

The Right to Counsel in Criminal Cases: Still a National Crisis?

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ABSTRACT

In 1963, Gideon v. Wainwright dramatically changed the landscape of criminal justice with its mandate that poor criminal defendants be entitled to legal representation funded by the government. As scholars and practitioners have noted repeatedly over more than fifty years, states have generally failed to provide the equal access Gideon promised. This Article revisits the questions raised by the authors over a decade ago when they asserted that a genuine national crisis exists regarding the right to counsel in criminal cases for poor people. Sadly, despite a few isolated instances where litigation has sparked some progress, the issues remain the same: persistent underfunding and crushing caseloads, and little support from the Supreme Court to remedy ineffective assistance claims. The authors conclude that our patchwork system of public defense for the poor remains disturbingly dysfunctional.

TABLE OF CONTENTS

INTRODUCTION	1564
I. IS IT HAPPENING EVEN TODAY?	1567
II. THE U.S. SUPREME COURT AND THE RIGHT TO COUNSEL.....	1572
III. FUNDING AND RESOURCES FOR LEGAL SERVICES	1578
IV. LITIGATION TO PROMOTE REFORM	1589
A. Idaho	1590
B. New York.....	1592
C. Pennsylvania	1597
V. MOVING FORWARD	1599
CONCLUSION	1602

INTRODUCTION

The U.S. Supreme Court in *Gideon v. Wainwright*¹ moved the nation forward in the quest for equal access in our criminal justice system. With ringing language, the Court applied the Sixth Amendment right to counsel² to state criminal prosecutions and held that a poor

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1 372 U.S. 335 (1963).

2 See U.S. Const. amend. VI.

defendant is entitled to a lawyer even if he cannot afford to pay for that aid.³ Many commentators properly noted then that this was a major step, one which would change the way suspects were prosecuted throughout the United States. One of the lawyers Clarence Earl Gideon passed over to represent Gideon—after the Court’s reversal of his self-represented first trial—even went so far to say: “In the future the name ‘Gideon’ will stand for the great principle that the poor are entitled to the same type of justice as are those who are able to afford counsel.”⁴ The poor entitled to the same type of justice as are those who are able to afford counsel? Alas, this was not to be.

For decades, broad concerns have been raised as to whether the promise of *Gideon* has been kept.⁵ In the early part of this century,

3 [I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public’s interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.

Gideon, 372 U.S. at 344.

4 The lawyer was Tobias Simon. His report on the case to the Florida Civil Liberties Union is discussed in the foremost chronicle of the decision. ANTHONY LEWIS, *GIDEON’S TRUMPET* 239 (Vintage Books ed. 1989) (1964).

5 See, e.g., Lincoln Caplan, Editorial, *The Right to Counsel: Badly Battered at 50*, N.Y. TIMES (Mar. 9, 2013), <http://www.nytimes.com/2013/03/10/opinion/sunday/the-right-to-counsel-badly-battered-at-50.html> [<https://perma.cc/N4JN-AGG3>] (“Only 24 states have statewide public defender systems. Others flout their constitutional obligations by pushing the problem onto cash-strapped counties or local judicial districts. Lack of financing isn’t the only problem, either. Contempt for poor defendants is too often the norm. In Kentucky, 68 percent of poor people accused of misdemeanors appear in court hearings without lawyers. In 21 counties in Florida in 2010, 70 percent of misdemeanor defendants pleaded guilty or no contest—at arraignments that averaged less than three minutes.”).

In a news release from 2016, the U.S. Department of Justice (“DOJ”), while explaining why it was filing a brief challenging the Pennsylvania indigent defense system, had its principal officials state their concerns:

“For too many public defenders, crushing caseloads and scarce resources make it impossible to adequately represent clients who need and deserve assistance in legal matters,” said Attorney General Loretta E. Lynch. “The Constitution of the United States guarantees adequate counsel for indigent defendants, and the Department of Justice is committed to ensuring that right is met.”

“This brief recognizes the importance of the right to counsel as fundamental to a fair criminal justice process,” said Principal Deputy Assistant Attorney General

the Constitution Project⁶ formed the National Right to Counsel Committee.⁷ Its goal was to look at indigent defense throughout the nation to determine if the promise of *Gideon* was being kept, then make recommendations to remedy problems.⁸ For the first three years of the Committee's investigation, this Article's authors served as reporters to the Committee.⁹ In addition to contributing to the ultimate report of the Committee, the authors wrote a lengthy law review article discussing what they deemed to be a genuine national crisis regarding the right to counsel in criminal cases for poor people.¹⁰ What they saw was a system of criminal justice which was not functioning in any sort of responsible way for the many indigent defendants charged with crime.¹¹ While the problems were severe, they did see some room for hope. This Article explores, a decade later, whether there have been serious, positive changes to this system and evaluates whether that hope has been realized as concrete action. This Article concludes that this is not the case. The crisis remains and may even have become more severe in most parts of our country.

Vanita Gupta, head of the Civil Rights Division. "The Civil Rights Division will continue to ensure that this essential right is protected."

"Public defenders around the country are being asked to do essential, even heroic work, with a fraction of the resources they need," said Director Lisa Foster of the Office for Access to Justice. "When defenders are unable to do their jobs, their clients are stripped of a critical constitutional right, and our justice system is diminished."

Press Release, DOJ, Department of Justice Files Amicus Brief in Pennsylvania Right to Counsel Case (Sept. 11, 2015), <https://www.justice.gov/opa/pr/department-justice-files-amicus-brief-pennsylvania-right-counsel-case> [<https://perma.cc/EJ5B-SSA2>].

⁶ *Policy Counsel*, CONSTITUTION PROJECT, <https://www.constitutionproject.org/policy-counsel/> [<https://perma.cc/X56R-6MWW>] ("Created out of the belief that we must cast aside the labels that divide us in order to keep our democracy strong, The Constitution Project brings together policy experts and legal practitioners from across the political spectrum to foster consensus-based solutions to some of the most difficult constitutional challenges of our time.").

⁷ NAT'L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 222 (2009) ("The National Right to Counsel Committee is a bipartisan committee of independent experts representing all segments of America's justice system. The Committee was established in 2004 to examine the ability of state courts to provide adequate counsel, as required by the United States Constitution, to individuals charged in criminal and juvenile delinquency cases who are unable to afford lawyers.").

⁸ *Id.* at xi.

⁹ Our successors as Reporters were Norman Lefstein, Professor of Law and Dean Emeritus, Indiana University School of Law-Indianapolis; and the late Robert L. Spangenberg, Research Professor and Founder, The Spangenberg Project, Center for Justice, Law, and Society, George Mason University. *See id.* at xiii.

¹⁰ *See generally* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031 (2006).

¹¹ *Id.* at 1130.

I. IS IT HAPPENING EVEN TODAY?

Terrence Miller was charged with having committed serious drug offenses. As reported in *The Atlantic*, he

met his lawyer for the first time for a few minutes in a stairwell at the courthouse on the morning of trial. The lawyer had not tried a criminal case in seven years and had been appointed to Miller's case only four days before trial. He never spoke to any witnesses, or to Miller's former attorney, or to investigators in the public defender's office. He didn't know what his client would say on the witness stand.¹²

When the lawyer asked for a continuance to prepare the case properly, the trial judge—concerned with his busy docket—denied the request.¹³ Miller was convicted, and his appeal to the New Jersey Supreme Court was rejected.¹⁴ The dissenting justice bemoaned seeing “an impoverished defendant . . . treated as just another fungible item to be shuffled along on a criminal-justice conveyor belt” with “the right to effective assistance of counsel [being] nothing more than the *presence* of an appointed attorney at counsel's table.”¹⁵

Gail Chester¹⁶ was indicted and charged with stealing several items from the local Walmart valued at approximately seventy-two dollars.¹⁷ Brought to the Harrison County Jail in Mississippi, Chester waited and waited to see a lawyer and to have her day in court. She remained in jail for eleven months before a lawyer was appointed to represent her.¹⁸ She did not meet with that lawyer until thirteen

¹² Andrew Cohen, *How Much Does a Public Defender Need to Know About a Client?*, ATLANTIC (Oct. 23, 2013), <https://www.theatlantic.com/national/archive/2013/10/how-much-does-a-public-defender-need-to-know-about-a-client/280761/> [<https://perma.cc/D6TC-UMMQ>].

¹³ *See id.*

¹⁴ *See State v. Miller*, 76 A.3d 1250, 1254 (N.J. 2013). The majority explained its decision:

This is not the “rare” case in which the doctrine of fundamental fairness mandates reversal of the defendant's conviction. Defendant was not deprived of competent counsel. He had a meeting with his attorney, albeit one constrained in duration and conducted in a less than optimal location, prior to his suppression hearing. Following that hearing and before the commencement of trial the next day, defendant met in private with his counsel at the attorney's office. The attorney claimed he was prepared and conducted a vigorous defense on defendant's behalf, and there was no finding of prejudice.

Id. at 1268.

¹⁵ *Id.* at 1269 (Albin, J., dissenting).

¹⁶ This is a pseudonym to protect privacy.

¹⁷ NAACP LEGAL DEF. & EDUC. FUND, INC., ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS 3 (Feb. 2003). The items were “a clock radio, a walkman, and a package of batteries.” *Id.*

¹⁸ *Id.*

months after the arrest.¹⁹ Indeed, “the first time she spoke to the lawyer assigned to defend her was in court on the day her case was supposed to go to trial. In June of 2002, nearly [fourteen] months after her arrest, Chester pled guilty to misdemeanor shoplifting and was released from the jail.”²⁰

Henry James spent almost three decades in a Louisiana prison for a crime he did not commit. He was convicted of aggravated rape in 1982, and “he was sentenced to life in prison without the possibility of parole.”²¹ It was not until years later when a major New York law firm²² became involved in James’s case that DNA testing was performed. The testing showed that he could not have committed the rape.²³ At the trial, the victim had mistakenly identified James as the attacker.²⁴ In addition, James’s trial lawyer did not use a vital piece of forensic evidence. The testing of the rape kit just before trial showed that the attacker was a “non-secretor,” someone who “does not secrete antigens in their body fluids that would allow a serologist to determine his blood type.”²⁵ “James, however, is a secretor,”²⁶ and thus could not have committed the crime. This information was given to defense counsel, but the lawyer did not share it with the jury.²⁷ James was released from prison in 2011.²⁸

¹⁹ *Id.*

²⁰ *Id.* According to the NAACP report, “[t]he cost to the taxpayers of Harrison County of incarcerating Chester for nearly 14 months before her case made it through the courts [was] [a]pproximately \$12,090.” *Id.*

²¹ See *Henry James*, INNOCENCE PROJECT NEW ORLEANS, <http://ip-no.org/exonoree-profile/henry-james> [<https://perma.cc/T9WS-5223>].

²² Willkie Farr & Gallagher LLP. See *id.*

²³ See *id.*

²⁴ See *id.* The manner of the misidentification was deeply troubling and easily avoidable, as explained by the Innocence Project New Orleans:

Mr. James lived adjacent to the victim and spent most of the day before the crime helping the victim’s husband repair his car. . . . Immediately after her attack, she told police that she didn’t know her assailant but gave a brief description of her attacker. It was only the next day, after a police officer presented her with a picture of Mr. James, that she identified him as her rapist. The record contains no indication that the victim told the police that she had previously met her attacker; much less, that he had spent the previous day with her husband.

Id.

²⁵ *Id.*

²⁶ *Id.* (emphasis omitted).

²⁷ *Id.*

²⁸ *Id.*

Police arrested sixteen-year-old Kalief Browder for stealing a backpack.²⁹ The Bronx County Criminal Court set bail at \$3,000, an amount his family could not afford.³⁰ He remained in Rikers Island in pretrial detention for three years; he spent half that time in solitary confinement.³¹

Browder was appointed a lawyer, and each time Browder maintained his innocence and requested a trial, he was offered a plea—each refusal to accept a plea led to a delay.³² At that time, it took the courts in the Bronx an average of 517 days to resolve criminal cases.³³ The prosecutors asked for at least eight continuances.³⁴ Throughout this time, Browder continued to turn down plea offers, and the prosecutor finally dismissed the charges in June 2013.³⁵ While he was in prison, he experienced significant beatings and psychological damage, leading to his eventual suicide after numerous attempts.³⁶

Although the “Kids for Cash” scandal that came out of Pennsylvania in 2007 was attributable to the unethical and illegal choices of two county judges,³⁷ another key reason the scheme went unnoticed for so long was due to a lack of legal representation.³⁸ The former judges received thousands of dollars from owners of for-profit juvenile justice centers as they handed down lengthy sentences to juveniles who committed minor offenses.³⁹ More than fifty percent of the

²⁹ See Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), <http://www.newyorker.com/magazine/2014/10/06/before-the-law> [https://perma.cc/548C-GG22].

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See Matt Pearce, *Kalief Browder's Family Mourns His Suicide and Urges Reforms*, L.A. TIMES (Jun. 8, 2015, 1:06 PM), <http://www.latimes.com/nation/nationnow/la-na-kalief-browder-family-20150608-story.html> [https://perma.cc/P27M-7QJM].

³⁴ See Gonnerman, *supra* note 29.

³⁵ *Id.*

³⁶ See *id.*; Pearce, *supra* note 33.

