FINAL

JUSTICE DENIED

AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL

Report of the National Right to Counsel Committee

The Constitution Project

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April 2009

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Professor Lefstein's prior positions include service as director of the Public Defender Service for the District of Columbia, as an Assistant United States Attorney, and as a staff member in the Office of the Deputy Attorney General of the U.S. Department of Justice. His professional activities include serving as Chair, American Bar Association (ABA) Section of Criminal Justice in 1986–1987; and as Reporter for the Second Edition of ABA Criminal Justice Standards Relating to *The Prosecution Function, The Defense Function, Providing Defense Services,* and *Pleas of Guilty.* During 1997–1998, Professor Lefstein served as Chief Consultant to a Subcommittee on Federal Death Penalty Cases of the Judicial Conference of the United States, directing preparation of a report on the cost and quality of defense representation in federal death penalty prosecutions. His publications include *Criminal Defense Services for the Poor,* published by the ABA in 1982, and co-authorship of *Gideon's Broken Promise: America's Continuing Quest for Equal Justice,* published by the ABA in 2004. He also has served as a member of the ABA's Standing Committee on Legal Aid and Indigent Defendants and for nine years chaired its Indigent Defense Advisory Group. In 2007, Professor Lefstein concluded seventeen years as Chairman of the Indiana Public Defender Commission.

Robert L. Spangenberg

Research Professor and Founder, The Spangenberg Project, Center for Justice, Law, and Society, George Mason University;
B.S., 1955, Boston University; J.D., 1961, Boston University School of Law.

Professor Spangenberg specialized in civil legal services early in his career, developing the Boston Legal Assistance Project, a neighborhood civil legal services program, which he headed for nine years. After a two-year foundation study of civil legal services in Boston and a statewide study of indigent defense in Massachusetts, Professor Spangenberg joined Abt Associates in Cambridge, Massachusetts, where for nine years he conducted national and local studies of indigent defense systems across the country. In 1985, he founded The Spangenberg Group to continue the study of indigent defense nationwide. During his 23 years as President of the organization, he visited all 50 states, testified before legislative bodies about the justice system, and served as an expert witness in court proceedings. The Spangenberg Group published hundreds of reports and studies pertaining to the country's system of justice in criminal and juvenile proceedings, and for more than 20 years, Professor Spangenberg has served as a consultant to the ABA Standing Committee on Legal Aid and Indigent Defendants. In February 2009, Professor Spangenberg joined George Mason University, where he will continue his work on indigent defense matters.

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Preface

The National Right to Counsel Committee was created in 2004 to examine the ability of the American justice system to provide adequate counsel to individuals in criminal and juvenile delinquency cases who cannot afford lawyers. Decades after the United States Supreme Court ruling in *Gideon v. Wainwright* and other landmark Supreme Court decisions, which recognized the right to lawyers for those who cannot afford them, there was disturbing evidence that states and localities were not providing competent counsel, despite the constitutional requirement that they do so.

The Committee's charge was to assess the extent of the problem, the various ways that states and localities provide legal representation to those who cannot hire their own lawyers, and to formulate recommendations about how to improve systems of indigent defense to ensure fairness for all Americans. The result is *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel.*

In the years since the Committee began its work, there have been both measurable improvements in systems of legal representation, as well as notable failures, and these are documented in this report. In examining the nation as a whole, the accompanying report and recommendations cover a good deal of familiar ground. It is no longer news that *Gideon's* constitutional promise has not been fulfilled in many states and counties around the country. But the extent and persistence of the problems are greater than we realized. And the reasons for them are explained and analyzed in *Justice Denied* to a far greater degree than has been done at any time recently.

As *Justice Denied* convincingly demonstrates, despite the fact that funding for indigent defense has increased during the past 45 years since the *Gideon* decision, there is uncontroverted evidence that funding still remains woefully inadequate and is deteriorating in the current economic difficulties that confront the nation. Because of insufficient funding, in much of the country, training, salaries, supervision, and staffing of public defender programs are unacceptable for a country that values the rule of law. Every day, the caseloads that defenders are asked to carry force lawyers to violate their oaths as members of the bar and their duties to clients as set forth in rules of professional conduct. In addition, private contract lawyers and attorneys assigned to cases for fees receive compensation that is usually not even sufficient to cover their overhead and that discourages their participation in defense systems. Equally disturbing, in most places across the country there is no oversight at all of the representation that these lawyers provide, and the quality of the work they provide suffers as a result.

In addition, defendants throughout the country, especially in the lower criminal courts, are still convicted and imprisoned each year without any legal representation at all, or are "represented" by lawyers who have hundreds of other cases (thus violating rules of professional conduct), and lack the requisite expertise and sufficient support staff, including persons who can investigate their clients' cases. Sometimes people who cannot afford an attorney sit in jail for weeks or months before being assigned an attorney; others do not meet or speak with their lawyers until the day of a court appearance. Too often the representation is perfunctory and so deficient as not to amount to representation at all.

But there also are structural problems in the delivery of indigent defense services, such as a lack of independence for defenders and the management of their responsibilities. And there are policies respecting criminal prosecutions and rules of criminal procedure that exacerbate the difficulty of providing effective defense services.

All of these problems, and more, are discussed in *Justice Denied.* And, unlike any other recent report dealing with indigent defense, *Justice Denied* contains an in-depth contemporary analysis of the various ways in which the 50 states have structured their indigent defense delivery systems.

Additionally, *Justice Denied* breaks new ground in setting out a road map for those seeking to improve their indigent defense systems. Besides a comprehensive discussion of the approaches that have been successful in achieving improvements, the report contains a number of recommendations for achieving reform.

There is no doubt that Americans strongly support the right to counsel that *Gideon* and subsequent cases established. Americans believe that the amount of money a person has should not determine the quality of justice he or she receives. They understand that governments must play a fundamental role in securing a fair justice system by providing independent lawyers to those unable to afford their own.

The problems detailed in *Justice Denied* are the responsibility not just of states and localities. The federal government also has an obligation to ensure that the Sixth Amendment to the United States Constitution is enforced. It should be a full partner with states through federal funding, as recommended in this report.

The Constitution Project, which coordinated publication of this report, has over the years sponsored numerous committees of independent experts on a wide array of issues. Like the National Right to Counsel Committee, these experts have issued consensus reports and recommendations under the auspices of the Constitution Project. However, from the outset, this undertaking has differed from our sponsorship of other committees because we partnered with the National Legal Aid and Defender Association (NLADA), one of the nation's leading expert organizations on issues of

public defense in the United States. Moreover, NLADA contributed to the report through constructive comments, its studies of indigent defense programs that are cited in the report, and by arranging for experts to visit a number of lower criminal courts, as discussed in Chapter 2 of the report. The Committee's report is posted on the websites of both NLADA and the Constitution Project. However, the findings, conclusions, and recommendations contained in the report are solely those of the Committee.

The National Right to Counsel Committee includes an extraordinary group of individuals, with a diversity of viewpoints shaped by their service at the highest levels of every part of federal and state justice systems. Committee members have experience as judges, prosecutors, defense lawyers, and as law enforcement officials; members also include nationally-known law school academics, bar leaders, a victims' advocate, and a court researcher.

The Committee's honorary co-chairs are Walter F. Mondale, a former vice president of the United States who, as the then-attorney general of Minnesota, organized a remarkable amicus curiae brief joined by 23 states on behalf of Clarence Earl Gideon. The other is William S. Sessions, a former Director of the FBI and former United States District Court Judge. The Committee's co-chairs are Timothy K. Lewis, a former United States Circuit Court Judge; Rhoda Billings, a former Chief Justice of the North Carolina Supreme Court; and Robert M. A. Johnson, chief prosecutor of Anoka County, Minnesota, and a former President of the National District Attorneys Association. Among the Committee members are Professor Bruce R. Jacob, who as an Assistant Attorney General for the State of Florida opposed Mr. Gideon's request for counsel in his case before the Supreme Court. Another, Abe Krash, was on the legal team that successfully represented Mr. Gideon before that Court. Another member, Shawn Armbrust, then a journalism student and now a lawyer, played a leading role in successfully establishing the innocence of Anthony Porter, who came within 48 hours of being executed in Illinois. Yet another member, Alan J. Crotzer, was wrongfully convicted of a whole host of offenses in Florida, including sexual battery, kidnapping, burglary, and robbery, and sentenced to 130 years in prison; he was exonerated when DNA proved his innocence.

The Committee owes a great debt of gratitude to many people who contributed to their deliberations and to the report and its recommendations. First and foremost are its reporters: Norman Lefstein, Professor of Law and Dean Emeritus, Indiana University School of Law—Indianapolis, and Robert L. Spangenberg, Research Professor of the Center for Justice, Law, and Society at George Mason University. Professors Lefstein and Spangenberg are two of the nation's most highly regarded experts on issues of indigent defense. Together they drafted the Committee's report and assisted the Committee in crafting its recommendations. I also want to

acknowledge the efforts of Rebecca Jacobstein and Jennifer Riggs, two members of the Massachusetts bar and former staff members of The Spangenberg Group. Both devoted extensive time to the report and made extremely important contributions in preparing drafts of several chapters of the report.

Last, but by no means least, I want to recognize the valuable contributions to the Committee's work by its first team of reporters: Paul Marcus, Haynes Professor of Law and Kelly Professor of Teaching Excellence, William & Mary Law School, and Mary Sue Backus, Associate Professor of Law, University of Oklahoma College of Law. The early work of Professors Marcus and Backus for the Committee provided a firm foundation for development of the Committee's report. The materials they prepared were transmitted to Professors Lefstein and Spangenberg and were used by them in constructing their final report. Although Professors Backus and Marcus were unable to put aside other demands on their time in order to continue as the Committee's reporters, their assistance deserves special mention and appreciation. Much of their investigation of indigent defense is captured in their excellent law review article on the subject. *See* Paul Marcus and Mary Sue Backus, *The Right to Counsel in Criminal Cases, A National Crisis,* 57 Hastings L. J. 1031 (2006).

Finally, it is important for me to say a word about the intended audience for this report. *Justice Denied* is not just for those who provide indigent defense services, although everyone in the business of providing such services will surely find it of interest. Instead, the report should be required reading for legislators, executive branch officials, judges, researchers, bar leaders, and everyone else who possesses the power to remedy or influence the problems that this report vividly documents. *Justice Denied* is the handbook that lights the way toward genuine and lasting improvement in the delivery of indigent defense services in America, thus enhancing the quality of justice for all. Its findings and recommendations must—at long last—be heeded.

Virginia E. Sloan
President and Founder
The Constitution Project
April 2009

EXECUTIVE SUMMARY AND RECOMMENDATIONS

Introduction

More than 45 years ago, the United States Supreme Court rendered one of its best known and most important decisions—*Gideon v. Wainwright*. In memorable language, the Court explained that "[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." Observing that "lawyers in criminal courts are necessities, not luxuries," the Court concluded that governments have an obligation under the United States Constitution to provide lawyers for people charged with a felony who cannot afford to hire their own.

Soon afterwards, the Court extended *Gideon*, applying the right to a lawyer to juvenile delinquency cases and to misdemeanor cases where imprisonment results. The right to counsel is now accepted as a fundamental precept of American justice. It helps to define who we are as a free people and distinguishes this country from totalitarian regimes, where lawyers are not always independent of the state and individuals can be imprisoned by an all powerful and repressive state.

Yet, today, in criminal and juvenile proceedings in state courts, sometimes counsel is not provided at all, and it often is supplied in ways that make a mockery of the great promise of the Gideon decision and the Supreme Court's soaring rhetoric. Throughout the United States, indigent defense systems are struggling. Due to funding shortfalls, excessive caseloads, and a host of other problems, many are truly failing. Not only does this failure deny justice to the poor, it adds costs to the entire justice system. State and local governments are faced with increased jail expenses, retrials of cases, lawsuits, and a lack of public confidence in our justice systems. In the country's current fiscal crisis, indigent defense funding may be further curtailed, and the risk of convicting innocent persons will be greater than ever. Although troubles in indigent defense have long existed, the call for reform has never been more urgent.

The National Right to Counsel Committee

For the first time since the *Gideon* decision, an independent, diverse group, whose members include the relevant constituencies of the justice system, has examined the nation's ways of providing defense services for the poor and is sounding the alarm about the grave problems that exist today nationwide. The National Right to Counsel Committee was established to address the full dimension of the difficulties in indigent defense from a national perspective. The Committee's members include persons with judicial, law enforcement, prosecution, and defense experience, as well as policymakers, victim advocates, and scholars. The membership also includes a person who

was convicted of a crime that he did not commit, sent to prison, and later exonerated due to DNA evidence. (A list of Committee members and brief biographies of our Reporters precede this Executive Summary.)

Mission and Scope

The Committee's two-fold mission was to examine, across the country, whether criminal defendants and juveniles charged with delinquency who are unable to retain their own lawyers receive adequate legal representation, consistent with decisions of the Supreme Court and rules of the legal profession, *and* to develop consensus recommendations for achieving lasting reforms.

In approaching these subjects, the Committee was mindful that there have been numerous studies that have cataloged the problems with indigent defense, but these reports have not had significant impact in bringing about improvements. For this reason, the Committee was determined that its Report focus not simply on all that ails indigent defense—although Chapter 2 of this Report clearly does that—but that it also present detailed information on successful strategies for change. Chapter 3, therefore, is an in-depth, first-of-its-kind analysis of indigent defense litigation instituted to achieve reforms, including approaches that have been successful; Chapter 4 describes the various statewide structures used in the delivery of indigent defense services and suggests the kinds of oversight bodies most likely to succeed in promoting positive change.

Making a case for needed reform in the United States is not especially difficult because the subject has often been examined and the difficulties in delivering defense services are constantly in the news. In conducting its work, the Committee, through its Reporters, had access to literally hundreds of national, state, and local reports of indigent defense, as well as several thousand newspaper articles spanning even beyond the past decade. This Report cites many of the most recent studies conducted in state and local jurisdictions, a national report of the American Bar Association published in 2004, and numerous newspaper articles. In addition, some site visits were conducted by independent researchers (other than our Reporters), retained on behalf of the Committee, and the reports of these persons are referenced in Chapter 2. Because the Committee desired a study that would withstand the scrutiny of any persons who would doubt its findings, the statements in the five chapters of this Report are fully supported, with numerous sources contained in more than 900 footnotes.

The Committee's focus purposely has not included the myriad of problems involved in providing defense representation in death penalty cases. The Committee was aware that The Constitution Project had issued several reports related to the death penalty. *See* Mandatory Justice: Eighteen Reforms to the Death Penalty (2001); and Mandatory Justice: The Death Penalty Revisited (2006), both of which are available on The Constitution Project's website (http://www.constitutionproject.org/). There also are the 2003 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (*available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf). Moreover, by excluding death penalty prosecutions, the Committee believed that it could better concentrate its attention on defense representation in non-capital cases. Also, while juvenile delinquency proceedings are discussed in this Report, the Committee recognizes that its primary focus has been on defense services in criminal cases. For further specific information about juvenile defense representation, the Committee commends the materials available on the website of the National Juvenile Defender Center (http://www.njdc.info/index.php), some of which also are cited in Chapter 2.

Before summarizing each of the chapters in this Report, we want to emphasize that our overriding focus has been on the many *current* difficulties throughout the country in providing indigent defense representation. Obviously, there has been considerable progress since *Gideon* was decided in 1963. The sums spent by state governments and local jurisdictions in defending accused persons have increased significantly during the past four decades, and there are some places in which defense services are being delivered by talented professionals who have the time, training, and resources to do first-rate legal work for their clients. However, even in these places the progress that has been made is at considerable risk given the fiscal problems that now afflict state and local governments. Just as this Report was being completed, on December 10, 2008, the Center on Budget and Policy Priorities, a non-partisan research and policy organization, reported that "[a]t least 43 states faced or are facing shortfalls in their budgets for this and/or next year."

Moreover, the evidence is overwhelming that jurisdictions that have done reasonably well in the indigent defense area are in a distinct minority. In most of the country, notwithstanding the dedication of lawyers and other committed staff, quality defense work is simply impossible because of inadequate funding, excessive caseloads, a lack of genuine independence, and insufficient availability of other essential resources. In addition, as our summary below of Chapter 2 points out, these are by no means the only problems.

Chapter Summaries

Chapter 1—The Right to Counsel: What is the Legal Foundation, What Is Required of Counsel, and Why Does It Matter?

Our first chapter provides a primer on the right to counsel in America, which derives from the Sixth Amendment to the United States Constitution and is applicable to the states. We explain the kinds of cases to which the right applies, which are the vast majority of criminal cases at trial and on appeal as well as juvenile delinquency proceedings at trial and on appeal. Moreover, the Supreme Court of the United States has continued to extend and to elaborate upon the right to counsel. In 2002, the Court declared that a defendant who receives a suspended sentence in a misdemeanor case may not later be imprisoned for a probation violation unless counsel was afforded when the defendant was initially prosecuted. And, in 2008, the Court held that the right to counsel attaches at initial court appearances at which defendants learn of the charges brought by the state.

But an accused is entitled to more than just a lawyer. The right to counsel also encompasses the right to experts and transcripts to assist in a person's defense, and, like counsel, those must be paid for by governments. While the Court has not held that defendants *must* be represented by lawyers, it has declared that lawyers *must* be provided *unless* defendants knowingly, voluntarily, and intelligently decide to forego the assistance of counsel. On the other hand, the Court has said virtually nothing about how governments are to provide lawyers and, even more importantly, who must pay for the experts, transcripts, and thousands of attorneys across the country who must be provided to assist accused persons in criminal and juvenile cases. What we do know is that these expenses entail substantial costs, and the financial burden, as a result of the Court's decisions designed to fulfill a requirement of the federal Constitution, has fallen exclusively on state and local governments, who are called upon to translate the right to counsel into meaningful indigent defense programs. As we observe in Chapter 1, the Court's decisions "are a significant high-cost, unfunded mandate imposed upon state and/or local governments."

One of the reasons that the right to counsel is expensive is because the lawyers providing the representation must be trained and have offices, computers, and the assistance of investigators and other paralegals. If they are private attorneys, they must receive adequate compensation for their services. If they are employed as public defenders, they must have reasonable salaries and benefits. In addition, the rules of the legal profession require that all attorneys who represent clients, including indigent clients, must be "competent" and "diligent" in doing so. Consequently, they

cannot be allowed to have an unreasonable number of clients, lest they violate their duties as members of the bar and deprive their clients of the kind of representation that a private lawyer could be expected to provide. In addition, all states require that legal representation be made available in situations where the right to counsel is not constitutionally required, thus further straining the resources of public defense programs.

Chapter 1 also addresses why the right to counsel matters. The most compelling answer is that, in our adversary system of justice, fairness is served if both sides are represented by lawyers who are evenly matched in areas such as available time to devote to the case, training, experience, and resources. When the defense does not measure up to the prosecution, there is a heightened risk of the adversary system of justice making egregious mistakes. We have learned all too well during the past decade, with the advent of DNA evidence, that an unknowable number of genuinely innocent persons in the United States have been wrongfully convicted and sent to prisons. Usually this has happened due to police and prosecution errors or because of mistaken eyewitness identifications, though on occasion it has been due to clear abuses of law enforcement powers. Wrongful convictions also have occurred as a result of inadequate representation by defense lawyers. Whatever the reasons, for innocent persons to lose their liberty is a travesty. Equally troubling, it means that the guilty are free to roam without restraint, victimizing others, while the state pays to incarcerate those who have not transgressed against society. Well-trained lawyers and adequately funded systems of defense are essential to prevent this from happening.

Finally, effective programs of public defense are crucial to the public's trust in the legitimacy of its justice systems and confidence in its results. While politicians frequently fail to support adequate funding of indigent defense, fearing a lack of public support for such action, the evidence suggests that the public understands the issue better than the politicians may appreciate. Several years ago, a national, independent public opinion research organization polled 1,500 Americans and requested their views respecting indigent criminal defense. The results revealed overwhelming support for appointing and paying for lawyers on behalf of persons who could not afford one. The survey results are *available at* http://www.nlada.org/Defender/Defender_Awareness/Defender_Awareness_Indigent.

Chapter 2—Indigent Defense Today: A Dire Need for Reform

Over a period of many years, there have been numerous national reports that have exposed the countless problems in indigent defense and urged reforms, but the problems have persisted. Although the funding of indigent defense among state and local governments has increased considerably since the 1960's, inadequate financial

support continues to be the single greatest obstacle to delivering "competent" and "diligent" defense representation, as required by the rules of the legal profession, and "effective assistance," as required by the Sixth Amendment. Moreover, the country's current fiscal crisis, which afflicts state and local governments everywhere, is having severe adverse consequences for the funding of indigent defense services, which already receives substantially less financial support compared to prosecution and law enforcement.

Undoubtedly, the most visible sign of inadequate funding is attorneys attempting to provide defense services while carrying astonishingly large caseloads. Frequently, public defenders are asked to represent far too many clients. Sometimes the defenders have well over 100 clients at a time, with many clients charged with serious offenses, and their cases moving quickly through the court system. As a consequence, defense lawyers are constantly forced to violate their oaths as attorneys because their caseloads make it impossible for them to practice law as they are required to do according to the profession's rules. They cannot interview their clients properly, effectively seek their pretrial release, file appropriate motions, conduct necessary fact investigations, negotiate responsibly with the prosecutor, adequately prepare for hearings, and perform countless other tasks that normally would be undertaken by a lawyer with sufficient time and resources. Yes, the clients have lawyers, but lawyers with crushing caseloads who, through no fault of their own, provide second-rate legal services, simply because it is not humanly possible for them to do otherwise. Finally, to complete the picture, we discuss in Chapter 2 a variety of factors that exacerbate caseload problems for indigent defense systems, such as "tough on crime" policies translated by legislatures into additional criminal laws, the need for defendants to be aware of the collateral consequences of conviction, the criminalization of minor offenses, the ever-increasing complexity of the law with which defense attorneys must be familiar, a lack of open file discovery practices by prosecutors, and specialty courts that impose additional time demands on defense attorneys.

Beyond excessive caseloads, there are other impediments to having successful indigent defense programs. Too often the problems stem from a lack of independence from the authorities that provide funding for the defense program. We tell stories in Chapter 2 of county officials, responsible for providing funds for indigent defense, subjecting chief public defenders to political pressures because their lawyers challenged the prosecution and did exactly what they were required to do in representing their clients. We also point out that a lack of independence from the judiciary sometimes impacts the selection, appointment, and payment of counsel. Lawyers deemed to be too aggressive may be excluded from appointments, or favoritism may be shown to certain lawyers, who are appointed to a disproportionate share of the cases.

Other difficulties encountered in efforts to provide effective defense services include a lack of experts, investigators, and interpreters; insufficient client contact; and inadequate access to technology and data. Usually, there are no enforceable standards governing the performance of defense counsel, little or no training of defense lawyers, and a lack of meaningful supervision and oversight of their performance. Another problem is that defense lawyers are not always appointed to clients' cases in a timely manner, causing defendants to remain in custody far longer than they would otherwise and counties to incur jail costs that could have been avoided had counsel been appointed earlier in the process.

So far, we have focused on situations when lawyers are provided for the accused, although sometimes later than they should be. But there is another dimension to the problem, namely, the total absence of counsel because defendants either are not advised or not adequately advised of their right to counsel. When a defendant is not adequately advised of the right to counsel, the waiver almost certainly would not withstand scrutiny as a valid waiver of the right to legal representation. The invalidity of the waiver, however, typically fails to come to light, as the waiver process is of low visibility and defects rarely surface in the appellate courts. There are still some lower courts, moreover, that do not maintain a record of proceedings, so there is no way to be sure exactly how counsel was offered to the accused and if the waiver of legal representation was valid. There also is considerable evidence that, in many parts of the country, prosecutors play a role in negotiating plea arrangements with accused persons who are not represented by counsel and who have not validly waived their right to counsel. Not only are such practices of doubtful ethical propriety, but they also undermine defendants' right to counsel.

Many of the Committee's findings reported in Chapter 2 are virtually identical to a recently completed study of indigent defense services in misdemeanor cases in the United States conducted by the National Association of Criminal Defense Lawyers (NACDL). Publication of this study is expected to be released early in 2009. Among the problems identified in the forthcoming NACDL report are the following: (1) defendants unrepresented in misdemeanor courts because they have not properly waived the right to counsel; (2) excessive caseloads of public defenders and assigned counsel that undermine effective representation and lead lawyers to violate their ethical obligations; (3) defendants pleading guilty to misdemeanor offenses without an understanding of the applicable and potentially severe collateral consequences; (4) a lack of investigators, experts, and mental health professionals; and (5) the over-criminalization and prosecution of minor infractions and offenses, which drains resources that would otherwise be available for more serious offenses.

Chapter 3—How to Achieve Reform: The Use of Litigation to Promote Systemic Change in Indigent Defense

There is no better evidence of the problems in implementing the Supreme Court's right to counsel decisions than the enormous number of lawsuits that have been brought over a period of many years and the litigation currently pending, in which indigent defense representation has been challenged in the courts. Many times, as reflected in Chapter 3 (and in other chapters), these challenges have been successful and have led to improvements.

The lawsuits that we discuss were brought in federal and state courts in the following jurisdictions: Alabama, Alaska, Arizona, California, Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Washington, and West Virginia. In addition, as this Report was completed, litigation respecting indigent defense was pending in at least seven states, five of which are reviewed in Chapter 3. In Michigan and New York, lawsuits have been brought challenging entire systems for the delivery of indigent defense services. In Florida, Kentucky, and Tennessee, litigation is pending in which defense lawyers have challenged the actions of trial courts in seeking to require public defense programs to handle caseloads alleged to be excessive.

In concluding Chapter 3, we sum up lessons learned in seeking indigent defense reforms through litigation. We suggest that actions should be instituted pretrial on behalf of all, or a large class of indigent defendants, in order to secure a favorable remedy with broad impact. We also stress the importance of involving pro bono counsel from large law firms or the involvement of lawyers from public interest legal organizations, since systemic reform litigation is time consuming and requires an expertise not typically possessed by public defense practitioners. We also stress the importance of strong factual support on behalf of the claims asserted and discuss the role of the media and public support in fostering a climate likely to lead to a successful outcome.

Chapter 4—How to Achieve Reform: The Use of Legislation and Commissions to Produce Meaningful Change

In this chapter, we set forth the organizational structures for delivering indigent defense services in the 50 states and devote particular attention to developments since the year 2000. We note that 11 states have enacted legislative changes during the past

eight years and describe the kinds of changes that have occurred. In addition, we review the impetus for legislative reforms and the obstacles to achieving change.

Currently, there are 27 states that have organized their defense services either entirely or substantially on a statewide basis. Of these, there are 19 states that have a state commission with supervisory authority over the state's defense program headed by either a state public defender or state director; in the other eight states, there is a state public defender but not a state commission to provide oversight. In the remaining 23 states, there is either a state commission with partial authority over indigent defense (nine states); a state appellate commission or agency (six states); or no state commission of any kind (eight states).

Based upon our study of defense programs, we offer a number of suggestions about what is necessary in order to have a successful statewide oversight body. We urge that the state's commission be an independent agency of state government and that its placement within any branch of government be for administrative purposes only. We also suggest that the members of the commission be appointed by a diverse group of persons so that the members are not responsible to just one or two appointing authorities to whom they feel a sense of obligation. A range of other specific matters are explored as well, including the duties that should be given to commissions so that they will be able to improve the quality of representation in the state. Finally, we consider the role of study commissions in achieving indigent defense reforms, pointing out the contributions that they have made in the past and noting the several current commissions that are focused on indigent defense reforms.

Chapter 5—Recommendations and Commentary

This chapter contains the Committee's 22 Recommendations. Each of the recommendations is accompanied by Commentary with cross-references to other parts of the Report that explain and support our positions. All of the black-letter Recommendations, without the Commentary, are reproduced below.

One of our most important recommendations is that indigent defense should be independent, non-partisan, organized at the state level, adequately funded by the state from general revenues, and overseen by a board or commission. *See* Recommendation 2. Of equal significance is our recommendation that the federal government assist the states in the delivery of indigent defense services. For more than 45 years, the states and/or counties have struggled—and continue to struggle—to implement the *Gideon* decision and its progeny. The right to counsel is a federal guarantee based upon the Sixth Amendment to the United States Constitution, and it is entirely fitting that the federal government assist in its implementation. *See* Recommendations 12 and 13.

Finally, we emphasize that, in order to achieve reform at the state level, it is vital that a coalition of partners be engaged as part of a comprehensive strategy. The judiciary, bar officials, community leaders, public interest organizations, national associations of lawyers, and others need to be enlisted as partners to persuade the legislature of the importance of an adequate statewide program of indigent defense. To succeed, empirical documentation of the problems, as well as favorable media coverage, will be needed in order to generate a positive climate of public support. All of these efforts are essential investments in America's future because, as Judge Learned Hand said many years ago:

If we are to keep democracy, there must be a commandment:

Thou shalt not ration justice.

Recommendations

What States Should Do

Compliance with the Constitution

Recommendation 1—States should adhere to their obligation to guarantee fair criminal and juvenile proceedings in compliance with constitutional requirements. Accordingly, legislators should appropriate adequate funds so that quality indigent defense services can be provided. Judges should ensure that all waivers of counsel are voluntary, knowing, intelligent, and on the record, and that guilty pleas are not accepted from accused persons absent valid waivers of counsel. Prosecutors should not negotiate plea agreements with accused persons absent valid waivers of counsel and should adhere to their duty to assure that accused persons are advised of their right to a lawyer.

Independence

Recommendation 2—States should establish a statewide, independent, non-partisan agency headed by a Board or Commission responsible for all components of indigent defense services. The members of the Board or Commission of the agency should be appointed by leaders of the executive, judicial, and legislative branches of government, as well as by officials of bar associations, and Board or Commission members should bear no obligations to the persons, department of government, or bar associations responsible for their appointments. All members of the Board or Commission should be committed to the delivery of quality indigent defense services, and a majority of the members should have had prior experience in providing indigent defense representation.

Recommendation 3—The Board or Commission should hire the agency's Executive Director or State Public Defender, who should then be responsible for hiring the staff of the agency. The agency should act as an advocate on behalf of improvements in indigent criminal and juvenile defense representation and have the authority to represent the interests of the agency before the legislature pertaining to all such matters. Substantial funding for the agency should be provided by the state from general fund revenues.

States Without a Board or Commission

Recommendation 4—In states that do not have a statewide, independent, non-partisan agency responsible for all components of indigent defense services, a statewide task force or study commission should be formed to gather relevant data, assess its quality as measured by recognized national standards for the delivery of such services, and make recommendations for systemic improvements. The members of the task force or study commission should be appointed by leaders of the executive, judicial, and legislative branches of government, as well as by officials of bar associations, and task force or study commission members should bear no obligations to the persons, departments of government, or bar associations responsible for their appointments.

Qualifications, Performance, and Supervision of Counsel

Recommendation 5—The Board or Commission should establish and enforce qualification and performance standards for defense attorneys in criminal and juvenile cases who represent persons unable to afford counsel. The Board or Commission should ensure that all attorneys who provide defense representation are effectively supervised and remove those defense attorneys who fail to provide quality services.

Workload

Recommendation 6—The Board or Commission should establish and enforce workload limits for defense attorneys, which take into account their other responsibilities in addition to client representation, in order to ensure that quality defense services are provided and ethical obligations are not violated.

Compensation

Recommendation 7—Fair compensation should be provided, as well as reasonable fees and overhead expenses, to all publicly funded defenders and for attorneys who provide representation pursuant to contracts and on a case-by-case basis. Public defenders should be employed full time whenever practicable and salary parity should be provided for defenders with equivalent prosecution attorneys when prosecutors are fairly compensated. Law student loan forgiveness programs should be established for both prosecutors and public defenders.

Adequate Support and Resources

Recommendation 8—Sufficient support services and resources should be provided to enable all defense attorneys to deliver quality indigent defense representation, including access to independent experts, investigators, social workers, paralegals, secretaries, technology, research capabilities, and training.

Eligibility and Prompt Assignment

Recommendation 9—Prompt eligibility screening should be undertaken by individuals who are independent of any defense agency, and defense lawyers should be provided as soon as feasible after accused persons are arrested, detained, or request counsel.

Reclassification

Recommendation 10—In order to promote the fair administration of justice, certain non-serious misdemeanors should be reclassified, thereby reducing financial and other pressures on a state's indigent defense system.

Data Collection

Recommendation 11—Uniform definitions of a case and a consistent uniform case reporting system should be established for all criminal and juvenile delinquency cases. This system should provide continuous data that accurately contains the number of new appointments by case type, the number of dispositions by case type, and the number of pending cases.

What the Federal Government Should Do

A National Center for Defense Services

Recommendation 12—The federal government should establish an independent, adequately funded National Center for Defense Services to assist and strengthen the ability of state governments to provide quality legal representation for persons unable to afford counsel in criminal cases and juvenile delinquency proceedings.

Federal Research and Grant Parity

Recommendation 13—Until a National Center for Defense Services is established, as called for in Recommendation 12, the United States Department of Justice should use its grant and research capabilities to collect, analyze, and publish financial data and other information pertaining to indigent defense. Federal financial assistance through grants or other programs as provided in support of state and local prosecutors should also be provided in support of indigent defense, and the level of federal funding for prosecution and defense should be substantially equal.

What Individuals, Criminal Justice Agencies, and Bar Associations Should Do

Adherence to Ethical Standards

Recommendation 14—Defense attorneys and defender programs should refuse to compromise their ethical duties in the face of political and systemic pressures that undermine the competence of their representation provided to defendants and juveniles unable to afford counsel. Defense attorneys and defender programs should, therefore, refuse to continue representation or accept new cases for representation when faced with excessive workloads that will lead to a breach of their professional obligations.

Recommendation 15—Judges, prosecutors, and defense lawyers should abide by their professional obligation to report to disciplinary agencies knowledge of serious ethical violations that impact indigent defense representation when the information they possess is not confidential. Appropriate remedial action should be taken by persons with responsibility over those who commit such ethical violations.

Open File Discovery

Recommendation 16—Prosecutors should adopt open file discovery policies in order to promote the fair administration of criminal and juvenile justice.

Education, Advocacy and Media Attention

Recommendation 17—State and local bar associations should provide education about the professional obligations and standards governing the conduct of defense attorneys, prosecutors, and judges in order to promote compliance with applicable rules. State and local bar associations, defense attorneys, prosecutors, judges, and their professional associations should support and advocate for reform of indigent defense services in compliance with the recommendations contained in this report.

Recommendation 18—Criminal justice professionals, state and local bar associations, and other organizations should encourage and facilitate sustained media attention on the injustices and societal costs entailed by inadequate systems of indigent defense, as well as those systems that function effectively.

Litigation

Recommendation 19—When indigent defense systems require defense attorneys to represent more clients than they can competently represent or otherwise fail to assure legal representation in compliance with the Sixth Amendment, litigation to remedy such deficiencies should be instituted.

Recommendation 20—When seeking to achieve remedies that will favorably impact current and future indigent defendants, litigation should be instituted pretrial on behalf of all or a large class of indigent defendants.

Recommendation 21—Whenever possible, litigation should be brought by disinterested third parties, such as private law firms or public interest legal organizations willing to serve as pro bono counsel, who are experienced in litigating major, complex lawsuits and accustomed to gathering and presenting detailed factual information. Bar associations and other organizations should encourage law firms and public interest legal organizations to undertake indigent defense litigation and should recognize in appropriate ways the contributions of private counsel in seeking to improve the delivery of indigent defense services.

Recommendation 22—Defense lawyers who provide representation in appellate and post-conviction cases and organizations that advocate as amicus curiae should urge the United States Supreme Court and state Supreme Courts to adopt a test for ineffective assistance of counsel that is substantially consistent with the ethical obligation of defense counsel to render competent and diligent representation.

CHAPTER 1

The Right to Counsel: What is the Legal Foundation, What is Required of Counsel, and Why Does it Matter?

A. The U.S. Constitution and the Supreme Court

The Landmark Decisions: *Powell* and *Gideon*

The Sixth Amendment to the United States Constitution states that "in all criminal prosecutions the accused shall enjoy the right to … have the assistance of counsel for his defense."[1] By its terms, the Sixth Amendment does not require that counsel be appointed for the accused and, as part of the Bill of Rights which originally was applicable only to the federal government, it did not apply to the states at all.[2] When adopted in the late 1700's, it was a rejection of the English practice of denying legal representation to persons charged with felony offenses.[3] In addition, a number of the original states granted persons a right to counsel in their state constitutions,[4] but these provisions were not interpreted to require that counsel be appointed for those unable to afford a lawyer.[5]

Today, the Sixth Amendment provision related to the assistance of counsel means something entirely different due to several of the most famous decisions of the United States Supreme Court. And, as a nation, consistent with the direction charted by the nation's highest court, we understand the importance of providing lawyers to those unable to afford an attorney because persons who lack legal training cannot adequately represent themselves in criminal and juvenile court proceedings.

The landscape respecting the right to counsel began to change with the Supreme Court's 1932 decision in *Powell v. Alabama,*[6] in which nine poor black youths were accused of raping two white women. Amidst "an atmosphere of tense, hostile, and

1 U.S. Const. amend. VI.

2 The first ten amendments to the Constitution are collectively referred to as the Bill of Rights and, in accord with its specific language, originally applied only to restrain acts of the federal government. Gradually, through a process often referred to as "selective incorporation," the Supreme Court has applied most of the amendments to the States, concluding that they are embodied within the Fourteenth Amendment's due process of law clause because they are "fundamental to principles of liberty and justice." *See* Geoffrey R. Stone, et al., Constitutional law 702–10 (4th ed. 2001); Anthony Lewis, Gideon's Trumpet 93–99 (1964).

3 Powell v. Alabama, 287 U.S. 45, 60–61 (1932).

4 *See* Floyd G. Feaney and Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?,* 22 Rut. L. Rev. 361, 362, n. 11 (1991).

5 "The practical effect of this newly created right was limited because many defendants were too poor to pay for counsel and the right was not always understood to be a right to have counsel appointed. It took another 200 years to establish the principle that the state should provide counsel to those who are unable to pay for the representation." *Id.* at 362.

6 Powell v. Alabama, 287 U.S. 45 (1932).

excited public sentiment,"[7] the defendants were hurriedly charged and tried by white jurors, convicted, and sentenced to death, except for the youngest defendant who was 12 years old and sentenced to life in prison without the possibility of parole. As required by Alabama law applicable to death penalty cases, two defense lawyers were provided to the defendants, but this did not occur until the morning of trial when there was no opportunity for the attorneys to investigate their clients' cases or otherwise prepare for trial. The Supreme Court reversed the defendants' convictions, holding that they "were not accorded the right to counsel in any substantial sense"[8] and that the denial of counsel violated the federal Constitution's Fourteenth Amendment due process of law clause applicable to the states.[9]

Although the ruling in *Powell* was limited to capital proceedings in state criminal courts, its rationale regarding the need for legal representation has been invoked by the Supreme Court in subsequent decisions and is just as compelling today as when the words were penned more than 75 years ago:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[10]

Despite the foregoing rationale of the *Powell* decision, which applies not only to capital cases but to non-capital criminal and juvenile delinquency proceedings as well, legal representation as a matter of constitutional right was not extended beyond

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7 *Id.* at 51.

8 *Id.* at 58.

9 The applicable language of the Fourteenth Amendment provides that no "State shall deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. For a detailed account of the trials and history surrounding the *Powell* case, *see* Douglas O. Linder, *Without Fear or Favor: Judge James Edwin Horton and the Trial of the Scottsboro Boys,* 68 UMKC L. Rev. 549 (2000); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure,* 99 Mich. L. Rev. 48, 61–67 (2000).

10 *Id.* at 68–69.

capital cases for another 31 years—not until the Supreme Court's historic decision in *Gideon v. Wainwright.*[11] What happened in *Gideon* illustrates the enormous importance of providing defense lawyers for those who cannot afford to retain their own.

On June 3, 1961, there was a break-in at a pool hall in Panama City, Florida, resulting in the theft of some alcohol and change from a cigarette machine and juke box. Clarence Earl Gideon was charged with a felony under Florida law, i.e., breaking and entering with the intent to commit a misdemeanor. Gideon informed the trial judge that he could not go to trial because he needed a lawyer, and he asked the court to appoint a lawyer for him because he lacked money to hire an attorney. The judge summarily refused the request, and Gideon proceeded to defend himself, claiming that he was innocent. The jury, however, convicted Gideon, and he was sentenced to five years in prison, the maximum penalty for the offense. Gideon then sought relief from the Florida Supreme Court, arguing that the trial court's refusal to provide counsel for him violated his rights under the federal constitution, but again his claim was rejected.

With the aid of a prison library, Gideon drafted a five-page petition to the Supreme Court asking that his appeal be considered on constitutional grounds. The Court agreed to hear his case, and assigned Abe Fortas, a prominent Washington, D.C. lawyer from the firm of Arnold, Fortas & Porter to brief and argue Gideon's appeal.[12]

The unanimous decision of the Supreme Court in *Gideon v. Wainwright,* rendered on March 18, 1963, was written by Justice Hugo Black. Calling it an "obvious truth"[13] that lawyers in criminal cases are "necessities not luxuries,"[14] the Court held, for the first time, that the Sixth Amendment's effective assistance of counsel provision is a fundamental and essential right made obligatory upon the states by virtue of the Fourteenth Amendment's due process of law clause.[15]

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11 Gideon v. Wainwright, 372 U.S. 335 (1963). During the 25 years between *Powell* and *Gideon,* the Court decided only two major right-to-counsel cases: Johnson v. Zerbst, 304 U.S. 458 (1938) and Betts v. Brady, 316 U.S. 455 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963). In *Zerbst,* the Court held that an indigent criminal defendant had the right to the assistance of counsel under the Sixth Amendment when charged with a federal crime and that it could only be denied if based on a defendant's knowing, intelligent, and voluntary waiver of counsel. In *Betts,* the Supreme Court held that the Sixth Amendment did not apply to the states. The Court reasoned that the "appointment of counsel is not a fundamental right, essential to a fair trial" and thus was not part of the concept of "due process incorporated in the Fourteenth Amendment." *Id.* at 472.

12 *Gideon,* at 336–38. *See also,* Anthony Lewis, Gideon's Trumpet (1964); *Gideon's Trumpet* (CBS television broadcast, April 30, 1980).

13 *Gideon,* 372 U.S. at 344.

14 *Id.*

15 The Court stated that, "We accept *Betts v. Brady's* assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong,

With customary eloquence, Justice Black further explained:

> 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. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[16]

The "obvious truth" to which the Court referred was made apparent when Gideon's case was sent back to Florida for a new trial. This time Gideon had the "guiding hand of counsel,"[17] as a local attorney was appointed to represent him and in advance of trial spent several days investigating the case against his client. At trial, the lawyer skillfully exposed the weaknesses in the testimony of the state's witnesses, demonstrating how the state's eyewitness was likely the real culprit. He also called Gideon to the stand, who denied any role in the break-in and provided evidence of his innocence, rebutting testimony that went unchallenged during his first trial. The jury deliberated only an hour and acquitted Gideon of all charges.[18]

Because Gideon was charged with a felony under Florida law punishable by a maximum five-year sentence, *Gideon* has stood for the proposition that the Sixth Amendment right to counsel applies to defendants charged with felonies in state criminal courts. Like the *Powell* opinion on which *Gideon* relied, the Supreme Court's rationale in *Gideon* applies to all criminal and juvenile proceedings, not just felony cases, as the Court's decision was based on a desire to ensure that persons charged in the justice system were treated equally and afforded a fair opportunity to defend themselves.

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in concluding that the Sixth Amendment's guarantee of counsel is not one of those fundamental rights." *Id.* at 342.

16 *Id.* at 344.

17 *Id.* at 345.

18 *See* Anthony Lewis, Gideon's Trumpet 234–50 (1964). The attorney appointed to represent Gideon was W. Fred Turner of Panama City, Florida, who was appointed by the court upon Gideon's specific request. Turner spent considerable time in the vicinity of the alleged break-in getting to know local people, interviewing witnesses, and understanding the case. In fact, Turner went so far as to spend a day picking pears with the mother of the State's chief eyewitness against Gideon, Henry Cook. But Turner was not Gideon's first counsel when the case was remanded from the Supreme Court. Initially, two ACLU attorneys from Miami represented him. This infuriated Gideon, and he demanded that they be dismissed because he was adamant about having a local attorney. The judge asked whether there was anyone he would like to have as his lawyer, and Gideon requested Turner.

