appellate\\_Practice\\_Manual.pdf](http://www.adi-sandiego.com/panel/manual/California_Appellate_Practice_Manual.pdf).

198. The mean salary among appellate defenders in 2012 was \$93,834.00. *See* Iowa Legislature, *State Employee Salary Book*, <https://www.legis.iowa.gov/publications/fiscal/salaryBook> (search “2015” and “Inspections and Appeals, Dept of” in drop-down menus on main page, then search “appellate defender” in chart to see salary range). According to a 2011 survey, 50.2 percent of Iowa lawyers had income exceeding \$100,001.00 in 2010, and another 10.6 percent of Iowa lawyers earned between \$80,001.00 and \$100,000.00. IOWA STATE BAR ASSOCIATION, 2011 ECONOMIC SURVEY OF LEGAL PRACTICE IN IOWA 10, *available at* [http://c.ymcdn.com/sites/www.iowabar.org/resource/resmgr/Files/2011\\_Economic\\_Survey.pdf](http://c.ymcdn.com/sites/www.iowabar.org/resource/resmgr/Files/2011_Economic_Survey.pdf). This means that more than a slight majority of Iowa lawyers earns more than the average appellate defender, and that 30.8 percent of Iowa lawyers make more than \$150,000, substantially outpacing even the chief appellate defender's salary of around \$131,000.00.

directly correlated with increased performance, retained counsel would outperform government-salaried appellate defenders on relevant measures—yet the data do not support that conclusion. Increasing compensation, at least without making other changes, is not a change naturally suggested by the data in this study.<sup>199</sup>

Another area for potential reform that I ruled out was the possibility of caps or restrictions on assigning appointed counsel additional criminal cases.<sup>200</sup> A 2014 investigation by the Iowa Auditor of State found that eleven court-appointed attorneys had billed more than twelve hours per day on multiple occasions.<sup>201</sup> The particulars of the investigation are damning: On more than fifty days, court-appointed attorneys claimed to work more than twenty-four hours; on another ninety days, they claimed to work more than twenty hours; and on another 390 days, more than fifteen hours.<sup>202</sup> However, the potential impact of imposing a cap is not strongly supported by the appellate-outcome data here. Only two court-appointed attorneys had more than ten cases in the 2012–2013 sample, and even ten cases for a two-year period falls far short of the seventy or eighty cases that the chief appellate defender estimated each full-time appellate defender would handle during the same period.

#### *D. Disparity in Outcomes as Ineffective Assistance?*

As a prosecutor, I would be remiss if I failed to address the legal-issue elephant in the room, given my data that show defendants represented by appellate defenders do better on appeal. Can a criminal defendant who was represented by court-appointed attorneys, and whose conviction is affirmed on

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199. Other data also support the notion that changes in compensation—or at least compensation structures—do not materially affect the time spent on criminal trials or appeals. See Richard E. Priehs, *Appointed Counsel for Indigent Criminal Appellants: Does Compensation Influence Effort?* 21 JUST. SYS. J. 57, 67 (1999).

200. A student comment champions the approach taken by Washington’s Supreme Court that requires indigent counsel to comply with caseload limitations. See generally Andrea Woods, Comment, *The Undersigned Attorney Hereby Certifies: Ensuring Reasonable Caseloads for Washington Defenders and Clients*, 87 WASH. L. REV. 217 (2014).

201. Office of Auditor of State, State of Iowa, News Release, Sept. 4, 2014, at 1, available at <http://auditor.iowa.gov/reports/1160-4270-0E01.pdf>.