³⁷ See Warren Richey, ‘Kids for Cash’ Judge Sentenced to 28 Years for Racketeering Scheme, CHRISTIAN SCI. MONITOR (Aug. 11, 2011), <http://www.csmonitor.com/USA/Justice/2011/0811/Kids-for-cash-judge-sentenced-to-28-years-for-racketeering-scheme> [https://perma.cc/JPK4-WD9Z].

An investigation revealed that half of the children who appeared in [the Pennsylvania] courtroom were not represented by a lawyer and were never advised of their right to counsel. Of those unrepresented children, up to 60 percent were ordered by [one of the judges] to serve time at a detention facility.

What was not known, prior to the federal investigation, was that [the two judges] were receiving secret payments from the private detention centers. The centers stood to profit from the higher number of juveniles they were housing.

Id.

³⁸ See *id.*

³⁹ See *id.*

juveniles were not represented by counsel.⁴⁰ Of those who were given assigned counsel, their lawyers tended to be less experienced and “easily intimidated by [the judges].”⁴¹ Assistant public defenders expressed concern about the sentences, but the Public Defender did not investigate the concerns, nor did he effectively supervise the juvenile cases.⁴² After a shake-up in the court system and in the Public Defender’s Office, juvenile detentions went down seventy percent.⁴³

Donald Gamble, charged with two counts of armed robbery and one count of aggravated assault, was jailed for sixteen months until a law professor showed a prosecutor evidence of his innocence.⁴⁴ Prior to his obtaining representation, there was a ten-month period of no progress on Gamble’s case.⁴⁵ Yet, within a few hours of work on the case, the professor realized that Gamble did not match the depiction of the robber on the surveillance video.⁴⁶ Officials in the Orleans Parish District Attorney’s office dismissed the charges within five days after being notified of the discrepancy.⁴⁷ During his sixteen-month imprisonment, Gamble lost some of his teeth and needed surgery after several inmate beatings.⁴⁸ After Gamble’s release, Anderson Cooper interviewed current and former public defenders in New Orleans on *60 Minutes*.⁴⁹

When Cooper asked the attorneys if they had innocent clients sent to prison because they didn’t have enough time to spend on their case, all nine raised his or her hand. “We simply don’t have the time. We don’t have the money. We don’t have the attention to be able to give to every single person,”

⁴⁰ *See id.*

⁴¹ Dave Janoski & Michael P. Buffer, *Panel Investigating Luzerne County Kids-for-Cash Scandal Calls for More Oversight*, REPUBLICAN HERALD (May 28, 2010), <http://republicanherald.com/news/panel-investigating-luzerne-county-kids-for-cash-scandal-calls-for-more-oversight-1.818353> [<https://perma.cc/LCX7-WHUA>].

⁴² *See id.*

⁴³ *See id.*

⁴⁴ *Inside NOLA Public Defenders’ Decision to Refuse Felony Cases*, 60 MINUTES (April 16, 2017), <http://www.cbsnews.com/news/inside-new-orleans-public-defenders-decision-to-refuse-felony-cases/> [<https://perma.cc/HB6T-FXV7>]. The law professor was Pamela R. Metzger, then of Tulane University Law School. *Id.* Metzger is now Director of the Deason Criminal Justice Reform Center at Southern Methodist University’s Dedman School of Law. *Pamela R. Metzger*, SMU DEDMAN SCH. L., <https://www.law.smu.edu/professor-profiles/metzger> [<https://perma.cc/9Z6E-EEY7>].

⁴⁵ *See Inside NOLA Public Defenders’ Decision to Refuse Felony Cases*, *supra* note 44.

⁴⁶ *See id.*

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹ *Id.*

Orleans Public Defender's Office staff attorney Brandi McNeil said.⁵⁰

In his interview on the television program, Orleans Public Defender Derwyn Bunton stated that the New Orleans justice system was like a “conveyor belt.”⁵¹

The lead plaintiff in a New York class action suit claiming systemic ineffective assistance of counsel, Kimberly Hurrell-Harring, was a nursing assistant and mother of two.⁵² She was arrested for “sneak[ing] a small amount of marijuana to her husband,” then a prison inmate.⁵³ The usual charge for this crime was a misdemeanor and did not often lead to a jail sentence.⁵⁴ Moreover, this was the first offense for Hurrell-Harring.⁵⁵ Her assigned public defender had earlier been accused of negligent actions and was later disbarred.⁵⁶ He took but a few minutes to meet with his client and then he recommended that Hurrell-Harring plead guilty to a felony charge.⁵⁷ She did so, and then spent four months in jail before the conviction was thrown out on appeal.⁵⁸ During that time, she lost her nursing-assistant license, her job, and her home.⁵⁹

⁵⁰ Emily Lane, *Orleans Public Defenders on '60 Minutes': Innocent Imprisoned Because We're Overworked*, NOLA.COM (Apr. 17, 2017), http://www.nola.com/crime/index.ssf/2017/04/orleans_public_defenders_on_60.html [<https://perma.cc/ZART-KN3T>].

⁵¹ *Id.*

⁵² See Tracy Frisch, *Equal Before the Law? New York Counties Face Push to Upgrade Public Defender System*, TRUTHOUT (Sept. 9, 2015), <http://www.truthout.org/news/item/32702-equal-before-the-law-new-york-counties-face-push-to-upgrade-public-defender-system> [<https://perma.cc/A5EP-S849>].

⁵³ *Id.*

⁵⁴ *See id.*

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ *Id.* After years of litigation, the parties and the New York Governor's Office reached a favorable settlement the day before the class action case was to go to trial. See Victoria Bekiempis, *How New York Is Finally Helping Poor Defendants*, NEWSWEEK (Oct. 22, 2014, 11:47 AM), <http://www.newsweek.com/new-york-ttk-landmark-public-defense-case-278889> [<https://perma.cc/KW6Z-APAZ>]. As part of the settlement, every indigent defendant will be given a lawyer at arraignment, and caseloads will be reduced in five counties, “substantially limit[ing] the number of cases any lawyer can carry, thereby ensuring that poor criminal defendants get a real defense.” *Id.* (quoting Press Release, N.Y. Civil Liberties Union, Settlement Begins Historic Reformation of Public Defense in New York State (Oct. 21, 2014), <https://www.nyclu.org/en/press-releases/settlement-begins-historic-reformation-public-defense-new-york-state> [<https://perma.cc/9MQN-XAZ3>]); see *infra* text accompanying notes 204–29.

II. THE U.S. SUPREME COURT AND THE RIGHT TO COUNSEL

In their earlier work, this Article's authors tracked the scope and bases for the Court's numerous counsel decisions both expanding *Gideon*⁶⁰ and narrowing it.⁶¹ In the past decade—with one major exception—the Justices have spent little time considering right-to-counsel issues in the bulk of prosecutions.⁶² The key exception here is that the Court has been willing to extend Sixth Amendment scrutiny of the performance of counsel to the plea bargaining setting. In *Padilla v. Kentucky*⁶³ the Justices decided that a criminal-defense attorney must advise a client about the immigration consequences of a guilty plea before a deal is reached with the prosecutor.⁶⁴ The Court expanded this principle in two decisions holding that the right to effective assistance of counsel applies to the plea bargaining stage in cases in which counsel either failed to advise the client of a plea offer⁶⁵ or incorrectly advised the client about the state of the law resulting in the defendant rejecting a plea offer.⁶⁶

Unfortunately, however, the Supreme Court has been generally unwilling to become actively involved in reviewing claims of ineffec-

⁶⁰ See *Ake v. Oklahoma*, 470 U.S. 68, 82–83 (1985) (holding that the government must provide experts to indigent defendants if necessary for a fair trial); *Coleman v. Alabama*, 399 U.S. 1, 9–10 (1970) (holding that the right to counsel applies to preliminary hearing, even if evidence at that hearing cannot be used against the defendant at trial); *United States v. Wade*, 388 U.S. 218, 223–27 (1967) (holding that the right to counsel applies to pretrial matters, including lineups).

⁶¹ See *United States v. Ash*, 413 U.S. 300, 321 (1973) (holding no right to a lawyer unless defendant is personally confronted); *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972) (holding no Sixth Amendment right unless defendant receives actual sentence of imprisonment); *Kirby v. Illinois*, 406 U.S. 682, 691 (1972) (holding that right to counsel only applies after initiation of adversary judicial proceeding).

⁶² The Court, however, has looked to the ineffective assistance of counsel in capital cases. See, e.g., *Buck v. Davis*, 137 S. Ct. 759, 775–76 (2017) (finding that defense lawyer acted ineffectively by offering expert testimony that prisoner was statistically more likely to act violently in the future because he was African American); *Hinton v. Alabama*, 134 S. Ct. 1081, 1088–89 (2014) (holding that defense lawyer's mistake as to the correct law in applying for expert assistance constitutes ineffective counsel); *Sears v. Upton*, 561 U.S. 945, 952–53 (2010) (finding that lower courts looked too narrowly at the actual prejudice requirement); *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (finding it improper to rely too heavily on the American Bar Association guidelines for performance of counsel when they do not describe the norms at the time of representation).

⁶³ 559 U.S. 356 (2010). The Court applied *Padilla* in *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017), where the defendant was able to establish the necessary prejudice under *Strickland* “because he never would have accepted a guilty plea had he known that he would be deported as a result.”

⁶⁴ *Padilla*, 559 U.S. at 357.

⁶⁵ *Missouri v. Frye*, 566 U.S. 134, 150–51 (2012).

⁶⁶ *Lafler v. Cooper*, 566 U.S. 156, 174–75 (2012).

tive assistance of counsel under its holding in *Strickland v. Washington*.⁶⁷ In this case, the Court established a very challenging two-part ineffectiveness test.

First, “a convicted defendant [who] complains of the ineffectiveness of counsel’s assistance . . . must show that counsel’s representation fell below an objective standard of reasonableness.”⁶⁸ There are no specific guidelines for determining whether counsel meets an objective standard of reasonableness; instead, “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms . . . considering all the circumstances.”⁶⁹ The second element of an ineffective-assistance-of-counsel claim is that “any deficiencies in counsel’s performance must be prejudicial to the defense.”⁷⁰ To satisfy the prejudice prong, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”⁷¹

⁶⁷ 466 U.S. 669 (1984).

⁶⁸ *Id.* at 687–88.

⁶⁹ *Id.* at 688.

⁷⁰ *Id.* at 692.

⁷¹ *Id.* at 694. The first prong can be extremely difficult to satisfy; some courts have gone so far as to say there will be no proper constitutional claim unless the legal representation “is so lacking that the trial has become a farce and a mockery of justice.” *Heath v. Vose*, 747 A.2d 475, 477 n.1 (R.I. 2000) (quoting *State v. Dunn*, 726 A.2d 1142, 1146 n.4 (R.I. 1999)). The second prong may be even more daunting, as explained by one Wyoming Supreme Court justice: “[I]t is practically impossible to prove prejudice because it is practically impossible to prove that the outcome would have been different had the jury been allowed to hear certain evidence. This is especially true because our system does not allow a defendant to query the jury about its deliberations.” *Osborne v. State*, 285 P.3d 248, 253–54 (Wyo. 2012) (Voigt, J., concurring). Further, some courts rather routinely state that “if an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel’s performance was deficient.” *E.g.*, *People v. Graham*, 795 N.E.2d 231, 238 (Ill. 2003). The Supreme Court’s most recent decisions in the area, though narrow, offer little hope for a relaxed application of the standard. In *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1909 (2017), the Court considered whether the trial judge’s error in closing the court room implicated *Strickland*. If the error was structural, the question became whether under *Strickland*, actual prejudice had to be shown. *Id.* at 1910. The majority answered affirmatively in rather stark fashion:

The prejudice showing is in most cases a necessary part of a *Strickland* claim.

The reason is that a defendant has a right to effective representation, not a right to an attorney who performs his duties “mistake-free.” As a rule, therefore, a “violation of the Sixth Amendment right to effective representation is not ‘complete’ until the defendant is prejudiced.” . . . [T]he rules governing ineffective-assistance claims “must be applied with scrupulous care.”

Id. at 1910–12 (citations omitted). The majority in *Davila v. Davis*, 137 S. Ct. 2058, 2066 (2017), considering a collateral attack, refused to extend the ineffective-assistance-of-counsel trial review to the performance of defense counsel on appeal:

In 2006, there were “chilling examples . . . of abysmal representation that [were] nevertheless upheld under this constitutional test.”⁷² It is disheartening to report that those chilling examples continue today. One of this Article’s authors explored the ineffective-assistance claim in recent years,⁷³ finding that cases involving truly careful monitoring of awful lawyering were relatively few in number.⁷⁴ Instead, the courts have been remarkably narrow in applying the *Strickland* test. They continue to allow the system to deprive indigent defendants of significant aid by competent lawyers. This is true even when there is little question that defense lawyers in underfunded systems are over-

The criminal trial enjoys pride of place in our criminal justice system in a way that an appeal from that trial does not. The Constitution twice guarantees the right to a criminal trial The trial “is the main event at which a defendant’s rights are to be determined, and not simply a tryout on the road to appellate review.” And it is where the stakes for the defendant are highest, not least because it is where a presumptively innocent defendant is adjudged guilty, and where the trial judge or jury makes factual findings that nearly always receive deference on appeal and collateral review.

Id. (citations omitted).

⁷² Backus & Marcus, *supra* note 10, at 1088.

⁷³ See generally Paul Marcus, *The United States Supreme Court (Mostly) Gives Up Its Review Role with Ineffective Assistance of Counsel Cases*, 100 MINN. L. REV. 1745 (2016).