Expansion of the Right to Counsel

In 1963, in the wake of the *Gideon* decision, numerous questions were unresolved. Foremost among these was whether the right to counsel extended beyond felony cases. For example, did the right to counsel apply in misdemeanor prosecutions and in juvenile delinquency proceedings? Was it necessary to provide defense counsel the services of experts, such as psychiatrists, and other kinds of ancillary assistance? At what stage of a case must counsel be provided? Under what circumstances, if any, may a defendant proceed without an attorney? And, perhaps most important of all, who is responsible for compensating the defense attorneys who would now be required and how should the delivery of defense services be structured?[19]

Types of Cases Requiring Counsel

The next major expansion of the right to counsel occurred in 1967 with the Supreme Court's *In re Gault*[20] decision, in which the right to counsel was applied to juvenile delinquency proceedings. Citing *Powell* and *Gideon*, the Court held that a child found to be delinquent and "subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon

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19 Prior to the Supreme Court's ruling in *Gideon,* states sometimes provided counsel to indigent defendants in non-capital cases. For example, as early as 1854, the Indiana Supreme Court approved appointing counsel for an indigent charged with burglary: "But that the services rendered by Baird [the defense attorney] were necessary to be rendered by some attorney, will scarcely admit of argument. It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial. The defense of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court, and to the public." Webb v. Baird, 6 Ind. 11, 13 (1854). In 1881, a New York Criminal Procedure Law was amended to provide that in felony cases defendants were to be asked whether they wanted an attorney, and if they did, a pro bono lawyer was to be appointed. *See* Michael McConville and Chester L. Mirsky, Jury Trials and Plea Bargaining: A True History, 36, n. 20 (2005). Moreover, the first public defender office in the United States was established in 1914 in Los Angeles. *See* website of the Los Angeles Public Defender Office, *available at* http://www.pd.co.la.ca.us/history.html. Nevertheless, as stated in an amicus curiae brief filed in the Supreme Court in *Gideon*, "counsel is rarely appointed in non-capital cases, even if requested." Brief of Amici Curiae American Civil Liberties Union, Gideon v. Wainwright, 371 U.S. 335 (1963). The extent to which counsel actually was provided in state non-capital criminal prosecutions prior to *Gideon* is not well documented, but clearly as of 1963, no state provided the range of guarantees that *Gideon* and subsequent Supreme Court decisions have required. For a discussion of the right to counsel in the early American colonies and in States prior to the *Gideon* decision, *see* Note, *An Historical Argument for the Right to Counsel During Police Interrogations,* 73 Yale L. J. 1000, 1018–34 (1964); Fellman, *The Right to Counsel Under State Law,* 1955 Wis. L. Rev. 281 (1951); W. H. Beaney, The Right to Counsel in American Courts 8–24, 80–100 (1955); James J. Tomkovcz, The Right to the Assistance of Counsel 1–13 (2002).

20 *In re* Gault, 387 U.S. 1 (1967).

regularity of proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.'"[21]

Then, in 1972, in the case of *Argersinger v. Hamlin,*[22] the Sixth Amendment again was invoked, resulting in another significant expansion of the right to counsel. An indigent defendant was charged with the misdemeanor offense of carrying a concealed weapon. Denied legal representation, he was convicted and sentenced to jail. Emphasizing the defendant's loss of liberty and the importance of counsel in achieving fair trials, the Supreme Court reversed. As the Court explained, "absent a knowing and intelligent waiver [of counsel], no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[23]

In 2002, *Argersinger* was applied to cases in which defendants, without being afforded counsel, receive suspended jail sentences, are placed on probation, and later the probation is revoked and imprisonment imposed. In *Alabama v. Shelton,*[24] the Supreme Court held that "the Sixth Amendment right to appointed counsel, as delineated in *Argersinger*…, applies to a defendant in Shelton's situation. We hold that a suspended sentence that may 'end up in the actual deprivation of a person's liberty,' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution of the crime charged."[25] As the Court explained, when the prison term is activated, incarceration is not for the probation violation but for the underlying suspended offense for which the defendant was never provided the opportunity to have legal representation.[26]

Based upon the Fourteenth Amendment's due process and equal protection clauses, defense counsel for the indigent also has been required in appellate cases. In 1963, in *Douglas v. California,*[27] a companion case to *Gideon* decided the same day, the Supreme Court held that an indigent defendant may not be discriminated against

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21 *Id.* at 36.

22 Argersinger v. Hamlin, 407 U.S. 25 (1972).

23 *Id.* at 37. Following *Argersinger,* the Supreme Court emphasized that actual imprisonment is what triggers the right to counsel. In Scott v. Illinois, 440 U.S. 367 (1979), the Court held that the Sixth Amendment is not violated when a defendant faces possible imprisonment but is only fined. "[W]e believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointed counsel." *Id.* at 373.

24 Alabama v. Shelton, 535 U.S. 654 (2002).

25 *Id.* at 658.

26 *Id.* at 662.

27 Douglas v. California, 372 U.S. 353 (1963).

by virtue of poverty and denied the right to an attorney to assist with the first appeal granted by the state as a matter of right.[28] More recently, in *Halbert v. Michigan,*[29] a case decided in 2005, the Court invoked the rationale of *Douglas,* holding that a state may not deny counsel to a defendant who seeks to appeal following entry of a guilty plea. In *Halbert,* the Court recounted the numerous issues that defendants who plead guilty may raise on appeal in an effort to set aside their guilty pleas, as well as the difficulty of doing so without the aid of an attorney.[30]

This discussion of the expansion of the right to counsel deals with what states *must* do as a matter of federal constitutional law. However, state courts have interpreted their state constitutions and statutes in ways that have expanded the right to counsel beyond what the Supreme Court has required.[31] This is important because,

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28 "The present case, where counsel was denied petitioners on appeal, shows that the discrimination is not between possibly 'good and bad cases,' but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment…." *Douglas,* 372 U.S. at 357–58.

29 Halbert v. Michigan, 545 U.S. 605 (2005).

30 The Court stated that "one who pleads guilty or *nolo contendere* may still raise on appeal constitutional defects that are irrelevant to his factual guilt, double jeopardy claims requiring no further factual record, jurisdictional defects, challenges to the sufficiency of the evidence at the preliminary examination, preserved entrapment claims, mental competency claims, factual basis claims, claims that the state had no right to proceed in the first place, including claims that a defendant was charged under an inapplicable statute, and claims of ineffective assistance of counsel." *Id.* at 621–22. Further the Court pointed out that, "navigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals, like Halbert, who have little education, learning disabilities, and mental impairments." *Id.* at 621. "Michigan's very procedures for seeking leave to appeal after sentencing on a plea, moreover, may intimidate the uncounseled." *Id.* at 622.

31 To illustrate, under the Oregon Constitution, defendants have the right to counsel at any criminal proceeding, whether or not a term of imprisonment is imposed. *See* Or. Const., Art I § 11; Gaffey v. State, 67 P.2d 634 (Ore. App. 1981). The right to counsel in Oregon also applies to all offenses that have the character of criminal prosecutions, such as traffic infractions, whether or not they are statutorily labeled crimes or have the possibility of imprisonment, if they retain penal characteristics. *See* Brown v. Multnomah County District Court, 570 P.2d 52 (1977). Moreover, Oregon provides counsel as of right in termination of parental rights proceedings, to both the parents and the child, civil commitment proceedings, and dependency proceedings to both the parents and the child. *See* ORS 138.510 et seq. Tennessee also has expanded the right to counsel in criminal proceedings, appointing an attorney to every person "accused of any crime or misdemeanor whatsoever" (Tenn. Code Ann. § 40-14-102 (2005); and in all proceedings for the filing of a writ of habeas corpus or of error *coram nobis* (Tenn. Code Ann. § 40-14-204 (2005). In Massachusetts, the right to counsel is afforded to children and their parents, custodians, or guardians in care and protection and related proceedings; persons in mental health proceedings, including civil commitment, medical treatment, sex offender registry, and sexually dangerous person cases; and elderly or disabled persons in care and protection. *See* Art. 12 of the Massachusetts Declaration of Rights; Marsden v. Commonwealth, 352 Mass. 564, 568 (1967); M.G.L. ch. 6 §§ 178L and 178M; M.G.L. ch. 123 §§ 5, 12(b), 35; M.G.L. ch. 123A §§ 13-14; M.G.L. ch. 201 §§ 6, 6A, 14(d); M.G.L. ch. 211D § 16; Rogers v. Commissioner of Dept. of Mental Health, 390 Mass. 489 (1983); Guardianship of Roe, 383 Mass.

oftentimes, indigent defense[32] programs are called upon to provide the necessary legal representation, which requires the time of defense lawyers and support staffs, as well as additional cost.

Transcripts, Experts, and Other Assistance

The Supreme Court recognized, even before *Gideon,* that poverty must not prevent a defendant from receiving fair and equal treatment in the courts. The *Douglas* and *Halbert* cases discussed in the preceding section applied the reasoning of *Griffin v. Illinois,*[33] a 1956 Supreme Court decision in which the Court held as a matter of due process and equal protection that a trial transcript must be furnished to an indigent at state expense if it is required for a defendant's appeal to be heard in the state's appellate court. As the Court in *Griffin* explained, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[34]

The principle of the *Griffin* case was applied again by the Court in 1985 in *Ake v. Oklahoma*[35] to require that the state provide access to a psychiatrist for an indigent defendant who makes a preliminary showing that his sanity will be an issue at trial. The *Ake* decision has been invoked by federal and state courts to require that other kinds of assistance, both expert and non-expert, are provided to indigent defendants, thereby helping to ensure that the accused receives meaningful legal representation.[36]

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415 (1981); Superintendent of Belchertown State Sch. v. Saikewicz, 373 Mass. 728 (1977); M.G.L. ch. 19A § 20; M.G.L ch. 19C § 7.

32 This report uses the terms "indigent defense" and "public defense" interchangeably to refer to programs in state and local jurisdictions used to provide legal representation in criminal and juvenile cases for persons unable to afford an attorney.

33 Griffin v. Illinois, 351 U.S. 12 (1956).

34 *Id.* at 19.

35 Ake v. Oklahoma, 470 U.S. 68 (1985).

36 *See* Moore v. State, 390 Md. 343 (Md. 2005) (citing cases that have extended *Ake's* reasoning to non-psychiatric experts); *See, e.g.,* Dunn v. Roberts, 963 F.2d 308, 313 (10th Cir. 1992) (battered-spouse syndrome expert); Scott v. Louisiana, 934 F.2d 631, 633 (5th Cir. 1991) (ballistics expert); Little v. Armontrout, 835 F.2d 1240 (8th Cir. 1987) (hypnosis expert); Bright v. State, 265 Ga. 265 (Ga. 1995) (toxicologist); Crawford v. State, 257 Ga. 681 (Ga. 1987) (serologist, psychologist, survey expert); Thornton v. State, 255 Ga. 434 (Ga. 1986) (forensic dentist); People v. Lawson, 163 Ill. 2d 187 (Ill. 1994) (fingerprint and shoe print experts); James v. State, 613 N.E.2d 15, 21 (Ind. 1993) (blood spatter expert); State v. Coker, 412 N.W.2d 589, 593 (Iowa 1987) (expert to assist with intoxication defense); Harrison v. State, 635 So.2d 894 (Miss. 1994) (pathology expert); State v. Huchting, 927 S.W.2d 411, 419 (Mo. Ct. App. 1996) (DNA expert); People v. Tyson, 209 A.D.2d 354 (N.Y. App. Div. 1994) (voiceprint expert); State v. Mason, 82 Ohio St. 3d 144, (Ohio 1998) (non-psychiatric experts generally).

At What Stage of the Proceedings Is Counsel Required?

The *Powell, Gideon, Gault,* and *Argersinger* cases held that the accused had a constitutional right to counsel at trial. These cases did not address the stage of the case at which the right to counsel attaches. Timing is important because the earlier a defense attorney enters a client's case, the better the lawyer is able to protect the client's rights and provide effective representation. If, for example, representation begins just after the client is charged, counsel can seek the defendant's release from custody and begin a prompt investigation of the facts.

In its *Powell* decision in 1932, the Supreme Court recognized the importance of counsel's presence during the pretrial phase of a case: "[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense…."[37]

Although the Supreme Court has not specified the exact time by which defense counsel must be offered to the indigent accused, clearly, a defendant must be furnished the right to an attorney well before the trial itself. As the Court has explained, "the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'"[38] In 2008, the Court rendered its most recent decision on the subject, holding that the right to counsel attaches at a criminal defendant's initial court appearance where he learns of the charges against him and his liberty is subject to restriction regardless of whether the prosecutor is aware of the proceedings.[39] This ruling is consistent with what the Court previously had stated, i.e., defendants are guaranteed counsel "at any stage of the prosecution,

37 *Powell,* 287 U.S. at 57–8.

38 Brewer v. Williams, 430 U.S. 387, 398 (1977) (*citing* Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

39 Rothgery v. Gillespie County, 128 S. Ct. 2578 (2008). In *Rothgery,* the Supreme Court did not actually decide that the initial court appearance at issue in the case was a "critical stage" at which a lawyer had to be offered to the accused. As the Court explained: "Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the post-attachment proceedings; what makes a stage critical is what shows the need for counsel's presence. Thus, counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself…. Our holding is narrow…. We merely reaffirm what we have held before and what an overwhelming majority of American jurisdictions understand in practice: a criminal defendant's initial appearance before a judicial officer, where he learns the charges against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." *Id.* at 2591–92.

formal or informal, in court or not, where counsel's absence might derogate from the accused's right to a fair trial."[40]

Thus, the Court has held that the right to counsel attaches at a preliminary hearing to determine whether a crime has been committed and if the accused is the likely perpetrator;[41] at a post-indictment lineup where the accused is exhibited to a witness;[42] at a court-ordered psychiatric exam conducted after the defendant has been indicted;[43] and when a defendant pleads guilty to a criminal charge.[44] These decisions, as well as common sense, dictate that public defense[45] systems should provide legal representation either at or just after the commencement of adversary judicial proceedings.[46]

Waiver of the Right to Counsel

A defendant may relinquish the constitutional right to be represented by counsel. In numerous cases over a period of many years, the Supreme Court has spelled out what is required for a valid waiver of counsel. Beginning with *Johnson v. Zerbst* in 1938, while dealing with waiver of counsel in a federal criminal case in which defendants proceeded to trial without legal representation, the Supreme Court explained:

> '[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights.... A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.... The constitutional right of an accused to be

40 United States v. Wade, 388 U.S. 218, 226 (1967).

41 Coleman v. Alabama, 399 U.S. 1, 8–11 (1970).

42 United States v. Wade, 388 U.S. 218.

43 Estelle v. Smith, 451 U.S. 454 (1981).

44 *See, e.g.,* Iowa v. Tovar, 541 U.S. 77 (2004). Some situations have been held not to be "critical stages" of a case for the defendant and hence, the right to counsel does not attach even though the event occurs after the start of adversary judicial proceedings. *See, e.g.,* United States v. Ash, 413 U.S. 300 (1973) (right to an attorney does not attach when a witness identifies defendant at a post-indictment photographic array); Gilbert v. California, 388 U.S. 263 (1967) (post-indictment taking of handwriting exemplars does not constitute a critical stage to which the right to counsel attaches).

45 For a definition of the meaning of "public defense" as used in this report, *see supra* note 32.

46 Although the right to counsel applies to suspects when they are interrogated in custodial settings prior to the initiation of adversary judicial proceedings, the right to counsel is for the purpose of implementing the Fifth Amendment's privilege against self-incrimination. Denial of counsel in such situations is not a Sixth Amendment violation. *See* Edwards v. Illinois, 451 U.S. 477, 482 (1981); Miranda v. Arizona, 384 U.S. 436, 470 (1966).

> represented by counsel … imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.[47]

In 1947, in a case where a defendant pled guilty to a felony charge without the assistance of counsel, the Supreme Court elaborated on what is necessary to constitute a valid waiver:

> To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.[48]

In 2004, the Supreme Court reaffirmed its position on waiver of counsel in the case of *Iowa v. Tovar.*[49] In this case, the defendant pled guilty to the misdemeanor charge of operating a motor vehicle while under the influence of alcohol. Citing its 1938 decision in *Johnson v. Zerbst,*[50] the Court again emphasized that "any waiver of counsel [must] be knowing, voluntary, and intelligent."[51] The Court further explained that it had not "prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel. The information a defendant must possess in order to make an intelligent election, our decisions indicate, will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding."[52]

47 Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938).
48 Von Moltke v. Gillies, 332 U.S. 708, 723–24 (1947).
49 Iowa v. Tovar, 541 U.S. 77 (2004).
50 Johnson v. Zerbst, 304 U.S. at 464–65.
51 Iowa v. Tovar, 541 U.S. at 88.
52 *Id.*

While conceding that its decisions concerning the right to counsel suggest that a lawyer is necessary in order to assure that a defendant receives a fair trial, the Supreme Court in 1975, nevertheless, held in *Faretta v. California*[53] that a defendant has a constitutional right to proceed without counsel.[54] However, before a defendant is permitted to do so, the trial court should make clear "the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes wide open.'"[55]

The Cost of the Right to Counsel

The foregoing discussion shows that, in order to secure fair treatment for the indigent, the Supreme Court has required that lawyers be provided pursuant to the Sixth Amendment in the vast majority of criminal and juvenile delinquency cases absent an intelligent and knowing waiver of counsel.[56] It also reflects that counsel must be provided soon after the start of adversary judicial proceedings and lawyers must have access to experts and other assistance necessary to prepare an effective defense of their clients. But since the Supreme Court is not a legislative body, the Court has said relatively little about the huge costs that their constitutional decisions entail. Taken together, the Court's historic rulings, based upon the *federal* Constitution's

53 Faretta v. California, 422 U.S. 806 (1975).

54 The decision in *Faretta* was based upon the language of the Sixth Amendment, which speaks of the "assistance" of counsel, thus implying that such assistance must be able to be refused. As the Court remarked, "[t]o thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment." *Id.* at 820. The Court also thought it was important to recognize individual autonomy, so that a person will not "believe the law contrives against him." *Id.* at 834. After *Faretta,* the Court authorized judges to appoint "standby counsel" even over a defendant's objection, when deemed necessary to assist a defendant engaged in self-representation. *See* McKaskle v. Wiggins, 465 U.S. 168 (1984).

55 Faretta v. California, 422 U.S. at 835 (*citing* Adam v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)). But, the Court has refused to recognize a right to self-representation on appeal. *See* Martinez v. Court of Appeal of California, 528 U.S. 152 (2000).

56 However, the Court has not extended the right to counsel to all of the kinds of cases in which the assistance of a lawyer could be exceedingly helpful. *See e.g.,* Ross v. Moffitt, 417 U.S. 600 (1974) (right to counsel applies to an indigent defendant's first appeal as of right but does not extend to subsequent discretionary appeals or to applications for review to the United States Supreme Court); Murray v. Giarrantano, 492 U.S. 1 (1989) (right to counsel does not extend to state post-conviction proceedings in a capital case); Pennsylvania v. Finley, 481 U.S. 551 (1987) (right to counsel does not extend to state post-conviction proceedings in a non-capital case). Nor is there a right to counsel if a defendant is only subjected to a fine. *See infra* note 23, Scott v. Illinois. A defendant also does not have the right to an attorney when seeking to show that he or she was wrongfully convicted and thus entitled to exoneration. The subject of wrongful convictions is discussed later in this chapter. *See infra* notes 131–49 and accompanying text. (A cross reference in this report is to footnotes in the same chapter in which the cross reference appears unless the chapter number is provided.)

Sixth Amendment counsel provision, are a significant, high-cost, unfunded mandate imposed upon state and/or local governments.[57]

So, what has the Supreme Court said about the funding of legal representation for the indigent? In *Gideon,* the expense of defense services was not discussed at all. However, in the *Argersinger* decision, which required that counsel be provided even in misdemeanor cases in which the accused is imprisoned, Justice Powell, concurring in the Court's opinion, commented on "available funding," referring to it as an "acute problem."[58] In a footnote, Justice Powell elaborated, stating that "[t]he successful implementation of the majority's rule would require state and local governments to appropriate considerable funds, something they have not been willing to do."[59] Quoting a source published in 1972, Justice Powell noted that, despite the much larger size of the American economy and its population compared to Britain, "American legal aid expenditures are less than 2 times as high."[60] A more recent comparison of criminal defense expenditures between this country and England and Wales shows that, on a per capita basis, the United States lags well behind in providing financial support.[61]

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57 The same point is made in Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help,* 55 Hastings L. J. 835, 843 (2004) [hereinafter Lefstein, *Lessons from England*].

58 Argersinger v. Hamlin, 407 U.S. at 59. A number of states impose various fees on indigent defendants to cover a small part of the cost of their legal representation. These fees are sometimes referred to as recoupment, contribution, reimbursement, application fees, etc. The Supreme Court has held that a defendant may be required to repay a portion of the cost of his defense services where the trial court was required to consider whether imposing such a duty could result in a substantial hardship to the defendant. Fuller v. Oregon, 417 U.S. 40 (1974). The ABA recommends that "reimbursement" (payments required to be made at the termination of a case) should not be required, whereas "contribution" (ordered at the time representation is provided or during the course of proceedings) should be permitted. ABA Standards for Criminal Justice: Providing Defense Services 5-7.2 (3d ed.) (1992) [hereinafter ABA Providing Defense Services]. *See also* discussion of subject at website of the National Association of Criminal Defense Lawyers, *available at* http://www.nacdl.org/public.nsf/printerfriendly/A0408p50?opendocument

59 *Argersinger,* 407 U.S. at 61 n. 30.

60 *Id. See* Cappelletti & Grodley, *Legal Aid: Modern Themes and Variations,* 24 Stan. L. Rev. 347 (1972).

61 Lefstein, *Lessons from England, supra* note 57, at 922–24. The author discusses the many differences between legal aid expenditures for criminal defense in England and the United States and calculates a comparison between the two countries in which the dollar cost of defense functions for which England pays and the United States does not (e.g., police station housing legal representation is routinely provided in England) are removed from consideration. Still, the analysis concludes that, on a per capita basis, England's expenditures far exceed those of the 50 states, the District of Columbia, and the federal government. Moreover, England does not have a death penalty, which is easily the most expensive type of indigent defense case in which representation is provided in the United States. Nevertheless, for 2001–2002, the author found that, in the United States, the federal government and the states spent $11.72 per capita, whereas $26.67 per capita was spent in England during 2002–2003. "… [T]here [are not] obvious explanations, such as the incidence of recorded crime, that would account for England's per capita expenditures for criminal legal aid being so much higher than those in the United States. Instead, the real explanation for the disparity in

One of the most specific statements about funding and the right to counsel is contained in a 1994 dissent of Justice Blackmun in a capital case. In Justice Blackmun's opinion, "the absence of funds to compensate lawyers prevents even qualified lawyers from being able to present an adequate defense."[62] In fairness, the Supreme Court has sometimes expressed concern for whether the states would be able to afford to implement its right to counsel decisions. In *Scott v. Illinois,*[63] the Court explained that the basis for its ruling in *Argersinger* was that "incarceration was so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense, regardless of the cost to the States, implicit in such a rule."[64] The Court then refused to extend the right to counsel to cases where only a fine is imposed against a defendant, reasoning that any extension of the right to counsel where no incarceration results would "impose unpredictable, but necessarily substantial, costs on 50 quite diverse States."[65]

The organized bar has long recognized that if effective defense services are to be provided, *government* must pay for them. As stated in the American Bar Association Standards Related to Providing Defense Services, "[g]overnment has responsibility to fund the full cost of quality legal representation for all eligible persons…."[66] This standard reflects the enormous need for defense services in all of the kinds of cases to which the right to counsel attaches and that it is totally unrealistic to expect that effective representation will be delivered unless systems of public defense are adequately funded. In its Model Rules of Professional Conduct, the ABA strongly encourages lawyers to provide pro bono legal services but excludes from the category of appropriate volunteer service those cases covered by the constitutional right to counsel.[67]

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defense expenditures between the United States and England is simply that England spends more on criminal legal aid…. Indeed, England's commitment to legal services has resulted in its spending more on public defense than on prosecuting criminal cases, which is also in distinct contrast to the United States. Despite complaints of solicitors about a lack of fee increases, England's criminal defense system is considerably better funded than is its U.S. counterpart." *Id.* at 923–24.

62 McFarland v. Scott, 512 U.S. 1256, 1258 (1994) (Blackmun, J., *dissenting*). In contrast, several years earlier, in a dissenting opinion from a denial of *certiorari*, Justice White expressed the view that it was unnecessary to provide any compensation to defense lawyers for undertaking defense representation even in a capital case. *See* Martin County, Florida v. Makemsom, 479 U.S. 1043 (1987) (White, J., *dissenting*).

63 440 U.S. 367 (1979).

64 Scott, 440 U.S. at 372–73.

65 *Id.* at 373.

66 ABA Providing Defense Services, *supra* note 58, at 5-1.6.

67 *See* Model Rules of Prof'l Conduct R. 6.1 (2007) [hereinafter ABA Model Rules]. "Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases." *Id.* at R. 6.1 cmt. 1.

B. Standards for Organizing Defense Services and Client Representation

Following *Gideon* and the Supreme Court's other decisions extending the right to counsel, it was inevitable that the number of lawyers engaged in furnishing defense services would increase significantly and that new systems for providing counsel would emerge. To guide these developments, national organizations have issued important standards about the structure of defense services and the representation of defense lawyers. The American Bar Association and the National Legal Aid and Defender Association are the leading organizations that have published these standards. Although the standards of these organizations have proven influential, membership in both organizations is voluntary and compliance with the organizations' standards is voluntary as well.

In 1992, the American Bar Association issued its third edition of ABA Standards for Criminal Justice on Providing Defense Services.[68] These standards, published in a 106-page booklet, cover all of the important elements related to the structure of public defense programs, such as securing the independence of the defense function, assigned counsel programs, contract defense services, public defender programs, eligibility for defense services, and waiver of counsel. On the important question of professional independence for the defense function, the ABA calls for defense lawyers to "be free from political influence and [to] … be subject to judicial supervision only to the same extent as are lawyers in private practice."[69]

In 2002, the American Bar Association published its ABA Ten Principles of a Public Defense Delivery System.[70] The purpose was to condense its detailed standards for organizing defense services and to make them readily understandable to the lay public

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68 The black-letter standards (without commentary) are *available at* http://www.abanet.org/crimjust/standards/defsvcs_blk.html. The second edition of the standards was approved by the ABA House of Delegates in 1980 and the first edition in 1969. The standards are part of a multi-volume work dealing with most facets of the criminal justice system. When the initial volumes were issued, Chief Justice Warren Burger described the project as "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history." *See* http://www.abanet.org/crimjust/standards/home.html

69 ABA Providing Defense Services, *supra* note 58, at 5-1.3(a).

70 ABA Ten Principles of a Public Defense Delivery System (2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf [hereinafter Ten ABA Principles]. The principles are based on an earlier work prepared by James R. Neuhard, Director of the Michigan State Appellate Defender Office, and Scott Wallace, former Director of Defender Legal Services for the National Legal Aid and Defender Association (NLADA). *See* ABA Ten Principles, at Acknowledgements. In order to improve services in the area of juvenile defense, the National Juvenile Defender Center and the National Legal Aid and Defender Association have issued Ten Core Principles for Providing Quality Delinquency Representation Through

and non-lawyer legislators.[71] Because these principles have gained wide acceptance in public discussions of indigent defense and have been carefully considered by the National Right to Counsel Committee in formulating our own recommendations, we reprint them below:

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.
2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
3. Clients are screened for eligibility and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.
4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
5. Defense counsel's workload is controlled to permit the rendering of quality representation.
6. Defense counsel's ability, training, and experience match the complexity of the case.
7. The same attorney continuously represents the client until completion of the case.
8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the judicial system.
9. Defense counsel is provided with and required to attend continuing legal education.
10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

The most important standards dealing with the duties of lawyers in representing clients were first published in 1994 by the National Legal Aid and Defender Association.

Public Defense Delivery Systems (2d ed. July 2008) [hereinafter Ten Core Principles], *available at* http://www.njdc.info/pdf/10_Core_Principles_2008.pdf.

71 "The Principles were created as a practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems. The Principles constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney. The more extensive ABA policy statement dealing with indigent defense services is contained within the ABA Standards for Criminal Justice, *Providing Defense Services* (3d ed. 1992)…." ABA Ten Principles, *supra* note 70, at Introduction.

The NLADA Performance Guidelines for Criminal Defense Representation are now contained in a 146-page booklet, consisting of black-letter recommendations covering a defense lawyer's duty in representing a criminal defendant, from the very beginning of a case through the time of conviction.[72] Thus, the guidelines deal with such matters as the initial client interview, pretrial release of the defendant, case investigation, filing pretrial motions, plea negotiations, trial preparation, the trial itself, sentencing, and motions for a new trial. Although less thorough than NLADA's standards, some of the same subjects are dealt with in the ABA Standards for Criminal Justice on the Defense Function.[73] Separate standards pertaining to capital defense representation, known as the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases,[74] also have been approved, and there also are standards related to the defense of cases in juvenile courts.[75]

In addition to national standards of the kinds mentioned above, a wide variety of standards dealing with the performance of defense counsel have been issued by defender programs, state commissions, and bar associations, although the vast majority of these are voluntary, and sanctions are not imposed in the event of violations.[76] In contrast, some state supreme courts have issued rules pertaining to defense services, especially in the area of capital defense representation, and these typically are mandatory.[77]

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72 Performance Guidelines for Criminal Def. Representation (4th Printing) (National Legal Aid and Defender Ass'n 2006) [hereinafter NLADA Performance Guidelines].

73 ABA Standards for Criminal Justice: Defense Function (3d ed. 1993) [hereinafter ABA Defense Function]. The black-letter standards (without commentary) are *available at* http://www.abanet.org/crimjust/standards/dfunc_toc.html.

74 ABA Guidelines for the Appointment and Performance of Def. Counsel in Death Penalty Cases (rev. 2003), *available at* http://www.abanet.org/deathpenalty/resources/docs/2003Guidelines.pdf.

75 *See, e.g.,* Juvenile Justice Standards (ABA & Inst. of Judicial Admin. 1981). *See also* Ten Core Principles, *supra* note 70.

76 *See, e.g.,* Standards for Public Defense Services (Washington Defender Association 1989) (adopted by the Washington State Bar Association in January 1990), *available at* http://www.defensenet.org/resources/standards/wda-standards-for-public-defense-services/; Wash. Rev. Code § 10.101.030 (2005), Mass. Gen. Laws ch. 211 § 9 (1996); Performance Standards and Complaint Procedures (Committee for Public Counsel Services), *available at* http://www.publiccounsel.net/private_counsel_manual/private_counsel_manual_pdf/chapters/chapter_4_sections/criminal/criminal_district_court_superior_court_murder_(trial_level).pdf. In contrast to voluntary standards, at least one state has adopted standards that purport to be mandatory as a condition for receiving funding from the state. *See* Standards for Indigent Defense Services in Non-Capital Cases (Indiana Public Defender Commission 1995), *available at* http://www.in.gov/judiciary/pdc/docs/standards/indigent-defense-non-cap.pdf. For a discussion and examples of defense standards, *see* Scott Wallace and David Carroll, *The Implementation and Impact of Indigent Defense Standards* (2003), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/205023.pdf.

77 *See, e.g.,* Ind. R. Crim. Proc. 24 (setting forth experience qualifications for appointment of counsel in capital cases); Tenn. Supreme Ct. R. 13 (experience qualifications for assignment of

C. Professional Duty of Lawyers Representing the Indigent

While almost all of the standards discussed in the preceding section are voluntary, an indigent defense program could choose to require that its attorneys adhere to them. For example, certain of the recommendations contained in NLADA's Performance Guidelines for Criminal Defense Representation could be made mandatory for an agency's attorneys, and sanctions could be imposed in instances of non-compliance.[78] However, we are aware of no defense program that has actually developed a vigorous process to monitor and strictly enforce compliance with performance standards.[79]

But every attorney who practices law in the United States, including all who represent indigent clients, are subject to their respective states' rules of professional conduct.[80] In each state, these rules were approved by the state's highest court and, virtually everywhere, the states' rules are substantially similar in both form and substance to the ABA Model Rules of Professional Conduct.[81] In all states, moreover, failure to comply with the state's rules of professional conduct can lead to disciplinary sanctions, such as reprimand, suspension, or even disbarment.[82]

In addition, pursuant to every state's rules, a lawyer is required to furnish "competent" representation, defined in nearly all states in accordance with the ABA

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counsel in capital cases, much like those in Indiana); La. Supreme Ct. R. XXXI (experience qualifications for appointment of counsel in both capital and appellate cases); Ga. Superior Ct. R. 29.8 (general qualifications for appointment of counsel, not capital-specific, which state that cases should be assigned based on sufficient levels of experience and competence, with less experienced attorneys receiving cases within their capabilities). Additionally, there are state bar associations that have adopted rules regarding capital defense representation. As an example, *see* Guidelines and Standards for Texas Capital Counsel (Standing Committee on Legal Services to the Poor in Criminal Matters 2006), *available at* http://www.texasbar.com/Template.cfm?Section=Texas_Bar_Journal1&Template=/ContentManagement/ContentDisplay.cfm&ContentID=16076.

78 "Use of judgment in deciding upon a particular course of action is reflected by the phrases 'should consider' and 'where appropriate.' In those few instances where NLADA believes a particular action is absolutely essential to providing quality representation, the *Guidelines* use the words 'should' or 'shall.'" NLADA Performance Guidelines, *supra* note 72, at xii.

79 *But see* In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Issued by the Nevada Supreme Court on January 4, 2008), *available at* http://www.nvsupremecourt.us/documents/orders/ADKT411Order.pdf.

80 "Each state has a set of ethics [rules] that govern the lawyers in that state. In addition, some states have special statutes that govern the conduct of lawyers…." Mortimer D. Schwartz, et al., Problems in Legal Ethics 40 (6th ed. 2003).

81 *See supra* note 67, ABA Model Rules. The three states in which the ethical rules are most dissimilar in format from the ABA Model Rules are California, Maine, and New York. *See* Cal. Rules of Prof'l Conduct (1992); Me Bar Rules (2007); NY State Bar Association Lawyer's Code of Prof'l Responsibility (2002).

82 *See* Problems in Legal Ethics, *supra* note 80, at 42.

Model Rules as requiring "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[83] In most states, a comment contained in the states' rules of professional conduct is quite explicit: "A lawyer's workload must be controlled so that each matter can be handled competently."[84] However, as this report shows, defense lawyers often have far too many cases—a major impediment to "competent" representation—which prevents defenders from spending sufficient time with their clients and adequately preparing their cases.[85]

Because defender caseloads are often unmanageable, in 2006, the ABA Standing Committee on Ethics and Professional Responsibility issued for the first time a formal opinion dealing with the obligations of public defenders and other lawyers confronted with too much work.[86] As explained by the ABA's ethics committee, the rules of the profession "provide no exception for lawyers who represent indigent persons charged with crimes."[87] Accordingly, overburdened defense lawyers, their supervisors, and heads of defense programs have inescapable ethical duties. The individual lawyer must take appropriate steps to seek withdrawal from a sufficient number of pending cases and endeavor to stem the flow of additional case assignments.[88] Supervisors and heads of programs also must understand that they, too, are violating their ethical duties if they permit their subordinate attorneys to provide representation in excessive numbers of cases.[89] The opinion is aimed at securing "competent" representation for those clients who continue to be represented by the defender.[90]

Despite the legal profession's requirement that competent representation be provided and that workloads be controlled, there is scant evidence in the United States that defense attorneys are ever actually disciplined for failing to represent their clients adequately. Disciplinary commissions in the 50 states normally act in response to com-

83 ABA Model Rules, *supra* note 67, at R. 1.1 (2007).

84 *See* ABA Model Rules, *supra* note 67, at R. 1.3 cmt. 2. The black letter of Rule 1.3 requires that lawyers "act with reasonable diligence and promptness in representing a client."

85 *See infra* notes 95–124 and accompanying text, Chapter 2.

86 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006), *available at* http://www.abanet.org/cpr/06_441.pdf [hereinafter ABA Formal Op. 06-441].

87 *Id.*

88 *Id.*

89 "Rule 5.1 provides that lawyers who have managerial authority, including those with intermediate managerial responsibilities, over the professional work of a firm or public sector legal agency or department shall make reasonable efforts to ensure that the other lawyers in the agency or department conform to the Rules of Professional Conduct." *Id.*

90 *Id.* The opinion is discussed in Norman Lefstein and Georgia Vagenas, *Restraining Excessive Defender Caseloads: The ABA Ethics Committee Requires Action,* 30 The Champion 10 (Nat'l Assoc. Crim. Defense Lawyers, December 2006).

plaints from disappointed clients, but neither indigent defendants nor others on their behalf often complain about counsel's representation to disciplinary authorities.[91]

There is one area, however, in which the rules of professional conduct, bolstered by decisions of the Supreme Court interpreting the Sixth Amendment, have made an important difference with cost implications. Today, when multiple persons are charged in criminal cases or in juvenile delinquency proceedings, normally, each person should have his or her own separate lawyer, as there are few occasions in which a single defense attorney should represent more than one co-defendant.[92] The ABA

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91 *See, e.g., Prosecutors, Defense Attorneys Rarely Disciplined,* San Jose Mercury News, February 12, 2006: "When California prosecutors and criminal defense attorneys engage in conduct that violates defendants' rights, they can rest assured that they will rarely be held to account by the agency in charge of policing lawyers. A Mercury News review of 1,500 state disciplinary actions over a five-year period found that just one of them involved prosecutorial misconduct. Criminal defense attorneys drew more notice from the State Bar of California, but not much more: Only five percent of the actions concerned criminal defense attorneys targeted for their work on behalf of clients. The findings came in the wake of a Mercury News investigation published last month that revealed the trial and appellate courts also rarely act to curb prosecutors or defense attorneys…. Some experts say that the situation is deplorable, although they are quick to add that California's failures are not unique." *See also* California Commission on Fair Administration of Justice, Report and Recommendations on Reporting Misconduct (October 18, 2007), *available at* http://www.ccfaj.org/documents/reports/prosecutorial/official/official%20report%20on%20reporting%20misconduct.pdf.

92 *See* ABA Model Rules, *supra* note 67, at R. 1.10 (2007). "The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated." *Id.* at R. 1.10 cmt. 2. Additionally, the ABA Model Rules state that a "firm" is a "lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." *Id.* at 1.1(c). The foregoing suggests that a program providing indigent defense services should not be permitted to have separate lawyers from the same office or program represent multiple co-defendants. However, there are a number of states (e.g., Arkansas, California, Illinois, Maryland, New Jersey, and New York) that do not apply the rule of imputed disqualification to public defenders. Although not provided for in the ABA Model Rules, some states have held that if a "Chinese wall" of separation is established among lawyers practicing together, a presumption of shared confidence among the attorneys is rebutted and the rule of imputed disqualification does not apply. *See* Catherine Schaefer, *Imputed Disqualification: Do Ethics Screens Adequately Shield Public Defenders from Conflicts of Interest?,* 21 The Champion 29, 32 (Nat'l Assoc. Criminal Defense Lawyers 1997). South Carolina is an example of a state that has adopted an exception for disqualification due to conflicts of interest when a lawyer is a public defender: "A lawyer representing a client of a public defender office, legal services association, or similar program serving indigent clients shall not be disqualified under this Rule because of the program's representation of another client in the same or a substantially related matter if: (1) the lawyer is screened in a timely manner from access to confidential information relating to and from any participation in the representation of the other client; and (2) the lawyer retains authority over the objectives of the representation pursuant to Rule 5.4(c)." S.C. Rules of

Model Rules preclude representation of multiple parties by a single attorney whenever the interests of clients are "directly adverse" or there is a "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client."[93] As the comment to the rule explains, "[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant."[94] Similarly, the Supreme Court's decisions have underscored the need for each defendant to have his or her own lawyer as a means of securing for each defendant conflict-free representation, thereby providing "effective assistance of counsel" as guaranteed by the Sixth Amendment.[95] Consequently, the number of lawyers needed for indigent clients and the expense of indigent defense services nationwide is considerably greater than it would be otherwise.

Neither rules of professional conduct nor standards governing the conduct of defense lawyers discussed in the preceding section address the myriad of ways in which indigent defense representation in criminal and juvenile cases has become increasingly complex during the past several decades. In 2007, the American Council of Chief Defenders (ACCD) issued a statement that outlines how over the years legal developments and procedural changes have made indigent defense much more difficult, placing on defense lawyers far greater time demands and requiring a higher level of expertise.[96] As the ACCD explains, defense attorneys now have to deal with "entire new practice areas, including sexually violent offender commitment proceedings, and persistent offender ('three strikes') cases which carry the possibility of life imprisonment."[97] Further, the statement discusses the increased complexity of juvenile defense work, the importance of defenders understanding the collateral consequences of convictions, and the specialized knowledge needed by defense lawyers who provide representation in capital cases.[98] Also, defense lawyers must be alert

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Professional Conduct, R 1.10 (e). *Compare* Ethics Advisory Opinion 78-02 (South Carolina Bar Ethics Advisory Comm. 1978) (a public defender office is the same as a law firm for conflict of interest issues).

93 ABA Model Rules, *supra* note 67, at R.1.7(a) (1),(2) (2007).

94 ABA Model Rules, *supra* note 67, R.1.7 cmt. 23 (2007).

95 *See* Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978); Glasser v. United States, 315 U.S. 60 (1942). *See also* ABA Defense Function, *supra* note 73, at 4-3.5(c).

96 *American Council of Chief Defenders Statement on Caseloads and Workloads,* August 24, 2007 [hereinafter *ACCD Statement on Caseloads and Workloads*], *available at* http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCDCASELOADSTATEMENTsept6.pdf. The American Council of Chief Defenders (ACCD) is comprised of heads of defender programs from all over the country. ACCD is a unit of the National Legal Aid and Defender Association.

97 *Id.* at 7.

98 *Id.* at 7–9.

to numerous rules related to procedural default, pursuant to which defendants can forfeit the opportunity to litigate in state and federal appellate courts absent timely objection in the trial court. [99]

D. Ineffective Assistance of Counsel: The Difficulty of Correcting Mistakes

The Supreme Court has long held that the "the right to counsel is the right to the effective assistance of counsel."[100] In the case of *Strickland v. Washington,*[101] decided by an 8–1 majority in 1984, the Supreme Court held that, to successfully claim ineffectiveness, a defendant must establish that the facts of the case satisfy a two-pronged test.[102] First, counsel's performance must have been deficient, meaning that "counsel's representation fell below an objective standard of reasonableness."[103] Specific guidelines to determine whether an attorney meets an objective standard of reasonableness were rejected, but instead "the proper measure remains reasonableness under prevailing professional norms."[104] However, in evaluating a claim of ineffectiveness, a court "must be highly deferential"[105] to defense counsel and "indulge a strong presumption that counsel's performance was within the wide range of reasonable professional assistance."[106]

99 *See, e.g.,* McQuinn v. Commonwealth, 20 Va. App. 753, 460 S.E.2d 624 (*en banc*) (1995) (motion to strike evidence is waived for appeal if not renewed at the close of all evidence); Spencer v. Commonwealth, 238 Va. 295, 384 S.E.2d 785 (1989), *cert. denied*, 493 U.S. 1093 (1990) (defendant who objects to a trial court ruling on *voir dire* of the jury must also object to the seating of the juror to preserve objection for appeal). For procedural default and its application to the death penalty, *see* Larry W. Yackle, *The American Bar Association and Federal Habeas Corpus,* 61 Law & Contemp. Probs. 171 (1998).

100 McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970).

101 Strickland v. Washington, 466 U.S. 668 (1984).

102 While the focus of this section is on the two-prong test for determining ineffective assistance of counsel, a defendant is also denied the effective assistance of counsel when the state "interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Id.* at 686. *See infra* note 124 for cases cited by the Supreme Court.

103 *Strickland,* 466 U.S. at 688.

104 *Id.* The Supreme Court further elaborated on this point by stating that "prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.,* ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2nd ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides." *Id.*

105 *Id.* at 689.

106 *Id.*

In addition, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."[107] Assuming counsel's deficient representation, there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[108] The reason for this second prong of the ineffectiveness standard is because "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."[109] Or, as further explained in the *Strickland* opinion, since the purpose of the Sixth Amendment is "to ensure a fair trial, … [t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[110]

Only Justice Marshall dissented in *Strickland,* rejecting both the "performance" and "prejudice" prongs of the Supreme Court's majority opinion. Respecting the performance prong—the "objective standard of reasonableness"—Justice Marshall complained "that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts."[111]

As for the defendant's burden to show prejudice, Justice Marshall observed that "it may be impossible for a reviewing court confidently to ascertain how the government's evidence and argument would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer,"[112] noting that "evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel."[113] To Justice Marshall, it seemed "senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice."[114]

Since *Strickland* was decided, commentators have been virtually unanimous in their criticisms of the opinion.[115] Some have echoed views of Justice Marshall,[116] whereas

107 *Id.* at 692.
108 *Id.* at 694.
109 *Id.* at 692.
110 *Id.* at 686.
111 *Id.* at 707.
112 *Id.* at 710.
113 *Id.*
114 *Id.*
115 *See, e.g.,* Yale Kamisar et al., Modern Criminal Procedure 1130–32 (10th ed. 2002). *See also infra* notes 116–118 for law review articles discussing *Strickland's* shortcomings and problems.
116 *See, e.g.,* Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard,* 88 J. Crim. L. & C. 242 (1997).

others have accused the Supreme Court of being insensitive to the very serious problem of adequate representation.[117] Most of all, the decision has been criticized due to the exceedingly difficult burden of proof placed on defendants in challenging counsel's representation[118] and because it has led appellate courts to sustain convictions in truly astonishing situations. One writer has summarized a few of the cases:

> [T]he test has proved impossible to meet. Courts have declined to find ineffective assistance where defense counsel slept during portions of the trial, where counsel used heroin and cocaine throughout the trial, where counsel allowed his client to wear the same sweatshirt and shoes in court that the perpetrator was alleged to have worn on the day of the crime, where counsel stated prior to trial that he was not prepared on the law or the facts of the case, and where counsel appointed in a capital case could not name a single Supreme Court decision on the death penalty.[119]

In a companion case to *Strickland,* the Supreme Court rejected an exception to its *Strickland* standard based upon external factors related to the nature of the defense services provided. In *United States v. Cronic,*[120] the defendant was convicted of a complicated mail fraud scheme following a jury trial in which he was represented by a young, court-appointed lawyer with a real estate practice who had no jury trial experience. Although the case involved thousands of pages of documents and the government had taken four and one-half years to prepare its case, the defendant's lawyer was afforded only 25 days. The United States Court of Appeals for the Tenth Circuit reversed the defendant's conviction, inferring that the circumstances of the defendant's representation meant that he had been denied the effective assistance of counsel.[121] The court's opinion emphasized the following factors, among others: the lack of time afforded counsel for investigation and preparation; the inexperience of counsel; the seriousness of the charges; and the complexity of possible defenses.[122]

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117 *See, e.g.,* Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths - A Dead End?,* 86 Colum. L. Rev. 9 (1986).