202. *Id.* at 1–2. The report does not identify whether any of the claims were for appellate work and the specifics of those prosecutions are not yet matters of public record.

appeal, claim ineffective assistance because he was not appointed a “better” lawyer in the form of an appellate defender? I think not. For one thing, it’s virtually impossible to prove that a particular court-appointed attorney was less effective than a hypothetical appellate defender, even if the data show that—over time and on average—the appellate defenders achieve better outcomes. For another, appellate claims of ineffective assistance require proof of a reasonable probability of a different outcome.<sup>203</sup> Putting a number on that term—“reasonable probability”—is hard. The courts have said that it means something less than fifty percent,<sup>204</sup> and I would argue that it probably also means something more than the 9.56 percent overall difference in rates of favorable outcome.<sup>205</sup> Lastly, appellate counsel’s decisions about which issues to raise are virtually immune to second-guessing, given the tactical nature of those decisions.<sup>206</sup> No one disputes that an ideal indigent-defense system would afford the same outcomes to defendants regardless of the type of lawyer they receive. But, at best, the data reported here suggest the desirability of some institutional changes—changes in training for court-appointed attorneys or in the availability of appellate defenders. This study does not create an escape-hatch for convicted criminals who happened to receive counsel from the court-appointed list.

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203. *See, e.g., Roe v. Flores-Ortega*, 528 U.S. 470, 471–72 (2000) (explaining that “[b]ecause the defendant in such cases must show that counsel’s deficient performance actually deprived him of an appeal, . . . he must demonstrate that there is a reasonable probability that, but for counsel’s deficient failure to consult with him about an appeal, he would have timely appealed,” and that “[t]he question whether a defendant has made the requisite showing will turn on the facts of the particular case”).

204. *E.g., Strickland v. Washington*, 466 U.S. 668, 693 (1984) (“[W]e believe that a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.”).

205. The 9.56 percent difference is calculated based on 19.38 percent favorable outcomes for appellate defenders versus 9.82 percent for court-appointed attorneys. *See* Table 1: Favorable Action, *infra* p. 242. The difference is even smaller when court-appointed attorneys’ performance is compared to the average for all 2012–2013 appeals (excluding pro se appeals): The mean rate of favorable action was 16.41 percent, which amounts to a 6.59 percent difference. *See id.*

206. *See Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 1998) (“Selecting assignments to assert as grounds for reversal is a professional judgment call [Iowa courts] are reluctant to second-guess.”); *Cuevas v. State*, 415 N.W.2d 630, 633 (Iowa 1987) (noting “[h]ighly competent appellate lawyers generally assign only the strongest points and rely on them for reversal”).

## VII. CONCLUSION

If we are to continue having criminal appeals in Iowa,<sup>207</sup> then the effectiveness of counsel should not vary based on the type of lawyer. The study contained in this article—even with its limitations—suggests that some indigent defendants get better lawyers than others, in the form of appellate defenders versus court-appointed attorneys. This is an untenable state of affairs.

The exact mechanism for leveling the playing field between indigent-defense counsel is beyond the scope of this article. The data here note a problem, and the numbers alone cannot provide a solution. But at least this much is clear: If Iowa's criminal justice system continues to have separate and distinct types of appellate counsel for indigent defendants, something has to give.

The easiest solution is to hire more appellate defenders, thereby shifting a greater proportion of representation to that office. If this is not feasible for political or institutional reasons, significant reforms—like giving the appellate defenders oversight of court-appointed-attorney work product—are needed. The bottom line is that court-appointed attorneys must get better at their job and perform better on the metrics used in this study. They must improve their advocacy to win a more-comparable numbers of cases, they must file papers with fewer technical and procedural problems, they must seek further review more often, and they must present more compelling cases in further-review applications to obtain Supreme Court review.

The data here are not perfect, and of course I did not set out to mathematically evaluate every potential variable in criminal appeals. My goal here was to show, with some evidentiary support, the difference between types of appellate defense

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207. “There is, of course, no constitutional right to an appeal.” *Jones v. Barnes*, 463 U.S. 745, 751 (1983); see *McKane v. Durston*, 153 U.S. 684 (1894) (noting that “review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law”). A cynic familiar with *Jones* and *McKane* might propose asking the Iowa General Assembly to resolve any perceived disparities in attorneys’ effectiveness by abolishing statutory criminal appeals altogether. Not only would this affect my job security as an appellate prosecutor, at least one scholar has considered whether the modern Supreme Court would support abolishing the right to appeal. See generally Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 504 (1992). In any event, the abolition of statutory criminal appeals in Iowa seems highly unlikely in the near future.

counsel, and the different outcomes seen by their clients. The story told by the data is that appellate defenders outperform court-appointed attorneys on the metrics that matter. It's time for Iowa policymakers to do something about that.