⁷⁴ See *id.* at 1764–65. Those that exist appear to be the exception to the rule. The most notorious example in the last several years concerned the dozing attorney in *United States v. Ragin*, 820 F.3d 609 (4th Cir. 2016). There, the Fourth Circuit found a constitutional violation because the lawyer slept “during a substantial portion of the trial.” *Id.* at 622. The court explained further the constitutional issue the slumber raised:

Whether a lawyer slept for a substantial portion of the trial should be determined on a case-by-case basis, considering, but not limited to, the length of time counsel slept, the proportion of the trial missed, and the significance of the portion counsel slept through. At the same time, however, while we decline to dictate precise parameters for what must necessarily be a case-by-case assessment, we caution district courts that the scope of our holding today should not be limited to only the most egregious instances of attorney slumber.

Id. at 622 n.11; see also *United States v. Mohammed*, 863 F.3d 885, 890–91 (D.C. Cir. 2017) (holding that counsel was ineffective for failing to investigate the possibility of impeaching the government’s central witness as biased against the defendant despite clear indication that he should and could have done so); *Weeden v. Johnson*, 854 F.3d 1063, 1068–70 (9th Cir. 2017) (holding that counsel was ineffective for failing to seek psychological evaluation of troubled fourteen-year-old); *State v. Sims*, 769 S.E.2d 62, 66–67 (Ga. 2015) (holding that counsel was ineffective for failure to object in murder trial to prosecutor’s opening statement referring to the defendant’s silence prior to arrest); *Freiburger v. State*, 775 S.E.2d 391, 394–95 (S.C. Ct. App. 2015) (holding that counsel was ineffective in murder case where trial attorney did not rebut the State’s ballistics evidence); *State v. Barela*, 349 P.3d 676, 681–82 (Utah 2015) (holding that counsel was ineffective for failing to object to an erroneous state-of-mind requirement in jury instructions on elements of the crime).

whelmed by their caseloads.⁷⁵ Sixth Amendment claims have consistently been rejected even in prosecutions in which counsel seemed to be acting below an acceptable level of competence.

Federal judges argued in dissent that Robert Wayne Holsey's trial lawyers did not effectively represent him.⁷⁶ "Holsey's lead defense lawyer drank a quart of vodka every night of Holsey's trial" because the lawyer was about to be sued and prosecuted for stealing client funds.⁷⁷ The lawyer later testified that "he 'probably shouldn't have been allowed to represent anybody' due to his condition."⁷⁸ Holsey's death penalty was allowed to stand because a majority of the circuit-court panel found that the lawyer's performance did not affect the outcome of the trial.⁷⁹

⁷⁵ The structural gaps in funding for indigent defense remain stark throughout the United States. One commentator recently wrote:

Strickland's ineffective assistance of counsel standard lends itself to systematic violations primarily because ensuring effective assistance of counsel for every criminal defendant has significant monetary costs for the state. The state (or local jurisdiction, depending on what entity provides counsel for indigent defendants) has a strong financial incentive to minimize the costs of indigent defense providers (usually public defender offices). As a result, many jurisdictions chronically and seriously underfund their indigent defense systems. Public defenders in some jurisdictions carry such enormous caseloads that they cannot possibly provide every defendant, in the words of the *Strickland* Court, the "assistance of counsel guaranteed by the Sixth Amendment." Indigent defense counsel carrying caseloads of 1000–1600 cases per year cannot possibly provide effective assistance.

Erica Hashimoto, *Motivating Constitutional Compliance*, 68 FLA. L. REV. 1001, 1019–20 (2016) (footnotes omitted). Another commentator made the point even more succinctly: "Excessive caseloads and severe underfunding of public defenders' offices systematically deprive criminal defendants of their right to effective counsel. These are well-documented problems, and the need for reform is not new." Ace M. Factor, Note, *Lessons from New Orleans: A Stronger Role for Public Defenders in Spurring Indigent Defense Reform*, 66 DUKE L.J. 1565, 1567 (2017) (footnotes omitted).

⁷⁶ *Holsey v. Warden*, 694 F.3d 1230, 1276 (11th Cir. 2012) (Barkett, J., dissenting).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 1273. The dissenting opinion focused on the lack of effectiveness of the trial lawyer:

I cannot believe that one juror hearing all of the mitigating evidence would not credit Holsey's experts and lay witnesses and find Holsey to be either fully mentally retarded or borderline mentally retarded and so diminished in his cognitive and behavioral capacity as to be either ineligible for or undeserving of the death penalty. When combined with Holsey's evidence of his horrific child abuse, none of which was presented to his sentencing jury, there is a substantial probability that one juror would not have voted in favor of the death penalty had this evidence been introduced by competent counsel.

Id. at 1294. Holsey was executed at the end of 2014. *Georgia Executes Robert Holsey After Supreme Court Denies IQ Appeal*, NBC NEWS (Dec. 9, 2014, 11:51 PM), <http://www.nbcnews>

Cedric Ivory's lawyer at his murder trial allegedly was addicted to drugs and was an alcoholic.⁸⁰ The Sixth Circuit Court of Appeals rejected Ivory's ineffectiveness claim and noted that the lawyer "was conscious throughout the proceedings, cross-examined the state's witnesses, moved for a judgment of acquittal, and made a coherent closing argument."⁸¹

Daniel Larsen's case is different; his ineffective-assistance claim could not be rejected because it was not even raised until Larsen had served more than fourteen years in prison for a crime he did not commit.⁸² In 1999, he was found guilty of possession of an illegal knife, and he was sentenced to twenty-eight years to life in prison.⁸³ Numerous credible witnesses known to the defense lawyer were available to testify at trial on Larsen's behalf.⁸⁴ They would have said that the two arresting police officers detained the wrong man for the possession.⁸⁵ Years later, a federal judge stated that these witnesses were "credible and persuasive," and that had the jury heard the testimony it would not have voted to convict.⁸⁶ Larsen's trial lawyer did not call these witnesses; he did not call any witnesses.⁸⁷ The conviction was affirmed on appeal in the state courts—no one thought to bring up the Sixth Amendment contention in the California courts of appeal or in the state supreme court.⁸⁸ It was not until the California Innocence Project became involved in Larsen's case that the ineffective assistance claim was even raised.⁸⁹ Larsen was finally released from prison in 2013, after several federal habeas corpus rulings.⁹⁰

.com/storyline/lethal-injection/georgia-executes-robert-holsey-after-supreme-court-denies-iq-appeal-n264921 [https://perma.cc/8EWL-S8K2].

⁸⁰ Ivory v. Jackson, 509 F.3d 284, 295 (6th Cir. 2007).

⁸¹ *Id.*

⁸² Larsen v. Adams, 642 F. Supp. 2d 1124, 1127 (C.D. Cal. 2009), *abrogated on other grounds*, Lee v. Lampert, 610 F.3d 1125 (9th Cir. 2010), *rev'd en banc*, 653 F.3d 929 (9th Cir. 2011).

⁸³ *Id.* These previous convictions had occurred almost ten years earlier. *Id.* at 1127 n.4.

⁸⁴ *Id.* at 1126 n.1.

⁸⁵ *Id.* at 1140. The procedural history and findings are contained in the district court decision in the habeas corpus hearing. *Id.* at 1126–27. The ruling that ordered Larsen's release was affirmed on appeal in *Larsen v. Soto*, 730 F.3d 930 (9th Cir. 2013), *amended and superseded on denial of reh'g* by 742 F.3d 1083 (9th Cir. 2013).

⁸⁶ *See Larsen*, 642 F. Supp. 2d at 1140–41.

⁸⁷ *Id.* at 1135.

⁸⁸ *Id.* at 1127.

⁸⁹ *See Daniel Larson*, CAL. INNOCENCE PROJECT, <https://californiainnocenceproject.org/read-their-stories/daniel-larsen/> [https://perma.cc/X3TE-WY5Z].

⁹⁰ *Id.*

In 2009, Jorge Rodriguez was sentenced to twenty years in prison, followed by ten years of probation for the crime of burglary with an assault or battery.⁹¹ Although subject to deportation for this conviction as a noncitizen, the defendant was not advised of this fact by his lawyer.⁹² The Florida procedural requirement was satisfied by the trial judge telling Rodriguez during the plea hearing, “If you’re not a citizen of the United States, not only could this deport you, it could prevent you from ever coming back to this country again legally. Do you understand that?”⁹³ The Supreme Court’s *Padilla* decision, which requires counsel to speak with the client about the possible deportation consequence of a criminal conviction, had not yet been handed down.⁹⁴ The law in Florida was clear: “[P]rior to the decision in *Padilla*, no formal duty existed for counsel to advise clients of the immigration consequences of a plea.”⁹⁵ This fact was dispositive for both the Florida judges and the federal district judge: “Under the law in effect at the time of Petitioner’s plea, counsel had no duty to advise a client of a non-criminal collateral consequence, and as a result, counsel’s performance was not defective.”⁹⁶ It is true that *Padilla* had not yet been decided. It is also true that at the federal level the procedural question was very narrow.⁹⁷ Still, it is deeply troubling that not a single judge—not one—expressed any concern that the lawyer had not spoken with the client about such a highly significant aspect of the guilty plea.⁹⁸

It may be that Samuel Fields’s lawyer did perform capably at trial for murder.⁹⁹ Fields contended that his lawyer should have been more

91 *Rodriguez v. Sec’y*, No. 2:12-cv-289-FtM-29DNF, 2014 WL 7074210, at *1 (M.D. Fla. Dec. 15, 2014).

92 *Id.* at *6.

93 *Id.* at *7.

94 *See supra* notes 63–66 and accompanying text.

95 *Barrios-Cruz v. State*, 63 So. 3d 868, 872 (Fla. Dist. Ct. App. 2011).

96 *Rodriguez*, 2014 WL 7074210, at *8.

97 Was this “a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States”? *Id.* at *2.

98 *See also* *Hanks v. State*, 71 N.E.3d 1178 (Ind. Ct. App. 2017). There, the defendant was sentenced to fifty years in prison for felony child molesting. *Id.* at 1181–82. He pleaded guilty to the charge in an “open offer” process where the state would not make a sentencing recommendation. *Id.* at 1181. He complained that his lawyer did not advise him of the judge’s strict sentencing practices in sex-offender cases and that his lawyer gave no advice as to “the wisdom of accepting” the government’s offer. *Id.* at 1188. The trial judge himself noted that he likely had a reputation as a “hanging judge” in sex-offender cases. *Id.* at 1187. The court held that there was no Sixth Amendment violation because the lawyer’s performance did not fall “short of the standard of reasonable competence demanded” at the time of the trial. *Id.* at 1188.

99 *See* *Fields v. White*, No. 15-38-ART, 2016 WL 3574396 (E.D. Ky. June 23, 2016).

forceful in the closing argument to the jury.¹⁰⁰ In a habeas review, a court noted that “perhaps” trial counsel could have been more aggressive.¹⁰¹ That contention is not what is noteworthy about the opinion dismissing Fields’s Sixth Amendment claim. What is striking about the case is the manner in which the judge described the ineffective assistance review called for by the Supreme Court:

[T]he Constitution does not guarantee that a defendant will have a perfect lawyer. It does not guarantee that he will have a good lawyer. It does not even guarantee that he will *not* have a “really bad one.” (“[T]he Supreme Court has gone out of its way to make clear that, in order to obtain a new trial on ineffective-assistance grounds, the petitioner must do more than show that he had a bad lawyer—even a really bad one.”).¹⁰²

III. FUNDING AND RESOURCES FOR LEGAL SERVICES

In 2006, we asserted that the drastic underfunding of the defense function for poor people was a root cause of the intractable problems plaguing the patchwork of state indigent defense systems in the

¹⁰⁰ *Id.* at *20.

¹⁰¹ *Id.* at *22.

¹⁰² *Id.* (quoting *Storey v. Vasbinder*, 657 F.3d 372, 374 (6th Cir. 2011)); *see also* *Bahtuoh v. Smith*, 855 F.3d 868, 872 (8th Cir. 2017). There the court did not find ineffective assistance even though defense counsel failed to present the defendant’s testimony which had been promised in his opening statement. *Id.* The court wrote that applying the *Strickland* standard in a federal habeas action meant that the federal judges’ review was “doubly deferential.” *Id.* (quoting *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)). The petitioner in *Waiters v. Lee*, 857 F.3d 466, 468–69 (2d Cir. 2017), also pursued a habeas action, claiming a Sixth Amendment violation. In rejecting the claim, the majority of the court explained the extremely difficult burden: “The operative question in reviewing a state court’s *Strickland* ruling is thus ‘not whether a federal court believes the state court’s determination was incorrect[,] but [rather] whether that determination was [objectively] unreasonable—a substantially higher threshold.’” *Id.* at 478 (alterations in original) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2006)). The defense lawyer there did not offer expert testimony on the question of whether the 130-pound defendant was so intoxicated after sixteen drinks that he could not have formed the necessary intent to commit the crime. *Id.* at 485–86 (Jacobs, J., dissenting). The dissenter disagreed with the majority’s *Strickland* analysis:

The refusal by defense counsel to introduce his only powerful piece of evidence is simply unaccountable. At trial, he offered no explanation. He seems not to have discussed the issue with his client before or during the evidentiary colloquy. At the hearing to vacate Waiters’s conviction . . . , conducted by the same state trial judge, defense counsel could not recall why he let pass the offered opportunity to call an expert. A pity: I would be deeply curious to know.

. . . .