118 *See, e.g.,* Richard Klein, *A Generation Later: The Constitutionalization of Ineffective Assistance of Counsel,* 58 Md. L. Rev. 1433 (1999); Martin C. Calhoun, *How to Thread the Needle: Toward a Check-List Based Standard for Evaluating Effective Assistance of Counsel Claims,* 77 Geo. L. J. 413 (1988); Jeffrey L. Kirchmeier, *Drinks, Drugs, Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement,* 75 Neb. L. Rev. 425 (1996) (stating that one of the major problems with the *Strickland* decision is the "almost insurmountable hurdle" created by the two prong test); Richard L. Gabriel, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process,* 134 U. Pa. L. Rev. 1259 (1986).

119 David Cole, No Equal Justice 78–79 (1999).

120 United States v. Cronic, 466 U.S. 648 (1984).

121 United States v. Cronic, 675 F.2d 1126 (10 Cir. 1982), *rev'd,* 466 U.S. 648 (1984).

122 *Id.* at 1128.

Nevertheless, the U.S. Supreme Court reversed the Tenth Circuit and reinstated the defendant's conviction, thereby rejecting the proposition that ineffective assistance of counsel could be inferred based upon the circumstances of the defendant's case and counsel's situation. As in *Strickland,* the Court presumed that the lawyer was competent and stressed that "the burden rests on the accused to demonstrate a constitutional violation."[123]

As a result of *Cronic,* it is extremely difficult to overturn a conviction by arguing that institutional deficiencies in public defense mean that ineffective assistance of counsel was rendered. Thus, for example, gross underfunding of a public defender program leading to high public defender caseloads, with representation furnished by untrained lawyers who have only meager support services, is not apt by itself to be sufficient to establish Sixth Amendment violations. However, the Court conceded in *Cronic* that, if there was a complete denial of counsel or "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."[124] In addition, the Court in *Cronic* recognized that there could be circumstances where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."[125]

Like the U.S. Constitution, state constitutions typically contain provisions guaranteeing the assistance of counsel.[126] State supreme courts, therefore, *could* avoid the *Strickland* test for ineffective assistance by invoking their own state's constitutional provisions on counsel and devising tests for ineffectiveness less stringent than the test contained in *Strickland.* In fact, however, only one state actually appears to have done so. The Hawaii Supreme Court has held that "specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence" must be shown and that these reflect "a possible impairment, rather than a probable impairment, of a potentially meritorious defense."[127] As the court further explained, *Strickland's* test "has been criticized as be-

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123 *Cronic,* 466 U.S. at 658.

124 *Cronic,* 466 U.S. at 659. Cases cited in *Cronic* as examples of situations in which it would be appropriate to presume prejudice included the following: Geders v. United States, 425 U.S. 80 (1976) (right to a fair trial deprived when attorney-client consultation is barred during overnight recess); Herring v. New York, 422 U.S. 853 (1975) (there is not a fair trial when summation is disallowed during a bench trial); and Cuyler v. Sullivan, 446 U.S. 335 (1980) (prejudice presumed when counsel labors under an actual conflict of interest).

125 *Cronic,* 466 U.S. at 659–60. The *Cronic* decision is also discussed later in this report. *See infra* notes 24–30 and accompanying text, Chapter 3.

126 *See, e.g.,* H.I. Const. art. I, § 14 ("The State shall provide counsel for an indigent charged with an offense punishable by imprisonment"); N.Y. Const. art. I, § 6 ("In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel….")

127 State v. Wakisaka, 78 P.3d 317, 327 (Haw. 2003).

ing unduly difficult for a defendant to meet," and thus "under Hawaii's Constitution defendants are afforded greater protection of their right to effective assistance of counsel."[128]

In recent years, a narrow majority of the Supreme Court has found ineffective assistance of counsel under the *Strickland* test in several capital cases.[129] However, successful challenges under *Strickland* are the exception both in the Supreme Court and in lower courts.[130] Nevertheless, perhaps *Strickland's* two-prong approach to ineffective assistance of counsel could be justified if it achieved the objective that the Supreme Court announced for its decision, namely, permitting society to have confidence that the outcome of the case is a just result. As shown in the next section, however, we cannot rely on our courts always to reach the correct result, and *Strickland's* test for judging effective assistance of counsel has been unsuccessful in protecting the innocent, let alone ensuring that counsel has performed competently.

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128 *Id.* at 327 n. 10. In interpreting their state constitutional provisions for ineffective assistance of counsel, several state supreme courts have articulated their standards in ways that differ from the Supreme Court's *Strickland* test. *See e.g.,* Ryan v. Palmateer, 108 P.3d 1127 (Ore. 2005). Also, although Massachusetts and New York courts have stated that their tests for ineffective assistance of counsel under their state constitutions differ from the *Strickland* two-prong approach, an analysis of cases from these states suggests that there does not appear to be any meaningful difference between *Strickland* and what is required under state law. *See, e.g.,* Commonwealth v. Urena, 632 N.E.2d 1200 (Mass. 1994) (although the court acknowledges that there are apparently two different but similar tests for ineffective assistance of counsel under Massachusetts and federal law, the nature of the difference is left unresolved); People v. Sowizdral, 275 A.D.2d 473, 474, 712 N.Y.S.2d 203 (2000) ("courts of this state have not adopted the *Strickland* two-prong analysis for ineffective assistance of counsel"); People v. Acevedo, 2007 NY Slip Op. 6451 (2007) (analyzing facts under both federal and state tests for ineffective assistance and reaching the same result).

129 *See* Rompilla v. Beard, 545 U.S. 374 (2005) (lawyers who failed to review a court file that would have yielded possible mitigation evidence relevant to death penalty sentencing hearing failed *Strickland's* test and were ineffective); Wiggins v. Smith, 539 U.S. 510 (2003) (lawyer's failure to look beyond pre-sentence report and department of social services records to discover mitigation evidence in a capital case that showed years of abuse, homelessness, foster care, and physical torment, failed *Strickland's* test and was ineffective); Williams v. Taylor, 529 U.S. 362 (2000) (lawyer's failure to discover and present certain mitigation evidence in a capital case sentencing hearing failed *Strickland's* test and was ineffective).

130 *See, e.g.,* Martin C. Calhoun, *How to Thread the Needle: Toward a Check-List Based Standard for Evaluating Effective Assistance of Counsel Claims,* 77 Geo. L. J. 413, 457 (1988) (from the time of the *Strickland* decision until the time of the article the Supreme Court has rejected all of the ineffectiveness claims that it squarely addressed and survey of circuit court ineffectiveness cases shows that only 30 of 702 claims, or 4.3%, were successful).

E. Conviction of the Innocent and the Importance of Counsel

Since the first DNA exoneration case in the United States in 1989,[131] it has become increasingly evident that state court justice systems all too often make egregious mistakes, resulting in innocent persons being convicted while the guilty go free. Even when *Gideon* and the Supreme Court's subsequent right-to-counsel decisions were rendered, there was reason to believe that innocent persons were sometimes convicted or felt pressure to plead guilty to offenses brought against them.[132] But the evidence then was not nearly as compelling as it is now. Today, largely because of DNA, we know for certain that our criminal justice systems are not nearly as accurate as some have believed,[133] and this reality furnishes compelling justification for ensuring that indigent defense in the United States is well funded and soundly organized. Effective lawyers not only can secure fair treatment for the indigent accused, they also can play a vital role in protecting innocent persons from wrongful conviction.

While there is now a substantial body of literature dealing with wrongful convictions,[134] two recent studies are especially noteworthy because they explain the scope of the problem and the reasons that mistakes occur. In *Exonerations in the United States 1989 Through 2003,*[135] researchers from the University of Michigan documented 340 exonerations of innocent defendants. Of this number, 144 were cleared

131 David Vasquez was exonerated by DNA evidence on January 4, 1989. He had been incorrectly convicted in Virginia for second degree homicide and burglary in 1985 and sentenced to 35 years in prison. *See The Innocence Project, available at* http://www.innocenceproject.org/Content/276.php.

132 *See, e.g.,* Martin L. Radelet et al., In Spite of Innocence (1992).

133 Justice O'Connor has suggested that the Constitution provides "unparalleled protections against convicting the innocent." *See* Herrera v. Collins, 506 U.S. 390, 420 (1993) (O'Connor, J. concurring).

134 *See, e.g.,* Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction,* 6 U. Chi. L. Sch. Roundtable 73, 75–80, 90–92 (1999) (discusses how innocent persons can be convicted and the difficult burden of establishing ineffective assistance of counsel); Penny J. White, *Errors and Ethics: Dilemmas in Death,* 29 Hofstra L. Rev. 1265, 1287–95, 1296–98 (2001) (discusses Illinois rules to eliminate causes of errors in capital cases and recommends additional remedies to provide a reliable system in capital cases); James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases 1973–1995,* 78 Tex. L. Rev. 839, 1844 (2000) (study of 4,578 capital sentences in state appellate courts and 599 capital sentences in the federal courts, concluding that capital sentences spend much time under judicial review precisely because they are persistently prone to error); Barry Scheck et al., Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted (2000); Wrongly Convicted: Perspectives on Failed Justice (Saundra D. Westervelt & John A. Humphrey eds., 2001); C. Ronald Huff & Arye Rattner, Convicted But Innocent; Wrongful Conviction and Public Policy (1996); Michael L. Radelet et al., In Spite of Innocence: Erroneous Convictions in Capital Cases (1992); Martin Yant, Presumed Guilty: When Innocent People Are Wrongly Convicted (1991).

135 Samuel L. Gross et al., *Exonerations in the United States 1989 Through 2003,* 95 J. Crim. L. & Criminology 523 (2005).

by DNA evidence, whereas 196 were exonerated through other means. As a group, the exonerated unjustly spent more than 3,400 years in prison, on the average about 10 years each.[136]

Of the 340 exonerations, 42 were cases in which an executive authority issued pardons based on evidence of innocence; 263 were cases in which courts dismissed the charges due to evidence of innocence, including DNA; in 31 cases, defendants were acquitted in a retrial based on evidence that they were never involved in the offense; and in four cases, states posthumously declared that the defendants were innocent of the crimes of which they were convicted.[137] The problem is national in scope as the 340 cases were from 38 states, with the most populous states in the country having had some of the largest number of exonerations, i.e., California, Texas, New York, Florida, and Illinois.[138] In developing their database, the researchers purposely excluded cases in which there were mass exonerations, such as the Rampart exoneration cases from Los Angeles in which probably more than 100 defendants were convicted based on police lies and the Tulia, Texas, cases in which 39 defendants were convicted due to the false testimony of an undercover narcotics agent.[139]

The study also identified the most frequent, direct causes of wrongful convictions. The researchers found that mistaken eyewitness identifications had occurred in 64% of the exoneration cases (219 out of 340); 43% of the exonerations involved perjury (146 out of 340); and in 15% of the exonerated cases the accused, often a juvenile or defendant with a mental disability, falsely confessed in response to police pressures (51 out of 340).[140] One of the study's most disturbing findings is that the vast majority of the 121 rape case exonerations involved mistaken eyewitness identifications (88% of the cases), whereas the study contains only six robbery exonerations even though the number of robberies in the U.S. far exceed the number of rapes and invariably involve eyewitness identifications.[141] Obviously, DNA evidence accounts for the difference in the number of exonerations in these two different kinds of cases. As the authors of the study note: "If we had a technique for detecting false convictions in robberies that was comparable to DNA identification for rapes, robbery exonerations would greatly outnumber rape exonerations…."[142] Ultimately, the authors conclude that "[w]e cannot come close to estimating the number of false convictions that occur

136 *Id.* at 524.

137 *Id.*

138 *Id.* at 541.

139 *Id.* at 551. The erroneous convictions in the Tulia, Texas, cases, which were due to gross police misconduct and abysmal representation of the defendants, is examined in Nate Blakeslee, Tulia (2005).

140 *Id.* at 542–47.

141 *Id.* at 530.

142 *Id.* at 531.

in the United States, but the accumulating mass of exonerations gives us a glimpse of what we're missing…. Any plausible guess at the total number of miscarriages of justice in America in the last fifteen years must be in the thousands, perhaps tens of thousands."[143]

A second study of wrongful convictions by a University of Virginia law professor published in 2008 tracks the first 200 cases of persons exonerated due solely to DNA evidence.[144] The study identified not only the causes of the wrongful convictions, as in the University of Michigan study, but it also explored how the cases were dealt with on appeal and during subsequent post-conviction proceedings. No previous study had ever sought to examine how the cases of exonerated defendants have been handled in the courts from start to finish.

As for the causes of wrongful conviction, the study determined that mistaken eyewitness identification was involved in 79% of the cases; false forensic evidence (e.g., blood, fingerprint, and hair comparisons) in 55% of the cases; false informant testimony in 18% of the cases; and false confessions of defendants in 16% of the cases.[145] After their convictions in trial courts, the defendants did not fare much better:

> … appellate courts did not effectively review the unreliable and false evidence that supported these convictions…. Innocent appellants rarely succeeded in litigating claims that challenged the false evidence supporting their wrongful convictions. Frequently they did not even raise claims challenging that evidence, perhaps due to the expense and difficulty of raising such factual claims. For example, no conviction was reversed based on a challenge to an eyewitness identification…. In many innocence cases, courts denied claims finding that evidence of guilt offset error, sometimes even referring to 'overwhelming' evidence of the appellant's guilt.[146]

Given the often woeful state of indigent defense services in the United States, as we describe in this report,[147] it is entirely reasonable to infer that a substantial number of defendants wrongfully convicted were inadequately represented. And while the foregoing studies point to specific reasons for wrongful convictions other than defense counsel's performance, sometimes it is perfectly obvious that a lawyer's ineffective assistance contributed significantly to the error along with other factors. One such case is that of Jimmy Ray Bromgard, who after serving more than 14 years in prison,

143 *Id.* at 551.
144 Brandon L. Garrett, *Judging Innocence,* 108 Columbia. L. Rev. 55 (2008).
145 *Id.* at 89–91.
146 *Id.* at 61.
147 *See infra* Chapter 2 of this report.

was exonerated based upon DNA of a brutal rape of an eight-year old girl. While his wrongful conviction was attributable directly to mistaken eyewitness identification and faulty scientific evidence, Bromgard's attorney clearly failed to do his job. As explained in one summary of Bromgard's case, the defense lawyer "failed to challenge the girl's courtroom identification…, undertook no investigation, gave no opening statement, did not prepare a closing argument, … failed to file an appeal, … failed to object when the state's expert witness testified, without scientific basis, that the chances were only one in one hundred thousand that scalp and pubic hairs found at the crime scene were not Bromgard's."[148]

We are not so naïve as to believe that all wrongful convictions can be prevented if defendants are represented effectively by well-trained and able defense counsel. But we are convinced that defendants who are innocent—and there are an unknown number who are—stand virtually no chance of avoiding conviction absent dedicated representation by attorneys who can investigate the client's case, find witnesses, cross-examine skillfully, and otherwise offer an effective defense to counter the state's false evidence. The causes of wrongful conviction, such as mistaken eyewitness identifications, faulty scientific evidence, and police perjury, are all matters that competent defense lawyers can address. Former Attorney General Janet Reno had it exactly right: "[i]n the end, a good lawyer is the best defense against wrongful conviction."[149]

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148 Lefstein, *Lessons from England, supra* note 57, at 860. This case illustrates one of the other costs of inadequate systems of public defense besides imprisonment of the innocent. After Bromgard's release from prison, he sued the State of Montana and settled his claims out-of-court for $3.5 million, the largest sum Montana has ever paid to settle a civil-rights case. Recently, a lawsuit against Yellowstone County for a violation of his civil rights because of its failure to provide him with an adequate defense was dismissed by a federal judge, and an appeal of this decision is likely. The complaint in this case alleges that "[M]r. Bromgard's conviction was also caused by the deliberate indifference of Yellowstone County officials who knowingly established a woefully inadequate system of indigent defense representation in criminal cases, utterly lacking adequate compensation, screening, supervision and training for its contract counsel." Complaint, Bromgard v. State of Montana, et al., Civil No. 04-192- M-LB, (D. Mont. 2004), *available at* http://www.sado.org/fees/Bromgard%20complaint.pdf. *See also* Clair Johnson, *Bromgard Appeals Ruling that Favors County,* Billings Gazette, December 24, 2008, *available at* http://billingsgazette.net/articles/2008/12/25/news/local/20-bromgard.txt. The subject of civil rights claims is discussed *infra* notes 152–66 and accompanying text, Chapter 3. Since the Bromgard case, Montana has changed its system of indigent defense representation. *See infra* notes 11, 29, and accompanying text, Chapter 4.

149 Office of Justice Programs, U.S. Dept. of Justice, Nat'l Symposium on Indigent Defense 2000, at vii (2000).

CHAPTER 2

Indigent Defense Today: A Dire Need for Reform

A. The Need for Reform is Decades Old

Since the U.S. Supreme Court's *Gideon* decision in 1963, several organizations have conducted national studies of indigent defense over several decades. Invariably, these studies conveyed a grim view of defense services in criminal and juvenile cases, pointing out many problems in providing counsel across the country, including inadequate funding of defense systems as a whole;[1] inadequate compensation for assigned counsel; inadequate funding of public defenders who are "treated like stepchildren;"[2] pressure to waive counsel on juveniles[3] and adult defendants;[4] inconsistent indigency standards;[5] incompetent or inexperienced counsel;[6] late appointment of counsel;[7] the need for greater public financing of indigent defense;[8] increased pressure on defendants by defense attorneys to accept guilty pleas to expedite the movement of cases;[9] large differences between urban versus rural representation;[10] disproportionate salaries

1 The report states that this is "the greatest problem faced by defender systems." Nat'l Legal Aid and Defender Ass'n, Guidelines for Legal Defense Systems in the United States: Report of the National Study Commission on Defense Services 8 (1976) [hereinafter NLADA Guidelines for Legal Defense Systems].

2 Lee Silverstein, Defense of the Poor in Criminal Cases in American State Courts: A Field Study and Report 149 (1965). Silverstein began his one-year study before the Supreme Court's decision in *Gideon.* The study was commissioned by the American Bar Association (ABA) and the Ford Foundation and targeted 300 sample counties with a mail survey sent to each county.

3 Patricia puritz et al., A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings 7–8 (reprint 2002) (1995) [hereinafter Puritz], *available at* http://www.njdc.info/pdf/cfjfull.pdf.

4 Sheldon Krantz, et al., Right to Counsel in Criminal Cases: The Mandate of *Argersinger v. Hamlin* 5 (1976) [hereinafter Krantz].

5 *Id.*

6 *Id.*

7 *Id.*

8 *See* ABA Special Committee on Criminal Justice, Criminal Justice in Crisis: A Report to the American People and The American Bar on Criminal Justice in the United States: Some Myths, Some Realities, and Some Questions for the Future 39–44 (1988) [hereinafter ABA Special Committee on Criminal Justice].

9 National Advisory Commission on Criminal Justice Standards and Goals: Courts 43 (1973) [hereinafter NAC Courts]. In 1971, the Law Enforcement Assistance Administration, a federal agency within the United States Department of Justice, commissioned the National Advisory Commission (NAC) on Criminal Justice Standards and Goals to produce "for the first time, national criminal justice standards and goals for crime reduction and prevention at the State and local levels." *Id.* at Foreword. The resulting report, published in 1973, is the only national source that has attempted to quantify maximum annual public defender caseloads. In preparing its report, the NAC drew on limited empirical data then available, but relied mostly on qualitative and anecdotal information to formulate their recommended standards. This subject is further discussed in this chapter and later in this Report. *See infra* notes 96–124 and accompanying text. *See also infra* notes 45–51 and accompanying text, Chapter 5.

10 Nat'l Legal Aid and Defender Ass'n, The Other Face of Justice 27 (1973) [hereinafter NLADA Other Face of Justice]. This study was commissioned by the Law Enforcement

between public defenders and prosecutors;[11] overwhelming caseloads of juvenile defenders;[12] excessive caseloads of public defenders;[13] lack of investigative resources; and understaffing of public defense offices.[14]

In the 1970's and 1980's, most public defender programs employed lawyers who provided representation on a part-time basis.[15] County governments mostly organized and funded indigent defense.[16] In 1962, the year before the *Gideon* decision, it was estimated that indigent defense expenditures for felony cases would cost $25 million if representation were provided by assigned counsel at the average fee rates then being paid by county governments.[17] But by 1972, estimated expenditures for indigent defense were $87 million,[18] $200 million in 1976,[19] $436 million in 1980,[20] $625 million

Assistance Administration of the U.S. Department of Justice. An NLADA survey administered for this study documented information from 3110 counties in the United States. A field study of 20 randomly selected counties was conducted to ascertain how indigent defense services were being delivered.

11 About 76% of full-time chief public defenders were being paid less than the chief prosecutor in their jurisdiction. *Id.* at 19.

12 Puritz, *supra* note 3, at 6.

13 *See* NLADA Guidelines for Legal Defense Systems, *supra* note 1, at 8. *See also* ABA, Gideon Undone: The Crisis in Indigent Defense Funding (John Thomas Moran ed., 1982) [hereinafter ABA Gideon Undone] (estimating the increase of felony defendants requiring counsel had gone from 48% in recent years to 55% to 60% in 1982).

14 NLADA Other Face of Justice, *supra* note 10, at 36. *See also* Krantz, *supra* note 4, at 17.

15 NLADA reported that 650 defender programs existed in 883 counties throughout the country, representing almost two-thirds of the country's population. Of those defender offices that reported information, more than 50% of the offices were part-time and nearly 75% of individual defenders were part-time. NLADA Other Face of Justice, *supra* note 10, at 13, 16.

16 NLADA's study showed that county governments primarily funded public defender systems in most jurisdictions. As reported by defender offices, state governments contributed 28.7% of funding for public defender programs while counties funded 57.8%, the federal government provided 9.7%, municipal governments provided 2.8%, and private organizations furnished 1%. *Id.* at 31. A 1982 study also showed that county-based systems were the most dominant in the United States. *See* Robert Spangenberg et al., Bureau of Justice Statistics, U.S. Department of Justice, National Criminal Defense Systems Study 9 (1982) [hereinafter Spangenberg, National Criminal Defense Systems].

17 Silverstein, *supra* note 2, at 10.

18 County governments provided over $50 million of the $87 million in indigent defense funding. Krantz, *supra* note 4, at 14.

19 This sum is a conservative estimate based on data collected by staff of the project. *See* NLADA Guidelines for Legal Defense Systems, *supra* note 1, at 7.

20 Norman Lefstein, Criminal Defense Services for the Poor: Methods and Programs for Providing Legal Representation and the Need for Adequate Financing 10 (ABA 1982) [hereinafter Lefstein, Criminal Defense Services].

in 1982,[21] and $991 million in 1986.[22] A 1973 study estimated that that the average cost per indigent defense case was $122.[23] Although funding of indigent defense increased after *Gideon,* in 1982, nearly 20 years after the decision, one source revealed that criminal defense services only accounted for 1.5% of total expenditures of the entire criminal justice system.[24] However, the criminal justice system as a whole was also underfunded. A study in 1985 stated that "less than 3% of all government spending in the United States went to support all civil and criminal justice activities."[25]

These national reports made clear that there needed to be important indigent defense improvements, as well as increased funding. Although funding has gone up, it is still woefully insufficient, and many of the same problems exist today, more than four decades later. Our country's failure to provide adequate representation to indigent defendants and juveniles is not just a problem of the past.

B. Insufficient Funding

Despite the progress since *Gideon,* there is still an urgent need for fundamental reform. To understand this need, we begin by examining the funding of indigent defense, including the methods and sources of funding. Later, we discuss the inextricable link between inadequate funding and the current crisis.

According to the latest available data on nationwide indigent defense expenditures, the 50 states and their counties spent approximately $3.5 billion on indigent defense in 2005.[26] A current figure is unavailable, since there is no national source to maintain and report on indigent defense data for the 50 states. Although the United States

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21 *See* Spangenberg, National Criminal Defense Systems, *supra* note 16, at 23.

22 A survey performed in 1986 revealed that, of the increased funding for indigent defense, 61% was derived from county governments, 38% from state governments, and 1% from other sources. *See* The Spangenberg Group, U.S. Department of Justice, *Criminal Defense for the Poor, 1986,* Bureau of Justice Statistics Bulletin, Sept. 1988, at 4 [hereinafter TSG *Criminal Defense for the Poor*].

23 NLADA Other Face of Justice, *supra* note 10, at 32. Based on FBI data, the study reported that in 1971 there were over 8 million non-traffic arrests—approximately 1.7 million felony arrests and 6.9 million non-traffic misdemeanor arrests (including over 1.7 million juvenile arrests). Of the 8 million people accused of crimes each year, more than half required that counsel be appointed to defend them. Moreover, the NLADA study found that, on average, 65% of felony defendants were indigent and, on average, 47% of misdemeanor defendants were indigent and in need of public representation. *Id.* at 70–71.

24 *See* ABA Gideon Undone, *supra* note 13; *see also* Lefstein, Criminal Defense Services, *supra* note 20, at 10.

25 ABA Special Committee on Criminal Justice, *supra* note 8, at 5.

26 The Spangenberg Group, State and County Expenditures for Indigent Defense Services in Fiscal Year 2005 37 (2006) (prepared with financial support of the ABA Standing Committee

Supreme Court has mandated that governments supply counsel to indigent defendants, as discussed in Chapter 1, it has never mandated how such systems should be created or funded. In implementing the right to counsel, both state and local governments are free to decide the type of indigent defense systems to employ and how to fund them. Although states must ensure that counsel is provided, some have chosen to place all or some of the burden on local governments.

Indigent Defense Models

State and local governments choose from three primary models for implementing the right to counsel: public defender, contract counsel, or private assigned counsel. In the public defender model, attorneys are hired to handle the bulk of cases requiring counsel in that jurisdiction. Public defender attorneys are full- or part-time salaried employees who frequently work together in an office with a director or administrator and support staff. Even when public defenders are the primary indigent defense providers in the jurisdiction, because some cases present a conflict of interest, public defenders cannot accept every case, and an alternative method for providing counsel must also exist. In the contract model, private attorneys are chosen by a jurisdiction—often after a bidding contest—and provide representation as provided by contractual terms. Most contracts are annual and require counsel to handle a certain number of cases or a particular type of case (e.g., misdemeanors), although some require counsel to handle all cases except where conflicts exist. Finally, in the assigned counsel model, private attorneys are appointed by the court from a formal or informal list of attorneys who accept cases for a fixed rate per hour or per case. This model is also typically used for cases when public defenders or contract counsel exist but cannot provide representation.

State and County Funding

Across the country, funding for these indigent defense models is provided by states, counties, or a combination of both.[27] As the table below shows, the majority of states (28) now essentially fully fund indigent defense (i.e., provide more than 90% of the funding).

on Legal Aid and Indigent Defendants) [hereinafter ABA/TSG FY 2005 State and County Expenditures].

27 In every state, indigent defense funding includes not only criminal and juvenile cases to which the Sixth Amendment right to counsel attaches, but also other kinds of cases for which the state provides counsel (e.g., abuse and neglect and termination of parental rights cases, child in need of services cases, and mental health commitment cases). *See supra* note 31 and accompanying text, Chapter 1.

Table I: Sources of Indigent Defense Funding in the 50 States[28]

Full State Funding[29]		More Than 50% State Funding	Full County Funding	More Than 50% County Funding
Alaska	Montana	Kansas	Pennsylvania	Alabama
Arkansas	New Hampshire	Louisiana	Utah	Arizona
Colorado	New Jersey	Oklahoma		California
Connecticut	New Mexico	South Carolina		Georgia
Delaware	North Carolina			Idaho
Florida	North Dakota			Illinois
Hawaii	Oregon			Indiana
Iowa	Rhode Island			Michigan
Kentucky	Tennessee			Mississippi
Maine	Vermont			Nebraska
Maryland	Virginia			Nevada
Massachusetts	West Virginia			New York
Minnesota	Wisconsin			Ohio
Missouri	Wyoming[30]			South Dakota
				Texas
				Washington

Only Pennsylvania and Utah still require their counties to fund all indigent defense expenses. Five states provide between 50% and 85% of the funds required for indigent defense, and 16 states shift the burden of over half the funding to the counties.[31] As numerous statewide indigent defense studies have shown,[32] when counties primarily

28 This table is based substantially on ABA/TSG FY 2005 State and County Expenditures, *supra* note 26, at 35–37.

29 These states (except for Wyoming) fund 90% or more of indigent defense expenditures. In some of the states, local governments contribute office space and/or a small amount of additional funding.

30 The State of Wyoming contributes approximately 85% of indigent defense expenditures.

31 The five states are Kansas, Lousiana, Oklahoma, South Carolina, and Wyoming. *See also supra* note 30. Beyond Pennsylvania and Utah, only six states contribute less than 10% of funding—Arizona, California, Michigan, Nebraska, Nevada, and Washington. *See* ABA/TSG FY 2005 State and County Expenditures, *supra* note 26, at 35–37.

32 *See, e.g.,* The Spangenberg Group, Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services (2006) [hereinafter TSG NY Report]; Nebraska Minority and Justice Task Force/Implementation Committee, The Indigent Defense System In Nebraska: An Update (2004) [hereinafter Nebraska Update]; The Spangenberg Group, Status of Indigent Defense in Georgia: A Study for the Chief Justice's Commission on Indigent Defense Part I (2002) [hereinafter TSG GA Report Part I].

fund indigent defense, there are certain to be inequities among the locally funded systems. Inevitably, urban counties have far more cases than rural counties and are often overburdened. At the same time, a rural county, with fewer resources, may be financially crippled by the need to fund the defense of a single serious homicide case.

Even populous counties sometimes struggle when faced with the cost of defending capital or other complex cases. In Travis County (Austin), Texas, costs have been rising and will continue to rise due to an increase in the number of cases, increased fees for court-appointed counsel, and a rise in the number of complex cases. In the past, the county normally had one or two death penalty or complex prosecutions a year, but it appears that it may receive as many as five such cases during 2008–2009. Consequently, during the next fiscal year, Travis County is likely to need $7 million for indigent defense, but the state's last contribution to the county was only $427,700.[33]

Fortunately, more states are beginning to recognize the importance of providing greater state funding. In 1986, 10 states contributed nothing toward indigent defense.[34] In 1986, the 50 states combined contributed 38% of the total funding of indigent defense, while the counties contributed 62%.[35] In 2005, the states contributed just over 50% of overall funding.[36] In several states, the comparative share of state funding has increased dramatically. For instance, between 1986 and 2005, Arkansas went from contributing nothing toward indigent defense to contributing 91% of the overall costs; Iowa went from contributing less then three percent to full state funding; and Minnesota went from 11% to 93% state funding.[37]

During the past several years, more states have begun to relieve the counties of their funding burden. This has occurred along with the creation of more unified statewide systems or oversight bodies, which is further discussed in Chapter 4.[38] In 2002, Montana spent only slightly more than the counties to fund indigent defense.

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33 Steven Kreytak, *Big Money Set Aside for Major Cases. Defense Costs Mount for Indigent Defendants,* Austin American-Statesman, Oct. 18, 2008.

34 Arizona, Arkansas, Georgia, Idaho, Louisiana, Mississippi, Nebraska, Pennsylvania, Texas, and Utah. *See* TSG *Criminal Defense for the Poor, supra* note 22, at 4.

35 Of the total cost of indigent defense ($991,047,250), the states contributed $377,698,104 and the counties contributed $604,355,473. Other sources of indigent defense funding (e.g., municipal, federal and private funding) included in the total amounted to $8,993,673. *Id.*

36 Of the total cost of indigent defense ($3,520,941,367), the states contributed $1,777,017,327 and the counties contributed $1,684,389,040. *See* ABA/TSG FY 2005 State and County Expenditures, *supra* note 26, at 37.

37 *See* TSG *Criminal Defense for the Poor, supra* note 22, at 4; ABA/TSG FY 2005 State and County Expenditures , *supra* note 26, at 35–36.

38 *See infra* notes 11–38 and accompanying text, Chapter 4.

In 2005, following a statewide study[39] and class-action lawsuit,[40] Montana created a new statewide system and accepted full funding of the new system, substantially increasing state expenditures.[41] In 2006, including supplemental expenditures, state spending again increased significantly.[42] In Georgia, following the efforts of a study commission and statewide study of indigent defense,[43] the state created a statewide system and in 2005, compared with 2002, more than doubled its share of funding.[44] However, this increase in state funding did not totally relieve the counties. While the state took over the funding of adult felonies, criminal appeals, and juvenile delinquency cases, the counties still must fund all misdemeanor and ordinance violation cases. Between 2002 and 2005, the counties' expenditures increased by 28%.[45]

In Texas, the Fair Defense Act of 2001 created the Texas Task Force on Indigent Defense to help the counties improve their local indigent defense systems and provide state oversight. Through the Task Force, state funds are awarded to counties whose indigent defense programs meet certain criteria.[46] Since 2002, following the creation of the Task Force, Texas has nearly doubled its share of indigent defense funding.[47]

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39 Nat'l Legal Aid and Defender Ass'n, An Assessment of Indigent Defense Services in Montana (2004).

40 For information on the lawsuit, *see* American Civil Liberties Union website, *available at* http://www.aclu.org/crimjustice/indigent/10127prs20020214.html. *See also infra* note 29 and accompanying text, Chapter 4.

41 In 2002, Montana spent $9.2 million on indigent defense; in 2005, the sum was $13.8 million. *See* ABA/TSG FY 2005 State and County Expenditures, *supra* note 26, at 36.

42 In 2006, the state spent $19.3 million on indigent defense. *Fiscal Year 2008 Legislative Scorecard: Developments Affecting Indigent Defense,* The Spangenberg Rep., Nov. 2007, at 1.

43 *See* TSG GA Report Part I, *supra* note 32.

44 In 2002, when Georgia's counties primarily funded local indigent defense systems, the state contributed $9.4 million or 17% of overall funding; in 2005, for the new statewide system, the state contributed $37.2 million or 40% of overall funding. *See* The Spangenberg Group, State and County Expenditures for Indigent Defense Services in Fiscal Year 2002 35 (2003) (prepared with financial support from the ABA Standing Committee on Legal Aid and Indigent Defendants [hereinafter ABA/TSG FY 2002 State and County Expenditures]; ABA/TSG FY 2005 State and County Expenditures, *supra* note 26, at 35.

45 County funding increased from $44.6 million in 2002 to $57 million in 2005. *See* ABA/TSG FY 2002 State and County Expenditures, *supra* note 44, at 35; ABA/TSG FY 2005 State and County Expenditures, *supra* note 26, at 35.

46 Grants in Texas have helped to create new public defender offices in at least 11 counties so far. *See* Task Force on Indigent Defense, FY 2008 Discretionary Grant Award with Recommended Adjustments (Aug. 24, 2007), *available at* http://www.courts.state.tx.us/tfid/pdf/FY08Discretionaryawards082407.pdf. For further discussion of Texas, *see infra* notes 52–58 and accompanying text, Chapter 4.

47 In 2002, Texas contributed $7.2 million, or 6.3% of overall indigent defense funding, while the counties contributed $114 million. In 2005 the state's share increased to $16.4 million or 11.3% of indigent defense expenditures. In 2006, Texas state funding was about 10% or $15,686,574 compared to $150,527,384 by the counties. *See* Texas Task Force on Indigent Defense, Task Force

In Nevada, an effort is underway by the Nevada Association of Counties (NACO), the Nevada Supreme Court's Indigent Defense Commission, and others to establish a fully state-funded indigent defense system. On behalf of NACO, a bill has been introduced in the 2009 legislative session that seeks to allow counties with populations over 100,000 (i.e., Clark and Washoe counties) to use the State Public Defender's Office and require the state to fund all indigent defense expenses. Currently, only the smaller Nevada counties may use the State Public Defender's Office, and they must pay 80% of the cost of doing so or otherwise fully fund their own local system.[48] In 2005, Nevada contributed less than three percent of the overall cost of indigent defense in the state.[49]

General and Special Fund Revenues

In the competition for state funds, indigent defense is frequently at the back of the line. As a result, in some states indigent defense is not entirely supported by state general funds. Special funds and other revenue sources are unpredictable and more apt to fall short of indigent defense needs.[50] In recent years, many states that have increased their indigent defense funding have relied substantially on these latter funding mechanisms. Regrettably, this approach often undermines the goal of adequate indigent defense funding.

In Georgia, for example, the legislature voted in 2004 to fund its new statewide public defender system through additional fees and surcharges, including additional fees in civil and criminal cases, surcharges on bail bonds, and an application fee for indigent defendants. Unfortunately, as later discussed in this chapter, collection of these special funds has not been sufficient to cover Georgia's rising costs. Moreover,

on Indigent Defense Meeting Notebook 82 (2005); ABA/TSG FY 2005 State and County Expenditures, *supra* note 26, at 36; *Fiscal Year 2008 Legislative Scorecard: Developments Affecting Indigent Defense,* The Spangenberg Rep., Nov. 2007, at 1.

48 Keith Trout, *NACO Seeks Five Bill Drafts on Behalf of Counties,* Reno Gazette-J., Oct. 10, 2008. Less than half (seven) of the 15 counties under 100,000 employ the State Public Defender's Office. Division of Internal Audits, Department of Admin., Audit of the State Public Defender's Office 4 (2005) *available at* http://dintaud.state.nv.us/ExecutiveBranch/AuditReports/FY%202005/05-03_Public_Defender_Final_report.pdf.

49 ABA/TSG FY 2005 State and County Expenditures, *supra* note 26, at 36.

50 For instance, when Wisconsin created an application fee program with funds earmarked for indigent defense, the program was projected to generate $7 million. However, actual collections during the first four years of the program failed to exceed $100,000. *See* The Spangenberg Group, Public Defender Application Fees: 2001 Update 19 (2001) (prepared with financial support from the ABA Standing Committee on Legal Aid and Indigent Defendants), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/pdapplicationfees2001-narrative.pdf. For the legality of requiring such payments from defendants, *see supra* note 58, Chapter 1.

not all of the funds collected have been directed to indigent defense. Although the fund collected $45.5 million in fiscal year 2008, indigent defense is receiving only $40.4 million in fiscal year 2009, with the remaining $5 million being returned to Georgia's general fund.[51]

In Kentucky, 15% of indigent defense funding is derived from non-general fund sources, including a portion of court costs imposed in all criminal cases and a portion of a fee in DUI cases. Although these revenue sources were created to help defray the cost of indigent defense, the legislature has in the past used the existence of these revenues to justify cutting general fund support for indigent defense.[52] In other words, alternative funding mechanisms run the risk of being used to supplant rather than supplement general funds. The Kentucky approach, moreover, has failed to keep the state's indigent defense system from serious funding shortfalls.

Similar problems exist in states that rely primarily on counties to fund indigent defense as well. In Louisiana, the state historically has contributed less than 20% of indigent defense funding, and many local judicial districts have faced funding crises. Under new legislation, 2008 state funding was increased to $28 million,[53] up from $4.3 million in 2005.[54] In addition, state law requires the judicial districts to establish an indigent defender fund[55] that is primarily funded by a $35 fee imposed on all persons convicted of state or local violations (except parking tickets),[56] a fee that fluctuates monthly. While Hurricane Katrina depleted the local parishes' indigent defender accounts, studies have shown that indigent defense in Louisiana was facing serious funding shortages even before the natural catastrophe.[57]

In New York, where the state contributes less than 40% of indigent defense funding, indigent defense has been described as "a patchwork composite of multiple plans that provides inequitable services across the state to persons who are unable to afford

51 Bill Rankin, *Public Defender Council Submits Budget Cuts, with Concerns,* Atlanta J.-Const., Sept. 10, 2008.

52 The Spangenberg Group, Public Defender Application Fees, *supra* note 50, at 8.

53 *See* Louisiana Public Defender Act, La. Rev. Stat. Ann. §§ 15:141-15:184 (2007).

54 *See* ABA/TSG FY 2005 State and County Expenditures, *supra* note 26, at 35.

55 La. Rev. Stat. Ann. § 15:168 (2007).

56 *Id.*

57 *See, e.g.,* Nat'l Legal Aid and Defender Ass'n, In Defense of Public Access to Justice: An Assessment of Trial-Level Indigent Defense Services in Louisiana 40 Years After Gideon (2004); The Spangenberg Group, The Orleans Indigent Defender Program: An Overview (1998). *See also* The Louisiana Justice Coalition website, *available at* http://www.lajusticecoalition.org/resources/reports+and+links. For later developments in Louisiana, *see infra* notes 13–15, 34, 97–98, and accompanying text, Chapter 4.

counsel" and "in a serious state of crisis."[58] Nearly one-half of the state funding comes from non-general-fund revenue sources.[59]

Funding Shortages

As the cost of indigent defense continues to increase nationwide, funding shortages are guaranteed to worsen, given the country's economic condition at the beginning of 2009. Even before today's economic crisis, many indigent defense systems across the country were already facing serious budget shortfalls and cutbacks. Between 2002 and 2005, *when adjusted for inflation,* many states that fully fund their indigent defense systems actually decreased their level of financial support, including Connecticut, Hawaii, Missouri, New Mexico, Oregon, and Wisconsin.[60] Now, 37 states are facing mid-year budget shortfalls for fiscal year 2009,[61] and 22 of these states fully fund their indigent defense systems. Obviously, when states reduce financial support for public defense, which is already underfunded, there is a substantially greater risk that accused persons will not receive adequate legal representation and that wrongful convictions will occur.

A number of states can be cited to illustrate the current funding emergency in indigent defense. For example, in 2008, Maryland was faced with the need to reduce its budget by $432 million, and as a result, the public defender agency lost $400,000 in support staff salaries. Also, as of October 2008, the Public Defender announced that it would cease to pay for private court-appointed attorneys in conflict cases. As a

58 TSG NY Report, *supra* note 32, at ii.

59 The estimate of one-half of funding from non-general revenue sources includes expenditures for representation of juveniles in New York Family Courts and covers cases in which the Sixth Amendment right to counsel attaches, as well as cases in which the Constitution does not require that counsel be appointed. The funding sources are a fee for lifting a license suspension, a fee for criminal history checks, an increased attorney registration fee, and a surcharge for parking violations. *Id.* at 26, 30.

60 *See* ABA/TSG FY 2002 State and County Expenditures, *supra* note 44, at 35–36; ABA/TSG FY 2005 State and County Expenditures, *supra* note 26, at 35–37. To derive the FY 1986 dollars adjusted for inflation, the Consumer Price Index calculator of the U.S. Department of Labor was used, *available at* http://data.bls.gov/cgi-bin/cpicalc.pl. The raw state expenditure data from 1986 was multiplied by the inflation rate from 1986 to 2005. (Expenditure reports prepared by The Spangenberg Group do not compare expenditures between fiscal years and do not adjust for inflation.)