## APPENDIX A: CODING RUBRIC

*Docket Number*

The docket number for each case was initially recorded from the Iowa Judicial Branch website for each opinion day, then compared with the online docket records available through Iowa Courts Online. Where there was inconsistency between the published opinion and the docket, the docket controls.<sup>208</sup>

*Criminal Appeal/Postconviction Relief*

The type of case was recorded based on the caption of the case. Cases captioned *State v. Defendant* were coded as criminal cases. Cases captioned *Defendant v. State* were coded as postconviction cases. Coding did not vary based on the presence of a cross-appeal, application for discretionary review, or petition for writ of certiorari; those cases were coded for the type of case in which they originated.<sup>209</sup>

*County*

The county was recorded based on the cover page of the slip opinion posted on the Judicial Branch website.

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208. Compare *State v. Sean Dana Scott*, slip op. at 1, [http://www.iowacourts.gov/about\\_the\\_courts/court\\_of\\_appeals/court\\_of\\_appeals\\_opinions/recent\\_opinions/20130515/3-373.pdf](http://www.iowacourts.gov/about_the_courts/court_of_appeals/court_of_appeals_opinions/recent_opinions/20130515/3-373.pdf) (listing Sup. Ct. No. 12-1531) with Iowa Courts Online, *State v. Sean Dana Scott*, Sup. Ct. No. 12-1561, available at <https://www.iowacourts.state.ia.us/ESAWebApp/AppelSimpFrame>.

209. For example, *State v. VanderLinden* originated as a petition for writ of certiorari. The defendant filed the writ to challenge a district court judge's change of mind on a motion for judgment of acquittal, setting aside of a verdict, and then reinstatement of the verdict. See *State v. VanderLinden*, 2013 WL 1453245 (Iowa Ct. App. 2013). The Supreme Court treated the writ as an application for discretionary review and transferred it to the Court of Appeals, which affirmed. *Id.* at \*3. The case was coded as a criminal case.

### *Counsel Type*

Type of counsel was determined by reviewing both the slip opinions and the online docket for each case. In judicial opinions, both court-appointed and retained counsel are identified by their firm and/or city of residence. Employees of the appellate defender's office are identified as such. Attorneys were coded as court-appointed if the docket shows that fees were waived due to indigency, if the district court entered an order appointing counsel, or if the clerk's office labeled filings as "Ct App." Cases were coded for retained counsel if the docket noted an appeal fee was paid. In the event of conflicting evidence as to the type of counsel, the latest evidence concerning counsel of record listed on the judicial opinion was used as the basis for coding. If no defense attorney appeared on behalf of the defendant at the time of the judicial opinion, the case was coded as "pro se."

### *AAG*

The Assistant Attorney General whose name appeared on the brief in each case was coded as the AAG for that case. In the event one State attorney withdrew and was replaced by another, only the latest attorney was coded.

### *Judge*

The judge was coded based on who was listed as the author of the court's opinion.

### *Favorable/Unfavorable Outcome*

Unfavorable outcomes were coded to include all cases in which the judgment was either affirmed in whole (or conditionally affirmed) or the appeal was dismissed. All other outcomes were classified as favorable.

*Type of Favorable Outcome*

Types of outcomes were broken into three categories, coded as follows—

*1. Acquitted*

Outcomes were coded as “acquitted” if one or more of the counts charged were vacated with jeopardy attached (meaning that the defendant cannot be retried on those particular charges). This includes any case in which the court ordered dismissal of some or all of a trial information or remanded for an order of dismissal. Also included are any cases in which a greater charge was vacated for judgment to be entered on a lesser charge.