. . . [T]he evidence the jury never got to see would have altered the entire evidentiary picture, such that acquittal was at least reasonably probable.

Id. at 485–87 (brackets omitted) (citations omitted) (internal quotation marks omitted).

United States.¹⁰³ Excessive public defender caseloads, insufficient compensation for appointed and contract defense lawyers, limited access to attorneys, lack of ancillary resources critical to competent representation, and the resulting ineffective assistance of counsel, among other problems, can all be traced to inadequate funding.¹⁰⁴ In the intervening decade, despite repeated calls for additional funding by virtually every stakeholder in the criminal justice system,¹⁰⁵ the fiscal

¹⁰³ Others have also noted this problem. *See, e.g.*, AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* 38 (2004) ("Funding for indigent defense services is shamefully inadequate."); AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING* 3 (1982) [hereinafter AM. BAR ASS'N, *GIDEON UNDONE*] ("[I]ndigent defendants are not being provided competent counsel due to lack of adequate funding for such services. . . . This bleak picture, twenty years after the *Gideon* decision, is a severe blot upon the fabric of the nation's constitutional and historic commitment to a free society with *justice and liberty for all.*"); Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis Is Chronic*, 9 CRIM. JUST. 13, 13 (1994) ("[T]he current level of funding for a majority of the indigent defense programs around the country has reached the crisis level and threatens the effective implementation of the Sixth Amendment right to counsel."); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 9–10 (1997) ("Thus, notwithstanding nominal budget increases, spending on indigent defendants in constant dollars per case appears to have declined significantly between the late 1970s and the early 1990s.").

¹⁰⁴ *See* AM. BAR ASS'N, *GIDEON UNDONE*, *supra* note 103, at 3.

¹⁰⁵ *See, e.g.*, AM. BAR ASS'N, REPORT ON RESOLUTION 104A, at 4–5 (2013) (urging Congress to fund a National Center for Indigent Defense Services); JOHN P. GROSS, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *Gideon at 50: PART I—RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS* 18–19 (2013); Eric Holder, Attorney General, Address at the Justice Department's 50th Anniversary Celebration of the U.S. Supreme Court Decision in *Gideon v. Wainwright* (Mar. 15, 2013), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-justice-departments-50th-anniversary-celebration-us> [<https://perma.cc/EEE6-YE4C>].

This cry for help has been voiced repeatedly by the defense bar. This statement by Michael Barrett, Director of the Missouri State Public Defender Office, is typical:

We've been jumping up and down trying to call attention to this matter for the last two years, telling the state, "This [lawsuit] is coming, this is coming," although we didn't know precisely when it would come. . . . It was inevitable, just given all the studies that have been done regarding our caseload and the limited number of lawyers the state gives us.

Matt Ford, *A 'Constitutional Crisis' in Missouri*, ATLANTIC (Mar. 14, 2017), <https://www.theatlantic.com/politics/archive/2017/03/missouri-public-defender-crisis/519444/> [<https://perma.cc/PL8V-Y4EU>]. Barrett also noted: "A lawyer can probably only handle 40, maybe 50 case[s] at any one time. . . . Our lawyers have three times that amount, and people are taking pleas because they're sitting in local jail waiting for their lawyer to get to them." *Id.*

Judges—from state trial court judges to Justices of the U.S. Supreme Court—also echo this concern. *See, e.g.*, *Luis v. United States*, 136 S. Ct. 1083, 1095 (2016) ("[Indigent defendants must rely on] overworked and underpaid public defenders. As the Department of Justice explains, only 27 percent of county-based public defender offices have sufficient attorneys to meet nationally recommended caseload standards."); *State v. Bernard*, 528-021, p. 9 (La. Crim. Dist. Ct., Parish of Orleans 4/8/16) ("The defendants' attorneys have demonstrated that they cannot effectively represent their clients without adequate funding and resources. The court has no difficulty

picture has not changed much. Rather, there are some indications that the funding situation has deteriorated even further since 2006.¹⁰⁶

States continue to utilize a variety of methods to meet their Sixth Amendment obligation to provide attorneys for poor criminal defendants.¹⁰⁷ Some indigent defense systems are organized at the state level, while others rely primarily on localities to administer public defense programs, and still others use a hybrid delivery system combining the two.¹⁰⁸ States also differ in how services are delivered, such as through salaried public defenders, appointed counsel paid by the hour, contract attorneys who handle all cases in a defined jurisdiction, or a combination of these.¹⁰⁹ Organizational structures are further complicated by funding systems, which also vary by state.¹¹⁰ In approximately half the states, funding is provided exclusively through state appropriations, while the other half use some combination of state and local funds in varying ratios.¹¹¹ Although some states' appropriations only provide a small fraction of necessary funding, Pennsylvania is the only remaining state that provides no state funds and leaves the entire responsibility for funding indigent defense to local governments.¹¹²

The financial crisis of 2007–2008 and the resulting economic downturn hit state budgets hard, with thirty-seven states facing budget shortfalls in 2009.¹¹³ The Brookings Institution reported that state tax receipts “fell by roughly \$100 billion in real terms from 2007 to 2009,” a drop more precipitous and longer lasting “than in previous downturns, including a pair of back-to-back recessions in the early 1980s.”¹¹⁴ The federal government attempted to provide fiscal relief to states and localities during this “Great Recession” through a stimulus

concluding the defendants' constitutional right to assistance of counsel is being violated.”); *see also* Eve Brensike, *The Illusory Right to Counsel*, 37 OHIO NORTHERN U. L. REV. 597, 598 (2011) (“[C]riminal defendants routinely face the threat of incarceration (or continued incarceration) without the aid of competent counsel.”).

¹⁰⁶ *See infra* notes 113–26 and accompanying text.

¹⁰⁷ For a complete description of the organizational structure and funding sources for each state, *see generally* STEPHEN D. OWENS ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 246683, INDIGENT DEFENSE SERVICES IN THE UNITED STATES, FY 2008–2012—UPDATED (2015).

¹⁰⁸ *See id.* at 1.

¹⁰⁹ *See id.*

¹¹⁰ *See id.*

¹¹¹ *See id.* *See generally* HOLLY R. STEVENS ET AL., AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, STATE, COUNTY AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008 (2010).

¹¹² *See* OWENS ET AL., *supra* note 107, at 1, 24.

¹¹³ NAT'L RIGHT TO COUNSEL COMM., *supra* note 7, at 59.

¹¹⁴ Tracy Gordon, *State and Local Budgets and the Great Recession*, BROOKINGS INSTITU-

package to the tune of \$145 billion distributed “to help states fill their budget gaps.”¹¹⁵ Even with this federal assistance, however, “large budget gaps opened in nearly every state, including a record number of states (43) that confronted shortfalls in the middle of a budget cycle Overall, states faced more than \$500 billion in cumulative shortfalls from 2009 to 2012.”¹¹⁶

Compounding the shortfalls in state revenues, states also had to contend with rising demand for spending, particularly involving public welfare programs, as a result of the dramatic employment loss associated with the economic downturn.¹¹⁷ This recession was notable for the remarkable breadth and depth of historic employment losses.¹¹⁸ As employment and personal income dropped, enrollments in income-based programs like Medicaid and unemployment insurance climbed.¹¹⁹ Similarly, more defendants qualified for public-defense services during these tough economic times.¹²⁰ In short, during the Great Recession, states faced rising demand for public services at a time when revenues were dropping dramatically. States attempted to address these significant budget gaps through a number of fiscal strategies, including raising revenues through tax and fee increases and drawing down reserves.¹²¹ Given the size of the budget shortfalls, however, most states simply were forced to cut spending.¹²²

Even before the economic crisis hit, “many indigent defense systems across the country were already facing serious budget shortfalls and cutbacks.”¹²³ Spending cuts related to the recession exacerbated the situation. The Bureau of Justice Statistics reported that state government spending on indigent defense steadily dropped from 2008

TION (Dec. 31, 2012), <https://www.brookings.edu/articles/state-and-local-budgets-and-the-great-recession/> [https://perma.cc/K5ES-7SNR].

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *See id.*; Christopher J. Goodman & Steven M. Mance, *Employment Loss and the 2007–09 Recession: An Overview*, MONTHLY LAB. REV., Apr. 2011, at 5–8.

¹¹⁸ *See* Goodman & Mance, *supra* note 117, at 3.

¹¹⁹ *See* Gordon, *supra* note 114.

¹²⁰ The Census Bureau reported that “the number of Americans living below the official poverty line [in 2010], 46.2 million people, was the highest number in the 52 years the bureau has been publishing figures on it.” Sabrina Tavernise, *Soaring Poverty Casts Spotlight on ‘Lost Decade,’* N.Y. TIMES (Sept. 13, 2011), <http://www.nytimes.com/2011/09/14/us/14census.html> [https://perma.cc/HS26-ZCH7]. Joblessness was the central factor in the growing number of poor Americans, with just over fifteen percent of Americans, the highest level since 1993, living below the poverty line (\$22,314 for a family of four). *See id.*

¹²¹ *See* Gordon, *supra* note 114.

¹²² *See id.*

¹²³ NAT’L RIGHT TO COUNSEL COMM., *supra* note 7, at 59.

through 2012, with a significant decline in intergovernmental transfers of state funds to localities.¹²⁴ These budget cuts occurred as caseloads for states' public defenders grew four to seven percent.¹²⁵ For most states during the Great Recession, not only was there simply no money to expand much-needed funding for public defense, budgets were cut even in the face of the critical and continually growing need.¹²⁶

Although a majority of state budgets appear to have recovered from the economic downturn, a significant number of states are still struggling to recover from losses in state revenue attributable to the recession.¹²⁷ "Overall, state tax revenue has bounced back more slowly after the 2007–09 recession than the three previous downturns," and the economic recovery is uneven across the states.¹²⁸ "Low energy prices, weak consumer spending, and . . . slow[] growth in state personal income" have contributed to an uneven recovery in state revenues and a reluctance on the part of states to take on new spending.¹²⁹ This slow, uneven recovery means that there is little hope that states have the resources to expand funding for public defense now or any time in the near future.

With the exception of its two most populous counties, Oklahoma and Tulsa, the state of Oklahoma directly funds public defense through the Oklahoma Indigent Defense System ("OIDS").¹³⁰ Oklahoma provides a stark example of the lingering effects of the Great Recession and the inability of states to adequately fund their public defense systems.¹³¹ The state "made deep cuts to state appro-

124 ERINN HERBERMAN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, STATE GOVERNMENT INDIGENT DEFENSE EXPENDITURES, FY 2008–2012—UPDATED 1 (2015).

125 See Jennifer Burnett, *Justice in Jeopardy: Budget Cuts Put State Public Defense Systems Under Stress*, CAPITOL IDEAS, July/Aug. 2010, at 16; *infra* notes 167–76 and accompanying text.

126 See generally Burnett, *supra* note 125; *infra* notes 167–76 and accompanying text.

127 See Barb Rosewicz & Daniel Newman, *Tax Revenue Has Recovered in 31 States, Despite Flat Q3*, PEW CHARITABLE TR. (May 17, 2017), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2017/05/17/tax-revenue-has-recovered-in-31-states-despite-flat-q3> [<https://perma.cc/N6XG-Q265>].

128 *Id.*

129 *Id.* The fiscal outlook for states remains bleak. See LUCY DADAYAN & DONALD J. BOYD, ROCKEFELLER INS. OF GOV'T, 2016: ANOTHER LACKLUSTER YEAR FOR STATE TAX REVENUE 4, 4–5 (2017) (documenting "disappointing" state tax collections in 2016 and "anticipating continued slow growth in tax revenues for the remainder of fiscal year 2017 and fiscal year 2018").

130 OWENS ET AL., *supra* note 107, at 15.

131 The OIDS has had a rocky history since its creation in 1991. See Backus & Marcus, *supra* note 10, at 1119–20 (describing the litigation that spurred the state legislature to create the agency and its early funding challenges).

priations during the Great Recession, and state funding has never returned to pre-recession levels.”¹³² “Since 2015, the downturn in the [state’s] energy sector,” along with tax cuts by the Republican-led legislature, resulted in “two consecutive years of large budget shortfalls and cuts.” “Adjusted for inflation, [Oklahoma’s fiscal year] 2017 budget is almost 15 percent less than the budget for [fiscal year] 2007, for a total decline of \$1.17 billion” in state expenditures during this period.¹³³

For the OIDS, those state budget woes have resulted in the double hit of declining state appropriations and growing caseloads.¹³⁴ “The agency warned in its 2016 Annual Report that” the loss of funding and resulting crushing caseloads “have ‘jeopardized the agency’s ability to continue to provide constitutionally effective legal representation.’”¹³⁵ From 2002 to 2016, OIDS attorneys saw their “caseload[s] rise by nearly 50 percent, while their state appropriations . . . dropped by almost 35 percent.”¹³⁶ In a single year, “between 2015 and 2016, the total number of cases [OIDS attorneys] handled rose by 17 percent.”¹³⁷

Just to make it to the end of the 2017 fiscal year, the OIDS sought an emergency supplemental appropriation of \$1.5 million.¹³⁸ The state legislature provided \$700,000.¹³⁹ Although the agency is among a select few receiving a small increase in its fiscal year 2018 budget,¹⁴⁰ the agency has warned that the funding lost over the last few years must be restored in order for Oklahoma to meet state and federal constitutional requirements to provide defense services to indigent criminal defendants.¹⁴¹ Otherwise, the fallout from the prolonged funding crisis could mean the release of defendants due to lack of counsel, reversal

¹³² *8 Key Facts About Oklahoma’s Budget (#betterok Budget Bootcamp)*, TOGETHER OKLA. (Jan. 5, 2017), <http://togetherok.org/8-key-facts-oklahomas-budget-betterok-budget-bootcamp/> [<https://perma.cc/T9NZ-SPQQ>].