61 Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin. McNichol and Lav, Center on Budget and Policy Priorities, State Budget Troubles Worsen 2 (2008), *available at* http://www.cbpp.org/9-8-08sfp.pdf.

consequence, the Chief Judge of Maryland's highest court has ordered the counties to pay the cost of attorneys who must be hired when the public defender has a conflict. At least one county has stated that it does not have the funds to pay those bills.[62]

Similarly, budget cuts in Florida are hitting hard in a number of counties. In Orange-Osceola County, where the criminal courts are among the busiest in the state, both prosecutor and public defender offices are facing combined budget reductions of $3 million.[63] The result is that the public defender's office has had to lay off 10 attorneys and has suffered a loss of 40 positions. In addition, some costs are being transferred to defendants who will be ordered, if convicted, to pay special fees of $50 in misdemeanor cases and $200 in felony cases. In Miami (Dade County), lack of funding has led to a lawsuit challenging excessive public defender caseloads.[64] Other public defender offices, such as those in Broward and Palm Beach Counties, are close to refusing cases.[65]

In Kentucky, the legislature in 2008 cut the indigent defense budget by 6.4%, totaling $2.3 million. As a result, the Department of Public Advocacy announced that it will begin to refuse several categories of cases, including conflict of interest cases, some misdemeanors, and probation and parole violation cases.[66] In Minnesota, the legislature cut the Board of Public Defense's FY 2009 budget by $4 million, forcing the layoff of 13% of public defender staff (23 public defenders). This is the largest staff reduction since the state assumed full indigent defense funding in 1995. The layoff is expected to cause public defender caseloads to go from bad (approximately 450 felony cases per attorney per year) to worse (approximately 550 felony cases per attorney per year).[67] Similarly, due to budget cuts, the Georgia Public Defender Standards Council in 2007 owed hundreds of thousands of dollars to attorneys representing indigent defendants in capital cases and was forced to lay off 41 employees.[68] In 2008, it closed a major conflict defender office as a cost-cutting measure.[69]

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62 Scott Daugherty, *Court: Counties Must Pay for Defense Lawyers,* The Capital (Annapolis, MD), Nov. 2, 2008, *available at* http://www.hometownannapolis.com/cgi-bin/read/2008/11_02-08/TOP.

63 *Financial Crisis Takes Toll on Justice System, Courts Across Region Feel Budget Crunch,* Nov. 10, 2008, *available at* http://www.wesh.com/consumernews/17950079/detail.html.

64 *See infra* notes 97–101 and accompanying text, Chapter 3.

65 Tonya Alanez and Missy Diaz, *Broward County Public Defender's Office Close to Refusing Cases, Caseloads Are So Big, Representing Clients Becoming Impossible,* South Florida Sun-Sentinel, Nov. 17, 2008.

66 Brandon Ortiz, *Chief Public Defender Takes Case to Judges,* Lexington Herald-Leader, May 29, 2008.

67 Richard Meryhew, *State to Pare the Ranks of Public Defenders by 23,* Star Tribune (Minneapolis-St. Paul, MN), June 5, 2008.

68 *4 Issues Facing Public Defender Program,* Atlanta J.-Const., Apr. 3, 2008 [hereinafter *4 Issues Facing Public Defender Program*].

69 Jonathan Springston, *Plan to Cut Public Defenders Could Leave Hundreds without Lawyers,* The Atlanta Progressive News, June 29, 2008.

Resource Inequities

In the battle for adequate funding, indigent defense faces tough competition for resources, especially in comparison to prosecutors. Even conceding that prosecutors consider some cases that are never charged and that some cases are represented by retained counsel, financial support of indigent defense typically lags well behind that provided for prosecutors. The ABA has urged "parity between defense counsel and the prosecution with respect to resources,"[70] but this goal is not being achieved. The inequities between prosecution and defense can take several forms, including disparity in the amount of funds, sources of funding, in-kind resources, staffing, and salaries.

In Tennessee, a one-of-a-kind study was conducted that illustrates the problem. Using state budget information, the study compared the overall resources of prosecution and defense by examining the funding of all agencies related to the prosecution and defense functions.[71] The study reviewed both state and non-state funds and concluded that total prosecution funding that could be attributed to indigent cases amounted to between $130 and $139 million for FY 2005. In contrast, indigent defense funding amounted to $56.4 million, a stunning difference of over $73 million.[72] Tennessee is not alone in this inequity. In California, where the counties fund indigent defense at the trial level, a comparison of FY 2006–07 county indigent defense and prosecution budgets revealed that indigent defense was "under-funded statewide by at least 300 million dollars."[73] Moreover, between FY 2003–04 and FY 2006–07, the statewide disparity in indigent defense and prosecution funding increased by over 20%.[74]

In addition to disparity in the overall amount of funding, differences also exist in funding sources and in-kind resources provided to the prosecution and indigent defense. Beyond general funding, the prosecution frequently receives special federal, state, and/or local funding for particular prosecution programs (e.g.,

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70 *See* ABA Ten Principles, *supra* note 70, Chapter 1, at Principle 8 ("There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the judicial system.")

71 The Spangenberg Group, Resources of the Prosecution and Indigent Defense Functions in Tennessee (2007), *available at* http://www.abanet.org/legalservices/sclaid/defender/downloads/TN_CompStudyFINAL_7.30.07.pdf.

72 *Id.* at 11, 16.

73 Laurence A. Benner and Lorenda S. Stern, Systemic Factors Affecting the Quality of Criminal Defense Representation: Supplemental Report to the California Commission on the Fair Administration of Justice 1 (2007), *available at* http://www.cpda.org/publicarea/CCFAJ/Professional-Responsibility-DAs-and-Defenders/Professional-Responsibility-DAs-and-Defenders/Supplemental%20Report%20Benner.pdf.

74 *Id.* at 3.

domestic violence prosecutions, bad checks, highway safety, and drug enforcement programs), while the defense is fortunate if it receives small amounts of grant funding. Furthermore, the prosecution has the benefit of accessing many federal, state, and local in-kind resources that cannot be quantified, including the resources of law enforcement, crime labs, special investigators, and expert witnesses. In contrast, indigent defense must either fight for special funding in their budgets to allow for these resources or seek prior approval from the court in order to access them, which is often denied.

The overall disparity in funding frequently means that there are very real inequities between prosecution and defense programs related to staffing levels and compensation. For example, in Cumberland County, New Jersey, the prosecutor's office has twice the number of attorney positions and over seven times the number of investigators handling criminal cases as the public defender's office, even though public defenders handle approximately 90% of the county's criminal cases.[75] In Harris County, Texas, the budget for the District Attorney's Office is over twice the amount available for indigent defense and includes 30 investigator positions compared with no investigators for the contract defenders.[76] In Saratoga County, New York, the District Attorney's Office has five more full-time and two more part-time attorney positions than the Public Defender's Office, partly due to state grant funding for cases such as domestic violence, sex crimes, car theft, and DWI cases.[77]

In New Orleans, prosecutors outnumber public defenders nearly three to one (90 to 32). The former Interim Chief Public Defender has stated that the disparity is likely to grow as federal grant funding of $1.7 million of federal funds awarded in the wake of Katrina is due to expire in 2009, leading to a lay-off of one-third of the program's attorneys.[78] The disparity is not surprising considering that the City of New Orleans provided nearly $5 million in funding to the District Attorney's Office in 2008 but nothing to the Public Defender's Office, although the City Council has agreed to consider a proposal to provide public defender funding in the future.[79]

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75 John Martins, *Tight Resources at Heart of Criminal Case Backlog,* Press of Atlantic City, Apr. 21, 2008, at C1.

76 Lisa Falkenberg, *An Idea Whose Time Has Come?,* Houston Chron., Mar. 12, 2008.

77 TSG NY Report, *supra* note 32, at 85.

78 Bigad Shaban, *Public Defender's Office Needs Funds,* Oct. 17, 2008, *available at* http://www.wwltv.com/topstories/stories/wwl101708mlpublicdefender.122ce87d3.html.

79 *Id. See also* Laura Maggi, *Public Defenders Ask New Orleans City Council to Plug Holes in Budget,* Times-Picayune, November 20, 2008, which indicates that the District Attorney's office is scheduled to lose $1.3 million in post-Katrina federal funds and is expected to ask the City Council for additional financial assistance.

Across the country, because of inadequate compensation, public defense programs find it difficult to attract and retain experienced attorneys. With so many jurisdictions currently experiencing budget woes, compensation is not likely to improve any time soon. Sometimes, prosecutors are also poorly paid.[80] Both public defender and prosecution offices lose experienced staff attorneys to the federal system, which provides far better compensation.[81]

Also, throughout the country, public defender salaries are often significantly below those of prosecutors. For instance, when salaries were frozen in Virginia in 2006, over 27% of the attorneys in the public defender system resigned, and many turned to higher paying jobs at prosecutor offices or to private law practice. Although entry-level public defender salaries have risen since that time, because prosecution offices receive supplemental funding from Virginia municipalities—from $6000 to $20,000 per attorney—public defenders are still paid less than their counterparts.[82] In Westchester County, New York, where county funding of indigent defense, as of 2006, was several million dollars below prosecution funding—not including over $6 million in grant funding for prosecution—district attorneys' salaries were approximately $6000 to $21,000 higher than public defenders' salaries.[83] In Missouri, the salaries of public defender trial attorneys in 2005 ranged between approximately $34,000 and $54,000. In contrast, prosecutors' salaries were reported to range from $40,000 to up to $100,000 or more. Public defender salaries are so low that some attorneys are forced to work second jobs, and the cumulative turnover of public defenders between 2001 and 2005 was an astounding 100%![84] Although Missouri's assistant public defenders have since received a four percent salary increase,[85] most have large law school debts and are still struggling.[86] As one public defender put it, "[i]f you want to raise a family, buy a house and a car, that's not going to happen."[87]

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80 *See, e.g.,* Crocker Stephenson, *State Assistant Prosecutors Quitting over Pay, Caseloads,* Milwaukee Wisconsin J. Sentinel, Oct. 27, 2008.

81 Kim Smith, *Attorney Exodus Irks Public Service Officials,* Ariz. Daily Star, July 7, 2008.

82 Peter Dujardin, *Public Defender Staff Paid Lower Than Others,* Daily Press (Charlottesville, VA), Feb. 3, 2008. However, effective July 1, 2008, a new Virginia statute permits public defenders to ask cities and counties to supplement salaries of public defenders. *See* Peter Dujardin, *Public Defenders Can Now Seek Equal Pay,* Daily Press Aug. 28, 2008.

83 TSG NY Report, *supra* note 32, at 84.

84 The Spangenberg Group, Assessment of the Missouri State Public Defender System 5, 6, 16 (2005) [hereinafter TSG MO Report], *available at* http://members.mobar.org/pdfs/legislation/spangenberg.pdf.

85 Tara Cavanaugh, *Timeline of Events for the Missouri Public Defender System,* Columbia Missourian, Oct. 19, 2008.

86 Tara Cavanaugh, *Timeline of Events for the Missouri Public Defender System,* Columbia Missourian, Oct. 19, 2008.

87 *Id.*

Similarly, compensation of assigned counsel is often far from adequate. Attorneys in private practice across the country routinely bill between $178 and $265 per hour for their work, a sum that is necessary in part to cover overhead expenses.[88] When the federal government retains private attorneys to provide representation in civil matters, the lawyers are compensated at similar rates.[89] In contrast, when an indigent person is accused of a non-capital felony offense and faces a loss of liberty, the lawyer assigned to defend that person is rarely paid over $90 an hour, and more often, the compensation is between $50 and $65 an hour.[90] In several states, including Oklahoma, South Carolina, and Tennessee, attorneys receive as little as $40 an hour for out-of-court work in such cases.[91] In Oregon, attorneys receive $40 an hour in non-capital felony cases even for trials and other work performed in court.[92] With few exceptions, assigned counsel are not given an additional payment to cover overhead expenses.[93] Moreover, states frequently limit the amount assigned counsel can be paid for any single case by setting maximum compensation levels. In order to exceed the maximum compensation level, an attorney must seek approval from the court—approval that, in fact, may be denied even after the work has been performed. In Mississippi, although attorneys are compensated for overhead expenses, the statutory limit is $1000 for work performed in a non-capital felony case.[94] This cap most likely has a chilling effect on the right to counsel by providing a disincentive for attorneys to perform work beyond the $1000 level, resulting in a conflict of interest between the attorney and client.[95]

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88 Lefstein, *Lessons from England, supra* note 57, Chapter 1, at 847, *citing* 2002 Survey of Law Firm Economics Executive Summary 10 (Altman Weil, Inc. ed, 2002).

89 *Id.* at 847–8, n.57.

90 The Spangenberg Group, Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview 21–30 (2007) (prepared with funding from ABA Standing Committee on Legal Aid and Indigent Defendants), *available at* http://www.abanet.org/legalservices/sclaid/defender/downloads/2007FelonyCompRatesUpdate_Nonfelony.pdf

91 *Id.* at 21–28.

92 *Id.* at 27.

93 *Id.* at 21–28.

94 *Id.* at 25.

95 Litigation respecting assigned counsel fee rates is discussed later in this report. *See infra* notes 2–6, 41–48, and accompanying text, Chapter 3. Just before this report was completed, the South Carolina Commission on Indigent Defense voted to suspend payments to assigned counsel in that state because its budget was reduced more than 25%. Litigation respecting non-payment of attorneys' fees is planned by appointed counsel. *See SC Attorney Seeks Delay in Trial Over Legal Fees,* Charlotte Observer, Jan. 13, 2009, *available at* http://www.charlotteobserver.com/233/story/466476.html

C. The Burden of Too Much Work

Because of inadequate funding, indigent defense attorneys in much of the United States struggle with the burden of overwhelming caseloads. As a consequence, even the best-intentioned lawyers cannot render competent and effective defense services to all of their clients. In this section, we discuss not only the presence of excessive caseloads, which is a problem virtually everywhere in public defense throughout the United States, but we also examine a variety of policy decisions and other factors that contribute to this excess.

Excessive Caseloads

When there are too many cases, lawyers are forced to choose among their clients, spending their time in court handling emergencies and other matters that cannot be postponed. Thus, they are prevented from performing such essential tasks as conducting client interviews, performing legal research, drafting various motions, requesting investigative or expert services, interviewing defense witnesses, and otherwise preparing for pretrial hearings, trials, and sentencing hearings. Eventually, working under such conditions on a daily basis undermines attorney morale and leads to turnover, which in turn, contributes to excessive caseloads for the remaining defenders and increases the likelihood that a new, inexperienced attorney will be assigned to handle at least part of the caseload.

As explained in Chapter 1, professional rules of conduct governing lawyers require that an attorney's workload be controlled to allow for competent representation in each case.[96] In addition, the commentary to several of the Committee's recommendations in Chapter 5 pertains to public defense workloads and adherence to ethical standards.[97] Because various rules pertaining to excessive caseloads are discussed elsewhere, we emphasize here only two additional observations that we believe to be especially important.

First, both the NLADA and the ABA have addressed the caseload issue in unambiguous language. NLADA guidelines require that, prior to accepting an appointment, defense attorneys ensure they have adequate time available to provide quality representation; further, should this change during the course of a case, they should seek to withdraw as counsel.[98] The ABA has warned for years against excessive caseloads

96 *See supra* notes 83–84 and accompanying text, Chapter 1.

97 *See infra* notes 45–52 and accompanying text, Chapter 5, related to Recommendation 6; and *infra* notes 84–96 and accompanying text, Chapter 5, related to Recommendation 14.

98 NLADA Performance Guidelines, *supra* note 72, Chapter 1, at 1.3(a).

for indigent defenders, and its standards seek to guard against them.[99] Moreover, the 2006 ethics opinion of the ABA Standing Committee on Ethics and Professional Responsibility, discussed in Chapter 1, emphasizes that the profession's rules are fully applicable to those who represent the indigent accused.[100] Like the NLADA guidelines and the ABA's standards, the ethics opinion requires defense attorneys not to accept too many cases and to seek court approval to withdraw from cases when the workload is such that they cannot provide adequate representation. However, if defenders ask to withdraw or request that they not be appointed to additional cases, judges are not bound to heed their request and, if relief is not granted, the rules of professional conduct require that attorneys continue to provide representation.[101]

Second, only one study has ever suggested national maximum caseload numbers for use by defenders. In 1973, the National Advisory Commission (NAC) on Criminal Justice Standards and Goals, funded by the federal government, issued a series of reports. In its report on the Courts, the commission recommended the following maximum annual caseload for a public defender office, i.e., on average, the lawyers in the office should not exceed, per year, more than 150 felonies; 400 misdemeanors; 200 juvenile court cases; 200 mental health cases; or 25 appeals.[102] Because the NAC standards are 35 years old and were never empirically based, they should be viewed with considerable caution. In fact, the commentary that accompanied the NAC caseload numbers contained numerous caveats about their use, which have rarely been cited. For example, the commission acknowledged the "dangers of proposing any national guidelines."[103] Further, while the commentary conceded that its numbers could be used to measure a single attorney's caseload, its report also contained a warning: "It should be emphasized that the standard [referring to its numbers] sets a caseload for a public defender's office and not necessarily for each individual attorney in that office."[104] Moreover, since the NAC's report was published, the practice of criminal and juvenile law has become far more complicated and time-consuming, as discussed in Chapter 1 and later in this chapter.

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99 *See, e.g.,* ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-5.3; ABA Ten Principles, *supra* note 70, Chapter 1, at Principle 5 ("[d]efense counsel's workload is controlled to permit the rendering of quality representation").

100 ABA Formal Op. 06-441, *supra* note 86, Chapter 1.

101 *Id. See also* ABA Model Rules, *supra* note 67, Chapter 1, at R. 1:16 (c) ("When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.")

102 NAC Courts, *supra* note 9, at 276. The standards are disjunctive, so if a public defender is assigned cases from more than one category, the percentage of the maximum caseload for each category should be assessed and the combined total should not exceed 100%. Obviously, a public defender's pending or open caseload should be far less than the annual figure.

103 *Id.* at 277.

104 *Id.*

Few jurisdictions or programs today have enforceable, maximum caseload standards, either for individual lawyers or for a defense program.[105] Even those that have caseload standards, often determined through weighted caseload studies, frequently exceed them.[106] Not only do the laws in many jurisdictions impose on defense programs the duty to accept indigent cases when appointed by the courts,[107] but also, there often are substantial political pressures on defenders not to refuse cases due to overload. The result is that indigent defendants frequently are represented by defense attorneys who are so overburdened with cases that the attorneys are violating their professional obligations as members of the bar and are constantly risking their clients' rights to effective representation.

During 2003, commemorating the 40th anniversary of the *Gideon* decision, the ABA Standing Committee on Legal Aid and Indigent Defendants held hearings at four different locations across the country to document indigent defense problems, including excessive caseloads. Numerous witnesses testified, revealing the presence of excessive caseloads in many of the states in which they resided, including Illinois, Louisiana, Maryland, Montana, Nebraska, New York, Oregon, Pennsylvania, Rhode Island, Virginia, and Washington.[108] The examples outlined in the paragraphs below, all of which are even more recent than the testimony of witnesses at the ABA hearings, provide a snapshot of the dimension of the caseload problem, but they are by no means the only places where the caseloads are out of control.

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105 New Hampshire appears to come as close as any jurisdiction in having enforceable, maximum caseload standards. *See infra* note 95 and accompanying text, Chapter 4.

106 However, weighted caseloads studies have proven useful to defense agencies in arguing on behalf of budget increases. Such studies also provide empirical workload standards that can be helpful to managers in administering the public defense program. *E.g.,* The Spangenberg Group, Updated Weighted Caseload Study: Colorado State Public Defender (forthcoming 2009) [hereinafter Colorado Updated Weighted Caseload Study]; The Spangenberg Group, Updated Weighted Caseload Study: Colorado State Public Defender (2002); The Spangenberg Group, Weighted Caseload Study: Colorado State Public Defender (1996); The Spangenberg Group, Maricopa County Indigent Defense Attorneys Case Weighting Study (2003); The Spangenberg Group, King County Public Defender Case Weighting Project (2003). These studies were commissioned by the above-listed defender organizations and are not always available on the internet.

107 *See, e.g.,* Colo. Rev. Stat. § 21-1-103 (2004): "The state public defender shall represent as counsel … each indigent person who is under arrest for or charged with committing a felony…." While certain exceptions to furnishing legal representation are contained in the statute, Colorado law also provides: "Case overload, lack of resources, and other similar circumstances shall not constitute a conflict of interest." *Id* at § 21-2-103

108 *See* ABA Standing Committee on Legal Aid and Indigent Defendants, Gideon's Broken Promise: America's Continuing Quest for Equal Justice 18, n.165 (2004) [hereinafter ABA Gideon's Broken Promise].

In January 2008, the Nevada Supreme Court ordered the two largest counties in the state to perform weighted caseload studies after finding that, "by any reasonable standard, there is currently a crisis in the size of the caseloads for public defenders in Clark County and Washoe County."[109] In Clark County, in 2006, the average public defender's caseload was 364 felony and gross misdemeanor cases; in Washoe County, the average caseload was 327 felony and gross misdemeanor cases.

During May 2008, the Knox County Public Defender in Tennessee sought permission from the court to refuse misdemeanor cases due to an overwhelming caseload in the office.[110] One attorney reported a pending caseload of 240 open cases, 144 of which were felonies, which is close to the NAC standard of 150 felonies for an entire year. Another attorney reported that between January and February 2008, she represented 151 clients, which averaged approximately 14 people per day. In 2006, six misdemeanor attorneys handled over 10,000 cases, averaging just less than one hour per case.

Recently, in Kentucky, despite the caseload of the Department of Public Advocacy (DPA) (the state's public defender) rising by an average of eight percent per year, the legislature in 2008 indicated that it would cut the agency's budget by $1 million during the next fiscal year. During the summer of 2008, DPA responded that, since the caseloads of its public defenders already exceeded NAC standards by 40%, affording attorneys an average of less than four hours per case, DPA would have to reduce its services.[111]

In Florida, where litigation regarding the right of public defenders to refuse cases is pending on appeal, average public defender caseloads in Miami (Dade County) have risen in the past three years from 367 to nearly 500 felonies and from 1380 to 2225 misdemeanors.[112] Despite these increases, the public defender office's budget in the past two years has been cut by 12.6%.[113]

High caseloads often force attorneys to continue cases. Worse yet, they can lead to mistakes that seriously affect a client's right to counsel and liberty. In Miami, for instance, one public defender was so busy that he did not have time to check the cal-

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109 In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Nev. Jan. 4, 2008). *See also infra* note 31 and accompanying text, Chapter 4.

110 J. .J. Stambaugh, *Motion Filed to Reduce Caseload: Public Defender Says Staff Doing Too Much, Should Drop Misdemeanors,* Knoxville News Sentinel, Mar. 27, 2008. *See also infra* notes 94–96 and accompanying text, Chapter 3.

111 Burton Speakman, *Public Defenders Face Budget Problems,* Bowling Green Daily News, Mar. 23, 2008. *See also infra* note 97 and accompanying text, Chapter 3.

112 *See infra* notes 98–99 and accompanying text, Chapter 3.

113 Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases,* The N.Y. Times, Nov. 9, 2008.

culation of a minimum sentence for a client charged with theft. Instead, the defender accepted the prosecutor's calculation of 2.6 years imprisonment. He and his client were resigned to this sentence when the prosecutor discovered an error. The client's minimum sentence was in fact only one year.[114] Another Miami public defender handles 50 serious felony cases at a time. On a day when she had 13 of these cases set for trial, she received a plea offer of one year for a client but did not have time to discuss it with him and to communicate in a timely fashion with the prosecutor. With the case unresolved, the prosecutor rescinded the plea offer, and the client ultimately pled guilty and was sentenced to five years.[115]

Excessive caseloads within a defender program also increase the likelihood that inexperienced attorneys will be forced to handle serious cases for which they are not fully qualified. In California, a statewide survey of judges and indigent defense attorneys conducted for the California Commission on the Fair Administration of Justice found "a statistically significant correlation between having an excessive caseload and using attorneys with less than [three] years [of] experience" to handle serious felony and "three-strikes" cases.[116]

In Missouri, the Public Defender Commission found in 2005 that "excessive caseloads can and do prevent Missouri State Public Defenders from fulfilling the statutory requirements [for representation] and their ethical obligations and responsibilities as lawyers."[117] The State Public Defender Deputy Director stated that 2004 caseloads required trial public defenders "'to dispose of a case every 6.6 hours of every working day.'" [118] He further described the situation: "'The present M.A.S.H. style operating procedure requires public defenders to divvy effective legal assistance to a narrowing group of clients,'" remarking that the situation forces public defenders "'to choose among clients as to who will receive effective legal assistance….'"[119] Since 2006, some cases have been assigned to private attorneys to ease public defender workloads, but this has not alleviated the problem. In October 2008, public defender offices in four

114 *Id.*

115 *Id.*

116 Laurence A. Benner and Lorena S. Stern, Systemic Factors Affecting the Quality of Criminal Defense Representation: Preliminary Report to the California Commission on the Fair Administration of Justice 28 (2007) [hereinafter Benner and Stern].

117 TSG MO Report, *supra* note 84, at 7 (*citing* Missouri State Public Defender Commission's Findings and Directive on Caseload Standards in Accordance With Professional and Statutory Obligations, Finding 9 (Adopted June 10, 2005)) (Draft Copy).

118 *Id.* at 7 (*citing* Dan Gralike, *Living Double in a World of Trouble – The Indigent Criminal Defense Crisis in Missouri,* ESQ. (Missouri Bar electronic weekly newsletter, *available at* http://www.mobar.org), June 3, 2005).

119 *Id.* at 8.

counties began to refuse certain categories of cases.[120] In one of those counties, public defenders have been averaging 395 cases a year. The State Public Defender maximum caseload standard, which was fixed some years ago, is 235.[121] In November 2008, the State Public Defender Director said of the situation, "[w]e keep diluting the representation that the indigent person is able to get, and mistakes will be made, and are being made."[122]

Also, in November 2008, Hawaii's Deputy Public Defender expressed concern about the workload of Hawaii's public defenders: "I think the quality of the representation has suffered because we have to divide our time…. It's hard to file motions, do legal research and do what needs to be done."[123] Hawaii's Public Defender noted that inadequate staffing and increasing caseloads will ultimately require the office to refuse cases.[124]

"Tough on Crime" Policies

For some years, there has been a national movement in the United States to get "tough on crime." For more than a decade, state legislatures have joined the federal government in creating many more mandatory sentencing and "three-strikes" laws that have greatly increased the stakes for the accused in criminal cases. Championing a reduction in criminal sanctions, like championing indigent defense, is a risky move for most politicians. As Ohio Governor Ted Strickland described it, "[t]here isn't a person in public office that's not sensitive to the accusation of being soft on crime."[125]

The effect of these laws can be seen in today's record high jail and prison population. The PEW Center on the States recently reported that the United States now incarcerates far more people than any other country in the world. At the start of 2008, our country had over 2.3 million people locked up, followed only by China with 1.5 million persons behind bars.[126] America incarcerates more people now than at any

120 Tara Cavanaugh, *Timeline of Events for the Missouri Public Defender System,* Columbia Missourian, Oct. 19, 2008 [hereinafter Cavanaugh].

121 *Id.*

122 Jill Glavan, *Public Defenders Overloaded,* Nov. 10, 2008, *available at* http://www.komu.com/satellite/SatelliteRender/KOMU.com/ba8a4513-c0a8-2f11-0063-9bd94c70b769/88c23c92-80ce-0971-007b-5afa7b3128a6.

123 Michael Levine, *Public Defenders Are Stretched Thin,* The Garden Island (Kauai, HI), Nov. 17, 2008.

124 *Id.*

125 The Pew Center on the States, One in 100: Behind Bars in America 2008 3 (2008) (*citing* The Columbus Dispatch, Jan. 26, 2008) [hereinafter Pew Center on the States].

126 *Id.* at 5.

other time in our history; one person out of every 100 people is in jail or prison.[127] This growth does not correspond to an equivalent increase in crime. In fact, crime has significantly decreased in the past 10 years. For instance, between 1996 and 2005, violent crime in this country decreased by 26% and property crime decreased by 14%.[128] Rather, the growth corresponds to "a wave of policy choices that are sending more lawbreakers to prison and . . . keeping them there longer."[129] However, a large number of the persons locked up are there for violating terms of their release. For instance, over one-third of prison admissions in 2005 were due to violations of parole.[130] Additionally, half of the population in the nation's jails is attributable to violations of probation.[131] Often, such violations are not for committing new offenses but for violating other terms of release, such as failing a drug test or missing a scheduled appointment with a probation or parole officer.[132] Overall, more than half of the persons released from prison return within three years for committing a new crime or violating the terms of their release.[133]

As a result of the "tough on crime" policy decisions, criminal cases have become more time-consuming and costly to defend. The greater the potential consequences of a conviction, the more time and effort a criminal defense attorney needs to expend to avoid a conviction or to mitigate its consequences. A recent empirical workload study of the Colorado State Public Defender found a significant increase in just the past six years in the time it takes public defenders to handle their caseloads due to a variety of factors, such as the creation of new crimes, enhanced penalties, and additional collateral consequences applicable upon conviction.[134]

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127 *Id.* at 3.

128 Federal Bureau of Investigation, United States Department of Justice, Crime in the United States 2005: Percent Change in Volume and Rate per 100,000 Inhabitants for 2 years, 5 years, 10 years (2006) [hereinafter Federal Bureau of Investigation], *available at* http://www.fbi.gov/ucr/05cius/data/table_01a.html.

129 Pew Center on the States, *supra* note 125, at 3.

130 *Id.* at 18, n. 31 (*citing* Bureau of Justice Statistics, U.S. Department of Justice, Prison and Jail Inmates at Midyear 2006).

131 *Id.* at 18.

132 *Id.*

133 *Id.* at 4 (*citing* Patrick A. Langan and David J. Levin, U.S. Department of Justice, *Recidivism of Prisoners Released in 1994,* Bureau of Justice Statistics Special Report, June 2002).

134 Colorado Updated Weighted Caseload Study, *supra* note 106 (empirical workload study, updated from 2002, reveals large increases since 2002 in the average time it takes a public defender to dispose of low-level felonies, including a stunning 64% increase for class 6 felonies, 13% and 36% increases for certain misdemeanors, and a 29% increase for juvenile cases).

Collateral Consequences

In addition to harsher criminal sanctions, defendants today face many more civil sanctions, or collateral consequences, as a result of criminal convictions. Collateral consequences can result in more severe sanctions for a defendant than the actual criminal sentence, including the loss of legal immigration status, public benefits, housing, a driver's license, and employment. Like tougher criminal sentencing laws, the emergence of collateral consequences reflects a policy decision by legislators that similarly raises the stakes in many criminal cases. State and federal laws that create these civil sanctions not only impact criminal defendants, but they also make it essential for indigent defense attorneys to attend training programs and to conduct additional legal research so that they can appropriately advise clients of the consequences of a criminal conviction.[135] Moreover, when harsh collateral consequences will result from a guilty plea and conviction, a defendant has a strong incentive to go to trial.

Although most states do not require defense counsel as a matter of law to advise a client of the potential collateral consequences prior to entering a guilty plea, ABA standards applicable to defenders state that they are ethically bound to do so.[136] Additionally, ABA standards affirm that trial judges have an obligation to ensure that defendants have been advised of collateral consequences when accepting a guilty plea.[137] Recently, several Nevada Supreme Court justices dissented from an order that adopted indigent defense performance standards because they failed to require counsel to advise clients of collateral consequences prior to pleading guilty.[138]

Criminalization of Minor Offenses

Although national crime rates have decreased and fewer major crimes are being committed,[139] indigent defense providers remain burdened with excessive caseloads consisting of all kinds of cases, as discussed earlier, including countless minor, petty offense cases. Felonies and violent felonies in particular have decreased dramatically in New York City, for example, but there has not been a concomitant decrease in

135 *See, e.g., ACCD Statement on Caseloads and Workloads, supra* note 96, Chapter 1, at 8–9.

136 *See, e.g.,* ABA Standards for Criminal Justice: Pleas of Guilty 14-3.2(f) (3d ed. 1997) ("to the extent possible, [to] determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from the entry of the contemplated plea").

137 ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons 19-2.3(a), 19-2.4(b) (3d ed. 2003). Standards 19-2.3(b) and 19-2.4(c), however, state that failing to do so should not be a basis for withdrawing a plea or challenging a sentence.

138 Brendan Riley, *Standards on Public Defenders Issued,* San Francisco Chron., Oct. 17, 2008.

139 *See* Federal Bureau of Investigation, *supra* note 128.

indigent defense caseloads due to the proliferation of violation and low-level misdemeanor charges.[140] It is now common in New York City to bring people to court for violations of the health code, riding a bike on a sidewalk, and drinking beer in public.[141] As one scholar has noted, "never before have so many been arrested for so little."[142]

New York is not alone in this regard. In Georgia, offenses that are classified as civil infractions in most states, such as speeding, following too closely, and other moving violations are misdemeanors that carry the potential of up to 12 months in jail.[143] With this classification comes the high cost of providing representation to indigent persons charged with these offenses, unless any potential of jail time is removed.[144] In Missouri, where the State Public Defender is currently seeking to refuse appointments in certain categories of cases, some persons are asking whether charging some low-level offenses as crimes is worth the cost of defending them.[145] For instance, in one case, a public defender represented a high school student for yelling profanities at a teacher. The State Public Defender's Deputy Director asked, "[d]o the taxpayers really need to pay for that kind of defense?"[146]

In Massachusetts, a commission created by the legislature quantified the costs of categorizing low-level offenses as crimes rather than as civil infractions. Over a four-year period, the state paid for attorneys to represent indigent defendants in almost 59,000 cases for trespassing, writing a bad check, disturbing the peace, shoplifting, and operating a motor vehicle with a suspended registration or license.[147] Very few of the offenders were incarcerated. Had these cases been dealt with as civil infractions with monetary and administrative penalties, the state would have saved approximately $8.5 million in representation costs alone.[148]

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140 TSG NY Report, *supra* note 32, at 121. In New York, a violation is an offense, other than a traffic infraction, for which a person may be incarcerated up to 15 days. *Id.* at 13, n.34, *citing* Penal Law 100.00(3). *See also* Steven Zeidman , *Time to End Violation Pleas,* N.Y. L. J., Apr. 1, 2008 (in 2007, 31% of adult arrests in New York City were for felonies, down from 56% in 1990).

141 *Id.*

142 *Id.*

143 The Spangenberg Group, Status of Indigent Defense in Georgia: A Study for the Chief Justice's Commission on Indigent Defense Part II: Analysis of Implementing *Alabama v. Shelton* in Georgia 50 (2003).

144 *Id.* at 51.

145 *See* Cavanaugh, *supra* note 120.

146 *Id.*

147 Report of the Commission to Study the Provision of Counsel to Indigent Persons In Massachusetts, chapter 253 of the Acts of 2004 10 (Apr. 2005), *available at* http://www.bristolcpcs.org/CommissionReport.pdf.

148 *Id.*

This trend toward criminalizing bad or reckless behavior not only increases indigent defense caseloads and costs, but it also diminishes public safety by "creating a permanent underclass" of persons with a criminal record that can handicap them for years in various ways.[149] The former chair of the Criminal Justice Section of the ABA, a district attorney, characterized the problem as creating "a modern day scarlet letter."[150]

Expansion of the Right to Counsel

Indigent defense providers across the country are handling more types of cases today than at any other time since *Gideon.* First, with expansion of the right to counsel under Supreme Court jurisprudence, as discussed in Chapter 1,[151] there has been a concurrent increase in the number of cases requiring the appointment of indigent defense counsel. Since 2002, for a person to be incarcerated for violating the terms of a suspended or probated sentence, counsel must have been provided for the underlying offense even if the defendant was not facing incarceration at the time of conviction.[152] Second, states now provide counsel to indigent persons in certain non-criminal cases. The number and cost of these cases can be quite significant and are usually considered part of the state's total indigent defense caseload and expenditures. In Virginia, for instance, court-appointed counsel are provided in dependency and termination of parental rights cases and in cases requiring the appointment of a guardian *ad litem* (e.g., for a minor). In FY 2006, these two case types accounted for 27% of the total cases handled by assigned counsel in Virginia.[153] In Massachusetts, defense lawyers are provided in numerous non-criminal cases, including dependency, guardian *ad litem,* and mental health (e.g., civil commitment) cases. Similar to Virginia, in FY 2003, non-criminal cases accounted for 27% of the total number of assigned counsel cases in Massachusetts.[154]

149 Robert M.A. Johnson, Chair's Column, *Have All Convictions Become a Life Sentence?,* Crim. Just. Mag., Summer 2007 (U.S. Department of Justice data from June 2006 indicates that almost one out of every six Americans has a criminal record. When ex-offenders apply for jobs or housing, an easily accessible criminal record can be a barrier to a success if employers and others rely on this information alone to determine a person's character).

150 *Id.*

151 *See supra* notes 20–30 and accompanying text, Chapter 1.

152 Alabama v. Shelton, 535 U.S. 654 (2002).

153 Fiscal year 2006 assigned counsel data on file with The Spangenberg Group. Juvenile, District Court (misdemeanor), and Circuit Court (felony and juvenile appeal) cases totaled 106,964, while guardian *ad litem* and dependency cases totaled 40,063. Data includes assigned counsel cases only.

154 Fiscal year 2003 data on file with The Spangenberg Group. Criminal cases totaled 209,050 and non-criminal cases totaled 76,739. Data includes assigned counsel cases only.

Deinstitutionalization Without Community Support

More than ever before, indigent defense attorneys are representing clients with serious mental illnesses. In recent years, there has been a drastic reduction in the number of beds available in mental health hospitals, accompanied by deinstitutionalizing persons with mental problems, but without significant growth in providing community support for the mentally ill. At the same time, the criminalization of minor offenses has increased the number of indigent defendants who are suffering from mental illness.[155] Moreover, mentally ill defendants are more likely to be incarcerated for minor offenses than are persons who are not mentally ill.[156] In fact, more mentally ill people are in jails or prisons today than are in mental hospitals.[157]

While the costs of incarcerating the mentally ill are apparent and well-documented,[158] the additional expense of providing an adequate defense for these persons has not been quantified. Mentally ill clients require more of a defender's time and often require additional public defense expenditures. For example, attorneys must spend extra time and effort to communicate with their clients in order to gather necessary information and ensure that their clients understand the legal concepts and case proceedings. Defense lawyers must also determine if clients need to be evaluated for competency to stand trial,[159] whether the facts justify an insanity defense, or both. If either is warranted, more time and resources are required to obtain expert witnesses and litigate the issues. Also, attorneys frequently need to devote time to finding treatment opportunities for their clients. And when mentally ill clients are incarcerated,

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155 *See* Human Rights Watch, Ill-equipped: U.S. Prisons and Offenders with Mental Illness 20–21 (2003), *available at* http://www.hrw.org/reports/2003/usa1003/index.htm; *see also* Treatment Advocacy Center, Criminalization of Individuals with Severe Psychiatric Disorders (Apr. 2007), *available at* http://www.psychlaws.org/GeneralResources/documents/pdfBP Criminalization.pdf.; Peter Wagner, *Incarceration Is Not a Solution to Mental Illness,* Mass Dissent, Apr. 2000, *available at* http://www.prisonpolicy.org/articles/massdissent040100.html.

156 Frontline, Deinstitutionalization: A Psychiatric "Titanic" (May 10, 2005), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/asylums/special/excerpt.html ("mentally ill jail inmates were 'four times more likely to have been incarcerated for less serious charges such as disorderly conduct and threats' compared with non-mentally ill inmates. These inmates were 3 times more likely than those not mentally ill to have been charged with disorderly conduct, 5 times more likely to have been charged with trespassing, and 10 times more likely to have been charged with harassment.") *excerpt from* E. Fuller Torrey, M.D., Out of the Shadows: Confronting America's Mental Illness Crisis (John Wiley & Sons, 1997).

157 Sally Satel, *Out of the Asylum, into the Cell,* The N.Y. Times, Nov. 1, 2003.

158 *See, e.g.,* The Bazelon Center for Mental Health Law, Fact Sheet #7 Post-Booking Diversion Jail-Based Diversion Programs, *available at* http://www.bazelon.org/issues/criminalization/factsheets/criminal7.htm; Treatment Advocacy Center, Criminalization of Individuals with Severe Psychiatric Disorders (Apr. 2007), *available at* http://www.psychlaws.org/GeneralResources/documents/pdfBPCriminalization.pdf.

159 *See* Dusky v. United States, 362 U.S. 402 (1960) (defendant must be able to consult rationally with defense counsel and to have a rational and factual understanding of the legal proceedings).

jail conditions often cause them to deteriorate,[160] making representation even more difficult and time-consuming.[161]

In Kentucky, where over half the people incarcerated are mentally ill or addicted to drugs,[162] the Department of Public Advocacy, Kentucky's public defender program, launched a pilot program that used social workers in four counties to divert eligible defendants into substance abuse and mental health programs.[163] The social worker program reduced the costs of incarceration by $1.3 million dollars, covering its cost and saving the state $300,000, while also reducing recidivism rates.[164] Nevertheless, Kentucky's governor recommended against the program's continued funding in his proposed budget. [165]

Complexity of the Law

With the emergence of science and technology and new criminal laws, many cases have become more complex, requiring specialized training and greater time to defend. Consider, for instance, the use of DNA and other forensic evidence, computer- or internet-based crimes, and the creation of sexually violent predator laws. In Chapter 1, we discussed the statement on workload of the American Council of Chief Defenders, which explains that such complex cases are a significant burden on a defender's time, requiring not only specialized knowledge but often also the review of thousands of pages of discovery and the use of experts.[166]

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160 Deborah Circelli, *Dignity Lost: Critics Slam Treatment as Jails Deal with Mentally Ill,* The News-J. (Daytona Beach, FL), Apr. 27, 2008.

161 In some jurisdictions in Texas, such as Travis County, mentally ill defendants found to be incompetent remain in jail for two months or longer while waiting for space in order to be transferred to state hospitals. *See* The Spangenberg Group, Travis County Mental Health Public Defender Program Evaluation: Initial Report 9 (2008).

162 Bob White, *Finding a Solution to Kentucky's Prison Boom: Advocates Want Treatment Not Incarceration,* The News-Enterprise (Hardin County, KY), Mar. 2, 2008.

163 Deborah Yetter, *Social Workers Help Find Alternatives to Prison,* Louisville Courier-J., Feb. 26, 2008.

164 *Id.*

165 *Id.*

166 *ACCD Statement on Caseloads and Workloads, supra* note 96, Chapter 1, at 7. *See also supra* notes 97–99 and accompanying text, Chapter 1.

Specialty Courts

Another development that affects public defender workloads is the growth of specialty courts, which have been established across the country to handle various types of cases (e.g., drug and domestic violence cases) separately from other criminal prosecutions. While the goals of such specialty courts are laudable and may include heightened attention to and more sentencing alternatives in particular cases, their creation places an additional burden on public defense. Typically, the indigent defense agency does not receive additional funding when a specialty court is created, but it is nonetheless expected to staff the court with attorneys who are often required to attend many more court appearances than in non-specialty courts.[167] Similarly, specialty courts may create an unfunded mandate for the prosecution and courts as well.

Lack of Open Discovery

Prosecution discovery policies are another area of decision-making that has a direct bearing on public defense workloads and indigent defense costs. Discovery refers to the evidence held by the state that is relevant to the case against the defendant, including witness statements, investigation reports, and physical evidence. When prosecutors provide to the defense all of the evidence in their possession, they practice open-file discovery. ABA criminal justice standards recommend the use of pretrial procedures that "promote a fair and expeditious disposition of the charges," which means providing defendants "with sufficient information to make an informed plea," to allow for thorough trial preparation and "minimize surprise at trial."[168] Moreover, the discovery should be provided "as early as practicable in the process" to allow for sufficient trial preparation.[169] However, since prosecutors are constitutionally required only to turn over evidence that may be favorable to the accused,[170] many prosecution offices do not adhere to open file discovery practices. For the most part, the degree to which discovery material *must* be turned over to the defense by prosecutors, and when they do so, is determined by state laws and procedural rules. But even when a state does not provide for open file discovery, prosecutors are not normally precluded from adopting more generous discovery policies.

Open-file discovery not only promotes the prompt dispositions of cases; it can also significantly reduce indigent defense workloads and costs. In order to represent clients adequately and determine whether a defense is available, defense attorneys

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167 *See, e.g.,* TSG NY Report, *supra* note 32, at 93.

168 ABA Standards for Criminal Justice: Discovery and Trial by Jury 11-1.1(a) (3d ed. 1996).

169 *Id.* at 11-4.1(a).

170 Brady v. Maryland, 373 U.S. 83 (1963).

must have a complete understanding of the prosecution's case against the client. If the defense does not obtain from the prosecution the relevant police reports and witness statements, the information must be obtained elsewhere. Defense lawyers normally can do so in various ways, all of which necessitate additional time, resources, and costs, not only for public defense, but also for the courts and prosecution. Absent knowledge of the state's evidence, defense attorneys are likely to need to conduct a more thorough investigation than might otherwise have been necessary and are more apt to ask for preliminary hearings in order to learn about the case and obtain witness statements. Attorneys may file and litigate motions that may have otherwise been unnecessary had they been supplied with the facts through open file discovery. They may also delay or refuse plea negotiations and perhaps even conduct trials that could have been avoided. Worst of all, when defense attorneys are unaware of all of the evidence against their clients, innocent clients are more likely to be convicted because of the inability of their attorneys to prepare a proper defense.