*2. New trial*

Outcomes were coded as “new trial” any time the Court of Appeals ordered a new trial or “reversed and remanded” without specifying that a count was dismissed or that the district court should enter an acquittal. This included any case in which a guilty plea was found to lack a factual basis and cases in which an order of suppression was reversed and the Court of Appeals did not affirm based on harmless error.

*3. Re-Sentenced*

Outcomes were coded as “re-sentenced” anytime the Court of Appeals remanded for a new sentencing hearing or modified a sentence. Any cases in which restitution or costs were remanded, re-calculated, or modified were also coded as “re-sentenced.”

*Procedural Defect/No Procedural Defect*

Cases were coded as having a procedural defect when they had any stricken filings, any defaults issued by the clerk’s office or a single-justice order, or both.



### *1. Stricken filings*

a. Cases were coded as having stricken filings if the comments for any single-justice order or deputy-clerk order listed defense filings as “struck” or “stricken,” or if orders compelled the filing of amended documents. Cases were also coded for having stricken filings if the deputy clerk issued a letter that compelled defense counsel to file amended documents or additional documents, such as a supplemental appendix.

b. If filings made by other defense attorneys were stricken prior to the appearance of counsel of record (whose name appeared on the brief), the stricken filings were not counted. If pro se defendants’ filings were stricken, they were not attributed to counsel, but were attributed to pro se defendants in cases in which no defense attorney appeared as counsel of record.

### *2. Defaults*

A case was coded as having a default if one was reflected in the online docketing system. If defaults were formally withdrawn by an order of a Supreme Court justice or a letter issued by the deputy clerk, they were not coded.

## *Oral Argument*

Cases were coded for oral argument based on whether argument was actually held, as reflected on the online docket. Cases originally scheduled for argument but then removed from the oral-argument calendar were coded as not having oral argument.

## *Further Review*

### *1. Whether defense counsel filed an application.*

In cases with an unfavorable outcome, each case was also coded for whether the defendant’s attorney filed an application for further review, as reflected in entries on the online docket. If a pro se defendant filed a further review,

the case was coded as defense counsel did not file. If counsel filed an untimely application, the case was coded as counsel did not file an application.

2. *Whether the application was granted.*

Each case that yielded an unfavorable outcome and in which an application was filed was coded based on whether the application was granted.

## APPENDIX B: DOCKET ABBREVIATIONS

*Parties*

T—Appellant  
E/EE—Appellee  
AD—Appellate Defender  
AG—Attorney General

*District Court Filings*

DCT—District Court  
PSI—Pre-Sentence Investigation Report

*Briefs and Appellate Filings*

APPL—Application  
EXT—Extension  
CC—Combined Certificate  
PB—Proof Brief  
DP—Designation of Parts  
FB—Final Brief  
RB—Reply Brief  
FRB—Final Reply Brief  
X—Appendix

*Appellate Comments*

NFE—No Further Extensions  
EDMS—Electronic Data Management System (e-filing)  
CERT—Certified or Certificate  
INFO—Informational (e.g., copy of notice of appeal)  
CONF—Confidential  
CT APP—Court-Appointed  
SUPP—Supplemental (e.g., appendix or brief)  
AM—Amended  
CA—Court of Appeals  
SC—Supreme Court

APPENDIX C: OUTCOMES  
(2012–2013, ALL CRIMINAL APPEALS)

Table 1: Favorable Action

Type of Counsel	Number of cases with favorable action	Total cases	Percentage with favorable action
Appellate Defenders	100	516	19.38%
Court-Appointed Attorneys	33	336	09.82%
Retained Counsel	27	123	21.95%
Total (all counsel)	160	975	16.41%

Table 2: Acquitted

Type of Counsel	Number of cases with acquittal	Total cases	Percentage with acquittal
Appellate Defenders	19	516	03.68%
Court-Appointed Attorneys	8	336	02.38%
Retained Counsel	3	123	02.44%
Total (all counsel)	30	975	03.08%