¹³³ *Id.*

¹³⁴ Ryan Gentzler, *The Indigent Defense System Needs \$1.5 Million to Avoid Another Constitutional Crisis*, OKLA. POL’Y INST. (Apr. 19, 2017), <http://okpolicy.org/indigent-defense-system-needs-1-5-million-avoid-another-constitutional-crisis/> [<https://perma.cc/THL6-68SG>].

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *See id.*

¹³⁹ *See id.*

¹⁴⁰ *FY 2018 Budget Highlights*, OKLA. POL’Y INST., 4 (June 8, 2017), <http://okpolicy.org/fy-2018-budget-highlights/> [<https://perma.cc/7J5T-LMVB>].

¹⁴¹ OKLA. INDIGENT DEF. SYS., 2016 ANNUAL REPORT 2 (2016).

of convictions where necessary expert services could not be provided, or the inability to prosecute death-penalty cases.¹⁴²

Like Oklahoma, Maine found itself facing a shortfall in its indigent funding for the 2017 fiscal year. Since 2010, Maine has provided defense attorneys to poor criminal defendants through a court-appointed system administered by the Maine Commission on Indigent Legal Services.¹⁴³ In early May of 2017, the Maine Commission announced that it had run out of money and could no longer pay defense attorneys for their constitutionally mandated work.¹⁴⁴ With two months left to go in the fiscal year, the Maine Commission's coffers were empty due to a reduced budget and the legislature's failure to appropriate supplemental funds to make up the roughly \$3 million gap.¹⁴⁵ As a result, attorneys representing the state's poor criminal defendants had to wait two months until the new fiscal year to be paid for their work.¹⁴⁶

Maine's court-appointed defense attorneys are familiar with working unpaid. Prior to 2017, the Maine Commission most recently ran out of money at the end of the fiscal year in 2013, "but the [state] Legislature acted in time to fund the shortfall."¹⁴⁷ In fact, the Maine Commission was underfunded for the first three years of its existence, and underfunding was common prior to the Maine Commission creation "when the service was run by the Maine Judicial Branch."¹⁴⁸ Running out of money has become a perennial issue in Maine, plaguing the state's ability to meet its constitutional obligations under the Sixth Amendment, especially the last few months of the fiscal year.¹⁴⁹ One state legislator worried that these nearly annual shortfalls could mean that "the State will not be able to proceed with criminal prosecutions" at all.¹⁵⁰

¹⁴² *Id.*

¹⁴³ See *Maine Commission on Legal Services*, MAINE.GOV, <http://www.maine.gov/mcils/> [<https://perma.cc/ZG8L-QFRW>].

¹⁴⁴ Matt Byrne, *State Funding for Court-Appointed Attorneys Runs Out*, PORTLAND PRESS HERALD (May 3, 2017), <http://www.pressherald.com/2017/05/03/state-funding-for-court-appointed-attorneys-runs-out/> [<https://perma.cc/B2KG-MEMD>].

¹⁴⁵ *See id.*

¹⁴⁶ *See id.*

¹⁴⁷ *Id.*

¹⁴⁸ Scott Dolan, *Maine's Court-Appointed Lawyers Face Fiscal Crunch*, PORTLAND PRESS HERALD, (Feb. 2, 2013), http://www.pressherald.com/2013/02/02/court-appointed-lawyers-face-fiscal-crunch_2013-02-03/ [<https://perma.cc/8K2Q-CAKX>].

¹⁴⁹ *See id.*

¹⁵⁰ *Id.*

North Carolina also faces routine year-end budget shortfalls. North Carolina's Commission on Indigent Defense Services, launched in 2001, utilizes a combination of salaried public defenders and contract and appointed counsel to provide legal representation to indigent defendants throughout the state.¹⁵¹ Appointed counsel handle a little more than half of North Carolina's indigent cases each year.¹⁵² From 2009 to 2016, the Commission's appropriated funds for appointed counsel fell short in the last few months of the fiscal year by an average of over \$6 million each year.¹⁵³ Like many states, North Carolina's year-end funding gaps have been fueled by rising caseloads.¹⁵⁴ Between 2002 and 2016, the Commission saw a 35.5% increase in its caseload and, at the same time, experienced budget cuts.¹⁵⁵

In 2011, the North Carolina Commission took steps to decrease expenditures to close these persistent budget gaps by severely reducing the hourly rates paid to appointed counsel.¹⁵⁶ District court appointments absorbed the steepest cuts, nearly 27%, to an hourly rate of \$55.¹⁵⁷ Most hourly rates were cut to below the original rates established by the North Carolina Commission over a decade ago.¹⁵⁸ Although the dramatic reductions in hourly rates helped close the budget gap, as a consequence, the state is losing a significant number of attorneys willing to accept court-appointed cases.¹⁵⁹ In particular, many of the most experienced and skilled attorneys stopped handling indigent cases, and there is concern that some areas of the state may not have enough qualified attorneys to handle the caseload.¹⁶⁰ After the rate decreases took effect, a survey of state court judges showed that 67% had seen a decline in the quality of representation.¹⁶¹

The Great Recession did not just cripple state budgets; county and municipal governments felt the pinch as well. The bursting of the housing bubble and the resulting significant declines in housing prices caused by the Great Recession meant steep declines in property-tax

151 See N.C. OFFICE OF INDIGENT DEF. SERVS., FY2016 REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 3, 10, 33 (2017).

152 See *id.* at 15.

153 *Id.* at 18.

154 *Id.* at 32.

155 *Id.* at 33–35.

156 *Id.* at 15.

157 *Id.* at 16.

158 *Id.*

159 *Id.* at 16–17.

160 *Id.* at 16.

161 *Id.* at 17.

collections, a staple of most local-government revenue.¹⁶² The housing bust infected other areas of the economy driving state revenue as well. “For example, it is estimated that the decline in housing values resulted directly in a decrease in consumer spending of some \$240 billion in 2010, which in turn significantly impacted state and local government sales tax receipts.”¹⁶³ The resulting severe cutbacks in government services in some localities literally meant turning the lights out as a number of municipalities turned off street lights at night to save money.¹⁶⁴ And, like states, economic recovery for counties and municipalities remains slow and uneven.¹⁶⁵ As of the end of 2016, ninety-three percent of counties still had not recovered to prerecession levels of total employment, unemployment rate, size of the economy, and home values.¹⁶⁶

The economic scourge of the Great Recession, along with the slow recovery, made it nearly impossible for states and localities to address the lack of adequate funding for public defense programs. As a result, the crushing caseloads for public defenders and decreases in compensation for court-appointed attorneys have also persisted.

In Nashville, Tennessee, during fiscal year 2012, public defenders “handling misdemeanors . . . took up to 1,000 cases each, typically giving them less than an hour to spend on each case.”¹⁶⁷ General caseload numbers from fiscal year 2014 suggest that the Nashville office would have needed more than twenty additional attorneys to meet national caseload guidelines.¹⁶⁸

162 LUCY DADAYAN, ROCKEFELLER INST., *THE IMPACT OF THE GREAT RECESSION ON LOCAL PROPERTY TAXES* 6–7 (2012).

163 Lawrence L. Martin, Richard Levey & Jenna Cawley, *The “New Normal” for Local Government*, 44 ST. & LOC. GOV'T REV. 17S, 17S (2012).

164 *See id.* at 22S.

165 *See* EMILIA ISTRATE & DANIEL HANDY, NAT'L ASS'N OF CTYS., *THE STATE OF COUNTY FINANCES: PROGRESS THROUGH ADVERSITY* 1 (2016).

166 Eric Morath, *Six Years Later, 93% of Counties Still Have Not Recovered from Recession, Study Finds*, WALL ST. J. (Jan. 12, 2016, 7:34 AM), <https://blogs.wsj.com/economics/2016/01/12/six-years-later-93-of-u-s-counties-havent-recovered-from-recession-study-finds/?mg=prod/accounts-wsj> [<https://perma.cc/M5Y6-BED8>].

167 Stephen Hale, *Buried Under Workload, Public Defender's Office Pushes Back*, NASHVILLE SCENE (Feb. 2, 2017, 5:00 AM), <http://www.nashvillescene.com/news/cover-story/article/20850716/facing-an-unmanageable-workload-the-public-defenders-office-is-now-limiting-the-cases-it-takes> [<https://perma.cc/TL83-JALY>].

168 *See id.* In 1973, the National Advisory Commission (“NAC”) on Criminal Justice Standards and Goals, funded by the federal government, made the first numerical recommendation for maximum annual caseloads for a public defender office: on average, the lawyers in the office should not carry caseloads that exceed, per year, more than 150 felonies; 400 misdemeanors; 200 juvenile court cases; 200 mental health cases; or 25 appeals. *See* NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, *REPORT ON COURTS* 276 (1973). Although these lim-

In Hobbs, New Mexico, “[t]he number of felony cases . . . ha[s] almost doubled since 2011, . . . even as the number of public defenders dropped by one-third.”¹⁶⁹ In October of 2016, New Mexico’s Chief Public Defender ordered his public defenders to stop taking additional cases when they were averaging over 200 felony cases per attorney.¹⁷⁰ He was held in contempt of court, and the public defenders were forced to continue accepting new cases.¹⁷¹

In Washington State before a 2013 class-action lawsuit successfully challenged the practice in two cities, two part-time appointed lawyers representing indigent misdemeanor defendants handled approximately 1,000 cases each per year.¹⁷² As a result, the lawyers “often spent less than an hour on each case,” engaged in little to no investigation, only communicated with their clients for a few minutes in an open courtroom, and based pleas entirely on the presumption that the police report was accurate.¹⁷³

In 2014, one Marion County, Indiana, public defender handled 1,333 cases in a single twelve-month period, which is more than three times the maximum annual caseload allowed for misdemeanors under national standards.¹⁷⁴

In 2010, a single attorney in Bonneville County, Idaho, was “assigned to handle more than four full-time attorneys’ worth of work—and a caseload that allows only one hour and ten minutes per client.”¹⁷⁵ “The office’s five defenders [were] cover[ing] the number of cases that [eleven] attorneys would be reasonably expected to handle

its are often cited as national standards, they were based primarily on qualitative and anecdotal information rather than empirical evidence. See AM. BAR ASS’N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS* 5 (2014). Newer workload studies, which focus on the average amount of time an attorney should expect to spend on a particular type of case in order to provide reasonably effective assistance of counsel, suggest that the NAC standards are often too high. See, e.g., *id.* at 5–7.

169 See Doug Mataconis, *There’s a Criminal Defense Crisis in New Mexico, and Nobody Seems To Care*, OUTSIDE THE BELTWAY (Dec. 30, 2016), <http://www.outsidethebeltway.com/theres-a-criminal-defense-crisis-in-new-mexico-and-nobody-seems-to-care/#ixzz4q7Wktz4V> [<https://perma.cc/2Y5J-8BXT>].

170 See *id.*

171 See *id.*

172 See *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013).

173 *Id.*; Brief of Plaintiffs at 2–3, *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013) (No. 2:11-cv-01100).

174 SIXTH AMENDMENT CTR., *THE RIGHT TO COUNSEL IN INDIANA: EVALUATION OF TRIAL LEVEL INDIGENT DEFENSE SERVICES* 197 (2016); ISTRATE & HANDY, *supra* note 165.

175 NAT’L LEGAL AID & DEFENDER ASS’N, *THE GUARANTEE OF COUNSEL: ADVOCACY & DUE PROCESS IN IDAHO’S TRIAL COURTS*, at iv (2010).

according to national norms,” with the added challenge from the lack of any investigative staff.¹⁷⁶

In addition to overwhelming caseloads that make competent representation nearly impossible, another consequence of strained state and local budgets is interfering with delivering on the promise of *Gideon*.¹⁷⁷ States are turning increasingly to forms of cost recovery for providing legal defense to indigent clients and imposing “new and often onerous ‘user fees’” as a means to generate revenue to pay for the criminal justice system.¹⁷⁸ A recent survey by National Public Radio (“NPR”) determined that in at least forty-three states and the District of Columbia defendants can be billed for a public defender.¹⁷⁹ These fees, which often carry high interest and penalties for nonpayment, can saddle criminal defendants with debt that impacts their ability to reenter society and often lands them back in jail.¹⁸⁰ According to a yearlong investigation by NPR, since 2010, forty-four states have increased criminal and civil court fees on everything from parole or probation officers to room and board for jail and prison stays.¹⁸¹ There is, however, a growing realization that saddling poor defendants with the costs of the criminal justice system through bail, fines, and fees, and then incarcerating them when they fail to pay, is akin to imprisoning people simply because they are poor.¹⁸²

Fees to cover the cost of public defense are particularly troubling because the cost often discourages individuals from exercising their constitutional right to an attorney and allows states to dodge the mandate of *Gideon* to provide representation to poor criminal defendants. In Michigan, for example, one judge estimated that the threat of paying the full cost of assigned counsel resulted in misdemeanor defendants waiving their right to counsel nearly ninety-five percent of the

¹⁷⁶ *Id.*

¹⁷⁷ See *supra* notes 1–4 and accompanying text.