To illustrate the foregoing, consider New York where defense attorneys rarely receive adequate discovery, and even more rarely, receive it in a timely manner. A public defender in Wayne County complained of last-minute discovery being provided by the state and noted that "[t]rue open file discovery would save [everyone] a lot of time, money and effort" through earlier plea agreements and less litigation overall.[171] In addition, prosecutors in New York often require defendants to waive their right to a preliminary hearing as a prerequisite to receiving discovery or withhold evidence to force a plea agreement, thereby undermining the adversarial system.[172] In Virginia, attorneys report receiving discovery at 5:00 p.m. the night before trial or even the day of trial, requiring last-minute continuances, thus resulting in added time and costs not only to the defense but also to the court, sheriffs, witnesses, and jurors.[173] In California, according to a statewide survey conducted for the California Commission on the Fair Administration of Justice, an "overwhelming majority" of experienced criminal defense attorneys and indigent defense providers reported a failure by the prosecution to provide exculpatory evidence and a delay in providing requested discovery material.[174]

Lack of open and timely discovery also can result in defense lawyers learning after substantial pretrial preparation that they have a conflict of interest. In a case in New

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171 TSG NY Report, *supra* note 32, at 81 (*citing Public Hearing Before the New York State Commission on the Future of Indigent Defense Services* 31–32, Rochester, March 11, 2005) (statement of Andrew Correia), *available at* http://www.courts.state.ny.us/ip/indigentdefense-commission/rochester.pdf).

172 *Id.* at 83.

173 The Spangenberg Group, A Comprehensive Review of Indigent Defense in Virginia 71 (2004) [hereinafter TSG Virginia Report], *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/va-report2004.pdf.

174 *See* Benner and Stern, *supra* note 116, at 3.

York, the defendant had been incarcerated nine months when the attorney had to withdraw due to a conflict discovered on the day of trial. Only then did the attorney learn that he had previously represented a key prosecution witness.[175] Consequently, defendant's newly appointed counsel had to repeat and be paid for much of the same work performed by the defendant's original lawyer. Continuances were required as well, resulting in the expenditure of additional time and resources for all involved in the court proceeding.

Finally, prosecutors have sometimes been cited for withholding exculpatory evidence, which has resulted in cases being retried and in compensation being awarded to persons wrongfully convicted. In North Carolina, for example, a man spent several years on death row because two prosecutors withheld evidence that was eventually used to exonerate him.[176] In such cases, not only does the retrial cost the state additional funds for indigent defense representation, but the state also pays for the appeal of the original wrongful conviction. In Texas, the state has paid $8.6 million in compensation in 45 wrongful-conviction cases since 2001, and nearly half (22) of these involved prosecutors withholding evidence from the defense.[177]

D. Other Impediments to Competent and Effective Defense Services

Throughout the country, nearly every state and local indigent defense system faces various challenges that impede the delivery of competent and effective defense services for the indigent. This section describes and documents these many other threats or roadblocks to fairly and fully implementing the right to counsel.

175 TSG NY Report, *supra* note 32, at 82.

176 As a result of this case, North Carolina passed a law requiring prosecutors to turn over all of their evidence to defense attorneys prior to trial. N.C. Gen. Stat. Ann. § 15A-903 (Supp. 2008). *See also* Kenneth Jost, *Prosecutors and the Law: Is Prosecutorial Misconduct a Serious Problem?,* 17 CQ Researcher 937, 939 (Nov. 9, 2007); A.J. Flick, *Judge Tosses Out Murder Conviction,* Tucson Citizen, Sept. 13, 2003 (prosecutor's office to implement open-file discovery policy after case dismissed against woman where prosecutor withheld exculpatory evidence).

177 Jennifer Emily and Steve McGonigle, *Dallas County District Attorney Wants Unethical Prosecutors Punished,* Dallas Morning News, May 4, 2008.

Lack of Independence

Both the ABA and the NLADA have long recognized the importance of professional and political independence of indigent defense providers.[178] When the defense function lacks such independence, the integrity of the indigent defense system is compromised. As discussed in Chapter 5, to ensure that the defense function is protected, the establishment of an independent policy board to provide oversight is strongly recommended.[179] Such boards now exist in some states, but there still are parts of the country where indigent defense is plagued by the oversight and influence of governmental funding sources and the courts. This influence, which may be rooted in a desire to control costs, assign cases to particular attorneys as a result of patronage, or a preference for certain attorneys known to resolve cases without litigation, often runs contrary to the duties of the defense provider and the interests of defendants. In short, the lack of independence of the defense function threatens the right to counsel.

Funding Sources

Probably the greatest risk to independence of the defense function is the pressure defenders receive from their funding sources. In New York, for instance, where the counties are primarily responsible for funding their own indigent defense programs, some county chief public defenders have publicly testified regarding the political pressure they received. The former Essex County Public Defender described the difficulty he had in obtaining the county's permission to hire a full-time assistant public defender. He was told by one county supervisor that "these defendants don't need to have Johnny Cochran…." After obtaining approval to hire the assistant, the former public defender was then pressured to fire him because the local judges did not like the way he practiced. This public defender was also told by a county supervisor that he "should join the District Attorney in his effort to keep the streets of Essex County

178 *See, e.g.,* ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-1.3(a) ("The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice."); and Std. 5-1.6 ("Under no circumstances should the funding power interfere with or retaliate against professional judgments made in the proper performance of defense services"); ABA Ten Principles, *supra* note 70, Chapter 1, at Principle 1 ("The public defense function, including the selection, funding, and payment of defense counsel, is independent"); NLADA Guidelines for Legal Defense Systems, *supra* note 1, at 2.10..

179 *See infra* Recommendations 2, 3, and 4, Chapter 5. *See also infra* notes 56–81 and accompanying text, Chapter 4; ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-1.3(b); Nat'l Legal Aid and Defender Ass'n, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services II-1 (1984).

safe."[180] In Onondaga County, the Director of the Hiscock Legal Aid Society has provided a powerful illustration of political pressure. Testifying before a legislative committee, she was questioned at length about specific defense policies and practices of her office, including not pleading cases at arraignment, filing defense motions, and sending demands to the prosecutor for discovery. The program later lost a contract to handle city court cases.[181]

Nebraska and its 93 counties, each with its own indigent defense system, has long suffered from similar problems. In 2004, a committee of the Nebraska Minority and Justice Task Force (established in 1999 by the Nebraska State Bar Association and the Nebraska Supreme Court) reviewed the counties' systems and noted a number of areas that threaten the independence of the defense function.[182] First, 23 of Nebraska's counties, like the judicial districts of Florida and Tennessee, publicly elect the heads of their public defender offices.[183] Because of this, the committee found that indigent defense representation in those counties does "not meet the standard of being independent from political influence."[184] Second, the committee concluded that in counties with contract programs, local policy boards are required in order to provide independence and oversight, but many are failing to do so. Third, according to the committee, many county boards enter into contracts directly with contractors "with

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180 TSG NY Report, *supra* note 32, at 41 (*citing Public Hearing Before the New York State Commission on the Future of Indigent Defense Services* 24–25, Albany, May 12, 2005) (statement of Mark Montanye), *available at* http://www.courts.state.ny.us/ip/indigentdefense-commission/albany_5-12-05.pdf).

181 *Id.* at 42 (*citing Public Hearing Before the New York State Commission on the Future of Indigent Defense Services* 230-232, Ithaca, Mar. 23, 2005) (statement of Susan Horn), *available at* http://www.courts.state.ny.us/ip/indigentdefense-commission/NYS_Commision_032305.pdf) ("A legislative committee member asked me the following series of questions in a hostile tone of voice, starting with, isn't it true that the legal aid society has a policy of not disposing of cases at arraignment? I answered that that was in fact our policy because we were never given adequate resources to be able to meet our clients in jail before arraignment or to have staff present to discuss cases with them before arraignment. Therefore, it would be a violation of an ethical [obligation] to our clients to do so. The next question was, isn't it true that you make motions in every case? The answer unfortunately was no. We don't have the resources to do that…. The next question was, isn't it true that you served demands to produce in every case? The answer was yes. That is the statutory requirement to preserve our client's rights to discovery. And, finally, I was asked, isn't it true that you require a written response from the DA's office to those demands? … These questions were very troubling because they imply that we were doing something wrong by fulfilling our legal and ethical responsibility to our clients and that we were subjected to criticism for providing vigorous representation to our clients. … I was subsequently told by a member of the judiciary … that the word on the street was that we lost the city court program because we delayed cases. My response then and my response [now] is, one person's delay is another person's due process.").

182 Nebraska Update, *supra* note 32; *see also* The Spangenberg Group, Review of 2004 Update To "The Indigent Defense System in Nebraska" by the Minority and Justice Implementation Committee (2004).

183 Nebraska Update, *supra* note 32, at 8.

184 *Id.* at 3.

no attempt to provide independence, [and] [t]he selection, funding and payment in most of these situations are influenced by considerations of costs rather than quality of services."[185] Sadly, similar problems had been found in Nebraska over a decade earlier.[186]

Selection and Assignment of Counsel

In order to protect the independence of attorneys assigned to represent indigent defendants, the ABA has long recommended that the assignment of cases be made in an orderly way to ensure that they are fairly distributed and to guard against patronage and its appearance.[187] This admonition, however, is routinely violated. Many jurisdictions lack uniform rules and procedures governing the selection and assignment of counsel, leaving assigned counsel systems ripe for abuse. The result sometimes is an unfair selection or exclusion of certain counsel and an inappropriate allocation of cases, all of which erode the independence of the defense function.

In Texas, despite the passage of the Fair Defense Act in 2001, which created state indigent defense standards, the counties retain discretion in creating the process and procedure for the appointment of counsel to indigent cases in their local courts. In Harris County, new standards and procedures for appointment of counsel in juvenile cases were adopted in 2007, allowing judges to assign attorneys either according to a computerized random selection process or by court request.[188] The latter method, which existed prior to the new standards, permits judges to favor some attorneys with political or judicial connections. For instance, one attorney reportedly made $40,000 from receiving nearly 250 juvenile appointments, despite having had his Texas law license twice suspended, having spent a day in jail for lying to the court, and having his attorney fees garnished by the Internal Revenue Service for failure to pay taxes. This attorney had reportedly been hired to represent the daughter of one of the three Harris County juvenile court judges in a vehicular manslaughter case.[189] Two other attorneys, neither of whom was certified in juvenile law, made over $150,000 in 2007; one of the attorneys received many juvenile appointments from a judge who had been his law partner and for whom he had been a campaign treasurer.[190]

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185 *Id.*

186 The Spangenberg Group, The Indigent Defense System in Nebraska (1993).

187 *See, e.g.,* ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-2.1, 5-2.3.

188 Harris County Juvenile Board Fair Defense Act: Standards and Procedures for Appointment of Counsel for Juvenile Respondents 13 (2007).

189 Rick Casey, *Judge Sure Keeps This Lawyer Busy,* Houston Chron., Oct. 16, 2007 (during trial of manslaughter case, it was reportedly revealed that attorney had removed evidence from daughter's vehicle that would show the speed of the car at the time of the fatal accident).

190 Rick Casey, *County Hires Bad Lawyers, Bans Good,* Houston Chron., Oct. 19, 2007.

While these Harris County attorneys were appointed in juvenile cases, three experienced, board-certified juvenile defense attorneys in Harris County were removed from the juvenile court list without being given specific reasons for removal.[191] Under the Harris County rules, juvenile attorneys must be "approved by a secret ballot" by a majority of the three judges.[192] One of the three attorneys removed from the list had reported to the Texas Task Force on Indigent Defense for several years an unfair allocation of appointments by one of the judges, and the judge was aware of the attorney's complaints. The second attorney removed from the list was the law partner and spouse of the first attorney. The third attorney surmised a couple of reasons for her removal, including that she was aggressive in her defense of juveniles and caused the docket to slow down.[193]

In Alabama, "there is little that is uniform in the way cases are handed out," according to an attorney for the Alabama Administrative Office of Courts. [194] Rather, the different circuits and courts employ their own methods with little or no oversight. In Mobile County, attorneys have complained about an unfair distribution of cases that favored some attorneys over others.[195]

In Nebraska, appointment of both assigned counsel and contract defenders is handled by the judiciary on an ad hoc basis without the guidance of any standards or uniform procedures.[196] In 2006, data from statewide surveys of judges, court-appointed attorneys (excluding public defenders), and county commissioners reflected a

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191 *Id.*

192 Harris County Juvenile Board Fair Defense Act, *supra* note 188, at 5.

193 Casey, *supra* note 190. At least two of the aggrieved Harris County juvenile attorneys appealed the decision of the judges to remove them from the juvenile list, citing their extensive experience in representing juveniles and their knowledge of juvenile law. Under the county's new standards and procedures for appointment (Harris County Fair Defense Act, Standards and Procedures for Appointment of Counsel for Juvenile Respondents, Standard 9.2.), an attorney may appeal an omission or removal from the list to the court's appointment coordinator, yet the appeal requires neither an independent review of the decision nor a second review by the three judges themselves. In fact, the appeal involves no opportunity for a hearing at all but rather simply requires the appointment coordinator to re-count the three original votes of the judges. Not surprisingly, neither appeal was successful. Additional and corroborating information for this Harris County, Texas, example was provided by the Texas Task Force on Indigent Defense. It has been widely reported that Harris County—the largest county in the United States without a public defender—is considering the establishment of such a program. *See, e.g., Harris County to Consider Public Defender Office,* April 10, 2008, *available at* http://standdown.typepad.com/weblog/2008/04/harris-county-t.html.

194 Rob Holbert, *Mobile Indigent Defense Cases and Payments Continue to Rise,* Lagniappe (Mobile, AL), Oct. 21, 2008.

195 *Id. See also infra* notes 251–253, and accompanying text.

196 *See* Nebraska Update, *supra* note 32, at 4.

number of serious problems in the appointment process.[197] For instance, 54% of district court judges surveyed responded that they do not maintain a list of attorneys for indigent defense appointments. In county and juvenile courts, 23% of the judges reported that their courts do not maintain lists of attorneys for appointment. Although systems that fail to use any rotation method are subject to abuse, one judge candidly admitted that, as an attorney, the judge would view the lack of rotation as "a hidden, secret system." This judge also conceded that he knew of other judges who "have 'paid attorneys back' for too many trials or other offenses by not appointing them again."[198] Not surprisingly, over 20% of attorneys surveyed in Nebraska perceived the use of patronage in the appointment process.[199]

Similarly, a 2007 performance audit of the Office of Indigent Defense Services in North Carolina noted that indigent defense attorneys in that state suffer from a lack of independence from the judiciary.[200] In areas with public defender offices, North Carolina law requires that the chief public defender be appointed by the senior resident superior court judge of the district in which the public defender will be practicing.[201] As the State Auditor points out: "Since it is reasonable to assume that each public defender has an interest in being reappointed to the next four-year term and would like to remain in the judge's favor during the interim, neither the public defender, his or her staff, nor the private counsel they appoint can be considered free from judicial influence."[202] The 2007 audit further found that, although each county is required to establish a committee to create a roster of attorneys for indigent appointments, 41 of the 100 counties had failed to do so.[203]

Failures in Providing Counsel

While some indigent defendants are represented by overworked attorneys or attorneys lacking sufficient independence, other indigent defendants obtain representation too late in the process or simply do not receive counsel at all. As discussed in Chapter

197 While the response rate of court-appointed attorneys was low (21% of all surveys mailed), the response rate of judges was extremely high (93% in district court, 86% in county court and 80% in juvenile court). Nebraska Minority Justice Committee, Report to the Nebraska Supreme Court on Indigent Defense Systems and Fee Structures 2 (2006), *available at* http://www.nebar.com/pdfs/mjic/2008/Progress_Report_07.pdf.

198 *Id.* at 8.

199 *Id.*

200 Office of the State Auditor of North Carolina, Performance Audit - Office of Indigent Defense Services 1 (2007).

201 *Id.* at 6–7, *citing* N.C. Gen. Stat. Ann. § 7A-498.7b (2008).

202 *Id.* at 7.

203 *Id.* at 7–8.

1, *Gideon* and its progeny require that all indigent defendants facing the possibility of incarceration—even the future possibility of incarceration after a suspended or probationary sentence is revoked—have a constitutional right to counsel.[204] Moreover, the right to counsel attaches at all critical stages of a case, beginning with the initial court appearance when a defendant first learns of the charges.[205] If a person elects to proceed without counsel, the record must show that the individual fully understood and voluntarily waived the right to an attorney.[206]

No Counsel and Late Counsel

Whether because of a desire to move cases through the court system, a desire to keep indigent defense costs down, or ignorance, pervasive and serious problems exist in misdemeanor courts across the country because counsel is oftentimes either not provided, or provided late, to those who are lawfully eligible to be represented. Also, when counsel is not provided, all too often, the defendant's waiver of legal representation is inadequate under Supreme Court precedents.[207] As a result, there is a shocking disconnect between the system of justice envisioned by the Supreme Court's right-to-counsel decisions and what actually occurs in many of this nation's courts. These conclusions were borne out by investigations conducted on behalf of the Committee during 2006 by three experienced criminal justice professionals who visited court proceedings in eight states across the country.[208]

Here are several illustrative findings of our investigators: "… the judge advised … [approximately 15] … defendants [all of whom were in custody] that they had the right to ask for counsel to be appointed, but the circumstances … almost impel indigent defendants to plead guilty and give up their right to counsel. There is no public defender or appointed counsel present at the proceedings with whom defendants can

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204 Alabama v. Shelton, 535 U.S. 654 (2002). *See also supra* notes 24–26 and accompanying text, Chapter 1.

205 Rothgery v. Gillespie County, 128 S. Ct. 2578 (2008). *See also supra* notes 38–40 and accompanying text, Chapter 1.

206 Johnson v. Zerbst, 304, U.S. 458 (1938).

207 For further discussion of requirements of a valid waiver, *see supra* notes 47–52 and accompanying text, Chapter 1.

208 Our investigators were the Hon. Charles D. Edelstein, Senior Florida Judge; John Rubin, Professor of Public Law and Government, Institute of Government, University of North Carolina; and Hon. Shelvin R. Singer, retired judge of Cook County, Illinois. The courts visited were in California, Colorado, Florida, Mississippi, Nevada, South Carolina, Texas, and Washington. Throughout this report, we have identified specific jurisdictions contained in published studies and news reports. However, we have not identified the courts in which our investigators made their observations. Their observations and findings are not contained in prior reports, but instead in memorandums furnished to the Committee. The interest of the Committee is in describing practices found to be widespread, not in identifying the particular judges or courtrooms that were observed.

consult. Consequently, a defendant who wants … counsel must wait several days for counsel to be appointed and possibly several more days for appointed counsel … to make contact."[209] All but one or two of the defendants pled guilty and received fines and probation with suspended sentences.[210] Another of our investigators summarized his observations of a court in a different state: "For all practical purposes, this is [a] court which provides appointed counsel infrequently and very late in the processing of a case. The practices surrounding pretrial release place great pressures on detained defendants to enter guilty pleas without the assistance of counsel."[211]

The foregoing observations are supported by numerous other sources. In the State of Washington, for example, despite court rules requiring early appointment of counsel, many courts do not appoint counsel in misdemeanor cases, either by not offering counsel to the accused or through accepting invalid waivers of counsel.[212] In Mississippi, a woman accused of stealing $200 from a slot machine languished in jail for eight months without receiving a lawyer; she finally pled guilty in order to be released from jail.[213]

The late appointment of counsel not only affects the attorney-client relationship, but it also undermines a defendant's right to be heard on pretrial release and the ability to prepare a defense. Unless counsel represents the accused soon after arrest, witnesses may be lost, memories of witnesses may fade, and physical evidence useful to the defense may disappear. Further, like the woman from Mississippi mentioned above, without defense representation, defendants may plead guilty just to obtain their release. In many jurisdictions, counsel is not appointed when bail is initially set, forcing indigent defendants to represent themselves and advance arguments for bail reduction and their release from custody. In Maryland, for example, indigent defendants frequently appear at bail review hearings before a judge without counsel because the state public defender's office is not funded sufficiently to assign attorneys for them.[214] As a result, indigent defendants arrested for relatively minor crimes were sometimes incarcerated for 30 days or even longer. Yet, when law school students argued for bail in these same cases, they were successful two-thirds of the time.[215]

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209 Professor John Rubin, Report to the National Right to Counsel Committee, April 25, 2006 (on file with Committee's Reporters).

210 *Id.*

211 Hon. Charles D. Edelstein, Report to the National Right to Counsel Committee, April 12, 2006 (on file with Committee's Reporters).

212 ABA Gideon's Broken Promise, *supra* note 108, at 26.

213 *Id.* at 23.

214 Doug Colbert, Op-Ed., *Can't Afford Bail, So They Sit in Jail,* The Baltimore Sun, Dec. 18, 2007.

215 *Id.*

The late appointment of counsel has even more severe consequences for indigent defendants in Mississippi, where the delay in assigning lawyers for the indigent has been described as a "pervasive problem."[216] Months may pass before counsel is appointed, causing many people charged with non-violent offenses to serve more time in pretrial custody than warranted for the offenses themselves.[217] One 50-year-old woman charged with shoplifting $72 worth of merchandise spent 11 months in jail before a lawyer was appointed to her case, and an additional three months before pleading guilty.[218] Juveniles also are adversely affected by the late appointment of counsel. A study conducted several years ago in Montgomery County, Ohio, reported that, because of insufficient funding, lawyers were unavailable to juveniles at their initial appearance, and many youths nevertheless acknowledged guilt without ever speaking to counsel.[219] Similarly, in Indiana, juveniles are frequently unrepresented at critical court appearances, and many juveniles waive their right to counsel without fully comprehending the right.[220] In Illinois, due to untimely appointments, most attorneys are unable to speak with juveniles prior to the first court appearance, including detention hearings, and are, therefore, unable to provide meaningful representation at this stage.[221]

When jurisdictions fail to fund indigent defense sufficiently to allow for timely access to attorneys and when courts fail to timely appoint counsel, the frequent result is not a net cost-savings, but instead, a shifting of expenses to corrections. For example, it cost Mississippi taxpayers over $12,000 to incarcerate the 50-year-old woman charged with shoplifting discussed above.[222] Despite cost savings that can result from the timely appointment of counsel, legislatures may still refuse adequate funding of indigent defense to make timely appointment possible. A recent story from Georgia illustrates the point. A county sheriff in Georgia noted that once the public defender office was opened, with a requirement that attorneys meet with incarcerated clients within 72 hours of arrest, the average daily jail population was reduced from 220 inmates to 190 inmates, despite an increase in the number of persons arrested.[223] As a

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216 NAACP Legal Def. and Educ. Fund, Inc., Assembly Line Justice: Mississippi's Indigent Defense Crisis 8 (2003) [hereinafter NAACP Legal Def. and Educ. Fund, Inc.].

217 *Id.* at 6.

218 *Id.* at 3.

219 Justice Programs Office, American University, Management and Operational Review of the Montgomery County Public Defender Office: Montgomery, Ohio 34, 44 (2000).

220 Elizabeth Gladden Kehoe and Kim Brooks Tandy, Indiana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings 30 (2006).

221 Cathryn Crawford, et al., Illinois: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings 2–3 (2007).

222 NAACP Legal Def. and Educ. Fund, Inc., *supra* note 216, at 2.

223 Lori Yount, *Paying for Public Defenders,* Chattanooga Times Free Press, Dec. 17, 2007.

result, the county saved $40 per person per day in incarceration costs.[224] Despite these data, one of the proposed state legislative responses to a budget deficit in indigent defense was to extend to five days the state's 72-hour requirement for initial attorney-client meetings. Ultimately, the proposal did not pass.[225]

Invalid Waivers

Although courts usually claim to offer counsel to those eligible, the way in which the offer is made and the procedure for obtaining a defendant's waiver of counsel often undermine the right itself. Concerns over cost or movement of the court's docket can lead to a lack of proper notification of the right or to pressure to waive it. The legal requirements for waiver of counsel, i.e., that it be "knowing, voluntary, and intelligent," were discussed earlier.[226] Beyond the court's role in making certain that a defendant's waiver of counsel is valid, prosecutors have a professional responsibility duty "not [to] give legal advice to an unrepresented person, other than the advice to secure counsel."[227] Similarly, the ABA has recommended that prosecutors should refrain from negotiating with an accused who is unrepresented without a prior valid waiver of counsel. Prosecutors also are admonished by the ABA to ensure that the accused has been advised of the right to counsel, afforded an opportunity to obtain counsel,[228] and not to seek to secure waivers of important pretrial rights from an accused who is unrepresented.[229]

Unfortunately, these legal and professional duties, as well as recommendations regarding appropriate professional conduct, are ignored on a daily basis. Throughout the country, many indigent persons, both adult criminal defendants and juveniles, are not fully informed of their right to counsel and are asked to sign waiver of counsel forms or speak to prosecutors without fully understanding their rights. The Committee's investigators found that, of the courts they visited in eight states,[230] some failed to provide a detailed explanation of the right to counsel on the written waiver form. Further, the right to counsel was not always explained individually to

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224 *Id.*

225 *4 Issues Facing Public Defender Program, supra* note 68.

226 *See infra* note 51 and accompanying text, Chapter 1. The ABA has urged that a proper waiver include "a thorough inquiry into the accused's comprehension of the offer" of counsel. ABA Providing Defense Services, *supra* note 38, Chapter 1, at 5-8.2(a). Standard 5-8.2(b) further recommends that when a defendant is facing the possibility of incarceration, a waiver should not be accepted unless the accused has had an opportunity to confer with an attorney.

227 ABA Model Rules, *supra* note 67, Chapter 1, at 4.3.

228 ABA Standards For Criminal Justice: Prosecution Function 3-4.1(b), 3-3.10(a) (3d ed. 1993) [hereinafter ABA Prosecution Function].

229 *Id.* at 3-3.10(c).

230 *See supra* note 208 for the names of the investigators and jurisdictions visited.

the accused, but instead was provided to groups of defendants en masse, sometimes through the use of a videotaped message. In a number of courts, judges made no inquiry as to whether defendants understood the consequences of their waivers of counsel. In one court, defendants were not informed of their right to counsel at all.

In several courts, the Committee's investigators found that defendants were encouraged to negotiate with prosecutors without the assistance of counsel, and in one court they were required to do so. These negotiations frequently involved a discussion of the charged offenses and led to guilty pleas. As one of our investigators explained in his report: "In … [this] County defendants are frequently told by the judge to negotiate with the prosecutors before … [the judge would consider] appointing a lawyer. These negotiations usually result in guilty pleas. No lawyer for defendant is present or involved."[231] Further, the courts often placed pressure on defendants to plead without counsel by informing them that a request for a lawyer would delay their case or release from jail, or that refusing a plea offer would result in a harsher sentence in the future.

In many Georgia courts, defendants have been instructed to speak with prosecutors about their charges and potential plea offers before their cases were called and often before any admonition of the right to counsel.[232] Further, courts frequently have failed to explain the right to counsel to individual defendants prior to accepting lengthy and complicated signed waiver forms.[233] In one egregious example from Georgia, a judge advised felony defendants that the court was prepared to follow the prosecutor's sentencing recommendation in exchange for a guilty plea, without ever mentioning the right to counsel until the judge and defendant were halfway through the plea colloquy.[234] In a Rhode Island court, a judge offered a defendant six months in jail for an immediate guilty plea without counsel, adding that if the defendant requested a lawyer, he would likely be sentenced to three years in jail.[235]

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231 Hon. Shelvin Singer, Report to the National Right to Counsel Committee, April 14, 2006 (on file with Committee's Reporters).

232 These examples occurred in misdemeanor cases prior to establishment in 2003 of Georgia's statewide indigent defense system that now funds felony and juvenile cases. It is unclear whether significant changes have been made in local court practices since the study listed below. However, misdemeanor cases in Georgia are still funded by the counties. The Spangenberg Group, Status of Indigent Defense in Georgia: A Study for the Chief Justice's Commission on Indigent Defense Part II: Analysis of Implementing *Alabama v. Shelton* in Georgia 34–38 (2003).

233 *Id*. at 39–44.

234 ABA Gideon's Broken Promise, *supra* note 108, at 25.

235 *Id.*

Absence of Law-Trained Judges

Following a yearlong investigation, in the fall of 2006, the New York Times published three articles about serious errors and abuses of power by New York State town and village court judges, the majority of whom are not attorneys and sometimes lack adequate legal training.[236] The conclusions of the New York Times investigation concerning indigent defense representation are fully supported by a study of defense services in New York, also released in 2006, and undertaken on behalf of a New York commission on the future of indigent defense appointed by the state's chief judge.[237] While the articles in the New York Times and the New York study deal only with the State of New York, the problems that they document almost certainly extend beyond that state since there are still 30 states in this country that have limited jurisdiction courts that are presided over by non-law trained judges.[238]

Specifically, in New York, of the 1,971 judges in its town and village courts, almost three-fourths are non-lawyers,[239] and none of the courts are "courts of record," as there is neither a verbatim transcript of their proceedings nor an audio recording.[240] Each year, in New York, these judges preside over about 300,000 criminal matters and sentence persons to jail for sometimes up to two years.[241] According to the study conducted on behalf of New York's commission on the future of defense services, problems in providing counsel include judicial ignorance or misunderstanding of the law on the duty to provide representation, improper advisements of the right to counsel, and the outright refusal to appoint counsel for certain offenses, even though the right to counsel is clearly applicable.[242] The problems are exacerbated by the understaffing of public defender offices, which prevents them from appearing at all first appearances in their jurisdictions, and county pressure on local judges to contain costs by not appointing counsel.[243]

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236 William Glaberson, *In Tiny Courts of N.Y.: Abuses of Law and Power,* NY Times, Sept. 25, 2006 [hereinafter Glaberson, *Tiny Courts*]; William Glaberson, *Small-Town Justice, With Trial and Error,* NY Times, Sept. 26, 2006; William Glaberson, How a Reviled Court System Has Outlived Critics, NY Times, Sept. 27, 2006). All of these articles are available through the search engine of the New York Times accessible on its website.

237 *See* TSG NY Report, *supra* note 32, at 103–120.

238 Glaberson, *Tiny Courts, supra* note 236. *See also* Mary C. McFarland, *The Role of Quasi-Judicial Officers in Today's Changing Courts,* 19 The Court Manager 18, 19 (2004) ("From the survey sent to court administrators, 21 percent of quasi-judges are required to be legally trained…. However, 71 percent are not required to have legal training and are primarily found in limited jurisdiction courts."), *available at* http://www.ncsconline.org/WC/Publications/KIS_QuaJudRole.pdf.

239 Glaberson, *Tiny Courts, supra* note 236.

240 TSG, NY Report, *supra* note 32, at 118.

241 Glaberson, *Tiny Courts, supra* note 236.

242 TSG NY Report, *supra* note 32, at 110–113.

243 *Id.*

According to a decision of the U.S. Supreme Court, a person who is tried before a non-lawyer judge is not denied due process of law under the federal Constitution so long as there is an absolute right to a new trial before a judge who is a lawyer.[244] However, if a defendant is unrepresented in a criminal proceeding in a New York town or village court, the defendant is unlikely to be aware that he or she can request a new trial before a law-trained judge since there is no requirement under New York law that a defendant must be so advised.[245]

Lack of Performance Standards, Training, and Oversight

When counsel is provided, beyond the need for reasonable caseloads, as discussed earlier,[246] it is essential that the lawyers adhere to performance standards and that they be appropriately trained and supervised. National professional standards require that defense counsel's knowledge, skill, and training be sufficient to provide representation in each case.[247] ABA principles also require oversight of an attorney's performance measured against national and local performance standards.[248] As discussed in Chapter 1, although national performance standards exist,[249] they are not binding in any state or local jurisdiction. Even when such standards are adopted by a jurisdiction or defense program, due to lack of resources and high caseloads, compliance is not usually monitored or enforced. As a result, untrained and unskilled attorneys often fail to provide competent representation, as required by rules of professional conduct, and the effective assistance of counsel demanded by the Sixth Amendment.

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244 North v. Russell, 427 U.S. 328 (1976). Despite the *North* decision, the New York Court of Appeals held in the case of People v. Charles F, 60 N.Y.2d 474, 470 N.Y.S.2d 342 (1983), that appellant charged with misdemeanor offenses as a juvenile and subject to incarceration did not have an "absolute due process right under New York or Federal law to trial before a law-trained Judge…." 60 N.Y.2d at 477, 40 N.Y.2d at 343. The decision in *Charles F.* was 4 to 3, with the majority ruling that the *North* case requires only that a defendant receive a fair trial, and that there was no showing in this case that the juvenile's trial was unfair and that transfer of the case pretrial to a law-trained judge is not required under a New York statute that allows transfer for "good cause." The dissent argued that the appellant had an absolute right to have his case heard before a law-trained judge, citing the *North* decision, since a lawyer-judge can deal more effectively with motions and evidentiary rulings. This issue does not appear to have been further litigated in the State of New York.

245 TSG NY Report, *supra* note 32, at 120.

246 *See infra* notes 96–104 and accompanying commentary.

247 *See, e.g.,* NLADA Performance Guidelines, *supra* note 72, Chapter 1, at 1.2(a), 1.3; ABA Ten Principles, *supra* note 70, Chapter 1, at Principle 6 ("Defense counsel's ability, training, and experience match the complexity of the case.") and 9 ("Defense counsel is provided with and required to attend continuing legal education."); and ABA Model Rules, *supra* note 67, Chapter 1, at R. 1.1.

248 *See* ABA Ten Principles, Principle 9 ("Defense counsel is provided with and required to attend continuing legal education.") and 10 ("Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.").

249 *See, e.g.,* NLADA Performance Guidelines, *supra* note 72, Chapter 1.

In recognition of the need to improve indigent defense representation in Nevada, in 2008, the Nevada Supreme Court did what few other state supreme courts have done—approved new indigent defense performance standards. However, Nevada's counties are responsible for 95% of the burden of funding indigent defense, and many of the counties have declared that they cannot afford to ensure compliance with the standards.[250]

In Alabama, where counties employ assigned counsel systems for indigent defense, brand new attorneys out of law school are reportedly just as likely as experienced attorneys to be assigned to serious cases, even homicide prosecutions.[251] A September 2008 editorial said of the system: "It is unconscionable that a defendant facing serious criminal charges can get stuck with a tax or real estate lawyer."[252] In recognition of the problem, Alabama's Chief Justice has called for indigent defense oversight across the state.[253]

Similarly, in many upstate counties in New York, assigned counsel systems require no experience or training to be eligible to receive court appointments.[254] Some of these programs also lack performance standards and oversight. Thus, attorneys fresh from passing the bar can end up having their first criminal trial be a felony case and can even be asked to represent someone charged with homicide.[255] Similar problems exist in counties with public defender offices, where there is little or no funding in the budget to provide training or oversight. One new public defender, who was given a felony caseload after only a few months of practice, described his training as "trial by fire."[256]

In 2007, in Caddo Parish, Louisiana, new public defenders with no training were assigned the existing caseloads of their predecessors, regardless of prior experience.[257] One attorney, right out of law school, started with a caseload of 270 felony drug cases. In Clark County, Nevada, where the public defender office was found to lack any performance standards or oversight of its attorneys, public defenders were observed to treat clients with disrespect and neglect their duties.[258] Further, many attorneys

250 Martha Bellisle, *Defense Reform Needed for Poor,* Reno-Gazette-J., May 4, 2008.

251 ABA Gideon's Broken Promise, *supra* note 108, at 17.

252 Stephen Stetson, *A State of Unequal Justice*, Huntsville Times, Sept. 14, 2008, at 1C.

253 *Id.*

254 *See* TSG NY Report, *supra* note 32, at 58–62.

255 *Id.* at 59.

256 *Id.* at 53.

257 The Spangenberg Group, Review of the Caddo Parish Indigent Defender Office 11 (2007) [hereinafter TSG Caddo Parish Report], *available at* http://www.abanet.org/legalservices/sclaid/defender/downloads/Caddo_Parish_FINALReport2.22.07.pdf.

258 Nat'l Legal Aid and Defender Ass'n, Evaluation of the Public Defender Office: Clark County, Nevada 17 (2003).

in the office did not have the necessary training to handle their caseloads. In Maine, a 2003 study noted that attorneys need have no experience or training to represent juveniles. Moreover, in some remote areas of Maine, juvenile attorneys must drive eight to 10 hours just to attend continuing legal education training.[259] In Washington, lack of attorney training regarding effective communication, developmental issues, mental health and learning disabilities contribute to inadequate communication with juvenile clients.[260]

Also, in Mississippi, a lack of performance standards, training, and supervision of indigent defense providers has been cited. In one egregious case, for instance, two attorneys who had been appointed to a death penalty case were disbarred or suspended from practice after the trial and before the direct appeal.[261] On other occasions, attorneys have continued to receive appointments even after being found to provide ineffective representation.[262]

Lack of Experts, Investigators, and Interpreters

Another area that seriously undermines the ability of indigent defense attorneys to provide an effective defense is the lack of access to and funding of non-attorney services such as experts, investigators, and interpreters. The outcome of a criminal case can hinge on retaining an appropriate expert or conducting a thorough fact investigation. In the case of non-English speaking clients, qualified interpreters are critical for attorney-client communication. Not only do states have a constitutional duty to provide these kinds of assistance, as discussed in Chapter 1,[263] but professional standards also require defense counsel to seek such services as are necessary to prepare an effective defense.[264]

Investigators are needed to interview witnesses and collect physical evidence,[265] while experts are often necessary to present an effective defense (e.g., insanity or battered

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259 ABA Juv. Just. Center and New England Juv. Defender Center, Maine: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings 26 (2003).

260 Elizabeth M. Calvin, et al., Washington: An Assessment of Access to Counsel and Quality of Representation in Juvenile Offender Matters 26 (2003).

261 NAACP Legal Def. and Educ. Fund, Inc., Assembly Line Justice: Mississippi's Indigent Defense Crisis 17 (2003).

262 *Id.* at 17.

263 *See infra* notes 33–36 and accompanying text, Chapter 1. *See also* ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-1.4.

264 *See, e.g.,* ABA Defense Function, *supra* note 73, Chapter 1, at 4-4.1(a); NLADA Performance Guidelines, *supra* note 72, Chapter 1, at 4.1.

265 Indigent defense attorneys often do not have the time or ability to track down witnesses, travel to distant locations, interview difficult witnesses, or survey crime scenes. Further, if attorneys perform

woman's syndrome), test physical evidence, or provide an opinion independent of the prosecution's state-supplied expert. As noted earlier, while the prosecution has at its disposal the services of state and federal law enforcement and experts, indigent defense attorneys commonly require prior court approval in order to access the same services. Often, however, defense attorneys are denied the use of experts or investigators due to limited funds. When judges serve as the gatekeepers of the funds for non-attorney services, they often feel pressure from elected officials to guard limited financial coffers. Moreover, when attorneys know that requests for services are frequently denied, they sometimes fail to seek the needed services.

In California, a study of cases claiming ineffective assistance of counsel, conducted for the California Commission on the Fair Administration of Justice, revealed that, of the 121 cases in which deficient attorney performance was found, 44% involved a failure to investigate.[266] In addition, a statewide survey of judges and indigent defense attorneys disclosed that over two-thirds of respondent judges conceded that their counties lacked adequate financial resources to fund indigent defense investigations.[267] Similarly, with regard to expert services, nearly two-thirds of indigent defense attorneys reported difficulty in obtaining approval for defense testing of DNA and other forensic evidence.[268]

In Michigan, a 2002 task force reported that reimbursement requests for experts and fees for investigators were often rejected.[269] The same problems continued to exist in Michigan in 2008, where investigative and expert services in some counties are rejected by the court or simply never requested.[270] In one county, rather than seeking the necessary investigative services from the court, attorneys commonly ask the prosecutor to have law enforcement perform the investigation.[271]

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their own investigations, they risk needing to become witnesses in their clients' cases in order to either introduce evidence or impeach the testimony of others. The problem of impeachment is dealt with in ABA Defense Function, *supra* note 73, Chapter 1, at 4-4.3 (e): "Unless defense counsel is prepared to forego impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or seek leave to withdraw from the case in order to present such impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person."

266 California Commission on the Fair Administration of Justice, Report and Recommendations on Funding of Defense Services in California 4 (2008), *available at* http://www.ccfaj.org/rr-pros-official.html.

267 *See* Benner and Stern, *supra* note 116, at 28.

268 *Id.* at 3–4.

269 The Task Force on Improving Public defender Services in Michigan, Model Plan for Public Defender Services in Michigan 5 (2002).

270 Nat'l Legal Aid and Defender Ass'n, A Race to the Bottom: Trial-Level Indigent Defense Systems in Michigan 51, 86, 87 (2008) [hereinafter NLADA Michigan Report].

271 *Id.* at 68.

In Virginia, some indigent defense attorneys are told by judges to use the state's experts, while other attorneys struggle to find experts willing to work for unreasonably low fees.[272] Similarly, some judges in New York advise indigent defense attorneys to use the state's experts rather than authorize funds for independent defense experts.[273]

Some jurisdictions also fail to provide certified interpreters to assist at court proceedings and attorney-client meetings when non-English speaking clients are represented. A study of the public defender's office in San Bernardino, California, found that, instead of interpreters to translate, attorneys used a friend, family member of the client, or another person on staff.[274] In New York, many indigent defense attorneys have no access to interpreters to conduct out-of-court communication with clients, but may use friends or family members of the client.[275] Moreover, some local courts in New York have no official interpreter to assist in court proceedings.[276]

Inadequate Client Contact

Professional conduct rules require, and standards applicable to defense representation recommend, that attorneys keep clients informed of the status of their case and promptly respond to client requests for information.[277] Obviously, to represent a client properly, defense attorneys must meet with their clients as soon as possible after a case begins in order to review the facts and circumstances of the case, determine the client's wishes, and prepare a defense, including determining whether investigation and legal research must be performed.[278]

The unfortunate reality is that indigent defense attorneys often are unable to comply with their professional duty respecting client contact due to several factors, such as excessive caseloads and the failure to be appointed in a timely manner. In addition, a jurisdiction's system of public defense sometimes lacks the resources to furnish counsel at the client's first court appearance. Early client contact is crucial to establishing

272 TSG Virginia Report, *supra* note 173, at 75.

273 TSG NY Report, *supra* note 32, at 75.

274 Nat'l Legal Aid and Defender Ass'n, Evaluation Report and Recommendations: San Bernardino County Public Defender Office 65 (2001).

275 TSG NY Report, *supra* note 32, at 71–72. (2006).

276 *Id.*

277 *See* ABA Model Rules, *supra* note 67, Chapter 1, at R. 1.4; ABA Defense Function, *supra* note 73, at 4-3.8; NLADA Performance Guidelines, *supra* note 72, Chapter 1, at 1.3(c), 2.2(b).

278 *See, e.g., Id.* at 5(a) ("Counsel should develop, in consultation with the client, an overall defense strategy.")

the attorney-client relationship, building trust, and, if the client is incarcerated, seeking the client's pretrial release.[279]

When attorneys have too many cases, client contact suffers and is sometimes virtually non-existent. Attorneys become unavailable to clients because they are constantly in court, and initial attorney-client meetings are forced to take place in court. The situation is often worse for incarcerated defendants. Some defense counsel lack sufficient time to visit their clients in jail or are unable to accept collect calls from the jail. For example, in Caddo Parish, Louisiana, where many attorneys labor under excessive caseloads, some public defenders cannot comply with an office policy to visit clients in jail within 10 days of their appointment.[280] One public defender admitted to not visiting in-custody clients until after the preliminary hearing is held, which may be a month or more after appointment to the client's case. Another reported that his jail visits were "sporadic" and that he usually only made telephone contact with incarcerated clients. A public defender representing juveniles described client contact as "kind of nonexistent."[281] Some public defender clients in Caddo Parish have actually filed pro se subpoenas for jail visitation records to alert the court that they have not been visited by their attorneys.[282] Given such a lack of client contact, it is not surprising that public defenders rarely argue motions seeking pretrial release for their clients within a month of being appointed.[283]

Out-of-court client contact is even more imperative when, as is often the case, courts lack sufficient space for confidential attorney-client meetings, eroding the attorney-client privilege and counsel's ability to prepare a defense.[284] In some courts in Missouri, for example, attorneys must meet with their incarcerated clients while they are shackled to other inmates, thereby violating attorney-client privilege principles, making it even more necessary to discuss their cases out of court.[285] Nevertheless, due to overwhelming workloads, many public defenders do not consult with incarcerated clients on even a monthly basis, as required by Missouri Public Defender Guidelines.[286]

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279 *See, e.g., Id.* at 2.1 (an attorney "has an obligation to attempt to secure the pretrial release of the client under the conditions most favorable and acceptable to the client").

280 TSG Caddo Parish Report, *supra* note 257, at 10.

281 *Id.* at 20.

282 *Id.* at 10.

283 *Id.* at 30.

284 *See, e.g.,* ABA Ten Principles, *supra* note 70, Chapter 1, at Principle 4 ("Defense counsel is provided sufficient time and a confidential space within which to meet with the client."); ABA Defense Function, *supra* note 73, Chapter 1, at 4-3.1 ("To ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be available for private discussions between counsel and accused.").

285 TSG MO Report, *supra* note 84, at 8.

286 *Id.* at 8–9.