Table 3: New Trial

Type of Counsel	Number of cases with new trial	Total cases	Percentage with new trial
Appellate Defenders	32	516	06.20%
Court-Appointed Attorneys	12	336	03.57%
Retained Counsel	15	123	12.20%
Total (all counsel)	59	975	06.05%

Table 4: Re-Sentenced

Type of Counsel	Number of cases with re-sentencing	Total cases	Percentage with re-sentencing
Appellate Defenders	49	516	09.50%
Court-Appointed Attorneys	13	336	03.87%
Retained Counsel	9	123	07.32%
Total (all counsel)	71	975	07.28%

**APPENDIX D: PROCEDURAL DEFECTS  
(2012–2013, ALL CRIMINAL APPEALS)**

Table 5: Defaults

Type of Counsel	Number of cases with defaults	Total cases	Percentage with defaults
Appellate Defenders	1	516	00.19%
Court-Appointed Attorneys	76	336	22.62%
Retained Counsel	27	123	21.95%
Total (all counsel)	104	975	10.67%

Table 6: Stricken Filings

Type of Counsel	Number of cases with stricken filings	Total cases	Percentage with stricken filings
Appellate Defenders	3	516	00.58%
Court-Appointed Attorneys	100	336	29.76%
Retained Counsel	27	123	21.95%
Total (all counsel)	130	975	13.33%

APPENDIX E: FURTHER REVIEWS  
(2012–2013, ALL CRIMINAL APPEALS)

Table 7: Further Review Sought Following Loss<sup>210</sup>

Type of Counsel	Number of cases further review sought	Number of cases lost	Percentage further review sought
Appellate Defenders	331	416	79.57%
Court-Appointed Attorneys	136	303	44.88%
Retained Counsel	54	96	56.25%
Total (all counsel)	521	815	63.93%

Table 8: Further Review Obtained Following Loss<sup>211</sup>

Type of Counsel	Number of cases further review obtained	Number of cases lost	Percentage further review obtained (of all cases)
Appellate Defenders	18	416	4.33%
Court-Appointed Attorneys	0	303	0.00%
Retained Counsel	5	96	5.21%
Total (all counsel)	23	815	2.82%

Table 9: Proportion of Further-Review Applications Granted

Type of Counsel	Number of cases further review obtained	Number of applications	Percentage applications granted
Appellate Defenders	18	331	05.44%
Court-Appointed Attorneys	0	136	00.00%
Retained Counsel	5	54	09.26%
Total (all counsel)	23	521	04.41%

210. This table tracks only further-review applications following a complete loss (total affirmance) at the Court of Appeals.

211. This table tracks the rate at which further-review applications were granted out of all losses for each type of counsel, rather than out of the number of applications filed by each type of counsel.

**APPENDIX F: OFFENSE SEVERITY  
(2012–2013, ALL CRIMINAL APPEALS)**

Table 10: Offense Severity: Felony Appeals

Type of Counsel	Number of felony appeals	Percentage of appeals handled
Appellate Defenders	388	75.19%
Court-Appointed Attorneys	255	75.89%
Retained Counsel	57	46.34%
Total (all counsel)	700	71.79%

Table 11: Offense Severity: Class A Felonies

Type of Counsel	Number of Class-A-felony appeals	Percentage of Class-A-felony appeals handled
Appellate Defenders	30	05.81%
Court-Appointed Attorneys	36	10.71%
Retained Counsel	3	02.44%
Total (all counsel)	69	07.08%

Table 12: Offense Severity: Class B Felonies

Type of Counsel	Number of Class-B-felony appeals	Percentage of Class-B-felony appeals handled
Appellate Defenders	102	19.77%
Court-Appointed Attorneys	93	27.68%
Retained Counsel	14	11.38%
Total (all counsel)	69	21.44%



Table 13: Offense Severity: Class C Felonies

Type of Counsel	Number of Class-C-felony appeals	Percentage of Class-C-felony appeals handled
Appellate Defenders	130	25.19%
Court-Appointed Attorneys	58	17.26%
Retained Counsel	18	14.63%
Total (all counsel)	69	21.13%