¹⁷⁸ ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 1 (2010).

¹⁷⁹ See Samantha Sunne, *Why Your Right to a Public Defender May Come With a Fee*, NPR (May 29, 2014, 10:01 AM), <https://www.npr.org/2014/05/29/316735545/why-your-right-to-a-public-defender-may-come-with-a-fee> [<https://perma.cc/9GYE-J3JD>]; see also BANNON ET AL., *supra* note 178, at 12.

¹⁸⁰ See BANNON ET AL., *supra* note 178, at 5.

¹⁸¹ See *As Court Fees Rise, The Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), <https://www.npr.org/templates/transcript/transcript.php?storyId=312158516> [<https://perma.cc/H2BF-KNDQ>].

¹⁸² See COUNCIL OF ECON. ADVISERS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 1 (2015).

time.¹⁸³ Rather than bolster the funding for public defense, this response to declining revenues has further undermined the legitimacy of *Gideon*'s guarantee to the right to counsel for all.

IV. LITIGATION TO PROMOTE REFORM

Chronic underfunding, exacerbated by the Great Recession and apparently unsolvable in the political sphere, often sparks litigation as advocates, seeking a way to compel action, turn to courts. The director of the Missouri Public Defender Office expressed the level of exasperation that led to litigation in that state: "I've done everything short of setting myself on fire to draw attention to the situation that the state has put us in."¹⁸⁴

In 2006, the authors envisioned systemic litigation as one method to motivate state legislatures to address the deficiencies of their indigent defense systems.¹⁸⁵ While acknowledging that litigation did not always lead to sustained practical results,¹⁸⁶ we nevertheless endorsed systemic litigation as a tool to "spur legislative action and to educate the public about the failings of a given system."¹⁸⁷ Since that time, this type of litigation has continued to evolve and has achieved real progress in a number of states, including Idaho, New York, and Pennsylvania, along with promising suits pending in other states, including California, Missouri, and Louisiana.¹⁸⁸ The outcomes in Idaho, New York, and Pennsylvania highlight two key variables that seem to impact the success of recent structural challenges to indigent defense systems: (1) the involvement of the Justice Department and (2) a shift in legal analysis away from *Strickland*.¹⁸⁹

¹⁸³ See BANNON ET AL., *supra* note 178, at 12.

¹⁸⁴ Margaret Stafford, *Missouri Sued Over Low Funding for Public Defense System*, U.S. NEWS (Mar. 9, 2017, 2:33 PM), <https://www.usnews.com/news/best-states/missouri/articles/2017-03-09/aclu-others-sue-missouri-over-public-defender-system> [<https://perma.cc/EH32-YK6B>].

¹⁸⁵ Backus & Marcus, *supra* note 10, at 1128–29; see also Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 432–43 (2009) (discussing trends in this type of structural litigation to address Sixth Amendment right to counsel violations).

¹⁸⁶ See Backus & Marcus, *supra* note 10, at 1116–22.

¹⁸⁷ See *id.* at 1129.

¹⁸⁸ See Lorelei Laird, *Starved of Money for Too Long, Public Defender Offices Are Suing—and Starting to Win*, ABA J. (Jan. 2017), http://www.abajournal.com/magazine/article/the_gideon_revolution [<https://perma.cc/38WV-VZES>] (discussing current litigation). While the focus here is on systemic challenges, direct appeals of individual cases and postconviction proceedings continue to shape Sixth Amendment right to counsel jurisprudence and prod states to action as well. See *supra* notes 63–66 and accompanying text.

¹⁸⁹ See Laird, *supra* note 188.

A. Idaho

It was no surprise to anyone when the American Civil Liberties Union (“ACLU”) filed a class action complaint in Idaho in 2015 alleging that Idaho’s county-based approach to indigent defense was constitutionally inadequate.¹⁹⁰ The lawsuit, which was based on a detailed 2010 study of the right to counsel in Idaho by the National Legal Aid and Defender Association,¹⁹¹ identified a litany of problems, which included

widespread use of fixed-fee contracts; extraordinarily high attorney caseloads and workloads; lack of consistent, effective, and confidential communication with indigent clients; inadequate, and often nonexistent, investigation of cases; lack of structural safeguards to protect the independence of defenders; lack of adequate representation of children in juvenile and criminal court; lack of sufficient supervision; lack of performance-based standards; lack of ongoing training and professional development; and lack of any meaningful funding from the State.¹⁹²

County-based systems like Idaho’s are particularly prone to these types of deficiencies and have long been criticized as inadequate.¹⁹³

At the same time that the ACLU was preparing and filing the lawsuit, the Idaho legislature was taking steps to improve Idaho’s public defense system. In 2014 the legislature created the independent State Public Defense Commission (“PDC”).¹⁹⁴ The legislature empowered the PDC to promulgate rules related to training and education

190 “In August of 2013, Idaho Chief Justice Roger Burdick testified before a legislative interim committee” that “[f]rankly, our system for the defense of indigents, as required by Idaho’s constitution and laws, is broken.” Steve Taggart, *The (Unsurprising) ACLU Public Defender Lawsuit Against Idaho*, IDAHO POL. WKLY. (June 21, 2015), <http://idahopoliticsweekly.com/politics/399-the-unsurprising-aclu-public-defender-lawsuit-against-idaho> [<https://perma.cc/8LBU-3PPD>]. Even the Governor had acknowledged as much in 2015 when he asked the state legislature to “address[] the very real challenge we face in our public defense system.” C.L. “BUTCH” OTTER, STATE OF THE STATE AND BUDGET ADDRESS 8 (2015), https://gov.idaho.gov/mediacenter/speeches/sp_2015/SOS%20FY%202016.pdf [<https://perma.cc/46U3-2ET4>]. He conceded that “[t]he courts have made it clear that [Idaho’s] current method of providing legal counsel for indigent criminal defendants does not pass constitutional muster.” *Id.*

191 See NAT’L LEGAL AID & DEFENDER ASS’N, *supra* note 175; Taggart, *supra* note 190. The report, authorized by the Idaho Criminal Justice Commission and the Idaho Juvenile Justice Commission, found that none of Idaho’s jumble of county administered public defense systems, with no state funding or oversight, met constitutional standards. NAT’L LEGAL AID & DEFENDER ASS’N, *supra* note 175, at iii.

192 Complaint para. 1, *Tucker v. State*, No. CV-OC-2015-10240 (Idaho Dist. Ct. June 17, 2015).

193 See NAT’L RIGHT TO COUNSEL COMM., *supra* note 7, at 54–55.

194 See David Carroll, *Idaho Governor Signs Public Defense Commission Bill into Law*,

for defense attorneys and to create “[u]niform data reporting requirements” that included “caseload, workload and expenditures.”¹⁹⁵ Two years later, the legislature significantly increased the powers and responsibilities of the PDC to promulgate additional rules.¹⁹⁶ These rules related to procedures for the creation, “oversight, implementation, enforcement and modification of indigent defense standards”; “requirements for contracts between counties and private attorneys for the provision of indigent defense services”; data reporting mandates; and procedures for grant applications by which counties can apply for state funds to offset the cost of compliance with indigent-defense standards.¹⁹⁷

Idaho’s move towards reform did not derail the lawsuit, but the state district court almost did.¹⁹⁸ Even though the trial court agreed that “the State is ultimately responsible for ensuring constitutionally-sound public defense,” the court dismissed the complaint.¹⁹⁹ The court found that the named plaintiffs did not have standing to sue, in part because none had yet been convicted or pursued appeals or postconviction relief; thus, there was no actual injury.²⁰⁰ According to the state district judge, a case-by-case review under *Strickland* was the proper vehicle for challenging ineffective assistance of counsel, while the plaintiffs’ complaint asked the court to “override” the legislature and “reshape” Idaho’s entire indigent defense system.²⁰¹ Invoking the familiar separation-of-powers concern about “invas[ing] the province of the legislature,”²⁰² the court insisted that the judiciary “d[id] not have the power or jurisdiction” to take the sweeping action requested.²⁰³ Upon appeal, the Idaho Supreme Court disagreed and reversed the dismissal based on the lower court’s standing decision and remanded back to the district court.²⁰⁴ The court rejected the lower

SIXTH AMEND. CTR. (Apr. 1, 2014), <http://sixthamendment.org/idaho-governor-signs-public-defense-commission-bill-into-law/> [<https://perma.cc/LKL3-ZZJX>].

¹⁹⁵ IDAHO CODE §§ 19-849, 19-850 (2016).

¹⁹⁶ See Carroll, *supra* note 194.

¹⁹⁷ IDAHO CODE § 19-850(1)(a).

¹⁹⁸ See Mem. Op. & Order Granting Mot. to Dismiss, *Tucker v. State*, No. CV-OC-2015-10240 (Idaho Dist. Ct. Jan. 20, 2016).

¹⁹⁹ *Id.* at 5, 31.

²⁰⁰ *Id.* at 21–22.

²⁰¹ *Id.* at 24–25.

²⁰² *Id.* at 29, 30. See Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1744 (2005) (discussing that many courts are loath to infringe upon legislative prerogatives due to separation of powers).

²⁰³ Mem. Op. & Order Granting Mot. to Dismiss at 25, *Tucker*, No. CV-OC-2015-10240.

²⁰⁴ *Tucker v. State*, 394 P.3d 54, 62–69, 73 (Idaho 2017). The Idaho Supreme Court did uphold the dismissal as to the governor as a named defendant, however, finding the causal link

court's reasoning that *Strickland* governed. It found that *Strickland*'s case-by-case analysis of ineffective assistance of counsel was "inapplicable when systemic deficiencies in the provision of public defense are at issue."²⁰⁵ Instead, the court cited *United States v. Cronin*²⁰⁶ in finding that the plaintiffs had "alleged actual and constructive denials of counsel at critical stages of the prosecution," a violation of constitutional and statutory requirements.²⁰⁷ Similarly, the Idaho Supreme Court also rejected the trial court's separation-of-powers concern. The court determined that the doctrine was not implicated because "[t]he right to counsel . . . is not entrusted to a particular branch of government" and the "requested relief d[id] not ask the judiciary to order the Legislature to do anything."²⁰⁸

The Idaho Supreme Court essentially adopted the arguments of the U.S. Department of Justice's ("DOJ") amicus curiae brief filed in the case.²⁰⁹ The brief distinguished between a claim that a defendant has been denied the assistance of counsel, whether actually or constructively, and a claim that his lawyer's performance was constitutionally ineffective.²¹⁰ The DOJ argued, and the Idaho Supreme Court agreed, that "[t]he availability of pre-conviction civil actions for systemic denials of counsel, whether actual or constructive, is critical to protecting the fundamental right that *Gideon* recognized."²¹¹ Both the DOJ brief and the court cited to *Hurrell-Harring v. State*,²¹² discussed in the next Section.

B. New York

Like Idaho, New York delivers public defense through its counties, which may opt to establish a public defender office, contract with a legal aid society, or utilize assigned private counsel.²¹³ Although New York provided for public defense for indigent criminal defendants even before *Gideon*, its "patchwork" of systems experienced the

between the governor and the appellants' injuries too attenuated to support standing. *Id.* at 64–66.

²⁰⁵ *Tucker*, 394 P.3d at 62 (citations omitted).

²⁰⁶ 466 U.S. 648 (1984).

²⁰⁷ *Tucker*, 394 P.3d at 63.

²⁰⁸ *Id.* at 72, 73.

²⁰⁹ See Brief for United States as Amicus Curiae Supporting Appellants at 2, *Tucker*, 394 P.3d 54.

²¹⁰ *Id.* at 17.

²¹¹ *Id.* at 2; *Tucker*, 394 P.3d. at 62–63.

²¹² 930 N.E.2d 217 (N.Y. 2010); *Tucker*, 394 P.3d at 62, 73; Brief for United States as Amicus Curiae Supporting Appellants at 2, 5, 19–23, 26, 30, *Tucker*, 394 P.3d 54.

²¹³ N.Y. COUNTY LAW § 722 (McKinney 2013).

usual problems: underfunding, lack of standards, and overworked and underresourced attorneys.²¹⁴ The persistent problems drew media attention,²¹⁵ sparked a successful lawsuit to increase abysmally low assigned counsel pay rates,²¹⁶ and motivated Chief Judge Judith Kaye to seek reform by establishing the Commission on the Future of Indigent Defense Services, or more commonly, the Kaye Commission.²¹⁷

After two years of research and investigation, the Kaye Commission

concluded that there is, indeed, a crisis in the delivery of defense services to the indigent throughout New York State and that the right to the effective assistance of counsel, guaranteed by both the federal and state constitutions, is not being provided to a large portion of those who are entitled to it.²¹⁸

It recommended a “statewide defender system” as “the only solution to the crisis in indigent defense representation in New York State.”²¹⁹

While efforts were underway to spur action on the Kaye Commission findings and recommendations, the New York Civil Liberties Union (“NYCLU”) filed a class action suit on behalf of twenty criminal defendants in five very diverse New York counties.²²⁰ The suit alleged that “the structural and systemic failings of the public defense system,” lack of funding, resources, and oversight violated the consti-

²¹⁴ See Geoff Burkhardt, *Public Defense: The New York Story*, CRIM. JUST., Fall 2015, at 22, 23 (discussing New York’s early history of indigent defense).