In Oakland County, Michigan, attorneys cannot meet privately with in-custody clients when they are in court but must do so while their clients are in the jury box in the presence of sheriffs and other defendants.[287] In other counties in Michigan, many court-appointed attorneys meet their clients for the first time in court, weeks after their initial appearance. In Shiawassee County, many attorneys meet their in-custody felony clients for the first time in court at the preliminary hearing.[288] Worse yet, in Chippewa County, attorneys regularly meet for the first time with their clients charged with felonies at their circuit court arraignment, even though they have had two to six weeks to do so after the preliminary hearing in district court.[289] Client contact with indigent defendants is not necessarily better when their cases are on appeal. In South Carolina, for example, the appellate office's caseloads are so high that only defendants in capital cases can expect to be visited by their attorneys.[290] Moreover, attorneys lack the time to properly respond to written correspondence, leaving clients with little or no personal contact from their attorney.[291]

Lack of Technology and Data

Indigent defense systems often lack adequate technology and data systems. In this day and age, the absence of computers and access to online legal research is really quite remarkable. Yet, in Caddo Parish, Louisiana, discussed in the preceding section, some public defenders appearing in juvenile court did not have computers, and their secretary had no fax machine or copier, having to rely instead on the courthouse's equipment.[292] Besides wasting attorney and staff time, sharing equipment raises concerns regarding confidentiality. In New York, some public defender offices have little or no access to online legal research. One large office did not even have updated copies of New York's penal law.[293]

Some public defender offices also do not have sufficient management information systems and technical support, leaving them unable to compile relevant statistical data regarding their caseloads. While the inability to collect and report on caseloads and cost data is undoubtedly due to underfunding, it also becomes a cause of underfunding. Without accurate empirical data, the programs cannot demonstrate to gov-

287 *See* NLADA Michigan Report, *supra* note 270, at 75.

288 *Id.*

289 *Id.* at 76.

290 The Spangenberg Group, South Carolina Commission on Indigent Defense: Appellate Division Review 24 (2008).

291 *Id.*

292 TSG Caddo Parish Report, *supra* note 257, at 18.

293 TSG NY Report, *supra* note 32, at 51.

ernmental funding sources its cost-efficiency and need for additional appropriations. Moreover, government policy-makers are unable to assess systemic deficiencies and compare various programs to determine those that are most efficient.

For example, several years ago, a review of the Riverside County, California, Public Defender Office found that the system used to track data was so old that the company that provided the software would no longer service it.[294] Managers were unable to use the system to track the number of cases attorneys were carrying and case dispositions, making it impossible to project accurate staffing needs. Similarly, in West Virginia, because the agency that administers and oversees the state's indigent defense system was underfunded, it was unable to compare the cost-effectiveness of public defender offices and private assigned counsel.[295] In Pennsylvania, there is no uniform method for maintaining or reporting data on indigent defense, and some counties cannot even estimate public defender caseloads.[296] Similarly, California lacks reliable data to compare the number of indigent cases handled by public defenders, contract counsel, and private court-appointed counsel.[297]

Finally, when data systems are lacking or inadequate, potential conflicts of interest cannot be sufficiently determined (e.g., concurrent or prior representation of a co-defendant, victim, or witness). For programs that have appropriate data information systems, potential conflicts can easily be checked by running various names through the system. Without this information technology, conflict checks must either be conducted manually or not at all.[298] When conflicts are discovered late, new counsel must be appointed, cases are delayed, efforts often are duplicated, and unnecessary additional costs are incurred.

Erosion of Conflict of Interest Rules

As discussed in Chapter 1, there are few instances in which a single attorney, or multiple attorneys from the same office or program, should represent two or more accused persons in criminal prosecutions and juvenile delinquency cases. Doing so not only likely violates professional responsibility rules, but claims of ineffective assistance of

294 Nat'l Legal Aid and Defender Ass'n, Evaluation Report on Riverside County Public Defender Office 20–21 (2000).

295 The Spangenberg Group, Final Report to the West Virginia Indigent Defense Task Force 6 (2000).

296 ABA Gideon's Broken Promise, *supra* note 108, at 28.

297 California Commission on the Fair Administration of Justice, Final Report 72 (2008), *available at* http://www.ccfaj.org.

298 TSG NY Report, *supra* note 32, at 51.

counsel are possible if the client is convicted.[299] However, in public defense, in order to avoid paying private, assigned counsel, some public defender offices allow different attorneys from the same office or program to represent co-defendants, even when it would normally be a conflict of interest for them to do so.[300]

Regardless of whether such conduct is permitted under the jurisdiction's rules of professional conduct, as interpreted by the state's courts and bar ethics committees, the practice provides less protection from conflicts of interest than accorded private clients represented separately by retained criminal and juvenile defense lawyers.

For example, in Missouri, in order to avoid having to pay outside counsel in conflict cases, the State Public Defender represents co-defendants by using public defenders from different regional offices within the state agency.[301] In this way, two public defenders from the same program represent two co-defendants with competing interests at trial. Quite aside from appearances, the "conflict public defender" is disadvantaged, as she does not have office space in the region to which she has been sent and is likely to be unfamiliar with the local judges and court procedures in the county.[302]

Lack of available funds for outside counsel also was cited as a reason that the public defender office in Clarion County, Pennsylvania, represents co-defendants.[303]

Similarly, in Georgia, recently public defenders were reported to be representing co-defendants as a cost-saving measure.[304] Such representation not only creates ethical problems for the attorneys, but it may also increase the potential that a conviction will be overturned on appeal.[305] This problem is likely to become more pervasive in Georgia, at least in Fulton County, where the conflict defender office was recently closed as a cost-saving measure.[306]

Case Delays

Throughout the country, lack of funds for indigent defense sometimes lead to cases being continued, prosecutions suspended, and new lawyers substituted for present counsel. Ironically, when these sorts of events occur, governments that already are

299 *See infra* notes 92–95 and accompanying text, Chapter 1.
300 *See infra* note 92, Chapter 1.
301 TSG MO Report, *supra* note 84, at 17–18.
302 *Id.* at 18.
303 The Spangenberg Group, A Statewide Evaluation of Public Defender Services in Pennsylvania 40 (2002).
304 *4 Issues Facing Public Defender Program, supra* note 68.
305 *Id.*
306 Bill Rankin, *Contracts Fail Poor Defendants, Critics Say,* Atlanta J.-Const., July 3, 2008.

underfunding indigent defense may end up incurring even greater costs. At the very least, the quality of our system of justice is severely and negatively affected.

For example, in Minnesota, after a $4 million cut in funding and a 13% layoff of the state's public defenders, courts are now being staffed with fewer defenders. The reduction is causing inefficiencies, wasting time and resources. As described by the chief public defender for the 5th Judicial District, when public defenders are scheduled in two courts or counties at once, the whole system becomes inefficient; judges, prosecutors, victims, witnesses, law enforcement, and court personnel all must wait for the public defender before the case can be heard.[307] In Blue Earth County, where one of two public defenders handling arraignments was laid off, the judge commented that the remaining defender is overwhelmed and unable to resolve as many cases. The result is that "[t]he whole process is slowed down," and the court's calendar is "clog[ged]."[308]

In Miami (Dade County), where public defenders are facing serious case overload and a lawsuit about their caseloads is pending on appeal, public defenders are overworked and need to continue cases.[309] During April 2008, one public defender had 13 cases set for trial on the same day and was forced to continue all but one of them. In Orange-Osceola County, Florida, which, like Miami, has been hard hit by budget cutbacks, felony cases also are being delayed.[310] The local prosecutor has summed up the situation: "Justice delayed is justice denied in many cases."

In Oregon, a funding crisis several years ago resulted in a moratorium on appointing counsel in certain criminal and juvenile cases. Following a $50 million cut from Oregon's Judicial Department budget, the chief justice issued a funding reduction plan that directed courts, for a period of four months, to cease appointing counsel and suspend the arraignment of persons charged with certain felonies and misdemeanors, and to defer certain pending misdemeanor and probation violation cases.[311]

Case delays are particularly problematic in death penalty cases, which are the most costly to defend. Recent news in Georgia has highlighted these problems. In 2008, the Georgia Public Defender Standards Council was unable to pay private defense attorneys in cases throughout the state, in some instances for more than six months of work. A number of capital cases ground to a halt. In a highly publicized capital

307 Dan Nienaber, *Legislator Sees Impact of Court Cuts,* The Free Press (MN), Oct. 11, 2008.

308 *Id.*

309 Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases,* The N.Y. Times, Nov. 9, 2008.

310 *Financial Crisis Takes Toll on Justice System, Courts Across Region Feel Budget Crunch,* Nov. 10, 2008, *available at* http://www.wesh.com/consumernews/17950079/detail.html.

311 *Oregon Indigent Defense Struggles with the Fallout of a Fiscal Crisis,* The Spangenberg Rep., Nov. 2003, at 14 (*citing* State Ex Rel Metropolitan Public Defender Services, Inc. v. Courtney, 64 P.3d 1138 (Ore. 2003)); *see also infra* notes 134–36 and accompanying text, Chapter 3.

case, for instance, which involved 54 separate charges and 478 potential state witnesses, a lack of funding caused the case to be halted several times over the course of three years, one court-appointed attorney to be instructed to work fewer hours, and new counsel from the state's Capital Defender Office to be appointed as a cost-saving measure, over the defense team's objection.[312] In another capital case, appointed counsel requested a continuance on the grounds that there were no available defense funds to enable the case to continue.[313] The judge denied the motion and, at the request of the prosecutor and over the defendant's objection, appointed local public defenders who sought to withdraw from the case, due in part to their already crushing caseloads.[314] Still another attorney sought to withdraw from a capital case because he had not been paid in more than one year, had received no money for investigators or experts, and felt that he was being ineffective.[315]

The failure to provide adequate funds has resulted in delays in capital trials in Louisiana as well. In 2005, in the case of *State v. Citizen,*[316] the Louisiana Supreme Court ruled that, if the state's government failed to pay for defense counsel, the prosecution would be stayed until funding was provided.

Similarly, in Madison County, Indiana, attorneys who had represented a defendant in a murder case for nearly four years sought to withdraw when the county refused to pay for their services and for the cost of experts.[317] One of the defense experts commented that his fees were small in comparison to the "unlimited resources" of the federal agency that had reviewed the prosecutor's evidence. When the court asked the defenders to negotiate the cost of the defense with the county's Public Defender Board, the attorneys responded that doing so would limit their ability to prepare a defense and jeopardize their client's right to effective assistance of counsel.[318] Ultimately, the court appointed new attorneys, but doing so results in a duplication of much of the four years of effort by the original attorneys and additional costs.

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312 *Georgia Public Defender Standards Council Out of Money; Capital Trials in Limbo,* The Spangenberg Rep., Apr. 2008, at 12.

313 Bill Rankin, *Costs Stall Capital Cases,* The Atlanta J.-Const., Jan. 18, 2008.

314 *Id.*

315 Amy Leigh Womack, *Defense Lawyer: Lack of Funds Could Spur Appeal,* The Telegraph (Macon, GA), May 8, 2008.

316 898 So.2d 325 (La. 2005). *See also infra* notes 102–107 and accompanying text, Chapter 3.

317 Shawn McGrath, *Longtime Public Defenders Withdraw in Delph Case,* The Herald Bulletin (Anderson, IN), July 6, 2008.

318 *Id.*

CHAPTER 3

How to Achieve Reform: The Use of Litigation to Promote Systemic Change in Indigent Defense

Various forms of litigation have been pursued over many years to address serious problems in the delivery of indigent defense services due to the constant lack of adequate funding, invoking a wide variety of legal theories. These lawsuits have had varying degrees of success. This chapter discusses the most significant litigation, suggests lawsuits and motions likely to be successful, and draws some lessons believed to be instructive.

A. Legal Theories Underlying Litigation

In order to effectuate change in indigent defense representation, some litigants have asserted the rights of defense attorneys to equitable treatment and just compensation. Others have sought to vindicate the rights of indigent defendants to effective assistance of counsel and due process of law. Increasingly, these arguments are combined with claims that continuing to provide representation will require defense lawyers to violate their ethical duties under rules of professional conduct. While courts have granted relief in all of these kinds of cases, court-ordered remedies seem to have had the greatest impact when lawyers have taken action before trial to vindicate the rights of indigent defendants.

Litigation Asserting Rights of Defense Attorneys

As officers of the court, lawyers historically were required to accept court assignments and provide representation to indigent defendants without compensation. This practice predated the Supreme Court's decision in *Gideon* by many years, and in some cases, by more than a century.[1] However, as the practice of criminal law became more complex and the number of cases necessitating appointed counsel rose, attorneys challenged the notion that they were required to take cases without reasonable compensation. While the U.S. Supreme Court has never ruled on whether court-appointed counsel are entitled to compensation, attorneys in several states have successfully

[1] State supreme courts have discussed the historical practice of requiring attorneys to provide defense services without compensation: "There is no doubt that it was the professional obligation of the English and the American attorney to accept an assignment to represent an indigent defendant…." State v. Rush, 46 N.J. 399, 403, 217 A.2d 441, 443 (1966). "The issue of compelled representation in criminal cases first arose in the context of a suit by the lawyer against a county government to collect a fee having been awarded to him by the trial court. With the exception of Iowa, Indiana and Wisconsin, the majority of courts held [referencing cases from the 1800's] that an attorney could not maintain an action against the county unless there was an express statutory authorization for funds." Scott v. Roper, 688 S.W.2d 757, 760 (Mo. 1985). The reference to Indiana undoubtedly was based on the case of Webb v. Baird, 6 Ind. 11 (1854), discussed at *supra* note 19, Chapter 1.

argued that a state's refusal to provide adequate compensation amounts to a taking of property under federal or state constitutions, and just compensation must therefore be paid. There appear to be no recent decisions of state appellate courts requiring that counsel provide pro bono service in indigent criminal and juvenile delinquency cases.

An example of attorney compensation litigation is *State v. Lynch,*[2] in which the Oklahoma Supreme Court ruled that, to compel lawyers to accept appointment without sufficient, speedy, and certain compensation violated the state constitution's due process of law clause. The rights of attorneys in both capital and non-capital cases were at issue in two consolidated cases. In the capital case, following a 10-week trial, the two court-appointed attorneys petitioned the trial court for fees and expenses, documenting a combined total of over 275 hours of work and more than $28,000 in fees. The statutory fee limit was $3200 which, if split between the attorneys, would have amounted to rates of $9 and $15 per hour. The court found that the fee cap inadequately compensated defense counsel and held that the state had an obligation to compensate attorneys "at a rate which was not confiscatory, after considering overhead and expenses."[3] As a remedy, the court, asserting its constitutional authority, ordered that fees for appointed counsel in capital cases be tied to the hourly rates of prosecutors and public defenders, taking into account overhead expenses. Respecting non-capital cases, the court gave the legislature 25 months to "allow … [it] to address the problem, and enact corrective legislation."[4] Within a year after this decision, the Oklahoma legislature established the Oklahoma Indigent Defense System (OIDS), which is responsible for much of the state's indigent defense services.[5] The Oklahoma Supreme Court's concern that counsel not be required to provide defense services in the absence of adequate compensation was preceded by decisions of other state courts respecting compensation paid to appointed counsel, and these cases also led to legislative action revamping indigent defense services in the respective states.[6]

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2 796 P.2d 1150 (Okla. 1990).

3 *Id.* at 1160.

4 *Id.* at 1164.

5 Tulsa and Oklahoma counties are not under the jurisdiction of the OIDS. *See* http://www.ok.gov/OIDS/. Rates of compensation for appointed counsel in Oklahoma still remain exceedingly low. *See* ABA/TSG Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases: A State by State Overview (2007) [hereinafter ABA/TSG Compensation in Non-Capital Felony Cases], *available at* http://www.abanet.org/legalservices/sclaid/defender/reports.html#sal.

6 Hulse v. Wifvat, 306 N.W.2d 707 (Iowa 1981); Bradshaw v. Ball, 487 S, W.2d 294 (Ky. Ct. App. 1972); State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966); State *ex rel.* Partain v. Oakley, 159 W. Va. 805, 227 S.E.2d 314 (1976). *See also* Richard J. Wilson, *Litigative Approaches to Enforcing the Right to Effective Assistance of Counsel in Criminal Cases,* 14 N.Y.U. L. Rev. L. & Soc. Change 203, 209 (1986) [hereinafter Wilson, *Litigative Approaches*]: "Furthermore, case law on compensation for services by assigned counsel is replete with decisions which examine compensation claims for representing a single individual. For example, the New Jersey Supreme Court's 1966 decision in State

Court-appointed attorneys in rural areas of Kansas and West Virginia have successfully argued that they were unfairly burdened with cases, whereas their urban counterparts were not, thus violating the equal protection of the laws. In *Stephan v. Smith,*[7] the Kansas Supreme Court ruled that, because some areas of the state had public defender offices and did not require participation from the private bar while other, usually rural areas, mandated private attorney representation, the system violated the state's equal protection clause because it treated private attorneys differently based on geographic location. Following this decision, the legislature made service by private attorneys on behalf of indigent defendants voluntary and increased compensation rates for assigned counsel.[8]

In *Jewell v. Maynard,*[9] the West Virginia Supreme Court found that the indigent defense system violated the equal protection rights of rural and younger attorneys. Due to low rates of compensation for court-appointed counsel, a cap on the amount of fees that could be earned, and the state's failure to reimburse attorneys for expenses in a timely manner, many attorneys were unwilling to accept court-appointed cases, forcing trial courts to assign more cases to those attorneys still willing to accept cases and causing them to be overworked. The court held that this situation imposed a financial hardship on the remaining attorneys serving indigent defendants, concluding that attorneys in rural areas without public defender offices and younger attorneys were disproportionately burdened, in violation of their rights to equal protection.[10]

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v. Rush led to a revamping of the New Jersey system…. Similar restructuring followed decisions in Kentucky, West Virginia, and Iowa."

7 747 P.2d 816 (Kan. 1987).

8 The Kansas State Board of Indigents' Defense Services reports that public defender offices became a more cost effective approach to providing indigent defense services as a result of this ruling. Consequently, the Board has focused on instituting a coordinated statewide approach to providing indigent defense services, including expanded use of contracts and public defender offices. *See* http://www.ksbids.state.ks.us/au_hi.html.

9 383 S.E.2d 536 (W. Va. 1989).

10 "[T]he evidence demonstrates that the current system inequitably distributes its burden depending upon location and age. Those lawyers who live in rural circuits without public defender systems bear a much greater burden than do their peers elsewhere, and, in general, younger lawyers bear a greater burden than older lawyers. Indeed, there are many lawyers in rural West Virginia who are required to devote an unreasonable percentage of their time to indigent representation." *Id.* at 541. While the case was pending, the West Virginia Supreme Court of Appeals named the West Virginia State Bar as a party to the lawsuit. The State Bar contacted the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID) for information about indigent defense and how West Virginia compared to other states. Subsequently, in cooperation with the ABA SCLAID and the State Bar, The Spangenberg Group conducted a study of the state's indigent defense system. *See* The Spangenberg Group, Analysis of Data on the Indigent Defense System in West Virginia: How West Virginia Compares with the Rest of the Nation (1988). After the ruling in this case and completion of the study, the legislature modified West Virginia's indigent defense system and established a state-funded program, i.e., the West Virginia Public Defender Services,

The court increased the hourly compensation rates from $20 to $45 for out-of-court work and from $25 to $65 for in-court work, effective one year after the date of the opinion. In addition, the court ordered the legislature to establish a method for attorneys to receive cash advances for out-of-pocket expenses and limited the appointments that an attorney could be required to accept to no more than 10% of annual workload. More than 15 years after this decision was rendered, the compensation rates for court-appointed counsel remain unchanged.[11]

Additional illustrative cases are *Makemson v. Martin County*[12] and *DeLisio v. Alaska Superior Court.*[13] In *Makemson,* the Florida Supreme Court held that maximum fee limitations enacted by the legislature to reimburse attorneys for defense services were unconstitutional as applied to the cases before the court because they interfered with the judiciary's inherent authority to ensure that defendants receive adequate legal representation consistent with the Sixth Amendment. In *DeLisio,* the Alaska Supreme Court held that court-appointed attorneys' services are property under the state constitution's "takings clause," for which they must be fairly compensated.[14] Accordingly, the court ruled that attorneys could not be required to accept cases pro bono and ordered that compensation should reflect that which is "received by the average competent attorney operating in the open market."[15]

Even when courts have been unwilling to declare statutory schemes of compensation unconstitutional, they have effectively increased compensation through alternative means. In *May v. State,*[16] an Alabama appellate court declined to declare a fee cap of $1000 unconstitutional, but held that attorneys were entitled to reimbursement

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an executive branch agency responsible for the administration, coordination, and evaluation of indigent defense programs across the state. For the agency's website, *see* http://www.wvpds.org/

11 *See* ABA/TSG Compensation in Non-Capital Felony Cases, *supra* note 5.

12 491 So.2d 1109 (Fla. 1986).

13 740 P.2d 437 (Alaska 1987).

14 "Private property shall not be taken or damaged for public use without just compensation." Alaska Const. art. I, sec. 18. The Fifth Amendment to the U.S. Constitution provides, in part: "… nor shall private property be taken for public use, without just compensation." The Supreme Court applied the takings clause of the Fifth Amendment to the states through the Fourteenth Amendment Due Process Clause in Chicago Burlington and Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897).

15 DeLisio, 740 P.2d at 443. In reality, within Alaska and other states, fees paid to assigned counsel are not comparable to "open market" fees for legal services. In Alaska, as of June 2007, attorneys appointed on a case-by-case basis earned $60 an hour for in-court work, and $50 an hour for out-of-court work. *See* ABA/TSG, Compensation in Non-Capital Felony Cases, *supra* note 5, at 8. Alaska has a state Public Defender Agency, which provides defense representation in indigent cases. *See* http://www.state.ak.us/admin/pd/; there also is the Alaskan Office of Public Advocacy which, in addition to other duties, provides representation in cases in which the Public Defender Agency has a conflict. *See* http://www.state.ak.us/admin/opa/.

16 672 So.2d 1307 (Ala. App. 1993).

for reasonable overhead expenses. The court interpreted an Alabama statute, which entitled attorneys to reimbursement for "expenses reasonably incurred," to include the cost of office overhead. Thus, in addition to the statutory fee limit, the court established a presumptive rate of $30 of overhead for each hour billed, thereby raising the total amount of compensation that attorneys could receive.[17] Likewise, in *Wilson v. State,*[18] the Mississippi Supreme Court held that attorneys were entitled to reimbursement of actual expenses in addition to fees, setting the presumptive overhead rate at $25 per hour.[19]

As the above cases illustrate, courts have often been receptive to requests of attorneys, finding certain appointment schemes discriminatory and severe restrictions on compensation to be unconstitutional. In the short-term, increased compensation presumably encourages attorneys to devote more time to their cases, thereby promoting more effective representation. Increased compensation also diminishes the likelihood of a shortage of private lawyers willing to accept appointed cases, as has sometimes

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17 In 1999, the legislature increased the rates paid to court-appointed counsel in Alabama from $40 to $50 per hour in-court time and from $20 to $30 per hour out-of-court time. On October 1, 2000, a second round of increases went into effect raising in-court payments to $60 per hour and out-of court payments to $40 per hour. Adding on the $30 an hour for overhead expenses, court-appointed attorneys were able to bill $70 an hour for out-of-court work and $90 an hour for in-court work. The per case caps on the total amount an attorney may bill were also increased to $3500 for Class A felonies, and up to $2500 and $1500 for Class B and Class C felonies, respectively. For capital offenses and for offenses that carry a possible sentence of life without parole, the total per case cap was removed. Regardless of these established limits, the new legislation allowed the court, upon a showing of good cause, to approve attorney fees in excess of the maximum amounts specified. *See* Ala. Code § 15-12-21(d) (2000). This statute, which previously stated that defense counsel was entitled to reimbursement for "expenses reasonably incurred in such defense," was amended to read, "for expenses reasonably incurred in the defense of his or her client." This led to a dispute over whether the legislature intended for overhead expenses to be eligible for reimbursement. In February 2005, the Attorney General issued Opinion 2005-063, which stated that office overhead did not qualify for reimbursement, even though the legislature passed a joint resolution stating that overhead expenses were to be paid. The state comptroller stopped all office overhead payments at that time. However, appointed attorneys filed a lawsuit challenging this opinion, and it was unanimously overruled by the Alabama Supreme Court. As a result, the state was required to pay overhead expenses both in the future and retroactively. *See* Wright v. Childree, decided December 26, 2006, discussed at http://www.nacdl.org/public.nsf/defenseupdates/alabama004

18 574 So.2d 1338 (Miss. 1990).

19 By ruling that attorneys were entitled to be compensated for actual expenses, the Mississippi Supreme Court avoided declaring its statute unconstitutional, which capped fees at $1000. *See also* Olive v. Maas, 811 So.2d 644 (Fla. 2002) (trial courts may grant fees in excess of the statutory schedule where extraordinary or unusual circumstances exist in capital collateral cases); *Bailey v. State,* 42 S.E.2d 503 (S.C. 1992) (fee caps are limitations on the funds the state is required to provide but counties are required to pay reasonable fees and expenses above and beyond those paid by the state); White v. Board of County Commissioners, 537 So.2d 1376, 1380 (Fla. 1989) (based upon Sixth Amendment, statute capping fees in capital cases is unconstitutional if it interferes with the delivery of effective representation and thus, fees in excess of the cap must be paid).

occurred.[20] However, long-term, improvements generally have not been achieved, as courts in these cases did not require that legislatures periodically increase rates of compensation and, in fact, assigned counsel fees are not routinely adjusted. In addition, litigation respecting compensation does not require courts to undertake a thorough review of a jurisdiction's indigent defense system. Even if fees are increased, a host of other problems may continue, such as a lack of support services and supervision of lawyers, as well as excessive caseloads.

One writer, who has examined efforts of lawyers to increase compensation through lawsuits, has offered this assessment:

> [F]ee litigation addresses only a single facet of the complex arrangement for providing criminal defense services. The more effective strategy is to mount a systemic Sixth Amendment challenge to a jurisdiction's mechanism for providing criminal defense services. A systemic challenge can address a broad range of issues; it can focus on the rights of defendants, not their lawyers and can analyze the quality of representation provided to the entire class of individuals who receive criminal defense services, rather than just the services provided in one particular trial. Further, the approach can trigger broad remedies—injunctive or declaratory relief—with the potential to prompt legislative response.[21]

On the other hand, earlier we noted several cases decided between 1966 and 1990 that dealt with compensation paid to assigned counsel, and each of these cases prompted legislative reforms of indigent defense.[22] Later, we discuss cases in which broad challenges were made to indigent defense systems, and a wide range of issues was considered by the courts.[23]

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20 *See infra* notes 42–48 and accompanying text, discussing cases in which litigation was brought on behalf of indigent defendants because low fee rates had led to a shortage of lawyers willing to provide representation as assigned counsel.

21 Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services,* 63 U. Pitt. L. Rev. 293, 322 (2002) [hereinafter Bernhard, *Take Courage*].

22 *See supra* notes 2–6 and accompanying text.

23 *See infra* notes 49–58 and accompanying text.

Litigation Asserting Defendant's Right to Counsel

In *Cronic v. United States,*[24] the U.S. Supreme Court established an exception to *Strickland v. Washington,*[25] which requires that a defendant seeking post-conviction relief show that counsel's representation was not reasonably competent and that the defendant was prejudiced as a result of counsel's performance. The *Cronic* decision spelled out three circumstances in which circumstances could give rise to a presumption of counsel's ineffectiveness without a specific showing of prejudice:[26] (1) the complete denial of counsel, such as situations where counsel was prevented from or failed to assist the accused during a critical stage of the proceedings; (2) circumstances where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing;" and (3) circumstances where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."[27]

Lawsuits asserting that the jurisdiction's defense system denies accused persons their rights to counsel and due process of law have been filed on behalf of individual indigent defendants or classes of indigent defendants. Lawyers in these cases have argued that indigent defense systems are so woefully inadequate that defendants *pending trial* are receiving, or have a strong likelihood of receiving, ineffective assistance of counsel.[28] By analogy, the Supreme Court's decision in *Cronic* provides a legal underpinning for these lawsuits. However, *Cronic* is not usually discussed by the courts in their decisions and is not technically applicable because *Cronic* was a post-conviction case. Consider, however, the third test for ineffective assistance of counsel listed by the Supreme Court in *Cronic,* i.e., circumstances in which "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." If this is an appropriate test for determining *after* a defendant's conviction whether *counsel could have been effective,* is it not also an appropriate test to be applied *before* trial? In other words, should not a court inquire *before* trial, assuming the matter is properly raised, whether, due to the circumstances of the indigent defense system, counsel *can be effective?* If the answer is "no," the solution seemingly should be to halt the prosecution temporarily, if necessary, and make other arrangements

24 466 U.S. 648 (1984).

25 For further discussion of the *Cronic* and *Strickland* decisions, *see supra* notes 100–30, Chapter 1, and accompanying text; and *infra* note 80 and accompanying text.

26 *Cronic*, 466 U.S. at 659–60.

27 *Cronic*, 466 U.S. at 659, n.25; n.28 (ineffectiveness presumed if counsel has a conflict of interest).

28 *See, e.g.,* Lavallee v. Justices in Hampden Superior Court, 812 N.E.2d 895 (Mass. 2004); New York County Lawyers' Association v. New York, 196 Misc. 2d 761 (N.Y.Sup.Ct. 2003); Doyle v. Allegheny County Salary Board, No. GD-96-13606 (Allegheny County, Pa. Ct.C.P. filed 1997); Rivera v. Rowland, 1996 Conn. Super. LEXIS 2800 (Oct. 22, 1996).

for effective defense representation.[29] Although this is essentially what courts have done in several cases where challenges to defense systems were brought pretrial, we have discovered only one case in which an appellate court specifically cited *Cronic* in deciding a pretrial motion about whether effective assistance could be rendered in the circumstances confronting defense counsel.[30]

In pretrial litigation, the most often cited systemic defect is that defense counsel are so overburdened with cases that it is impossible for any attorney, no matter how qualified and experienced, to represent effectively any client, thereby denying current and future indigent defendants the right to the effective assistance of counsel. This approach has been used successfully both at trial and on appeal,[31] and courts also have found that defenders have an inherent conflict of interest when excessive caseloads force them to choose between clients.[32] Still other courts have ruled that inadequate funding by the state or insufficient compensation for attorneys has denied or will lead to the denial of indigent defendants' rights to effective assistance of counsel.[33] Additionally, federal courts have found that delays in the appellate process due to disproportionately high caseloads are a denial of due process and may continue to lead

29 We are unaware of any cases in which a court has ruled, *based expressly upon analogy to Cronic,* that excessive caseloads render it so unlikely that even a competent lawyer could be expected to render effective assistance that prejudice to clients should be presumed. But it would seem to be an argument worth making. Consider, for example, the case of United States v. Morris, 470 F.3d 596 (6th Cir. 2006), which arose from state proceedings in Wayne County, Michigan. The defense attorney gave the defendant incorrect advice respecting the possible sentence the defendant could receive if he pled guilty. As the Court of Appeals explained: "The district court based … [its] determination on the extremely short time period that the system allows appointed counsel to prepare for the hearing, the lack of privacy afforded in the bull pen, which prohibits counsel from having a confidential, privileged conversation with the client regarding the plea offer…. Further, defense counsel is given very little time to review any discovery material before advising her client regarding a plea. Although the district court did not explicitly state which type of '*Cronic* failure' it found this situation analogous to, given its factual findings, we have no trouble agreeing that in this case 'counsel was placed in circumstances in which competent counsel very likely could not render [effective] assistance.' … As a result, Morris [the defendant] is presumed to have been prejudiced by the situation in which the attorney was placed, and has a valid claim of constructive denial of counsel." The court's description of defense counsel's situation is exactly the predicament faced by lawyers who are overwhelmed with excessive caseloads.

30 *See infra* note 104 and accompanying text.

31 *See* State v. Peart, 621 So.2d 780 (La. 1993); *In re* Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So.2d 1130 (Fla. 1990). *See also* State v. Smith, 681 P.2d 1374 (Ariz. 1984) (post-conviction case in which indigent defense system was found to be constitutionally deficient). *See infra* notes 67–82 and accompanying text.

32 *See* Harris v. Champion, 15 F.3d at 1538 (10th Cir. 1994); Green v. Washington, 917 F.Supp. 1238 (N.D.Ill. 1996); *In re* Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So.2d at 1130.

33 *See* State v. Young, 172 P.3d 138 (N.M. 2007); *Lavallee,* 812 N.E.2d at 895.

to due process violations.[34] Finally, in addition to a violation of the right to counsel, excessive caseloads have been found to undermine the ability of defense lawyers to provide competent representation, as required by rules of professional conduct.[35]

B. Litigation Options: When and How Cases Are Presented

The timing of litigation, as well as the persons for whom the case is filed, will likely impact a court's analysis of whether indigent defendants are being systematically deprived of their right to counsel. Two critical factors are (1) whether the case is brought pretrial or post-conviction; and (2) whether the case was brought on behalf of an individual defendant, a class of defendants, or all indigent defendants. A review of the cases suggests that litigation that was begun pretrial on behalf of all or a class of indigent defendants is more likely to achieve systemic reform.

Pretrial Litigation

When determining a pretrial claim, courts often assess "the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law."[36] In *Luckey v. Harris,*[37] the court explained that "[p]rospective relief is designed to avoid future harm."[38] Indigent defendants, therefore, need not show actual harm by the failure of the state to provide constitutionally adequate representation; they must show only that there is an on-going violation of their right to counsel and that they are at imminent risk of harm in the future.[39] Accordingly, pretrial litigation must demonstrate that the constitutional right to counsel is being denied or will be denied because some aspect of the provision of indigent defense services makes it unlikely that any attorney could provide competent representation under the circumstances. As

34 *Harris,* 15 F.3d at 1538; *Green,* 917 F.Supp. at 1238.

35 *See, e.g., infra* notes 85–88 and accompanying text.

36 Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988).

37 *Luckey,* 860 F.2d at 1012.

38 *Luckey,* 860 F.2d at 1017.

39 *See Luckey,* 860 F.2d at 1017; *see also Lavallee,* 812 N.E.2d at 895; *New York County Lawyers' Association,* 294 A.D.2d at 69; *Rivera,* 1996 Conn. Super. LEXIS at 2800. In cases of individual defendants, courts have a pretrial duty to investigate claims of counsel's ineffectiveness. Thus, in Holloway v. Arkansas, 435 U.S. 475 (1978), the Supreme Court held that the trial court was required to consider a pretrial claim of ineffective assistance of counsel due to a conflict of interest. Similarly, courts are required to consider a defendant's claim that defense counsel was being ineffective due to a failure to investigate properly defendant's case. *See* United States v. Zilges, 978 F.2d 369 (7th Cir. 1992).

discussed above, this approach is not unlike the third test for ineffective assistance of counsel listed in the *Cronic* decision.

Cases Asserting the Rights of All Indigent Defendants

As noted above, legal action may be instituted pretrial for an individual defendant or for all or a class of indigent defendants. For cases asserting the right to counsel for all indigent defendants, both those with cases currently pending and future defendants, the requirement of standing to bring the action has been met either through class certification or through action in a representative capacity.[40] Generally, so long as actual or imminent harm is alleged and factually supported, the cases have been deemed "justiciable," i.e., capable of being decided according to legal principles in a court of law.[41]

To illustrate, in *Lavallee v. Justices in Hampden Superior Court,*[42] indigent defendants in Hampden County, Massachusetts, sued the state for failure to provide them with counsel at or after arraignment. Petitioners alleged that "chronic underfunding of the assigned counsel system" resulted in an insufficient number of attorneys willing to accept assignments at the current compensation rates and requested that the court authorize increased compensation.[43] The Massachusetts Supreme Judicial Court agreed that indigent defendants were being denied their right to counsel under the state's constitution due to a shortage of attorneys, attributable to low rates of compensation. The court ruled that there was no need to articulate a specific harm for each defendant since the on-going harm of depriving them of the right to counsel warranted relief. Although the court was unwilling to increase assigned counsel rates, important relief was ordered: any indigent defendant incarcerated pretrial in Hampden County had to be released after seven days if counsel was not appointed, and any pending

40 *See Rivera*, 1996 Conn. Super. LEXIS at 2800 (to establish standing in a case for injunctive relief, class of indigent defendants need only allege that they are at imminent risk of harm) *citing Luckey*, 860 F.2d at 1017 (federal class certified of present and future indigent defendants and their attorneys); *New York County Lawyers Association,* 294 A.D.2d at 69 (association of lawyers could assert indigent defendants' rights to counsel where their members in fact suffer injury).

41 *See Luckey,* 860 F.2d at 1017, 1033 (prospective relief can protect constitutional rights as long as the likelihood of injury is shown); *Lavallee,* 812 N.E.2d at 895 (likelihood of harm sufficient to state a claim). *But see* Kennedy v. Carlson, 544 N.W.2d 1 (Minn. 1996) (to be justiciable, public defender must show actual or imminent injury; hypothetical injuries are insufficient); State v. Quitman County, 807 So.2d 401 (Miss. 2001) (counties had standing to sue because the county-based system adversely affected the county and its taxpayers).

42 *See Lavallee,* 812 N.E.2d at 895.

43 *Lavallee,* 812 N.E.2d at 900.

case against an indigent defendant had to be dismissed after 45 days if no attorney filed a court appearance on the defendant's behalf.[44]

Similarly, in *New York County Lawyers' Association v. New York,*[45] a court held that the rates for assigned counsel and caps on their fees per case denied indigent defendants their right to counsel. As in *Lavallee,* the court found that there were an insufficient number of available lawyers, leading to "less than meaningful and effective assistance of counsel." It concluded that the low rates of compensation and fee caps were the direct cause of the attorney shortage.[46] Noting "17 years of legislative inaction and proof of real harm and immediate danger of irreparable constitutional harm," the court entered a permanent injunction ordering the City of New York to pay assigned counsel $90 an hour until the legislature acted to remedy the situation.[47] Although this order applied only to the cases of assigned counsel in New York City, while the case was on appeal, the New York General Assembly increased the compensation rate for court-appointed attorneys in felony and family court cases to $75 per hour both for in-court and out-of-court time and $60 an hour in misdemeanor cases.[48]

While the two preceding cases dealt with fee increases for assigned counsel and achieved commendable results, the next two cases addressed indigent defense systems in the respective jurisdictions more broadly. In *Rivera v. Rowland,*[49] the American and Connecticut Civil Liberties Unions filed a class action lawsuit seeking injunctive relief on behalf of all indigent defendants, asking the court to order Connecticut to provide a public defender system that ensured the constitutional rights of the accused.[50] In support of their request, plaintiffs argued that the public defenders'

44 Following this decision, several defendants were released pursuant to the court's order. Afterwards, the court, through a single justice, entered an "interim order" allowing judges in Hampden County to assign counsel from the private bar even if they were unwilling or not certified to accept such cases and in contravention of a state statute granting authority to certify counsel to the Massachusetts Committee for Public Counsel Services. *See* Cooper v. Regional Administrative Judge of the District Court for Region V, 854 N.E.2d 966, 969 (Mass. 2006); *see also* Mass. Gen. Laws ch. 211D. Meanwhile, a second lawsuit, Arianna S. v. Commonwealth of Massachusetts, SJ 2004-0282 (2004), was filed challenging the statewide assigned counsel system. Faced with the *Arianna* petition and the initial *Lavallee* decision, the Massachusetts state legislature, during the 2005 legislative session, raised the compensation rates for assigned counsel to their current rates, i.e., $100 per hour for homicide cases, $60 per hour for Superior Court cases, and $50 per hour for all other cases. Mass. Gen. Laws ch. 211D § 11 (2005). Additional funding also enabled about 100 new public defenders to be hired, doubling the size of the Massachusetts Committee for Public Counsel Services.

45 196 Misc. 2d 761 (N.Y.Sup.Ct. 2003).

46 *New York County Lawyers' Association,* 196 Misc. 2d at 764.

47 *New York County Lawyers' Association,* 196 Misc. 2d at 790.

48 N.Y. County Law § 722b (2004).

49 1996 Conn. Super. LEXIS 2800 (Oct. 22, 1996).

50 *Rivera,* 1996 Conn. Super. LEXIS at 2800.

overwhelming caseloads, lack of adequate supervision, client contact, investigation, and trial preparation, as well as lack of resources, prevented indigent defendants from receiving effective assistance of counsel.[51] The court denied the state's motion to dismiss, holding that these allegations, if true, would be sufficient to support plaintiffs' claim under the state and federal constitutions.[52] Prior to a trial on the merits, the state entered into a consent decree, which required implementation of system-wide improvements, including reduced public defender caseloads, increased staffing, and enhanced training and supervision.[53]

A similar class action suit on behalf of all felony defendants in a county in the State of Washington was filed by the American Civil Liberties Union (ACLU) of Washington and Columbia Legal Services. In *Best v. Grant County,*[54] the goal was injunctive relief against the county on constitutional grounds, which, at the time, provided defense services through public defenders and contracts with private lawyers. The complaint alleged, *inter alia,* that funding for indigent defense was inadequate, caseloads were excessive, there was no oversight of the defense system, defense services lacked independence, and defendants were deprived of investigators and experts.[55] In October 2005, the presiding trial court judge ruled that defendants had a "well-grounded fear of immediate invasion of the right to the effective assistance of counsel."[56] Soon afterwards, plaintiffs' lawyers and Grant County officials entered into a settlement agreement in which the county agreed to "reduce excessive caseloads, guarantee that public defense lawyers are qualified to handle serious felony

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51 *Id.*

52 *Rivera,* 1996 Conn. Super. LEXIS at 2800, 19–20.

53 As a result of the consent decree, caseload goals were implemented in 1999. *See* Susan O. Storey, *Reflections on the Fortieth Anniversary of Gideon v. Wainwright,* 3 Conn. Pub. Int. L. J. 22 (2003). *See also* Doyle v. Allegheny County Salary Board, No. GD-96-13606 (Allegheny County, Pa. Ct.C.P. filed 1997) (ACLU and Pennsylvania CLU brought class action against Allegheny County and its Chief Public Defender alleging that overwhelming caseloads, understaffing, inadequate resources, and other long-standing systemic problems prevented indigent defendants from receiving effective assistance of counsel; case was resolved by consent decree requiring new standards for public defender staffing levels, performance, policies and procedures, training, and resources; and a consultant was retained after the decree to ensure compliance); State v. Perry Ducksworth, No. 1388-3, Circuit Court for the First Judicial District, Jones County, Mississippi (1994) (Mississippi and Louisiana Trial Assistance Project filed lawsuit for alleged systemic failure ofJones County Public Defender Office due to inadequate funding and excessive caseloads; county's Board of Supervisors more than tripled county's indigent defense budget while case was on appeal).

54 Best v. Grant County (No. 04-2-00189-0), *available at* http://www.aclu-wa.org/library_files/2004-04-05--GrantComplaint.pdf. For a description of the case and related documents, *see* http://www.aclu-wa.org/issues/subissue.cfm?&issuesubissue_id=3.

55 Compl. at 2, Best v. Grant County (No. 04-2-00189-0), *available at* http://www.aclu-wa.org/library_files/2004-04-05--GrantComplaint.pdf.

56 For a summary of the decision and subsequent settlement agreement, *see Grant County to Overhaul Defense System,* Nov. 7, 2005, *available at* http://www.aclu-wa.org/ inthecourts/ detail.cfm?id=302.

cases, and provide adequate funding for investigators and expert witnesses."[57] The settlement included a provision for appointing a monitor to oversee Grant County's compliance with the terms of the settlement agreement during the ensuing six years.[58]

In 2007, lawsuits similar to the *Rivera* and *Grant County* cases were filed in state courts in Michigan and New York, charging that indigent defense systems in the two states are completely broken. Both cases were still pending as this report was completed. In *Duncan v. State of Michigan,*[59] the ACLU and private attorneys filed suit against the State of Michigan and its governor. In *Hurrell-Harring v. New York,*[60] the New York Civil Liberties Union and private attorneys filed suit against the State of New York. While the Michigan case focuses on indigent defense deficiencies in three counties, the New York case alleges that indigent defense throughout New York State is defective. Both cases allege, *inter alia,* violations of the Sixth and Fourteenth Amendments to the Constitution, as well as 42 U.S.C. § 1983.[61] In both Michigan and New York, indigent defense is substantially organized at the county level; funding in Michigan is also from the counties, whereas in New York, the state contributes about 40% of the funding with the balance from the counties.

In the New York case, the complaint charges that there are a host of indigent defense problems because the State has "abdicated its responsibility to guarantee the right to counsel for indigent persons and has left each of its sixty-two counties to establish, fund and administer their own public defense programs, with little or no fiscal and administrative oversight or funding from the State."[62] Among the specific deficiencies claimed to exist are unnecessary and prolonged pretrial detention, restrictive client eligibility standards, no performance standards for attorneys, no monitoring or supervision of attorney representation, a lack of attorney training, a lack of resources for support staff and access to investigators and experts, overwhelming caseloads, a lack of independence from the judiciary, and inadequate compensation and resources

57 *Id.*

58 *Id.*

59 For the complaint in this case, filed in the Circuit Court for the County of Ingham, Michigan, *see* the website of the American Civil Liberties Union, *available at* http://www.aclu.org/images/asset_upload_file244_28623.pdf. There is also a recent evaluation of indigent defense in Michigan. *See* NLADA Michigan Report, *supra* note 270, Chapter 2, *available at* http://www.michbar.org/publicpolicy/pdfs/indigentdefense_report.pdf.

60 For the complaint in this case, filed in the Supreme Court of New York, Albany County, *see* the website of the New York Civil Liberties Union, *available at* http://www.nyclu.org/files/Amended%20Class%20Action%20Complaint.pdf

61 The text of § 1983 is quoted and its applicability to indigent defense is discussed at *infra* notes 150–69 and accompanying text.