Table 14: Offense Severity: Class D Felonies

Type of Counsel	Number of Class-D-felony appeals	Percentage handled by each type
Appellate Defenders	126	24.42%
Court-Appointed Attorneys	68	20.24%
Retained Counsel	22	17.89%
Total (all counsel)	216	22.15%

Table 15: Offense Severity: Misdemeanor Appeals

Type of Counsel	Number of misdemeanor appeals	Percentage handled by each type
Appellate Defenders	128	24.81%
Court-Appointed Attorneys	81	24.11%
Retained Counsel	66	53.66%
Total (all counsel)	700	28.21%

Table 16: Offense Severity: Aggravated Misdemeanors

Type of Counsel	Number of aggravated-misdemeanor appeals	Percentage handled by each type
Appellate Defenders	72	13.95%
Court-Appointed Attorneys	40	11.90%
Retained Counsel	30	24.39%
Total (all counsel)	69	14.56%

Table 17: Offense Severity: Serious Misdemeanors

Type of Counsel	Number of serious-misdemeanor appeals	Percentage handled by each type
Appellate Defenders	52	10.08%
Court-Appointed Attorneys	41	12.20%
Retained Counsel	31	25.20%
Total (all counsel)	124	12.72%

Table 18: Offense Severity: Simple Misdemeanors

Type of Counsel	Number of Simple-Misd. appeals	Percentage handled by each type
Appellate Defenders	4	00.78%
Court-Appointed Attorneys	0	00.00%
Retained Counsel	5	04.07%
Total (all counsel types)	9	00.92%

APPENDIX G: MISCELLANEOUS STATISTICS  
(2012–2013, ALL CRIMINAL APPEALS)

Table 19: Type of Counsel Overall (Pro Se Excluded)<sup>212</sup>

Type of Counsel	Number of cases	Percentage of all cases in sample
Appellate Defenders	516	52.92%
Court-Appointed Attorneys	336	34.46%
Retained Counsel	123	12.62%
Total (all counsel)	975	

Table 20: Type of Counsel Overall (Pro Se Included)

Type of Counsel	Number of cases	Percentage of cases
Appellate Defenders	516	52.28%
Court-Appointed Attorneys	336	34.04%
Retained Counsel	123	12.46%
Pro Se Defendants	12	01.22%
Total (all counsel)	987	

Table 21: Oral Argument

Type of Counsel	Number of cases with oral argument	Percentage of cases with oral argument/all criminal appeals
Appellate Defenders	34	06.59%
Court-Appointed Attorneys	35	10.42%
Retained Counsel	21	17.07%
Total (all counsel)	90	9.23%

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212. No statistics calculated for this article include pro se appeals, unless explicitly noted otherwise. All statistics are calculated based on the 975-case figure calculated in Table 19: Type of Counsel Overall (Pro Se Excluded).

Table 22: Comparison of Iowa and NCSC Data

Type of Outcome	Iowa Overall Statistics	NCSC Overall Statistics
Affirmed	83.59%	79.40%
Acquittal	03.08%	01.90%
New trial	06.05%	06.60%
Re-sentencing	09.33%	07.30%
Other	N/A <sup>213</sup>	04.80%

Table 23: State/Attorney General As Litigant

Type of Counsel	Frequency of event	Rate of event
Favorable Action on Defendants' Appeals	815	83.59%
Favorable Action on State's Appeal	14	77.78%
Sought Further Review Following Loss in Defendants' Appeal	20	12.50%
Obtained Further Review Following Loss in Defendants' Appeals	7	35.00%

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213. As discussed in note 63, *supra*, the tabulation of results in this study differs slightly from the tabulation of results in the NCSC report. The 4.8 percent "other" result does not directly correspond to any categorization used in this study.