²¹⁵ For example, Jane Fritsch and David Rohde’s *New York Times* three-part series, *Two-Tier Justice*, after a seven-month analysis of thousands of city records and court cases in 2000 concluded that almost no part of the indigent defense system functions as it was intended. See Jane Fritsch & David Rohde, *Lawyers Often Fail New York’s Poor*, N.Y. TIMES (Apr. 8, 2001), <https://www.nytimes.com/2001/04/08/nyregion/lawyers-often-fail-new-york-s-poor.html> [<https://perma.cc/BU7D-E3R9>]; Jane Fritsch & David Rohde, *For the Poor, a Lawyer with 1,600 Clients*, N.Y. TIMES (Apr. 9, 2001), <https://www.nytimes.com/2001/04/09/nyregion/for-the-poor-a-lawyer-with-1600-clients.html> [<https://perma.cc/8RXM-LQNA>]; Jane Fritsch & David Rohde, *For Poor, Appeals Are Luck of the Draw*, N.Y. TIMES (Apr. 10, 2001), <https://www.nytimes.com/2001/04/10/nyregion/for-poor-appeals-are-luck-of-the-draw.html> [<https://perma.cc/WAN9-87CX>].

²¹⁶ See *N.Y. Cty. Lawyers’ Ass’n v. State*, 763 N.Y.S.2d 397, 399 (N.Y. Sup. Ct. 2003) (holding fixed rates and caps for assigned counsel unconstitutional as a violation of the right to legal representation and ordering an increase).

²¹⁷ See generally COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2006).

²¹⁸ *Id.* at 15.

²¹⁹ *Id.* at v.

²²⁰ See *Hurrell-Harring et al. v. State of New York (Challenging New York State’s Failure to Provide Adequate Public Defense Services)*, N.Y. CIV. LIBERTIES UNION, <https://www.nyclu.org/en/cases/hurrell-harring-et-al-v-state-new-york-challenging-new-york-states-failure-provide-adequate> [<https://perma.cc/V58S-DVfV>].

tutional right to effective assistance of counsel.²²¹ The litigation dragged on for seven years before settling on the eve of trial.²²²

The trial court initially refused to strike the complaint,²²³ but the Appellate Division reversed the trial court and dismissed the action as nonjusticiable, invoking both *Strickland* and separation of powers in its rationale.²²⁴ The New York Court of Appeals, however, reversed the Appellate Division and reinstated the claim.²²⁵ It grounded its decision on the holding that the *Strickland* postconviction remedial standard was the wrong standard in a class action claim seeking prospective relief for systemic deficiencies.²²⁶ The court insisted that enforcement of a clear constitutional or statutory mandate is the proper work of the courts.²²⁷ The court determined that “[g]iven the simplicity and autonomy of a claim for nonrepresentation, as opposed to one truly involving the adequacy of an attorney’s performance, there is no reason . . . why such a claim cannot or should not be brought without the context of a completed prosecution.”²²⁸

Late in the game, approximately one month before the settlement was announced, the DOJ entered the fray and filed a statement of interest.²²⁹ The DOJ sought to provide the court with a “framework to assess” the plaintiffs’ claim of “‘constructive’ denial of counsel.”²³⁰ Without taking a position on the merits of the case, the department advised the court to consider the structural deficiencies of the New York system, such as lack of adequate funding, large workloads, lack of oversight, and lack of independence, in determining whether a lawyer can “fulfill the[] basic obligations to prepare a defense.”²³¹ In addition to considering structural deficiencies, the DOJ encouraged the court to examine the “traditional markers of representation,” such as meaningful client-attorney contact, investigation, and advocacy, to as-

221 Amended Class Action Complaint paras. 6, 12–15, *Hurrell-Harring v. State*, No. 8866-07 (N.Y. Sup. Ct. Apr. 28, 2008), 2008 WL 7801315.

222 See *supra* note 220.

223 See *Hurrell-Harring v. State*, No. 8866-07, 2008 N.Y. Misc. LEXIS 5479, at *16 (N.Y. Sup. Ct. Aug. 1, 2008).

224 See *Hurrell-Harring v. State*, 883 N.Y.S.2d 349, 352, 355 (N.Y. App. Div. 2009).

225 See *Hurrell-Harring v. State*, 930 N.E.2d 217, 227–28 (N.Y. 2010).

226 See *id.* at 221–22.

227 See *id.* at 225–26.

228 *Id.*

229 See Statement of Interest of the United States, *Hurrell-Harring v. State*, No. 8866-07 (N.Y. Sup. Ct. Sept. 25, 2014).

230 See *id.* at 1, 14.

231 See *id.* at 10, 11–12.

sess whether there has been a constructive denial of counsel.²³² According to the statement, either of these characteristics of a system—structural deficiencies or absence of markers of representation—could result in nonrepresentation in violation of the Sixth Amendment.²³³ Finally, the statement addressed the separation-of-powers issue. It reminded the state court that if the court held that the plaintiffs had been constructively denied the right to counsel on a systemic basis, the court has broad injunctive authority to remedy those constitutional violations.²³⁴

The settlement that came on the heels of the DOJ’s submission to the court was sweeping and meaningful. New York agreed to provide counsel at arraignment, establish workload limits, implement standards, ensure effective supervision and training, provide access to resources like investigators and experts, and pay the cost of implementing these reforms in the five counties named as defendants.²³⁵ Importantly, responsibility for implementing the reforms rests with the state’s independent Office of Indigent Legal Services (“ILS”) and the Indigent Legal Services Board (“ILSB”), both of which had been established in 2010 as the litigation dragged on.²³⁶

The Executive Director of the NYCLU declared the settlement a victory for equal justice and proclaimed that

[f]or the first time, New York State is acknowledging its constitutional responsibility to provide lawyers to poor defendants who have been forced to navigate the criminal justice system undefended and alone. . . . More than 50 years after the Supreme Court called the right to public defense an “obvious truth,” today our state begins making it an “actual truth.”²³⁷

²³² *Id.* at 7.

²³³ *Id.* at 8.

²³⁴ *Id.* at 10 n.16.

²³⁵ Stipulation & Order of Settlement at 5–16, *Hurrell-Harring v. State*, No. 8866-07 (N.Y. Sup. Ct. Oct. 21, 2014).

²³⁶ *See id.* at 2–3; N.Y. EXEC. LAW §§ 832, 833 (McKinney 2013).

²³⁷ Press Release, N.Y. Civil Liberties Union, Settlement Begins Historic Reformation of Public Defense in New York State (Oct. 21, 2014), <https://www.nyclu.org/en/press-releases/settlement-begins-historic-reformation-public-defense-new-york-state> [<https://perma.cc/9MQN-XAZ3>].

ILS has been making real progress in its work to improve the quality of public defense in New York. In May of 2017, ILS rolled out its mandatory caseload standards for the five *Hurrell-Harring* settlement counties. *See* ILS, A DETERMINATION OF CASELOAD STANDARDS PURSUANT TO § IV OF THE *HURRELL-HARRING V. THE STATE OF NEW YORK* SETTLEMENT 14 (2016). After studying a number of other recent caseload studies and conducting their own through the RAND Corporation, ILS established caseload standards that are much more stringent than the

In a letter to then–Attorney General Eric Holder, the director of ILS acknowledged that the DOJ’s statement of interest had played a significant role in propelling the parties towards settlement.²³⁸ The letter thanked Holder for his strong leadership on working to ensure the right to counsel for poor defendants across the nation.²³⁹

Of course, the *Hurrell-Harring* settlement was only a first step, with its comprehensive reforms limited to the five counties in the suit.²⁴⁰ The settlement also inspired a push to extend the reforms, including increasing state funding, throughout the entire state.²⁴¹ In 2016 the New York State Assembly unanimously passed legislation to do just that, but Governor Cuomo halted the reforms with a last-minute veto based on his concerns about cost.²⁴² Governor Cuomo, however, made good on his promise to work with the legislature to bring the groundbreaking terms of the *Hurrell-Harring* settlement to the rest of the state. In April of 2017, Governor Cuomo announced a legislative agreement on the fiscal year 2018 state budget which includes funding “to extend the reforms provided for in the *Hurrell-Harring* settlement to all 62 counties in New York.”²⁴³

old 1973 NAC Standards and Goals. *See id.* at 2, 13, 14. ILS determined that the NAC standards were woefully outdated for modern criminal law practice and that abandoning them would result in a significantly reduced overall workload for public defenders. *See id.* at 3. For example, the NAC standards called for a limit of 400 misdemeanors per year, whereas the ILS standards limits misdemeanors to 300. *See id.* at 2, 14. Similarly, the NAC standards allow an attorney to handle up to 150 felonies a year, whereas the ILS standards set a significantly lower limit of only 50 in the violent felony category. *See id.* In addition to providing for the maximum number of cases in each of seven discrete categories a public defender may handle, the standards also dictate the average minimum number of hours per case in each of those same categories that assigned private counsel are expected to devote. *See id.* at 14.

²³⁸ *See* Letter from William J. Leahy, Director, ILS, to Eric Holder, Attorney Gen. (Nov. 13, 2014), <https://www.ils.ny.gov/files/Hurrell-Harring%20Leahy%20Letter%20To%20AG%20Holder%20111314.pdf> [<https://perma.cc/CT6Y-JHEY>].

²³⁹ *See id.*

²⁴⁰ *See* Stipulation & Order of Settlement, *supra* note 235.

²⁴¹ *See* Memorandum from Andrew Cuomo, Governor, State of N.Y., to New York State Senate, Veto #306 (Dec. 31, 2016), <http://www.politico.com/states/fl/?id=00000159-583a-d437-a37d-7dbab7db0001> [<https://perma.cc/3ZAN-DQ4P>]. The bill also included funding for representation in certain noncriminal cases in family and surrogate court (such as custody and termination of parental rights) beyond what is required under *Gideon*. *Id.* at 1.

²⁴² *See id.* at 2.

²⁴³ Press Release, Governor Andrew M. Cuomo, Governor Cuomo and Legislative Leaders Announce Agreement on FY 2018 State Budget (Apr. 7, 2017), <https://www.governor.ny.gov/news/governor-cuomo-and-legislative-leaders-announce-agreement-fy-2018-state-budget> [<https://perma.cc/F8AY-7LE3>].

C. Pennsylvania

Pennsylvania is now the lone state that shifts the entire burden of public defense to counties and provides no funding, no standards, and no oversight to the local systems.²⁴⁴ A recent ruling by the Pennsylvania Supreme Court, however, may change that. The decision has the potential to spur the same kind of reform that New York State has seen from its high court decision. The case, *Kuren v. Luzerne County*,²⁴⁵ was a class action alleging that the county's failure to minimally fund the Office of the Public Defender resulted in overwhelming workloads and an inability to provide the basic elements of constitutionally adequate representation.²⁴⁶ A few months before the case was filed, the Chief Public Defender, Al Flora, an original named plaintiff in the action,²⁴⁷ had been forced to begin declining cases due to the overwhelming workload. As a result, the other named plaintiffs were all criminal defendants who were entitled to representation but had to navigate the criminal justice system without an attorney.²⁴⁸

The Commonwealth Court, Pennsylvania's intermediate appellate court, upheld the trial court's dismissal of the complaint.²⁴⁹ The court was not persuaded by the reasoning in *Hurrell-Harring*, but rather insisted that

there is no precedent from the United States Supreme Court acknowledging that a constructive denial of counsel claim may be brought in a civil case that seeks prospective relief in the form of more funding and resources to an entire office, as opposed to relief to individual indigent criminal defendants.²⁵⁰

²⁴⁴ See *supra* note 112 and accompanying text. Up until 2016, Utah shared Pennsylvania's hands-off approach, but Utah has now established a state-funded Indigent Defense Commission, leaving Pennsylvania as the lone state eschewing state involvement in the delivery of public defense. See Jessica Miller, *With Its Members Selected, the Indigent Defense Commission Will Start Working on Utah's Public Defender Problems*, SALT LAKE TRIB. (Oct. 20, 2016, 10:04 AM), <http://archive.sltrib.com/article.php?id=4484365&itype=CMSID> [<https://perma.cc/E43M-PL8Q>].

²⁴⁵ 146 A.3d 715 (Pa. 2016).

²⁴⁶ *Id.* at 725.

²⁴⁷ Flora was eventually dropped from the case for lack of standing, but the action proceeded with the criminal defendants as the named plaintiffs. See *Flora v. Luzerne Cty.*, 103 A.3d 125, 133 (Pa. Commw. Ct. 2014), *aff'd in part, rev'd in part sub nom.* *Kuren v. Luzerne Cty.*, 146 A.3d 715 (Pa. 2016).

²⁴⁸ See Complaint para. 108, *Flora v. Luzerne Cty.*, No. 2012-04517 (Luzerne Cty. Ct. C.P. Apr. 10, 2012).

²⁴⁹ *Flora*, 103 A.3d at 140.

²⁵⁰ *Id.* at 136.