62 Complaint in *Hurrell-Harring, supra* note 60, at 4.

for those who provide defense services, especially in comparison to the prosecution.[63] Similar allegations are contained in the Michigan lawsuit.

Not all cases asserting the rights of indigent defendants have been successful. In *Kennedy v. Carlson,*[64] the public defender for Hennepin County, Minnesota, filed suit claiming that the state's failure to provide sufficient funds for his office "may or will"[65] result in the violation of his clients' Sixth Amendment rights. However, the Minnesota Supreme Court held that the public defender had failed to establish an actual and imminent injury to his clients, finding the claim that violations may or will occur to be "too speculative and hypothetical."[66] While acknowledging the office's high caseloads, the court noted that there was no evidence that any attorney had provided ineffective assistance of counsel or even substandard representation. Since the public defender failed to provide evidence that clients had been prejudiced due to ineffective assistance of counsel, the case was distinguished from those in other jurisdictions where relief had been provided.

Cases Asserting the Rights of a Class of Defendants

Another approach to achieving change has been for public defender offices to seek to withdraw from some of their cases and/or to halt the assignment of prospective cases, thereby providing relief to a class of indigent defendants whose cases are not now being properly handled or would not be properly handled in the future. If the litigation is successful, not only can improvements be achieved, but also, the court's order can lead state legislatures or local authorities to provide additional funding.

In 1990, the Florida Supreme Court in *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*[67] found that the large workload and enormous backlog of appellate cases of public defenders, caused by the "woefully inadequate funding of the public defenders' offices," was a "crisis situation of constitutional dimensions," requiring a systemic response.[68] The court noted that the number of cases requiring briefing had grown from 408 to 1005 in less than three years and that privately retained counsel filed briefs at least one year earlier than public defenders. The Florida Supreme Court concluded that the excessive caseloads were requiring public defenders to choose between the rights of clients, creating a conflict of interest and a violation of the right to counsel. To remedy the situation, the court ordered

63 *Id.* at 59–98

64 544 N.W.2d 1 (Minn. 1996).

65 *Kennedy,* 544 N.W.2d at 15.

66 *Kennedy,* 544 N.W.2d at 8.

67 *In re* Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So.2d 1130 (Fla. 1990).

68 *Id.* at 1132–33.

lower courts to appoint alternate counsel upon public defender motions to withdraw and stated that the legislature should appropriate sufficient funds for a "massive employment of the private sector on a one-shot basis."[69] The court further advised:

> If sufficient funds are not appropriated within sixty days from the filing of this opinion, and counsel hired and appearances filed within 120 days from the filing of this opinion, the courts of this state with appropriate jurisdiction will entertain motions for writs of habeas corpus from those indigent appellants whose appellate briefs are delinquent sixty days or more, and upon finding merit to those petitions, will order the immediate release pending appeal of indigent convicted felons who are otherwise bondable…. There can be no justification for their continued incarceration during the time that their constitutional rights are being ignored or violated.[70]

While the legislature approved funds to pay for private counsel to reduce the case backlog, it did not increase funding of the public defender for the long-term and an appellate case backlog later developed. So in 1993, the public defender office once again moved to withdraw, asking to be excused from over 350 overdue appeals. This time, a retired judge was appointed to sit as a special commissioner to hear evidence and make findings of fact regarding both the efficiency and productivity of the public defender's office and to determine whether the allegation of case overload was supported by the facts. After a four-day evidentiary hearing, the commissioner concluded that the public defender was working at capacity but was nonetheless overloaded with cases and should be allowed to withdraw from certain of his cases.[71]

Although most challenges to excessive caseloads have been litigated in state courts, one notable case, similar to the Florida cases discussed above, was filed in federal court. In *Green v. Washington,*[72] a federal district court in Chicago held that petitioners, indigent defendants incarcerated in Illinois prisons whose appeals had not been

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69 *Id.* at 1138.

70 *Id.* at 1139. The court's threat to "entertain motions for habeas corpus" if the legislature did not act promptly to appropriate "sufficient funds" was similar to the approach adopted in several other cases. *See, e.g.,* Lavallee v. Justices in Hampden Superior Court, *supra* notes 42–44, and State v. Peart, *infra* notes 76–79.

71 *See In re* Certification of Conflict in Motions to Withdraw Filed by Public Defender of the Tenth Judicial District, 636 So.2d 18 (Fla. 1994). At the time of the lawsuit, the Florida appellate public defender offices were state-funded, whereas the fees for private appointed counsel were borne by the counties. Subsequently, the legislature enacted legislation setting up state-funded regional conflict offices. *See* Fla. Stat. § 27.511 (2007). *See also* Rose v. Palm Beach County, 361 So.2d 135 (Fla. 1978) (judiciary has inherent authority to order local governments to pay higher witness fees in extraordinary cases to ensure an indigent defendant's constitutional right to compulsory process).

72 917 F.Supp. 1238 (N.D. Ill. 1996).

filed for one year or more, were deprived of their rights to due process of law. The cause of the problem, according to the court, was chronic underfunding of the Illinois First District Office of the State Appellate Defender to handle its caseload. Further, the court noted that the Illinois General Assembly had been on notice for at least eight years that there was inadequate staff to represent an increasing number of indigent appellants. Despite the lack of appellate staff, the Illinois General Assembly decreased the appellate defender's appropriation. Facing a history of inaction from both the judicial and legislative branches of the Illinois government, the court held that "[i]n the usual situation where a violation of constitutional rights has been caused or permitted to continue despite full knowledge and ample opportunity to cure on the part of governmental defendants, the appropriate remedy is one that would grant prompt (perhaps immediate) relief to the victim of that violation."[73] Although the court asked the State of Illinois to propose an appropriate remedy, the case ultimately was dismissed when the legislature appropriated additional funds for the use of private attorneys to address the backlogged appeals and substantially increased funding for the Office of the State Appellate Defender.

The judgment in *Green* was based upon the federal court decision in *Harris v. Champion,*[74] in which a federal court of appeals held that a violation of due process and ineffective assistance of counsel could be found if an appellant's direct appeal from a state conviction was pending for more than two years without final state action. As in *Green,* the delays were attributable to underfunding of the state's appellate defense program. Further, the court stated that such cases merited a rebuttable presumption of prejudice, permitting the federal courts to grant writs of habeas corpus and release otherwise bondable defendants pending their state appeals. However, the court noted in its opinion that none of the named defendants would probably be entitled to such relief because, during the pendency of their cases, all of the defendants received appointed counsel and were believed to have had briefs filed on their behalf.[75] Nevertheless, the remedy is potentially available for future indigent defendants in the event underfunding of appellate counsel causes inordinate delays in appellate review.

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73 *Green,* 917 F. Supp. at 1281. In this case, as well as in numerous other decisions cited in this chapter, expert testimony was presented by Robert L. Spangenberg, President of The Spangenberg Group, which for many years, specialized in the study of indigent defense delivery systems throughout the United States. For discussion of Spangenberg's testimony in this case, *see Green,* 917 F. Supp. at 1250–51.

74 15 F.3d 1538 (10th Cir. 1994).

75 15 F.3d at 1570. *See also* Simmons v. Reynolds, 898 F.2d 865 (2d Cir. 1990) (six-year delay in pursuing appeal due to inaction of appointed counsel denied defendant due process of law but did not entitle defendant to release from custody, as appeal was decided in state court during pendency of defendant's habeas petition).

Facing an overload of cases at the trial level, a public defender in New Orleans filed a pretrial "Motion for Relief to Provide Constitutionally Mandated Protection and Resources,"[76] contending that systemic deficiencies caused his caseload to be so high that it prevented him from providing effective assistance of counsel to his clients. In *State v. Peart,*[77] the Louisiana Supreme Court ruled that, due to excessive caseloads and insufficient support of Louisiana's indigent defense system, "the services being provided to indigent defendants … do not in all cases meet constitutionally mandated standards for effective assistance of counsel."[78] The court found that there was a rebuttable presumption of ineffectiveness in all of the public defender's cases and remanded the case to the trial court for individualized determinations regarding whether each indigent defendant represented by the public defender was receiving effective assistance.[79]

Since *Peart* was a pretrial case in which the question was whether counsel *could be effective,* the tests for determining post-conviction ineffective assistance of counsel contained in *Strickland* and *Cronic* were not applicable. The remedy that the Louisiana Supreme Court fashioned, in which the trial court on remand was required to conduct individualized hearings respecting each defendant to determine counsel's likely effectiveness, has not been adopted in cases by courts in other states.[80] Nor do

76 State v. Peart, 621 P.2d 780, 784 (La.1993).

77 *Id.* at 780.

78 *Id.* at 783.

79 The court also stated that, in the event "legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel." *Peart,* 691 So.2d at 791. After the *Peart* decision, on July 1, 1994, the Louisiana Supreme Court created the Louisiana Indigent Defender Board (LIDB), by Supreme Court rule, under the judicial branch of state government. The legislature appropriated $5 million for the fiscal year to initiate the program. The board's powers and duties included developing policy for a capital litigation program, an appellate program, an expert witness/testing fund, and a district assistance fund, as well as standards and guidelines for court appointed counsel payments and qualifications. Subsequently, the LIDB's sunset provision took effect, but the next year it was re-established by the state legislature as the Louisiana Indigent Defense Assistance Board (LIDAB). In 2007, Louisiana replaced LIDAB with a new public defender program. *See infra* notes 13–15 and accompanying text, Chapter 4.

80 One of the attorneys who argued *Peart* before the Louisiana Supreme Court believes that the Court's decision suffered from three deficiencies that rendered it a failure in the battle for systemic defense reform in Louisiana: "First, the court failed to set forth principled standards governing pretrial ineffectiveness claims that could guide public defenders, courts, and legislators in the future. Second, the opinion mistakenly held that Strickland v. Washington's rejection of attorney performance standards when adjudicating pretrial claims precluded a court from applying caseload standards when adjudicating pretrial ineffectiveness claims. Third, the court's case-specific 'rebuttable presumption' of ineffectiveness was inadequate and unworkable." John Holdridge, *Judicial Reticence and the Need for Compelled Compliance with Indigent Defense Caseload Standards: State v. Peart's Disappointing Legacy* 1–2 (unpublished manuscript, on file with Reporters).

there appear to be other cases in which courts have found that the indigent defense services being provided create a rebuttable presumption that defendants are not being effectively represented.

In re the Matter of Continued Indigent Representation by the District Public Defender's Office in Knox County General Sessions Court is another example of a public defender's office seeking relief from an overwhelming caseload.[81] In 1991, the Public Defender of Knox County, Tennessee, filed a motion requesting that the General Sessions Court suspend appointments to his office for 60 days to allow the office's caseloads to become more manageable. In support of his position, the public defender presented amicus briefs, affidavits, and statistical data regarding the office's caseload. After an evidentiary hearing, the court granted the motion to suspend. As a result of this ruling, the court appointed lawyers who were required to represent indigent defendants pro bono, but soon afterwards, the legislature passed a law requiring reasonable compensation for court-appointed work.[82]

In some of the prior cases involving excessive caseloads, public defenders did not argue that their continued representation of existing clients or the defense of future clients would cause them to violate their ethical duties as lawyers. Now, with increasing frequency, defenders are claiming not only that the constitutional rights of their clients are jeopardized by excessive caseloads, so, too, are their responsibilities as members of the legal profession pursuant to rules of professional conduct, which require that competent and diligent representation be provided.[83] This relatively new approach has undoubtedly been fueled by the 2006 ethics opinion of the ABA Standing Committee on Legal Ethics and Professional Responsibility, which is discussed elsewhere in this report.[84]

In 2007, the Public Defender of Mohave County, Arizona, filed motions to withdraw from 36 of the office's pending cases, arguing that, unless relief was granted, defendants would be denied the effective assistance of counsel *and* attorneys would violate their ethical duty to furnish competent services.[85] During an evidentiary hearing, the

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81 *In re* the Matter of Continued Indigent Representation by the District Public Defender's Office in Knox County General Sessions Court (General Sessions Court, Knox County, Tenn. 1991).

82 *See* TN Code 40-14-207(a). In March 2008, the same Public Defender filed a similar motion requesting the suspension of assignments in the General Sessions Court due to underfunding and overwhelming caseloads. *See infra* notes 94–96 and accompanying text.

83 The professional duty of lawyers representing indigent defendants is discussed in Chapters 1, 2, and 5 *See supra* notes 78–99, Chapter 1, and accompanying text; *supra* notes 96–104, Chapter 2, and accompanying text; and *infra* notes 84–96, Chapter 5, and accompanying text.

84 *See supra* notes 86–90 and accompanying text, Chapter 1; and *infra* notes 86–88, Chapter 5.

85 *See* Arizona v. Lopez, Number 2007-1544 (Mohave County Superior Court, filed December 17, 2007). The public defender had other pending motions to withdraw, which were not consolidated with these 36 cases.

chief public defender testified about the caseloads of each of his lawyers, indicating that they could not accept additional cases and claiming that they were "overwhelmed." Asked about his own caseload, the public defender replied that he "would not be able to render effective representation to any additional people. Many times I question whether I'm doing what I should be doing on the cases that I have."[86]

After this evidentiary hearing, the trial court judge found that, given the office's caseloads, "[r]equiring or even allowing the Public Defender's Office to remain as appointed counsel in these cases would likely compromise them from an ethical standpoint and deprive the Defendants … of their right to effective representation."[87] The court, therefore, granted the public defender's motions to withdraw, declaring that it would apply its order to other pending motions to withdraw, and further held that future motions to withdraw *need* only reference the ruling in these cases. The court refused to "concern itself with financial or funding implications of its ruling on the motions to withdraw,"[88] leaving to the county the problem of paying the fees of private attorneys who would now be required to represent defendants in cases from which the public defender would be excused.

While the litigation in Mohave County, Arizona, was successful, similar litigation in New Orleans, also in 2007, resulted in a less positive result. A public defender

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86 *Id.* Transcript of Record at 40. In an opinion in 1970, a California appellate court suggested that a public defender adopt the sort of approach adhered to by the public defender in this case: "When a public defender reels under a staggering workload, he need not animate the competitive instinct of a trial judge by resistance to or defiance of his assignment orders to the public defender…. The public defender should proceed to place the situation before the judge, who upon a satisfactory showing can relieve him, and order the employment of private counsel … at public expense…. Boards of supervisors face the choice of either funding the costs of assignment of private counsel and often, increasing the costs of feeding, housing and controlling a prisoner during postponement of trials; or making provision of funds, facilities and personnel for a public defender's office adequate for the demands placed upon it." Ligda v. Superior Court of Solano County, 85 Cal. Rptr. 744, 754–55 (1st App. Dist., CA 1970).

87 Arizona v. Lopez, *supra* note 85, slip op. at 13. One of the earliest cases in which a court sought to limit the caseloads of public defenders was Wallace v. Kern, 392 F. Supp. 834 (D.C.N.Y. 1973), *judgment reversed and vacated,* 481 F.2d 621 (2d Cir. 1973). This was a class action civil rights lawsuit brought under 42 U.S.C. § 1983 (*see infra* note 153 for text of statute) on behalf of incarcerated defendants, claiming that lawyers from the New York Legal Aid Society were failing to provide effective assistance of counsel. The trial court ordered that the Society's trial attorneys not carry a caseload that averaged more than 40 felony indictments at a time because to do so "would prevent … [Legal Aid] from affording its existing clients their constitutional right to counsel." *Wallace,* 392 F. Supp. at 849. The decision was reversed on jurisdictional grounds, because the Second Circuit Court of Appeals held that the New York Legal Aid Society was not acting under color of state law since it was a private, not-for-profit corporation. The District Court opinion, however, is still persuasive authority for liability under § 1983, assuming that the other requirements of the statute are met. Section 1983 litigation is discussed at *infra* notes 152–69 and accompanying text.

88 Arizona v. Lopez, *supra* note 85, slip op. at 11.

employed by the Orleans Public Defender Office, with the support and assistance of his agency, sought to withdraw from cases and to halt the assignment of additional cases. During an evidentiary hearing, the public defender explained that his current caseload was well over 100 clients, many of whom were charged with very serious felonies. He also recounted his numerous defense counsel responsibilities for which he lacked adequate time due to his overwhelming caseload. These included a failure to conduct timely and adequate interviews of clients, investigation of his cases, seeking relevant records, identifying and interviewing witnesses, visiting crime scenes, considering the use of experts, filing pretrial motions, and preparing for trials.[89] In his order in the case, the trial court offered the following assessment:

> Indigent defense in New Orleans is unbelievable, unconstitutional, totally lacking the basic professional standards of legal representation and a mockery of what a criminal justice system should be in a western civilized nation.
>
> Equally shocking is the Louisiana legislature, which has known since 1972, constitutional violations and insufficient funding have plagued indigent defense, not only in New Orleans, but also in other Louisiana parishes.
>
> The Louisiana legislature has allowed this legal hell to exist, fester and finally boil over.[90]

The court's order in the case, which contemplated allowing the public defender to withdraw from some of his cases and stop accepting additional appointments, was appealed to a Louisiana appellate court. This court held that the trial judge had failed to conduct, consistent with the Louisiana Supreme Court's decision in *Peart,*[91] "individualized hearings" respecting each defendant in which the public defender claimed to lack sufficient time to provide adequate representation.[92] Ultimately, the litigation did not achieve its desired result. While the trial court appointed some private attorneys to handle some of the defender's case overload, the public defender at the center of the litigation and other public defenders assigned to other criminal courtrooms in Orleans Parish continue to carry extremely high caseloads.[93]

In June 2008, in Knoxville, Tennessee, the city's five misdemeanor court judges conducted a day-long evidentiary hearing on a motion by the Public Defender of

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89 Louisiana v. Edwards, No. 463-200 (D. La. March 30, 2007).

90 *Id.,* slip op. at 11.

91 *See supra* notes 76–80 and accompanying text.

92 Louisiana v. Edwards, No. 2007-K-0639 (La. Ct. App. Aug. 16, 2007).

93 Telephone interview by Norman Lefstein with Stephen Singer, official of the Orleans Public Defenders Office (October 10, 2008).

Knox County, who requested to be excused from assignments in future misdemeanor cases.[94] The public defender and two of his lawyers testified about their excessive caseloads and explained that they were incapable of doing what was required of them in order to represent their clients competently, as required by the state's rules of professional conduct and standards governing the defense function.[95] As of January 2009, however, the five judges had not yet rendered a decision on the public defender's motion, which reflects the difficulty sometimes encountered in obtaining a prompt judicial resolution in this kind of litigation.[96]

Another unresolved case at the time of this report's completion, which is pending before the Florida Supreme Court, is from Dade County (Miami), Florida.[97] In late July

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94 *In re* Petition of Knox County Public Defender, General Sessions Court for Knox County, Tennessee, Misdemeanor Division, Docket No. Not Assigned, filed March 26, 2008. On July 25, 2008, this same public defender also petitioned to temporarily suspend appointments in felony and misdemeanor cases in the Criminal Court for Knox County, Tennessee, Division 1, and to withdraw and temporarily suspend such appointments in the Criminal Court for Knox County, Tennessee, Divisions II and III. A hearing on these petitions was held in October 2008, and substantial temporary relief was granted to the Public Defender. As of January 2009, a final order on the petitions was being held in abeyance, pending negotiations between the Public Defender and state budget officials. Telephone interview by Norman Lefstein with Mark Stephens, Sixth Judicial District Public Defender, Tennessee (January 5, 2009). For copies of pleadings pertaining to this litigation, *see* website of the Sixth Judicial District Public Defender, *available at* http://www.pdknox.org/800main.htm

95 Mark Stephens, the Public Defender in Knoxville, Tennessee, testified that there was "a crisis in my office" because the volume of misdemeanor cases was so high that his lawyers did not have time even to interview in advance of court hearings all of the clients who requested an interview with their public defender. Typically, the lawyers were in court every other week and during their week in court were responsible for the cases of approximately 100 defendants. Here is how he explained the situation: "… [s]o there's [no time] … to do any on-scene investigations. There's [no time] … to do any contacting of [police] officers…. There's … [no] time to interview any witnesses. You just go into court you fly by the seat of your pants to see what you can accomplish…. The caseloads that currently exist in my office, in my view, prohibit my lawyers from fulfilling their ethical obligations and duties that they owe to their client…. And, consequently, the constitutional right of the accused to have a lawyer who is meeting his or her ethical responsibility to that client is not being fulfilled, and it's because of caseload, it's not as a result of the commitment or effort on the part of the lawyers." *In re* Petition of Knox County Public Defender, General Sessions Court for Knox County, *supra* note 94, Transcript of Record, 27–31.

96 A Tennessee Supreme Court rule contains language that the public defender had expected to be helpful in pursuing his motion seeking prompt relief from excessive caseloads. The rule, which applies to the appointment of counsel by trial judges, reads as follows: "The court shall not make an appointment if counsel makes a clear and convincing showing that adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards." Tenn. Sup. Ct. R. 13 (e) (4) (D).

97 Still another case that was pending at the time of the completion of this report is a declaratory judgment lawsuit filed by the Kentucky Department of Public Advocacy (the state's public defender program except for Jefferson County) and the public defender agency in Jefferson County (which includes Louisville). The lawsuit was filed due to 2008–2009 budget cutbacks in Kentucky, which

2008, a trial court judge in Miami held a two-day hearing on the motion of the Dade County Public Defender, who asked that his lawyers be excused from appointments in all felony cases, except capital cases, in Miami's 21 felony courtrooms. The public defender argued that underfunding of his office had led to excessive caseloads and that his lawyers could not ethically or legally accept additional non-capital felonies. In an opinion dated September 3, 2008, a trial court judge ruled substantially in favor of the public defender's position, declaring that, until further review, the public defender would be excused from having to accept appointments to all class C felonies, though appointments to class A and B felonies would continue.[98] The court summed up the situation with these words:

> … [T]he evidence shows that the number of active cases is so high that the assistant public defenders are, at best, providing minimal competent representation to the accused…. [T]he evidence clearly shows that … [the public defender] is in need of relief sufficient to ensure that the assistant public defenders are able to comply with the Florida Rules of Professional Conduct and carry out their constitutional duties…. The Court concludes that the testimonial, documentary, and opinion evidence shows that … [the public defender's] caseloads are excessive by any reasonable standard.[99]

In these recent cases from Arizona, Louisiana, Tennessee, and Florida, in which public defenders invoked their ethical duty as a basis for objecting to excessive caseloads, a great deal of statistical data was presented concerning past and current caseloads of either the individual lawyer (Louisiana) or of the individual lawyers and the overall office caseload (Arizona, Tennessee, and Florida). In addition, in all four cases, expert witness testimony was presented concerning whether the individual public defender (Louisiana) or the staff as a whole (Arizona, Tennessee, and Florida) could be expected to provide competent services given the size of the caseloads. Also, in the Arizona, Tennessee, and Florida cases, dedicated and skilled attorneys from prominent private law firms in their respective states, experienced in civil litigation, served as pro bono

adversely impacted hiring and retention of public defenders in the state and exacerbated excessive caseload problems for defenders. The relief sought includes a declaration from the court that public defender lawyers "may ethically and legally, … consistent with their ethical, constitutional and statutory obligations, … legally decline to accept appointments to represent indigent criminal defendants when, in their objectively reasonable judgment, their respective caseloads render them unable to competently and diligently and effectively represent those defendants." Lewis v. Hollenbach, Complaint at 22, Franklin Cir. Ct., Civ. No. 08-C1-1094 (2008), *available at* http://dpa.ky.gov/Lewis,%20et%20al%20v.%20Hollenbach,%20et%20al.pdf.

98 *In re* Reassignment and Consolidation of Public Defender's Motions to Appoint Other Counsel in Unappointed Noncapital Felony Cases, No. 08-1 (Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, September 3, 2008).

99 *Id.*, slip op. at 4, 5, and 6.

counsel and represented the public defender offices in challenging their caseloads.[100] In addition, in the Tennessee and Florida cases, private criminal defense attorneys testified that they believed the defenders could not adequately represent all of their clients and that, as private practitioners, they would not assume caseloads as large as those of the public defender unless they had substantial additional resources.[101]

Cases Asserting the Rights of an Individual Defendant

When pretrial litigation is brought on behalf of all or a class of indigent defendants, systemic reform is usually the goal. In contrast, when problems with the system of indigent defense are raised pretrial on behalf of a single defendant or co-defendants, the matter is normally presented to the trial court in a motion, and the relief sought relates to the specific defendant or defendants before the court. It is, therefore, not surprising that such actions do not normally result in systemic changes to the indigent defense system, as illustrated in the following cases.

In *New Mexico v. Young,*[102] in an unusually complex capital case involving co-defendants and two defense teams, the lawyers "filed a motion asking to be compensated at an hourly rate, to be allowed to withdraw, and/or to dismiss the death penalty."[103] The attorneys argued that they would require an additional $100,000 per defense team to represent the defendants even if the request for the death penalty was withdrawn, but would require an additional $200,000 per defense team if the death penalty remained an option. The New Mexico Supreme Court agreed that $100,000 was inadequate under the extraordinary circumstances of the case. As the court explained, "[t]he inadequacy of compensation in this case makes it unlikely that any lawyer could provide effective assistance, and, therefore, as instructed by the United States Supreme Court, ineffectiveness is properly presumed without inquiry into actual

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100 In the Arizona case, representation was provided by Osborn-Maledon of Phoenix; in the Tennessee case, representation was provided by Chambliss, Bahner & Stophel of Chattanooga; and in the Florida case, representation was provided by the Miami office of Hogan & Hartson. Other law firms that have made substantial contributions as pro bono counsel in important litigation seeking indigent defense reforms include Covington & Burling, Davis Polk & Wardwell, Holland & Knight, Jenner & Block, and Kirkland & Ellis.

101 For example, in the Florida litigation, a private criminal defense lawyer testified as follows: "[M]y 25 years of experience tells me you can't handle more than 50–100 cases in a year and give quality, effective representation…." Transcript of Record at 15, *Reassignment and Consolidation of Public Defender's Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases, No. 08-1.* "If I had to handle 436 [felonies during a year]…, I would be up 24 hours a day, seven days a week, 365 days a year and I still would not be able to effectively represent that many people." *Id.* at 16. "There's no way they can do the amount … of time and effort that any reasonable private practitioner should be putting on a case to effectively represent their clients." *Id.* at 17.

102 172 P.3d 138 (N.M. 2007).

103 *Young,* 172 P.3d at 140.

performance."[104] After considering various alternatives, the court determined that the proper course was to stay the prosecution of the case in which the death penalty remained an option unless additional funding for defense counsel was appropriated by the legislature. In doing so, the court remarked that it was making "no determination that similar fees or rates are constitutionally required in other cases."[105]

The Louisiana Supreme Court reached a similar result in *State v. Citizen,*[106] where there were insufficient funds to compensate appointed counsel in two capital cases. The attorneys for the defendants were to be paid by the then state-funded Louisiana Indigent Defense Assistance Board. When the board failed to provide adequate funds for the defense, the trial court ordered the local parish to appropriate the necessary funds for defense counsel. In overruling the trial court's decision, the Louisiana Supreme Court found that, under state law, a local parish could not be ordered to pay for indigent defense. Instead, the court noted that funding was the legislature's responsibility and that, even if the legislature were to reform the indigent defense system in Louisiana, which was then under consideration, changes would not be made in sufficient time to help the defendants. Accordingly, the court concluded that "the trial judge may halt the prosecution of these cases until adequate funds become available to provide for these defendants' constitutionally protected right to counsel…."[107]

Quitman County v. State of Mississippi (Taxpayers' Rights Case)

A different kind of strategy was pursued by Quitman County, Mississippi, in an effort to achieve systemic reform in the funding of indigent defense. On its own behalf and on behalf of its taxpayers, Quitman County asked that the State of Mississippi be ordered to pay for the cost of indigent defense representation, which by statute in Mississippi is funded by the counties.[108] In *State v. Quitman County,*[109] the county claimed that the state breached its duty under the state's constitution to provide representation for indigent defendants and that Quitman County could not afford the expense. When the case was first appealed to the Mississippi Supreme Court,

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104 *Young,* 172 P.3d at 141. In reaching this conclusion, the New Mexico Supreme Court expressly relied on the Supreme Court's *Cronic* decision. For a discussion of *Cronic, see supra* notes 24–30 and accompanying text.

105 *Young,* 172 P.3d at 144. Subsequently, the New Mexico legislature decided that it would not provide additional funds to support the work of defense counsel, and the death penalty request was dismissed. *See* http://www.deathpenaltyinfo.org/node/2345.

106 State v. Citizen, 898 So.2d 325 (La. 2005).

107 *Citizen,* 898 So.2d at 339. Since this decision, the system of indigent defense in Louisiana has been reformed. *See infra* notes 13–15 and accompanying text, Chapter 4.

108 For a discussion of what the U.S. Supreme Court has said about the state's duty to pay for the right to counsel, *see supra* notes 58–65 and accompanying text, Chapter 1.

109 807 So.2d 401 (Miss. 2001).

the court rejected the state's motion to dismiss and remanded the matter for trial, concluding that counties had standing to sue because the county-based system of indigent defense adversely impacted counties and their taxpayers.[110] The court also indicated that, if the allegations of chronic underfunding by the state were shown to lead to systemic constitutional deficiencies in providing the right to counsel, the county would be entitled to relief in the form of increased state appropriations.[111] After a trial, in which the trial court ruled against Quitman County, the case again was appealed to the Mississippi Supreme Court. The court sustained the trial judge's decision, concluding that Quitman County had not "met its burden of proving that the funding mechanism established by statute led to systemic ineffective assistance of counsel…."[112]

Post-Conviction Litigation

In post-conviction cases, it is sometimes possible to argue that not only did defense counsel fail to provide appropriate representation on behalf of a specific client, which would warrant an analysis of attorney performance under the *Strickland* standard for ineffective assistance of counsel, but also, that no lawyer could have effectively represented the client under the circumstances in which the jurisdiction provided indigent defense services. To succeed with such an argument, which is predicated on the Supreme Court's decision in *Cronic v. United States,*[113] courts have required proof both that systemic deficiencies exist and that they prejudiced or were highly likely to have prejudiced the defendant.

For instance, in *Conner v. Indiana,*[114] counsel argued in a post-conviction proceeding that the defendant was denied his right to an effective lawyer because the indigent defense system was so defective that even experienced counsel could not provide competent representation. Counsel pointed to the hiring of defense attorneys by judges based on political affiliation, as well as a lack of trained staff and resources. But the Indiana Supreme Court refused to provide relief, observing that the lower court

110 State v. Quitman County, 807 So.2d 401, 405 (Miss. 2001).

111 *Quitman,* 807 So.2d at 410.

112 Quitman County v. State, 910 So.2d 1032, 1048 (Miss. 2005) (court noted that there was no evidence of specific instances when the performance of court-appointed counsel was inadequate; no evidence that any defendant in Quitman County had ever alleged ineffective assistance; no evidence of any post-conviction proceedings challenging the effectiveness of counsel; no evidence that indigent defense expenses were the cause of the county's financial difficulties; and no evidence that excessive caseloads caused court delays as plaintiff alleged).

113 466 U.S. 648 (1984). For a discussion of *Cronic* and *Strickland*, *see supra* notes 100–25, Chapter 1, and accompanying text.

114 711 N.E.2d 1238 (Ind. 1999).

did not find any systemic deficiencies at all and that the defendant did not demonstrate that the systemic deficiencies alleged were present in his case.[115] While the court conceded that the indigent defense system was less than ideal, it did not believe that this particular defendant had been affected, finding that "political considerations did not hamper or constrain trial counsel, that trial counsel received funds to hire an investigator and a psychological expert, and that no evidence demonstrated that trial counsel failed to pursue any aspect of the defense because of pressure or lack of funds from the trial court."[116]

Similarly, the Arizona Supreme Court denied relief to the defendant in the post-conviction case of *State v. Smith,*[117] even though the Court found that the procedure followed by Mohave County, Arizona, in providing indigent defense services, violated the rights of indigent defendants to effective assistance of counsel and due process. The defense system was ruled defective because the county contracted with individual attorneys through a low-bid arrangement that failed to take into account the number and types of cases to be represented, the experience of the attorneys, and the time required for each case. The court further noted that investigative services had to be paid by the contracting attorney, thus reducing the likelihood that an investigator would be used, and that there was no limit on the number of retained clients contracting attorneys could have. Accordingly, the court found that the situation in Mohave County created an inference of ineffectiveness in all cases and held that this inference would prospectively apply to all counties using the same procedures for selecting and compensating counsel. However, in the particular case before it, the court ruled that the inference was rebutted.[118] (In considering the *Smith* case, however, it is important to note that the Arizona Supreme Court decision was not controlled by either *Strickland* or *Cronic* because *Smith* was decided approximately six weeks before these Supreme Court cases. If *Cronic* had been controlling, perhaps the Arizona Supreme Court would not have relied upon an inference that was rebutted but instead would have decided "that a presumption of prejudice … [was] appropriate without inquiry into the actual conduct of the trial."[119])

On balance, however, it is undoubtedly difficult to achieve systemic indigent defense reform when issues are litigated in post-conviction proceedings. Even if systemic deficiencies are acknowledged by courts, as occurred in *Conner,* the problems will rarely be found to raise "a presumption of prejudice," thereby avoiding an examination of what actually occurred during the trial. The state invariably will argue that

115 *Conner,* 711 N.E.2d at 1255.
116 *Id.* at 1254.
117 681 P.2d 1374 (Ariz. 1984).
118 *Id.*
119 *See supra* note 27 and accompanying text. *See also supra* notes 120–125, Chapter 1.

the representation of the defendant should be analyzed under *Strickland's* two-prong test and that the representation was reasonably competent, and even if it was not, there was no prejudice to the defendant notwithstanding deficiencies in the defense system. Thus, as one author has noted, efforts to achieve systemic reform through post-conviction litigation are unlikely to succeed.[120]

C. Judiciary's Authority to Provide Relief

While the actual remedies fashioned by state courts for systemic indigent defense deficiencies necessarily depend on the facts of the specific case, whether any relief is provided will turn on the authority of the courts to act. Among the states, courts have provided relief under their inherent authority to protect the core functions of the judiciary, their equity jurisdiction, and their powers of general superintendence. Most significant to the outcome, however, is the court's determination whether the doctrine of separation of powers precludes the requested relief. The federal courts have asserted jurisdiction in systemic reform cases based upon habeas corpus petitions and in cases brought as civil rights actions under § 1983[121]

Inherent Authority of State Courts

In most cases alleging the violation of indigent defendants' right to counsel due to systemic deficiencies, an infusion of funds to rectify the situation is required. Because the appropriation of funds is normally a legislative task, an issue of separation of powers arises when the judiciary is asked to order that additional funds be made available. Nevertheless, when faced with severe underfunding of the defense function, some courts have declared an inherent authority to compel the legislature to provide adequate appropriations in order to ensure that the judicial branch remains viable.[122] As the Mississippi Supreme Court has explained:

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120 *See* Bernhard, *Take Courage, supra* note 21. Post-conviction *Cronic* analysis is much like *Strickland* analysis in that the defendant must show prejudice to his defense. The distinguishing feature is where the burden lies. Under *Cronic*, if systemic deficiencies are found to deny the defendant the right to counsel, ineffectiveness is presumed and the burden shifts to the state to rebut the presumption. *Cronic*, 466 U.S. at 659. Under *Strickland*, the competence of the attorney is presumed and the burden to demonstrate prejudice remains with the defendant. *Strickland,* 466 U.S. at 693.

121 For discussion of § 1983, *see* infra notes 152–69 and accompanying text.

122 An important function of the judiciary is to ensure that the Sixth Amendment right to counsel is implemented and that there is a genuine confrontation between adversaries. *See Cronic*, 466 U.S. at 656–57.

> … this Court has recognized that where the Legislature fails to act, the courts have the authority and the duty to intervene…. In *Hosford,* poor courtroom conditions including loud noises and poor temperature control led the circuit court to petition this Court for assistance so that the county courthouse would have adequate operating facilities. We noted that while the three branches of government should remain separate and co-equal, where the Legislature, in its allocation of funds to the judicial branch, fails to fulfill a constitutional obligation to enable the judicial branch to operate independently and effectively, then it has violated its Constitutional mandate, and the Judicial branch has the authority to see that courts do not atrophy…. Certainly, if adequate facilities are essential to the administration of justice, so is effective representation.[123]

Thus, the court found that its inherent authority to protect the functioning of the judicial branch extended to compelling the legislature to allocate sufficient funds to uphold the rights of indigent defendants to meaningful representation.

Similarly, in the *Peart* decision discussed earlier, the Louisiana Supreme Court recognized not only that it "possesses inherent powers to do all things reasonably necessary for the exercise of [its] functions," but also that ensuring effective assistance of counsel for indigent defendants was one of its functions that would justify the use of its inherent powers.[124] While the court in *Peart* did not exercise its authority to order the legislature to provide adequate funding for indigent defense, it nevertheless threatened to do so if the legislature failed to act to remedy the situation:

> If legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel…. We decline at this time to undertake these more intrusive and specific measures because this Court should not lightly tread in the affairs of other branches of government and because the legislature ought to assess such measures in the first instance.[125]

New Mexico v. Young,[126] also a case discussed previously, is another example where a state's highest court has declared that it has the authority to enforce the constitu-

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123 *Quitman County,* 807 So.2d at 409–10.
124 State v. Peart, 621 So.2d 780, 790–91 (La. 1993).
125 *Peart*, 621 So.2d at 791.
126 172 P.3d 138 (N.M. 2007)

tional right to counsel by ordering the expenditure of state funds. The New Mexico Supreme Court explained:

> The New Mexico Constitution vests judicial power in the courts of this state. This power has been interpreted as granting courts the inherent power to exercise authority essential to their function and management of their caseloads. An essential function of the courts is to 'serve as the ultimate guardians of an indigent defendant's constitutional rights.' As guardians of the constitution, we must enforce the rights guaranteed by the constitution and further the intent of its provisions.[127]

Although additional funding was not ordered in *Young,*[128] the court noted that, on a prior occasion, it had enforced the constitutional right to counsel when it ruled that pro bono counsel representing indigent criminal defendants "were entitled to apply for and receive expert witness fees from the Public Defender … [and] that an indigent parent is entitled to the appointment of an expert witness at the State's expense in an abuse and neglect proceeding."[129]

Finally, in *State v. Lynch,*[130] still another case mentioned earlier,[131] the Oklahoma Supreme Court held that it had the inherent power to regulate the compensation paid to court-appointed attorneys. The court reasoned that, because lawyers are an important part of the judicial process, the regulation of the practice of law was intertwined with its state constitutional responsibility to ensure the efficient administration of justice.[132] In exercising its authority, the court set forth guidelines for lower courts to follow regarding appropriate compensation for court-appointed lawyers, thus seeking to avoid different rates among the state's counties.[133]

At least one state court, however, did not definitively resolve whether it could, consistent with the doctrine of separation of powers, require the legislature to appropriate funds to ensure the continued functioning of the judiciary. In *Metropolitan Public Defender Services, Inc. v. Courtney,*[134] the provider of indigent defense services for three counties filed a mandamus action asking the Oregon Supreme Court to order the legislature to restore funding for indigent defense. Due to appropriation reductions, a four-month moratorium on the appointment of counsel was implemented in certain

127 *Young,* 172 P.3d at 142.
128 *See supra* note 105 and accompanying text.
129 *Young,* 172 P.3d at 142.
130 796 P.2d 1150 (Okla. 1990).
131 *See supra* notes 2–6 and accompanying text.
132 *Lynch,* 796 P.2d at 1163–64.
133 *Id.*
134 State *ex rel.* Metropolitan Public Defender Services, Inc. v. Courtney, 64 P.3d 1138 (Ore. 2003).

criminal and juvenile cases. In response to the lawsuit, the court recognized that it had the inherent power to "ensure that the judicial branch operates as an independent branch of government, free from undue interference by the other branches,"[135] and it further assumed, without deciding, that its power included ordering the legislature to provide funding for the core functions of the judiciary. It also acknowledged that the impact of the budgetary crisis was "unprecedented and regrettable." Nevertheless, the court refused to order the restoration of funding because it did not find that the judiciary was prevented from carrying out its core functions.[136] Arguably, therefore, it is still unclear in Oregon whether the court's inherent authority extends to ordering the legislature to appropriate sufficient funds to ensure the judiciary's independence and ability to meet its constitutional obligations.

In contrast, the Florida Supreme Court has stated categorically that it lacks the authority to order the legislature to provide adequate funding for indigent defense, citing the separation of powers doctrine.[137] In *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender,*[138] the court held that it had the inherent authority under the state's constitution to address the backlog of appellate cases at the public defender's office when some indigent defendants were forced to wait two years until their cases were briefed. Although the court placed the blame squarely on the legislature for failing to provide sufficient funding for indigent defense, the court concluded it could not compel the legislature to act:

> [I]t is not the function of this Court to decide what constitutes adequate funding and then order the legislature to appropriate such an amount. Appropriation of funds for the operation of government is a legislative function. '[T]he judiciary cannot compel the Legislature to exercise a purely legislative prerogative.'[139]

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135 *Courtney,* 64 P.3d at 1139.

136 *Courtney,* 64 P.3d at 1141.

137 For prior discussion of this Florida case, *see supra* notes 67–71 and accompanying text.

138 561 So.2d 1130 (Fla. 1990).

139 *In re* Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So.2d at 1136. A law review student note objects to the proposition that separation of powers principles preclude the courts from addressing the fundamental constitutional issue of the right to counsel for indigent defendants. Arguing that indigent criminal defendants lack political clout to ensure that their constitutional rights are properly funded, the author explains: "For courts to label indigent defense funding a purely legislative task, is not only an abdication of constitutional responsibility, it is also a failure to take advantage of the judiciary's relative strengths and expertise in this unique field. Courts have an institutional advantage in advancing politically unpopular ideas, particularly when they raise important constitutional concerns, and should therefore capitalize on their expertise in the realm of indigent defense." Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems,* 118 Harv. L. Rev. 1731, 1748 (2005). Another commentator also has argued that "the judiciary holds the key to guaranteed enforcement of the

At the other end of the spectrum is the New Hampshire Supreme Court, which considered the separation of powers issue and came to a different conclusion than most other courts that have addressed the matter. The court found that the state's separation of powers doctrine precluded the legislature from statutorily fixing the fees paid to court-appointed counsel. Instead, the court concluded that it was up to the judiciary to determine what constituted reasonable compensation. In *Smith v. State of New Hampshire,*[140] two court-appointed attorneys sued the state, alleging that the statutory limits on the fees to be paid to court-appointed counsel were unconstitutional. Recognizing that upholding the constitutional right to counsel is a uniquely judicial function and that "the obligation to represent indigent defendants is an obligation springing from judicial authority," the Court explained:

> [I]t is peculiarly within the judicial province to ascertain reasonable compensation when the person who performs the services is acting under court appointment as an officer of the court. We view it implicit in the constitutional scheme that the courts of this State have the exclusive authority to determine the reasonableness of compensation for court-appointed counsel. The statutes in question intrude upon this judicial function in violation of the constitutional separation of powers mandate.[141]

The court concluded by acknowledging that, in order to comply with its ruling, the legislature would need to allocate adequate funds for these purposes.[142]

Other Theories of State Court Jurisdiction

In addition to exercising their inherent authority to ensure the functioning of the judiciary, state courts sometimes have taken action under their equity powers in order to promote fairness and justice when there is no legal remedy available. *New York County Lawyers' Association v. New York*[143] is a case in which systemic funding issues were addressed based upon equity jurisdiction. In this case, also discussed earlier,[144] the court entered a permanent injunction and ordered increased compensation rates for court-appointed counsel to ensure that there were a sufficient number of

constitutional right to counsel, particularly when the legislative branch fails to exercise its fiscal authority." Wilson, *Litigative Approaches, supra* note 5, at 205.

140 394 A.2d 834 (N.H. 1978).

141 *Smith,* 394 A.2d at 838.

142 Sometimes court-appointed counsel fees are expressly dependent upon the legislature's appropriation. *See, e.g.,* Mass. Gen. Laws ch. 211D § 11, which sets rates for court-appointed counsel "subject to appropriation."

143 196 Misc. 2d 761, 778 (N.Y.Sup.Ct. 2003).