Table 24: Retained Cases (2012–2013)

Type of Counsel	Frequency of event	Rate of event out of total retained cases
Defendants' appeals	17	80.95%
State's appeals (and cert. actions)	4	19.05%
Favorable action (for defendant) in defendants' appeals	9	52.94%
Favorable action (for State) in State's appeals	7	25.00%
Retained cases filed by appellate defenders	7	41.18%
Retained cases filed by court-apptd. attorneys	6	35.29%
Retained cases filed by retained counsel	4	25.53%

Table 25: Outcomes of Cases Granted Further Review (2012–2013)

Event	Frequency of event	Rate of event
Favorable Action (Ct. App. vacated, district court reversed)	12	52.17%
No favorable action (Ct. App. aff'd, district court aff'd)	9	39.13%
Further-review app. mooted due to defendant's death	2	08.70%
Total applications granted	23	

**APPENDIX H: STATISTICS FOR DIRECT APPEALS  
(2012–2013, EXCLUDING POSTCONVICTION APPEALS)**

Table 26: Favorable Action (Direct Appeals)

Type of Counsel	Number of cases with favorable action	Number of Direct Appeals	Percentage of cases with favorable action
Appellate Defenders	99	471	21.02%
Court-Appointed Attorneys	25	192	13.02%
Retained Counsel	26	105	24.76%
Total (all counsel)	150	768	19.53%

Table 27: Defaults (Direct Appeals)

Type of Counsel	Number of cases with defaults	Number of Direct Appeals	Percentage of cases with defaults
Appellate Defenders	1	471	00.21%
Court-Appointed Attorneys	42	192	21.88%
Retained Counsel	20	105	19.05%
Total (all counsel)	43	768	05.60%

Table 28: Stricken Filings (Direct Appeals)

Type of Counsel	Number of cases with stricken filings	Number of Direct Appeals	Percentage of cases with stricken filings
Appellate Defenders	3	471	00.64%
Court-Appointed Attorneys	61	192	31.77%
Retained Counsel	24	105	22.86%
Total (all counsel)	64	768	08.33%

Table 29: Further Review Sought Following Loss (Direct Appeals)<sup>214</sup>

Type of Counsel	Number of cases further review sought	Number of Direct Appeals	Percentage of cases further review sought
Appellate Defenders	294	372	79.03%
Court-Appointed Attorneys	65	167	38.92%
Retained Counsel	45	79	56.96%
Total (all counsel types)	404	618	65.37%

Table 30: Further Review Obtained Following Loss (Direct Appeals)<sup>215</sup>

Type of Counsel	Number of cases further review obtained	Number of Direct Appeals	Percentage of further review obtained (out of all losses)
Appellate Defenders	18	372	04.84%
Court-Appointed Attorneys	0	167	00.00%
Retained Counsel	4	79	05.06%
Total (all counsel types)	22	618	03.56%

214. This table tracks only further-review applications following a complete loss (total affirmance) at the Court of Appeals.

215. This table tracks the rate at which further-review applications were granted out of all losses for each type of counsel, rather than out of the number of applications filed by each type of counsel.

Table 31: Offense Severity: Felony Appeals (Direct Appeals)

Type of Counsel	Number of felony appeals	Percentage of felony appeals handled by each type
Appellate Defenders	350	74.31%
Court-Appointed Attorneys	116	60.42%
Retained Counsel	47	44.76%
Total (all counsel)	513	66.80%

Table 32: Offense Severity: Class A Felonies (Direct Appeals)

Type of Counsel	Number of Class-A-felony appeals	Percentage of Class-A-felony appeals handled by each type
Appellate Defenders	24	05.10%
Court-Appointed Attorneys	5	02.60%
Retained Counsel	3	02.86%
Total (all counsel)	32	04.17%

Table 33: Offense Severity: Misdemeanor Appeals (Direct Appeals)

Type of Counsel	Number of misdemeanor appeals	Percentage of misdemeanor appeals handled by each type
Appellate Defenders	121	25.69%
Court-Appointed Attorneys	76	39.58%
Retained Counsel	58	55.24%
Total (all counsel types)	255	33.20%



APPENDIX I: OFFENSE SEVERITY FOR ALL COUNSEL TYPES,  
ACROSS ALL CRIMINAL APPEALS AND DIRECT APPEALS