The Commonwealth Court was not moved by the allegations in the complaint that public defenders were unable to meet or communicate with clients, conduct investigation or discovery, prepare for trial, or properly litigate appeals.²⁵¹ The judges there characterized these failings as “only the fear” that the indigent plaintiffs might “not be adequately represented.”²⁵² That made the complaint a *Strickland* claim: “Should the legal representation assigned to the individual Indigent Clients prove ineffective and cause them prejudice, their recourse is to bring a post-conviction *Strickland* claim.”²⁵³

Like New York’s highest court in *Hurrell-Harring*, the Pennsylvania Supreme Court reversed the dismissal and recognized a “cognizable cause of action whereby a class of indigent defendants may seek relief for a widespread, systematic and constructive denial of counsel when alleged deficiencies in funding and resources provided by the county deny indigent defendants their constitutional right to counsel.”²⁵⁴ Asserting that it would be “illogical” to apply *Strickland* to structural claims like this one, the court found that “[n]onetheless, relief is available, because the denial of the right to counsel, whether actual, or as here, constructive, poses a significant, and tangible threat to the fairness of criminal trials, and to the reliability of the entire criminal justice system.”²⁵⁵

Once again, the DOJ weighed in and filed an amicus curiae brief in the appeal.²⁵⁶ The Pennsylvania Supreme Court adopted the DOJ’s framework for assessing how a plaintiff class can show the “likelihood of substantial and immediate irreparable injury” required for a prospective claim of a constitutional violation.²⁵⁷ Prospective injunctive relief for a constructive denial of counsel is available in two instances. First, “when . . . the traditional markers of representation—such as timely and confidential consultation with clients, appropriate investigation, and meaningful adversarial testing of the prosecution’s case—are absent or significantly compromised.”²⁵⁸ Second, “when substantial structural limitations—such as a severe lack of resources, unrea-

²⁵¹ *Id.* at 137.

²⁵² *Id.*

²⁵³ *Flora*, 103 A.3d at 137.

²⁵⁴ *Kuren v. Luzerne Cty.*, 146 A.3d 715, 743 (Pa. 2016); *see also id.* at 751–52.

²⁵⁵ *Id.* at 744; *see also id.* at 746.

²⁵⁶ *Id.* at 717.

²⁵⁷ *Id.* at 744.

²⁵⁸ *Id.*

sonably high workloads, or critical understaffing of public defender offices—cause that absence or limitation on representation.”²⁵⁹

Although the Pennsylvania Supreme Court sided with the DOJ on establishing the right of indigent defendants to challenge systemic deficiencies prior to conviction, the court denied the writ of mandamus the plaintiffs were seeking to order the county to increase funding.²⁶⁰ Instead, the court remanded the action back to the trial court, where the plaintiffs could then pursue injunctive relief, having established a cognizable claim.²⁶¹ As of the time of writing this Article, the case remains pending. Shortly after the decision, State Senator Stewart Greenleaf introduced legislation to establish the Pennsylvania Center for Effective Indigent Defense Legal Representation to facilitate improvements in public defense across the state.²⁶² As the Senator recognized, “It’s more likely there will be more lawsuits filed in other counties, and possibly the state.”²⁶³

V. MOVING FORWARD

The outcomes in Idaho, New York, and Pennsylvania highlight two key variables that seem to impact the success of recent structural challenges to indigent defense systems: (1) the involvement of the DOJ and (2) a shift in legal analysis away from *Strickland*. These two variables are somewhat linked, however, as a central feature of the DOJ’s filings in recent litigation arguing that *Strickland* does not govern prospective constructive denial of counsel claims.

Both of the U.S. Attorneys General who served during the eight years of the Obama Administration, Eric Holder and Loretta Lynch, were outspoken advocates for improving the quality of indigent defense. Attorney General Holder, in particular, followed up these words with action. Shortly after taking office in 2009, Holder acknowledged the continuing crisis in public defense and told the American Council of Chief Defenders that when he took the oath of office and swore to uphold the Constitution, “[s]upporting and defending the Constitution includes, in my view, a responsibility to serve as guardians of the rights of all Americans, including the poor and underprivi-

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 752.

²⁶¹ *Id.* at 751–52.

²⁶² See S.B. 61, 2017 Gen. Assemb., 2017 Sess. (Pa. 2017).

²⁶³ Colt Shaw, *Ruling Boosts Overworked Public Defenders in Only State that Doesn't Fund Them*, GOVERNING (Nov. 4, 2016, 10:22 AM), <http://www.governing.com/topics/public-justice-safety/tns-pennsylvania-public-defenders.html> [<https://perma.cc/PA9G-4BAK>].

leged.”²⁶⁴ Early in his tenure, Holder convened the National Symposium on Indigent Defense, subtitled “Looking Back, Looking Forward, 2000–2010,” which brought together stakeholders from all parts of the criminal justice system to review the progress of the last decade and to “identify[] critical areas for improvement.”²⁶⁵ He promised that group that the entire DOJ would “focus on indigent defense issues with a sense of urgency and a commitment to developing and implementing the solutions we need.”²⁶⁶ The DOJ, he pledged, was committed to “tak[ing] concrete steps to make access to justice a permanent part of the work of the Department of Justice.”²⁶⁷

Following the symposium, Attorney General Holder launched DOJ’s Office for Access to Justice (“ATJ”) in March 2010 to address the crisis in indigent defense services and to advance other access-to-justice initiatives.²⁶⁸ The office coordinates the DOJ’s multifaceted efforts to improve indigent defense as well as access-to-justice issues in the civil justice system.²⁶⁹ As part of its efforts to protect the constitutional guarantee to the effective assistance of counsel, the ATJ has developed a robust statement-of-interest practice. Of the nine statements of interest or amicus briefs that the ATJ has filed since its in-

²⁶⁴ Eric Holder, Attorney Gen., Address at the American Council of Chief Defenders Conference (June 24, 2009), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-american-council-chief-defenders-conference> [<https://perma.cc/JKJ7-TU5F>]. Holder gave many speeches over the course of his tenure calling attention to the problems in indigent defense systems across the country and outlining the DOJ’s actions to address the problem. See, e.g., Eric Holder, Attorney Gen., Address at the American Bar Association’s National Summit on Indigent Defense (February 4, 2012), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-american-bar-association-s-national-summit-indigent> [<https://perma.cc/4FJK-A5VC>].

²⁶⁵ Nat’l Justice Inst., Office of Justice Programs, *National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000–2010*, <https://www.nij.gov/topics/courts/indigent-defense/Pages/indigent-defense-symposium-2011.aspx> [<https://perma.cc/8HPM-GFGD>]; see also Eric Holder, Attorney Gen., Address at the Department of Justice National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000–2010 (Feb. 18, 2010), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-addresses-department-justice-national-symposium-indigent> [<https://perma.cc/2DPB-VR75>].

²⁶⁶ Holder, *supra* note 265.

²⁶⁷ *Id.* Attorney General Lynch voiced the same message, emphasizing the DOJ’s commitment to fulfilling *Gideon*’s promise, stating “that this Department of Justice and this entire administration will continue to . . . do everything in our power to further th[e] important mission” of “ensuring that in the United States there is indeed no price tag on justice.” Loretta E. Lynch, Attorney Gen., Remarks at White House Convening on Incarceration and Poverty (Dec. 3, 2015), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-convening-incarceration-and> [<https://perma.cc/3TCF-68VT>].

²⁶⁸ *Office for Access to Justice*, DOJ, <http://www.justice.gov/atj> [<https://perma.cc/33SA-VCYU>].

²⁶⁹ *Id.*

ception, five of them have been in right-to-counsel cases.²⁷⁰ In addition to Idaho, New York, and Pennsylvania, the ATJ filed statements of interest in Washington²⁷¹ and Georgia.²⁷²

In these submissions, the DOJ provided courts the legal framework to recognize civil constructive-denial-of-counsel claims seeking injunctive relief. Key to that framework, in the context of systemic claims, is abandoning *Strickland* and its postconviction test for ineffective assistance of counsel.²⁷³ When a public defender or appointed counsel is a lawyer in name only, without the time and resources to deliver competent representation, the issue is not effective assistance of counsel; it is nonrepresentation. Thus, courts may consider whether structural limitations so handicap an attorney that he is unable to fulfill the basic obligations to prepare a defense and find a violation of *Gideon* without waiting for a conviction. This approach, as we have seen in Idaho, New York, and Pennsylvania, has the potential to generate system-wide reform.

It remains to be seen, however, whether the DOJ will continue its work on indigent-defense issues under the Trump Administration.²⁷⁴

²⁷⁰ *Court Filings in Support of Access to Justice*, DOJ, <https://www.justice.gov/atj/court-filings-support-access-justice> [<https://perma.cc/Q243-9DMS>]; see *supra* notes 209, 229, 256 and accompanying text; *infra* notes 271–72 and accompanying text.

²⁷¹ Statement of Interest of the U.S., *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash., Aug. 8, 2013) (No. C11-1100). In *Wilbur*, the United States provided its expertise by recommending that if the court found for the plaintiffs, it should ensure that public defense counsel have realistic workloads and sufficient resources to carry out the “hallmarks of minimally effective representation.” *Id.* at 10.

²⁷² Statement of Interest of the U.S., *N.P. v. State*, No. 2014-CV-241025 (Ga. Super. Ct. Mar. 13, 2015) (addressing juveniles’ right to counsel).

²⁷³ See, e.g., *supra* note 255 and accompanying text.

²⁷⁴ The DOJ website continues to highlight the significance of its work on indigent defense. See *Indigent Defense Grants, Training, and Technical Assistance*, DOJ, <https://www.justice.gov/atj/indigent-defense-grants-training-and-technical-assistance> [<https://perma.cc/YGZ3-65DW>]. For instance, the page devoted to Indigent Defense Grants, Training and Technical Assistance is impressive, and describes a number of grant programs designed to improve public defense systems and the quality of representation of indigent defendants. In addition, the webpage highlights other grant initiatives aimed at collecting data and supporting research in indigent defense. Although many of these programs appear to have been initiated during the Obama Administration (in 2010, 2012, 2013, and 2015), Trump’s DOJ has reconfirmed that it “has been working to develop strategies, tools, and resources to help better understand and address the challenges to the effective provision of indigent defense.” *Id.*

Attorney General Jeff Sessions has spoken publicly either as a Senator or as a member of the President’s Cabinet—in speeches, press releases, and congressional testimony—about a number of criminal justice subjects, including drug restrictions, sentencing, and prosecuting civil rights violations. See, e.g., Jefferson Sessions, Attorney Gen., Address at the Department of Justice Civil Rights Division Awards Ceremony (Dec. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-department-justice-civil-rights-division> [<https://per>

CONCLUSION

In this thought-provoking Symposium,²⁷⁵ we acknowledge the excellent scholarship highlighting the many problems remaining with our criminal justice system even fifty years after the report by the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*.²⁷⁶ None of these problems, however, will be changed significantly without allegiance to the Sixth Amendment right to counsel. As the Supreme Court has written, "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."²⁷⁷ It is clear that at the adjudicatory level, the defendant "cannot be assured a fair trial unless counsel is provided for him. This seems to [the Justices of the U.S. Supreme Court] to be an obvious truth."²⁷⁸

Are lawyers ultimately provided for indigent defendants in the United States? Yes, overwhelmingly we continue to find that there are lawyers appointed for the majority of poor suspects who are entitled to counsel. As the Supreme Court has noted repeatedly, however, it is not simply the assignment of a lawyer which will satisfy the constitutional mandate.

The special value of the right to the assistance of counsel explains why "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." The text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of counsel to the accused, but "Assistance," which is to be "for his defence." Thus, "the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was con-

ma.cc/4W3X-AR98] (discussing prosecuting civil rights violations); Jefferson Sessions, Attorney Gen., Remarks Announcing New Initiative to Combat the Opioid Crisis (Nov. 29, 2017) (discussing going after drug cartels to reduce opioid crisis), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-announcing-new-tools-combat-opioid-crisis> [<https://perma.cc/3Z6U-LWLH>]; Jefferson Sessions, Attorney Gen., Remarks on Violent Crime Delivered in Memphis, Tennessee (May 25, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-violent-crime-memphis-tn> [<https://perma.cc/U6P3-SAW9>] (discussing changes in charging and sentencing policy at the DOJ). The authors have not been able to locate any statements from him regarding the right to counsel for indigent defendants.

²⁷⁵ Symposium, *The Challenge of Crime in a Free Society: 50 Years Later*, 86 GEO. WASH. L. REV. 1465 (2018).

²⁷⁶ PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967).

²⁷⁷ *United States v. Cronin*, 466 U.S. 648, 654 (1984) (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

²⁷⁸ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

fronted with both the intricacies of the law and the advocacy of the public prosecutor.” If no actual “Assistance” “for” the accused’s “defence” is provided, then the constitutional guarantee has been violated.²⁷⁹

In far too many prosecutions across the nation, it is truly shocking to report that nothing resembling the effective assistance of counsel can be found. Public and appointed lawyers are underfunded and overworked. State justice systems have inadequate financing and poorly conceived structural bases. Some defendants can be forced to wait years before their lawyers even speak with them. Lawyers all too often engage in “meet and greet” representation, spending mere minutes on a client’s case before advising that accused person to plead guilty.

No knowledgeable observer of our criminal justice system disputes this deeply troubling situation. Yet, many legislatures are either unable or unwilling to provide adequate funding to defense systems. Most judges across the nation—including our own Justices of the U.S. Supreme Court—turn a blind eye to obvious failures to provide vigorous representation to defendants, no matter how rich or poor.

This Article began by asking whether in the past decade there have been serious, positive changes to this system and whether that hope has been realized as concrete action. Sadly, the answer here is without dispute: in most jurisdictions, little has changed for the better. There are some notable exceptions, as we have discussed. Still, until such change can be made across our nation in providing competent lawyers with reasonable time to spend on individual cases, our country will continue to see a terrible failure as to the Sixth Amendment and as to other key provisions of our Constitution as well.

²⁷⁹ *Cronic*, 466 U.S. at 654 (footnote omitted) (citations omitted).