144 *See supra* notes 45–48 and accompanying text.

attorneys available to represent indigent defendants. The court first decided beyond a reasonable doubt that compensation then being paid was unconstitutional because it impaired the judiciary's ability to function. Although conceding that it would normally be up to the legislature to address the issue of appropriate funding, the court concluded that increasing compensation rates was the proper equitable remedy in order to provide access to justice:

> This court has shown substantial deference to the Legislature, awaiting legislation. Under these circumstances, equity can only be served by intervention to protect the fundamental constitutional rights of children and indigent adults who face present and future irreparable deprivations of these rights if injunctive relief is denied. The magnitude of the problem is evidenced by the bellowing cries for reform sounding for years from every corner of the New York legal community. The executive branch has also recognized the inadequacy of the rates and the failure to provide an increase for 17 years.[145]

Another basis for judicial action is the power of general superintendence, which refers to the authority of the highest courts of the states to oversee and supervise the lower courts. This responsibility includes providing remedies to correct errors or injustices occurring in the lower courts when no other legal remedies are available. It was through its power of general superintendence that the Massachusetts Supreme Judicial Court (SJC) addressed the systemic violation of indigent defendants' rights to counsel in *Lavallee v. Justices in Hampden Superior Court.*[146] Because of a shortage of available private attorneys willing to accept assigned cases, the court was asked to increase compensation rates to ensure the presence of an adequate number of lawyers.[147] While acknowledging the court's inherent authority to order funding if they cannot adjudicate cases due to inadequate facilities or supporting personnel, the court held that the state's failure to provide all indigent defendants with court-appointed counsel did not fall under this rubric. Instead, the court acted under its power of general superintendence to protect indigent defendants who were being denied their constitutional right to counsel. The court explained that, "while the constitutional rights of particular petitioners have not yet been adequately addressed, our powers of general superintendence require us to fashion an appropriate remedy to the continuing constitutional violation suffered by indigent criminal defendants…."[148] Accordingly, the Court set forth rules for the lower courts in Hampden County to follow to protect indigent defendants' rights to counsel, including the release of

[145] *New York County Lawyers' Association,* 196 Misc. 2d at 784.
[146] 812 N.E.2d 895 (Mass. 2004).
[147] For prior discussion of the *Lavallee* decision, *see supra* notes 42–44 and accompanying text.
[148] *Lavallee,* 812 N.E.2d at 909.

defendants incarcerated pretrial after seven days if no counsel was appointed and the dismissal of cases after 45 days if no attorney filed an appearance during that time. Because the court did not act under its inherent authority to ensure the proper functioning of the courts, the legislature was not ordered to appropriate additional funds.

The Michigan Supreme Court likewise exercised its power of superintendence in ordering that the Wayne Circuit Court and the Detroit Recorder's Court abandon their fixed-fee system to compensate court-appointed attorneys. *In the Matter of the Recorder's Court Bar Association v. Wayne Circuit Court*[149] is a case in which several groups of Michigan defense attorneys filed a complaint in the state's high court for "superintending control," seeking an order that the fixed-fee schedule of payments did not reasonably compensate them as required by statute and the U.S. Constitution. By statute, county courts were responsible for determining the rates of "reasonable compensation" for the work performed by court-appointed counsel. In implementing this directive, the defendant courts adopted a fixed-fee system whereby an attorney was paid a specified amount based solely on the severity of the charge, rather than on the work performed in the case or the costs incurred. In order to resolve the issues, a special master was appointed who found, *inter alia,* that the fixed-fee system encouraged counsel to pressure indigent clients to plead guilty and discouraged the filing of even serious defense motions. Based on the special master's report, the Michigan Supreme Court ruled that the fixed-fee system did not reasonably compensate attorneys for their work. Accordingly, given the county court's failure to perform its legal duty under the statute and in the absence of an adequate legal remedy, the court exercised its power of superintendence and directed the judges to implement another method of payment.

Federal Court Jurisdiction

The foregoing discussion reflects that most lawsuits concerning deficiencies in the delivery of indigent defense services have been filed in state courts. This is because federal courts normally are unwilling to exercise jurisdiction in cases that might interfere with on-going state criminal proceedings. However, if state courts abdicate their responsibilities, federal courts may be willing to enforce the right to counsel through a habeas corpus petition or class action complaint.

More than 35 years ago, the United States Supreme Court held that federal courts should abstain from deciding cases when doing so would interfere with state criminal proceedings. In *Younger v. Harris,*[150] the Supreme Court held that, due to equity juris-

[149] 503 N.W.2d 885 (Mich. 1993).
[150] 401 U.S. 37 (1971).

prudence considerations and federalism concerns, federal courts should not act under their equity jurisdiction unless there are extraordinary circumstances in which there is an irreparable injury that is both great and immediate. As the Court explained, "[t]he threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution."[151]

In *Luckey v. Miller,*[152] the *Younger* decision was held to apply to indigent defendants seeking federal action to repair systemic failures in the provision of defense services. In that case, the ACLU filed a civil rights action under 42 U.S.C. § 1983,[153] alleging that systemic deficiencies in the indigent defense system in Georgia denied indigent defendants their constitutional right to counsel and asked the federal court to order the state to provide constitutionally adequate services. The federal district court held that it could not exercise jurisdiction in the case because a decision favorably impacting indigent defense would interrupt pending criminal cases and require the federal court to monitor the state court's compliance. The Eleventh Circuit Court of Appeals agreed with the federal district court and dismissed the lawsuit on these grounds.

Not all federal relief is necessarily precluded, however, as there is an exception to *Younger* for defendants who are denied access to the courts due to a denial of counsel. In both the *Green* and *Harris*[154] cases, indigent defendants filed habeas corpus petitions in federal courts claiming that lengthy delays in the filing of their appeals, resulting from severe underfunding of indigent defense systems, deprived them of due process. In both cases, the federal courts concluded they had jurisdiction, even though the petitioners' appeals were still pending, because the denial of a timely ap-

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151 *Younger,* 401 U.S at 47.

152 976 F.2d 673 (11th Cir. 1992).

153 "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983. In Polk County v. Dodson, 454 U.S. 312 (1981), the Supreme Court held that a public defender is not subject to liability under § 1983 "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Id.* at 325. However, the Court left open the possibility of agency or governmental liability if it could be shown that agency policy or custom caused the defendant's injury. *Id.* at 326. Pursuant to this approach, a federal court refused to dismiss a lawsuit against the head of a public defender office and the county that funded the agency. The complaint alleged deliberate indifference to the Sixth Amendment rights of defendants by the agency's policies of allocating resources based on polygraph results of defendants and assigning inexperienced attorneys to capital cases without training them. *See* Miranda v. Clark County, 319 F. 3d 465, en banc (9th Cir. 2003).

154 *See supra* notes 72–75 and accompanying text.

peal was considered a denial of access to the courts. As the court observed in *Green,* "[t]o deny an indigent appellant access to his appeal and then to hold him or her responsible for that denial would be truly Kafkaesque."[155]

Federal courts usually require that persons seeking habeas relief from state court rulings first exhaust all state court remedies.[156] However, despite the pendency of the state cases, the federal courts in *Green* and *Harris* were willing to get involved because the state courts were aware of the problems and had consistently failed to provide a remedy. As the court in *Harris* explained, "[w]here state procedural snarls or obstacles preclude an effective state remedy against unconstitutional convictions, federal courts have no other choice but to grant relief in the collateral proceeding."[157] Potential remedies include addressing the state appellate delay, ruling on the merits of the underlying claim, or granting a conditional writ releasing the defendant until denial of the right to counsel is resolved.

While both *Green* and *Harris* addressed delay in appellate cases, the decisions in these cases do not appear to hinge on whether denial of access to the courts is at the appellate or trial level. Several cases filed in federal district courts seeking redress under § 1983 for the lack of adequate counsel for indigent defendants have been resolved through consent decrees. These cases were favorably concluded from a defense standpoint, even though the state ostensibly could have moved to dismiss under the *Younger* federal abstention doctrine. Arguably, where a denial of counsel limits or denies access to the courts, the federal abstention doctrine does not apply.

For example, in *Carter v. Chambers County,*[158] a federal class action lawsuit alleged that the county did not provide counsel to indigent defendants held in jail pretrial, depriving indigent defendants of their constitutional rights to due process and equal protection. After the action was filed, an extensive study was conducted on the Chambers County indigent defense system. In the end, the parties entered into a consent decree in which the county agreed to provide counsel for all defendants incarcerated prior to trial and unable to post bond within a prescribed period of time. *Stinson v. Fulton County Board of Commissioners*[159] was a similar federal class action case, in which it was alleged that, due to lack of indigent defense funding, accused persons were denied counsel between the time a bail bond was set and the defendant was arraigned or indicted. Again, a consent order was entered pursuant to which

155 *Green,* 917 F.Supp. at 1273.
156 *See, e.g.,* O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999).
157 Harris, 15 F.3d at 1555, *citing* Bartone v. United States, 375 U.S. 52, 54 (1963).
158 Carter v. Chambers County, No. 88-T-1196E, (M.D. Ala.1989).
159 Stinson v. Fulton County Board of Commissioners, No. 1:94-CV-75 GET (No. Dist. Ga. 1994).

Fulton County agreed to provide timely representation of counsel and make other improvements in its system of indigent defense.[160]

In *Doe v. Spokane County,*[161] the Spokane County Public Defender Office filed a § 1983 action seeking a federal injunction to compel the state courts to appoint private counsel until the office's caseload was reduced to allow them to provide effective assistance of counsel or, alternatively, to order the county to fund the office properly.[162] At the time of the lawsuit, the average yearly caseloads of public defenders were far in excess of any recognized national standards.[163] Prior to filing its lawsuit, the office repeatedly, albeit unsuccessfully, requested increased funding from the county.[164] The office then obtained external support from various legal organizations and the media.[165] A month after the legal challenge was filed, the county offered a settlement and agreed to increase the staff size of the office.[166]

There may be other paths, albeit limited ones, around *Younger* and the federal abstention doctrine. One possibility is to allege the lack of an adequate state forum due to bias or when state proceedings are unlikely to afford a remedy. In *Gibson v. Berryhill,*[167] the U.S. Supreme Court ruled that federal courts are not required to abstain from ruling on a question of federal law, even if that question is currently pending before a state tribunal, if the state tribunal is "incompetent by reason of bias,"[168] to decide the issue itself. The Supreme Court's reasoning was that dismissal of a federal lawsuit "presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved."[169]

Based on this logic, the Supreme Court held in *Gerstein v. Pugh,*[170] that the federal abstention doctrine did not apply if state proceedings were unlikely to afford an opportunity to be heard or to offer an adequate remedy. The plaintiffs were being held pretrial without a judicial finding of probable cause to support their continued detention. They sought injunctive relief from the federal courts, asking that the state be or-

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160 Stinson v. Fulton County Board of Commissioners, No. 1:94-CV-240-GET (No. Dist. Ga. 1999).

161 Doe v. Spokane County, No. C-83-406-RJM (E.D. Wash. 1983).

162 Nat'l Legal Aid and Defender Assoc., Indigent Defense Caseloads and Common Sense: An Update, 56–57 (1992).

163 *Id.*

164 *Id.* at 57.

165 *Id.*

166 *Id.*

167 411 U.S. 564 (1973) (federal abstention doctrine did not apply where administrative review board comprised solely of optometrists was incapable of fairly adjudicating dispute before it because every member had a financial stake in the outcome).

168 *Gibson,* 411 U.S. at 576.

169 *Id.*

170 420 U.S. 103 (1975).

dered to provide a judicial hearing for a probable cause determination. Even though plaintiffs were subject to pending state criminal prosecutions, the Supreme Court stated that federal intervention was not barred by the *Younger* abstention doctrine, noting that the injunction was not aimed at the prosecution itself but at the failure to provide a judicial determination of probable cause prior to pretrial detention. The Court further noted that its decision ordering the state to hold such hearings would not affect a trial on the merits in the cases. For this reason, state courts would not have an opportunity to review the issue of illegal pretrial detention because it could not be a defense at a state court trial. This case seemingly stands for the proposition that federal courts have jurisdiction to provide injunctive relief in pending state criminal cases under the inadequate state forum exception to *Younger* when a federal constitutional violation may continue if the state judicial proceedings are unlikely or unable to afford relief.

Another avenue around the *Younger* abstention doctrine is for the lawsuit to demonstrate extraordinary circumstances where there is a danger of irreparable injury of constitutional dimensions that is both great and immediate. The Supreme Court explained the requirements as follows:

> Only if "extraordinary circumstances" render the state court incapable of fairly and fully adjudicating the federal issues before it, can there be any relaxation of the deference to be accorded to the state criminal process. The very nature of "extraordinary circumstances," of course, makes it impossible to anticipate and define every situation that might create a sufficient threat of such great, immediate, and irreparable injury as to warrant intervention in state criminal proceedings. But whatever else is required, such circumstances must be "extraordinary" in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation.[171]

Arguably, if a state or local indigent defense system is consistently failing to provide indigent defendants with effective and competent counsel, with state governments and courts complicit in those systems, federal jurisdiction may be appropriate.

[171] Kugler v. Helfant, 421 U.S. 117, 124 (1975).

D. Lessons Learned from Prior Litigation

Assuming that a public defense system is underfunded and otherwise in significant need of reform, based upon the litigation discussed in this chapter, we believe certain principles are worth considering when instituting legal actions aimed at promoting systemic improvements. We list these principles here and then expand upon them afterwards: (1) litigation should be instituted on behalf of all or a class of indigent defendants so that a positive result will impact a large group of defendants; (2) litigation should be instituted pretrial, rather than post-conviction, thereby avoiding the need to demonstrate prejudice; (3) legal representation should be provided by disinterested lawyers experienced in civil litigation serving as pro bono counsel; (4) strong factual support that shows how the system adversely affects indigent defendants should be assembled and presented;[172] (5) counsel should present to the appropriate court persuasive legal authority to justify judicial intervention; and (6) media coverage and public support should be encouraged.

All or a Large Class of Indigent Defendants

Litigation seeking systemic change should be initiated on behalf of all or a large class of indigent defendants in order to secure a favorable remedy with broad impact. For example, indigent defense systems in Connecticut and Washington (Grant County) were enhanced after successful class action lawsuits alleging violations of the right to counsel.[173] In contrast, lawsuits aimed solely at increasing fee rates for assigned counsel may be successful in obtaining higher compensation, which is surely important in the short-term, but such cases will not necessarily reach broad systemic issues that may plague the indigent defense system because the extent of the requested relief is relatively narrow.[174] Also, lawsuits on behalf of individual defendants do not typically result in far-reaching changes, as the relief provided is confined to the particular facts of the case before the court. The favorable outcomes in cases from Louisiana and New Mexico in which the issue was the adequacy of compensation for defense

[172] For example, the plaintiffs in *Lavallee* and *New York County Lawyers' Association* supported their cases with affidavits, amicus briefs, examples of adversely affected individuals, studies, and numerical data. The plaintiffs in *Kennedy* and *Quitman County,* on the other hand, failed to provide specific examples of adversely affected indigent defendants, evidence of ineffective assistance, or adequate data to support their contentions.

[173] *See supra* notes 49–58 and accompanying text.

[174] *See supra* notes 42–48 for discussion of the *Lavallee* and *New York County Lawyers' Association* cases. However, in several states, increased fee rates contributed to the establishment or expansion of public defense programs. *See supra* note 6 and accompanying text.

counsel in capital cases illustrate this point.[175] Of course, such cases are precedent for similarly situated defendants in the future.

Pretrial Litigation

The timing of litigation is important because it is preferable that legal actions be instituted pretrial rather than post-conviction. At various places within this chapter, we have noted favorable results that were achieved through pretrial legal actions[176]. The major disadvantage to a post-conviction claim is that the courts will usually undertake to determine whether there was prejudice to the defendant under the Supreme Court's *Strickland* decision, and satisfying *Strickland's* two-prong test is exceedingly difficult.[177] The alternative is to argue that the defendant's case should be considered under the tests for ineffective assistance of counsel spelled out in the *Cronic* decision. As noted earlier, pursuant to *Cronic,* if the state's evidence has not been subjected to meaningful adversarial testing or there is little likelihood that even a competent attorney could have been effective under the circumstances, prejudice may be presumed without an inquiry into the actual conduct of the trial. However, the example offered by the Supreme Court in *Cronic* of a case in which prejudice could be presumed was *Powell v. Alabama,* a capital case involving multiple defendants in which the attorney assumed responsibility for the defense on the day of the trial. In the *Cronic* case itself, even though counsel was inexperienced, had never before tried a jury case, and was given a very short amount of time to prepare his defense for a complex federal mail fraud prosecution, the Court held that the tests for ineffective assistance of counsel specified in the decision were not met. As the Court explained:

> This case is not one in which the surrounding circumstances make it unlikely that the defendant could have received the effective assistance of counsel. The criteria used by the Court of Appeals do not demonstrate that counsel failed to function as the Government's adversary. Respondent therefore can make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel.[178]

175 *See supra* notes 102–07 and accompanying text
176 *See, e.g., supra* notes 36–58 and accompanying text.
177 *See supra* notes 101–19 and accompanying text, Chapter 1.
178 *Cronic*, 466 U.S. at 672–73.

Experienced Practitioners Serving Pro Bono

Another factor in achieving successful systemic indigent defense reform is the selection of counsel. The broader the class of plaintiffs, the broader the possible remedies, and the more complicated the litigation is likely to be. Indigent defense providers are rarely in a position to compile the necessary evidence to substantiate claims of systemic deficiencies, and they usually lack the requisite skill for the kinds of litigation discussed in this chapter. Accordingly, external counsel affiliated with law firms, bar associations, or public interest organizations who are willing to provide pro bono representation can make significant contributions. Besides possessing the necessary experience, they are likely to have more time, personnel, and resources than do public defenders to devote to a major systemic legal challenge. They also are used to conducting extensive discovery, preparing exhibits, and may have funds to retain necessary experts.

It is also possible that some public defenders and other indigent service providers are reluctant to disclose their arguable ineffectiveness, either in a specific case or in general.[179] In fact, some indigent defense attorneys may not fully appreciate their shortcomings or the defense system's deficiencies. If defense attorneys have never worked in another court system or in private practice, they may believe their standard operating procedures are just fine, even when they are not in compliance with standards related to the defense function and the rules of professional conduct. Disinterested private counsel may be able to play an important role in objectively assessing the performance of defense lawyers in the indigent defense system, suggesting how the lawsuit should be presented, and perhaps convincing indigent defense providers that they should acknowledge that they are unable to represent their clients adequately.

As discussed previously, there is recent evidence that public defenders may now be more willing than in the past to concede that, due to their excessive caseloads and other problems, they cannot in the future provide—and may not now be providing—competent representation consistent with standards governing defense services.[180] Such willingness appears in part to derive from the opinion of the ABA Standing Committee on Ethics and Professional Responsibility, which made clear that public defenders, just like all other lawyers, have a duty to provide competent

179 In analyzing the unsatisfactory outcome in Kennedy v. Carlson, *supra* note 64, one writer has concluded: "The lesson to be learned from the failure of the Minnesota litigation is that a public defender understandably will resist revealing how its own staff is causing or has caused injury to clients. The office would have to publicly admit error—a task that is unpleasant, bad for staff morale, and potentially damaging to its credibility with the public. The Minnesota litigation might have been more successful if it had been brought by a different plaintiff." *See* Bernhard, *Take Courage, supra* note 21, at 327. *But see supra* text at notes 86, 89, and note 95.

180 *See infra* notes 83–101 and accompanying text.

service under the rules of professional conduct and that there is a duty to withdraw from representation and seek to avoid additional appointments when caseloads are excessive. It is also worth noting that there are virtually no cases in the country in which disciplinary counsel have sought to sanction public defenders for undertaking the representation of too many clients, perhaps because such counsel understand that the caseloads of defenders are not entirely under their control.

Factual Support

One of the most important underpinnings for successful litigation is strong factual support demonstrating the problems with the jurisdiction's indigent defense system. Obviously, it is not sufficient for plaintiffs *merely* to assert that the system is underfunded or otherwise broken. Instead, a thorough compilation of evidence to support the claims is essential. Litigation will surely not succeed if proof is lacking or is in serious doubt.[181] If the factual record is unclear or the matter especially complicated, a special master may be appointed[182] or the case remanded for additional fact-finding.[183]

The importance of persuasive factual support is illustrated by the *Quitman County* cases.[184] The Mississippi Supreme Court's initial ruling was favorable to the Plaintiff, Quitman County. But when the case was remanded for a hearing in which the county was called upon to show the systemic failures of its defense system, the county failed to substantiate its claims with either empirical or anecdotal evidence. Thus, when the case returned to the Mississippi Supreme Court on appeal, the court upheld the lower court's determination that Quitman County had failed to meet its burden. The court noted that there was no evidence of specific instances when the performance of court-appointed counsel was inadequate; no evidence that any defendant in Quitman County had ever alleged ineffective assistance; no evidence of any post-conviction proceedings challenging the effective assistance of counsel; no evidence that indigent defense expenses were the cause of the county's financial difficulties; and no evidence that the caseloads of the public defenders were excessive or caused court delays as alleged. In fact, the public defenders themselves testified that they did not feel overburdened with cases.

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181 *See* Kennedy v. Carlson, 544 N.W.2d 1 (Minn. 1996), discussed *supra* at notes 64–66 and accompanying text.

182 *See In re* Certification of Conflict in Motions to Withdraw Filed by Public Defender of the Tenth Judicial District, 636 So.2d 18 (Fla. 1994), discussed *supra* at note 71 and accompanying text.

183 *See* State v. Quitman County, 807 So.2d 401 (Miss. 2001), discussed *supra* at notes 108–12 and accompanying text.

184 *Id.*

If possible, lawsuits seeking systemic reform should provide two types of evidence—empirical and anecdotal.[185] If a defense system is alleged to be inadequate due to excessive caseloads, lack of training, and underfunding, the claims must be backed up by caseload data, training levels of attorneys, and amounts of funding. Statistical comparisons with other jurisdictions and with prosecutors from the same jurisdiction may provide persuasive proof that no attorney could provide meaningful and effective legal assistance given the condition of the indigent defense system. It is also necessary to provide anecdotal evidence, citing exceptionally egregious examples, so that the court, as well as the general public, is aware of the insidious effects of an inadequate system of indigent defense. Unsuccessful lawsuits have failed to present evidence on one or both of these fronts. Sometimes, important factual information is available in reports about the jurisdiction's indigent defense system, and occasionally, such studies have been developed by or on behalf of indigent defense study commissions.[186]

Appropriate Court and Judicial Intervention

Counsel seeking reform of indigent defense through litigation initially must determine the appropriate venue in which to file suit. Clearly, some cases must be brought in the trial court, such as motions to withdraw or claims on behalf of an individual defendant. However, in some instances, pretrial litigation on behalf of all or a class of indigent defendants may be initiated by a writ of mandamus or other extraordinary writ in the state's highest court.[187] Counsel must also decide whether to file in state court or if a federal action can be maintained despite the various obstacles previously discussed respecting federal jurisdiction. In addition, the decision where to file suit may be influenced by whether the trial court will afford counsel time to make an adequate record, whether the supreme court of the state will likely appoint a special master or remand the case for an evidentiary hearing, the length of time each route is apt to take, and an assessment of the overall likelihood of success.

Counsel also will need to be ready to justify the legal basis for judicial intervention. A majority of courts have found that, if the circumstances are sufficiently compelling, they have the authority to order indigent defense improvements. Courts have relied

185 "… a lawsuit must establish—at a minimum—that the services provided are causing actual injury to clients. Actual injury can be established through a combination of anecdotal and empirical evidence. But without the facts to convincingly prove harm to the system's clients…, courts will reject complaints as not justiciable." Bernhard, *Take Courage, supra* note 21, at 325. Respecting the need to prove "actual injury to clients," *compare* language of the court in *Luckey,* 860 F.2d at 1017. *See also supra* note 39, cases cited therein, and accompanying text.

186 *See, e.g., infra* notes 121, 128, and accompanying text, Chapter 4.

187 *See, e.g.,* State *ex rel.* Metropolitan Public Defender Services, Inc. v. Courtney, *supra* note 134 and accompanying text.

upon various theories, including their inherent authority to protect the judiciary as a co-equal branch of government, as well as their equity jurisdiction and powers of general superintendence.[188]

Media and Public Support

Theoretically, when judges resolve court cases concerning indigent defense reform, it should be irrelevant whether the litigation is covered by print and other news media. Nor should it matter whether prominent persons in the state or community speak publicly in favor of necessary changes in the delivery of indigent defense services. However, the reality is that news reports about problems in indigent defense and strong public support for improvements may make a difference not only when legislatures consider new laws,[189] but also when courts decide difficult cases. For example, lawsuits in Connecticut and Washington, which resulted in favorable consent decrees, were accompanied by favorable editorials and media attention.[190] According to one writer who has examined indigent defense litigation, essential ingredients for success are "egregious conditions…, allegations of actual injury to clients, litigation support from a law reform organization or bar association, and *public favor.*"[191]

188 *See infra* notes 123–39, 146–49 and accompanying text.
189 *See infra* notes 29–31, Chapter 4.
190 *See* Bernhard, *Take Courage, supra* note 21, at 322.
191 *Id.*

CHAPTER 4

How to Achieve Reform: The Use of Legislation and Commissions to Produce Meaningful Change

A majority of states have established, through legislation, some type of supervisory authority[1] to oversee some or all of the state's indigent defense services. To be successful, an oversight body needs to be independent from political and judicial influence and able to assure the quality of representation provided. Proper construction and implementation of a statewide oversight body requires time, careful planning, and political fortitude. It is worth the effort, though, as meaningful state oversight can greatly enhance indigent defense representation.

A. Legislative Background of State Oversight Commissions

As depicted in Table II at page 151, currently 42 states either have a statewide authority that provides oversight for some or all indigent defense services or a statewide agency that provides representation directly. Of these states, 27 have a statewide public defender agency or supervisory body that provides oversight regarding almost all aspects of indigent defense services.[2] In all but two states,[3] funding comes almost entirely from the state. The majority of these statewide bodies with full authority over the indigent defense function have been in existence for more than 20 years.

Another nine states[4] have partial authority commissions that permit counties, to varying degrees, to maintain important responsibilities for indigent defense services. All but two of these states[5] require the counties to provide the majority of indigent defense funding, while the state usually allocates some supplemental funding. Partial authority statewide commissions that allow the counties to retain control over much

1 The terms "commission" and "body" are used throughout this chapter in referring to a state board or authority with oversight responsibilities for indigent defense. Citations to the statutes of the state public defense programs and commissions discussed or listed in this Chapter are contained in Appendix C. Also, we include in footnotes, as necessary, references to specific code provisions. In preparing this chapter, a report on state indigent defense commissions completed in 2006 was used as a starting point. *See* The Spangenberg Group, State Indigent Defense Commissions (2006) (prepared with funding from the ABA Standing Committee on Legal Aid and Indigent Defendants) [hereinafter ABA/TSG Indigent Defense Commissions].

2 Alaska, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, Vermont, Virginia, Wisconsin, West Virginia, and Wyoming. These 27 states are listed in the first three columns of Table II, reading from the left.

3 Louisiana and South Carolina.

4 Indiana, Georgia, Kansas, Nebraska, Nevada, Ohio, Oklahoma, and Texas, and Washington. Respecting developments in Nevada in 2008, *see infra* note 31 and accompanying text.

5 Kansas and Oklahoma.

of the provision of indigent defense services are of more recent origin, as only three of these bodies are more than 20 years old.

Eight states[6] have neither a statewide public defender agency nor an oversight body for trial representation but have established a state appellate, post-conviction, capital, and/or conflict office that oversees or provides representation in these areas.[7] Specifically, Illinois and Michigan have appellate agencies with a separate body that exercises some degree of oversight; California and Tennessee have similar structures for capital post-conviction cases. Nebraska's agency, which represents defendants in capital cases, capital post-conviction cases, appellate cases, post-conviction DNA cases, and some serious felony cases, has a limited oversight board as well.[8] Arizona, California, Florida, Idaho, and Mississippi have agencies that provide direct representation in post-conviction, conflict cases, or in capital cases but do not have an oversight body.[9] While, with the exception of Tennessee and Florida, trial representation in these states is funded primarily by the counties, these offices are funded by the states. Eight states do not have a statewide oversight body or statewide indigent defense provider.[10]

Legislative Trends in the Use of Oversight Commissions Since 2000

During the past eight years, there have been important legislative developments in providing indigent defense services in 11 states. Since 2000, eight states have passed legislation forming new oversight bodies for indigent defense; two states progressed from partial-authority to full-authority oversight bodies; and one state's

6 Arizona, California, Florida, Illinois, Idaho, Michigan, Mississippi, and Tennessee.

7 Florida has five regional offices that provide representation in indigent defense conflict cases. Because these conflict offices are fully state-funded state agencies and each has a director appointed by the governor, selected from among Supreme Court nominees, and confirmed by the state senate, these regional conflict offices are somewhat similar to a statewide conflict office. For purposes of Table II, *infra*, Florida is classified as a state without a statewide oversight body. Also, at the trial level in Florida, public defenders are elected for each judicial circuit. Tennessee is the only other state in which all public defenders are elected.

8 The board of the Commission on Public Advocacy is authorized by statute as a partial-authority commission. It also distributes state money for indigent civil legal services. However, due to lack of funds, the only oversight the Commission currently provides is choosing the chief defender for this Nebraska program.

9 Arizona has a capital post-conviction appeals office. Although a commission provides three nominees to the governor for the position of state capital post-conviction public defender, it does not choose the head of the office nor does it provide any oversight. California has a capital appeals office without an oversight body. Florida has five regional conflict offices, as discussed in note 7 *supra*. Idaho has a state appellate agency. Mississippi has multiple state agencies that provide direct representation for appeals, capital trials, and capital post-conviction cases.

10 Alabama, Arizona, Florida, Maine, New York, Pennsylvania, South Dakota, and Utah.

system evolved from a state agency of limited scope to an oversight body with partial authority.

Six of the eight states that formed new oversight bodies established commissions with full authority[11] and two established oversight bodies with partial authority.[12] Montana created a statewide public defender with a full-authority commission, while North Carolina, North Dakota, Oregon, and Virginia created new state commissions with state directors. West Virginia, which previously had a public defender system administered by the state without an oversight body, established a full-authority commission to oversee indigent defense in that state.

In 2007, Louisiana enacted legislation enlarging the jurisdiction of its commission so that it is now a full-authority commission as opposed to a partial-authority body. The responsibilities of the Louisiana Public Defender Board (LPDB) now include devising mandatory standards for providing indigent defense, establishing mandatory qualifications for public defenders, and monitoring and enforcing regulations.[13] However, because existing indigent defense delivery systems are presumed adequate throughout the state,[14] the LPDB may find it difficult to modify an ineffective delivery model.[15]

South Carolina's law was amended in 2008, giving the South Carolina Commission on Indigent Defense (SCCID) the authority to appoint circuit public defenders across the state to manage almost all aspects of indigent defense services in their jurisdictions.[16] The chief defenders now report directly to circuit defenders employed by the commission, whereas previously, most counties had their own or a joint public defender who was responsible to the county.[17] Moreover, the SCCID now has the authority to promulgate performance standards and monitor compliance.[18] In 2006, SCCID implemented a statewide case management system for public defenders and an online vouchering system for appointed counsel payments. This system allows for improved oversight and accountability, and assisted in the passage of the new legislation by helping to project the cost of implementing the commission's revised

11 Montana, North Carolina, North Dakota, Oregon, Virginia, and West Virginia.

12 Georgia and Texas.

13 La. Rev. Stat. Ann. § 15:147 (2007).

14 *Id.* at § 15:165(C) ("Any delivery model in existence prior to April 30, 2007, shall be presumed to be acceptable and meet standards [and] guidelines pursuant to rules adopted by the board, and as provided by statute until the delivery model is proven not to meet those standards and guidelines.")

15 *Id.* at § 15:165(D) (1)-(2).

16 The circuit public defenders for each judicial circuit are nominated by a Circuit Public Defender Selection Panel composed of active, licensed attorneys within the circuit. S.C. Code Ann. § 17-3-510(A) (West 2007).

17 *Id.* at § 17-3-520(B).

18 *Id.* at § 17-3-320(B) (1); § 17-3-340(H).

structure. Judges and court clerks welcomed the online vouchering system because it transferred the administrative responsibility for approving voucher payments to the commission while leaving to judges the authority to approve waivers of voucher caps. It also enables the commission to monitor the accuracy of vouchers submitted.

Prior to 2005, the duties of the Office of Public Defense (OPD) in Washington state were limited to overseeing "the effective and efficient delivery of indigent defense services for appeals."[19] In 2005, the state legislature appropriated funds for OPD to establish a criminal indigent defense pilot program at the trial level.[20] In 2006, and again in 2008, OPD's responsibilities were further expanded when the legislature allocated funds for OPD to disburse to the counties and cities to improve indigent defense at the trial level.[21]

Table II: Indigent Defense Systems of the 50 States

State PD with Comm'n		State Director with Comm'n		State PD without Comm'n		State Comm'n Partial Authority		State Appellate Comm'n or Agency	No State Comm'n	
State	Year Est.	State	Year Est.	State	Year Est.	State	Year Est.	State	State	Prior Study Comm.
CO	1969	MA	1983	RI	1942	NV	1971	CA	AL	Yes
MD	1971	NC	2000	DE	1953	KS	1981	IL	AZ	Yes
HI	1972	OR	2001	NJ	1967	OH	1984	ID	ME	Yes
KY	1972	VA	2004	VT	1972	IN	1989	MI	NY	Yes
NH	1972	ND	2005	NM	1973	OK	1991	MS	PA	Yes
CT	1974	LA	2007	WY	1977	NE	1995	TN	SD	
WI	1977	SC	2008	AK	1980	TX	2001		UT	
MO	1982			IA	1981	GA	2003		FL	
MN	1986					WA	2006			
AR	1997									
MT	2005									
WV	2008									

19 Office of Public Defense Sunset Review, Wash. Joint Legis. Audit and Rev. Comm., R. No. 08-2, at 1 (2008), *available at* http://www.opd.wa.gov/Reports/Other%20Reports/080109%20JLARC%20Report.pdf.

20 *Id.* at 22. OPD also operates a Parents' Representation Program that contracts to provide counsel for parents in dependency and termination of rights proceedings. *Id.* at 11.

21 *Id.* at 22.

Impetus for Legislative Reform

Legislative reform of indigent defense does not normally occur unless deficiencies in the state's services are readily apparent. Sometimes, there also are concerns about the cost-effectiveness of the system in use. Often litigation, statewide study commissions, national and state reform organizations, and media coverage have played important roles in persuading state legislatures to make improvements.

Montana is an example of a state where systemic litigation played a decisive role in indigent defense reform. In June 2005, the Montana legislature enacted a statute shifting responsibility for indigent defense funding and oversight from the counties to a new state authority. Momentum to pass this legislation originated from a lawsuit filed by the American Civil Liberties Union (ACLU), alleging that the system in place denied indigent defendants their right to effective assistance of counsel.[22] (Chapter 3 also discusses litigation that led to legislative reforms.[23]) Study commissions and reports also promote the passage of legislation. In North Dakota, new legislation establishing a full oversight commission was enacted in 2005 due to the work of the State Bar of North Dakota's Indigent Defense Task Force and a report about the state's defense system that the task force commissioned.[24] Similarly, the Georgia Indigent Defense Act was drafted in response to recommendations made by a study commission appointed by the Georgia Supreme Court.[25]

Reform organizations also have played a vital role in indigent defense improvement efforts. In Texas, Texas Appleseed, a non-profit, non-partisan public interest law center, conducted a comprehensive study that culminated in an extensive report issued in December 2000. The legislature began considering changes immediately afterwards, and the Texas Fair Defense Act was signed into law in June 2001.[26] Similarly, the Virginia Fair Trial Project and the Louisiana Justice Coalition contributed to their

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22 The ACLU agreed to put the lawsuit on hold once the state indicated its intent to resolve the situation through legislation rather than wait for a court order. *See* ACLU, *ACLU Agrees to Postpone Trial Over Lack of Legal Defense for Montana's Poor While Atty. General Seeks Legislative Remedy,* May 7, 2004, *available at* http://www.aclu.org/crimjustice/indigent/10227prs20040507.html. *See also* White v. Martz, 2006 Mont. Dist. LEXIS 136 (Mont. Dist. Ct. 2006).

23 *See, e.g., supra* note 6 and accompanying text, Chapter 3.

24 Further discussion of North Dakota's study commission is at *infra* notes 127–28 and accompanying text. *See also* report of The Spangenberg Group for the Task Force, *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/northdakotareport.pdf.

25 *See Landmark Indigent Defense Reform Signed Into Law in Georgia,* The Spangenberg Rep., Nov. 2003, at 10.

26 *See* Robert Spangenberg, *Governor Perry Signs Fair Defense Act in Texas,* The Spangenberg Rep., Jul. 2001, at 1.

states' reform efforts.[27] National organizations also have often provided funding and other assistance in promoting legislative change.[28]

Finally, media coverage that portrays the unfairness of an indigent defense system educates the public about the need for indigent defense reform and helps generate the political will necessary to make changes. For example, a reporter for the Atlanta Journal-Constitution wrote numerous articles describing the terrible condition of indigent defense throughout Georgia prior to passage of indigent defense reform legislation in that state.[29] In Virginia, media coverage led to the formation of a public defender's office in Charlottesville and increased compensation statewide for assigned counsel handling indigent defense cases.[30] Additionally, an indigent defense study commission was created in Nevada after the Las Vegas Review-Journal published a series of critical articles about the Clark County (Las Vegas) public defender system.[31]

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27 *See* Norman Lefstein, *The Movement Towards Indigent Defense Reform: Louisiana and Other States,* 9 Loy. J. Pub. Int. L. 125, 127 n.20 (2008) [hereinafter Lefstein, Loy. J. Pub. Int. L.]

28 In Texas, for example, the Open Society Institute, the Public Welfare Foundation, Department of Justice, the ARCA Foundation, the Southern Poverty Law Center, the Hogg Foundation, and the State Commissions Project supported by the ABA Standing Committee on Legal Aid and Indigent Defendants, all contributed funding. *See* Spangenberg, *supra* note 26, at 1.

29 *See, e.g.,* Bill Rankin, *Unusual Legal Aid Group Helps Turn Lives Around,* The Atlanta J.-Const., Dec. 2, 2002, at 1A.

30 *See Equal Justice: Ongoing Goal,* Op-Ed, The Daily Progress (Charlottesville, VA), Oct. 6, 2008.

31 *See* Brandon Riley, *Nevada High Court Orders Indigent Defense Reforms,* Las Vegas Rev. J., Jan. 4, 2008 [hereinafter Riley, *Nevada High Court Orders Indigent Defense Reforms*]. Specifically, the Nevada Supreme Court ordered "that a permanent statewide commission for the oversight of indigent defense shall be established and appointed by the Nevada Supreme Court…." *See* In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Nev. Jan. 4, 2008) [hereinafter In the Matter of the Review of Issues], *available at* http://www.nvsupremecourt.us/documents/orders/ADKT411Order01_04_08.pdf. However, as of the completion of this report in January 2009, the commission had not yet been established. While it is unusual for a state supreme court to establish a commission to deal with indigent defense issues, it is not unprecedented. In 1994, the Tennessee Supreme Court established the Indigent Defense Commission of the Supreme Court of Tennessee and gave it responsibility "for developing and recommending to the Court a comprehensive plan for the delivery of legal services to indigent defendants in the state court system." *See In re* Indigent Criminal Justice System, 883 S.W.2d 133, 134 (Tenn. 1994). However, recommendations of the Commission were not adopted by the Supreme Court of Tennessee and the Commission lapsed. Also, in 1994, the Louisiana Supreme Court established by court order Louisiana's first indigent defense commission, known as the Louisiana Indigent Defense Board, which was responsible for issuing "qualification and performance guidelines [for attorneys] throughout the state." Nat'l Legal Aid and Defender Assoc., In Defense of Public Access: An Assessment of Trial-Level Indigent Defense Services in Louisiana 40 Years after *Gideon* 2 (2004).

Obstacles to Legislative Reform

In several states, systemic reform legislation was introduced but failed to pass. Lack of political resolve, refusal of localities and local judges to cede control of their systems to state authority, and state unwillingness to pay for indigent defense are the major reasons for legislative inaction. On occasion, there also have been objections from the local bar, which sometimes stands to lose business if control is centralized.[32]

One state where legislative reform has consistently failed to garner sufficient support is Mississippi. In 1998, the Mississippi legislature passed a bill establishing a statewide, state-funded system for indigent defense, overseen by a commission. However, the commission was funded for only one year, the system itself was never funded, and in 2000, the legislation was repealed.[33] Mississippi is the only state to rescind such a commission.

As of 2005, Mississippi ranked last in the nation in per capita spending on indigent defense,[34] and studies indicate that representation at trial remains shamefully inadequate.[35] In 2006, the Mississippi Public Defender Task Force, which was established by the legislature to study the provision of indigent defense in the state and report its findings to the legislature,[36] once again recommended the creation of a statewide, state-funded indigent defense system to be overseen by a board.[37] In 2007, a bill to implement this suggestion died in committee.

While the Mississippi legislature repealed statutory authority for a state commission, two statewide, state-funded offices for capital cases were established.[38] Later, Mississippi created the Office of Indigent Appeals to provide representation for

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32 *See* ABA/TSG Indigent Defense Commissions, *supra* note 1, at 12.

33 *See* Miriam Gohara and Sarah Geraghty, *In Mississippi, Scales of Justice are Tilted,* The Com. Appeal (Memphis, TN), Mar. 14, 2003, *available at* http://www.naacpldf.org/content.aspx?article=145. *See also* Beverly Pettigrew Kraft, *State Fund for Public Defenders Now Broke,* The Clarion Ledger, Jul. 5, 1999.

34 In 2005, the population of Mississippi was 2,921,088 and the state's indigent defense expenditures were $12.8 million. ABA/TSG FY 2005 Indigent Defense Expenditures, *supra* note 26, Chapter 2, at 17, 36. Dividing total expenditures by population yields roughly $4.39 per capita as the amount spent on indigent defense. This sum ranked Mississippi last in terms of state indigent defense expenditures. *See Id.* at 35 (Table of 50 State and County Expenditures for Indigent Defense Services Fiscal Year 2005).

35 NAACP Legal Def. and Educ. Fund, Inc., *supra* note 216, Chapter 2, at 6. (right to counsel is "functionally meaningless in Mississippi, a state which provides almost no regulation, oversight, or funding for indigent defense").

36 Miss. Code Ann. § 25-32-71 (2007).

37 *See Mississippi Public Defender Task Force Makes Recommendations for Current Legislative Session,* The Spangenberg Rep., Feb. 2007, at 16.

38 *See* Miss. Code Ann. §§ 99-18-1 – 99-18-19 (2006) (creating the Office of Capital Defense Counsel); §§ 99-39-101 – 99-39-119 (creating the Office of Capital Post-Conviction Counsel).

indigent defendants convicted of non-capital felonies.[39] The state also recently extended the life of the Mississippi Public Defender Task Force until 2011, expanded its duties to include matters relating to youth and delinquency, and funded a division in the appellate office responsible for training, education, and technical assistance to all public defenders in Mississippi.[40] Regrettably, the state's persistent failure to improve and adequately fund indigent defense will likely ensure that services at trial remain woefully insufficient.

The state legislature in Alabama also has declined to reform indigent defense. In 2006, an Indigent Defense Task Force created by the Chief Justice of the Alabama Supreme Court drafted legislation that would have established a statewide indigent defense system.[41] The proposed bill would have given the commission full authority to determine the type of indigent defense system instituted in each district. Due largely to objections of local judges, who would no longer have the authority to determine the type of system in their circuits, and the concerns of the criminal defense bar that they would be assigned fewer cases and suffer a reduction in pay, the legislation failed to pass.[42] Similarly, in 2001, Alabama legislative committees defeated a bill to set up a statewide indigent defense commission.[43]

In New Mexico, the governor's opposition stymied systemic reform. Currently, the state public defender is an at-will employee appointed by the governor. The New Mexico legislature sought to enhance the independence of this state official by establishing a commission that was responsible for appointing the public defender and overseeing indigent defense in the state.[44] Legislation to achieve these objectives in New Mexico passed, but the governor vetoed the bill.

39 *Id.* at § 99-40-1.

40 *Id.* at § 25-32-71. *See Legislative Update on Mississippi Public Defender Task Force Recommendations,* The Spangenberg Rep., Jul. 2007, at 3.

41 *See Proposed Bill to Create Statewide Indigent Defense Commission in Alabama Failed,* The Spangenberg Rep., Jul. 2006, at 17–18.

42 *Id.*

43 *See Fundamental Improvements to Alabama's Indigent Defense System Defeated,* The Spangenberg Rep., Jul. 2001, at 12. Alabama is one of the states currently studying reform of its indigent defense system. *See infra* note 129 and accompanying text; *see also supra* note 253, Chapter 2.

44 *See House OK's Bill to Detach Public Defender from Governor,* Albuquerque J., Feb. 7, 2008. For further information, *see* New Mexico Coalition for Justice website, *available at* http://www.nmcoalitionforjustice.org.

Battle Between State Oversight and Local Control

When formulating a new indigent defense oversight body, legislatures have sometimes been called upon to balance the state's desire to improve defense representation with the local jurisdictions' desire to retain control over indigent defense. If a state is unwilling to provide all, or a majority, of the funding for defense services, state-imposed requirements with which local jurisdictions must comply are likely to be viewed as unfunded mandates. And, if a locality is required to cover a good deal of the expense, it will likely want to control how the defense services are provided in order to contain costs. Several states have enacted indigent defense legislation that illustrates this tug of war between state and local competing interests.

The Texas Fair Defense Act, enacted in 2001, endeavored to balance state oversight with local control by granting the newly created Texas Task Force on Indigent Defense partial authority over indigent defense throughout the state. By authorizing the Task Force to develop mandatory minimum standards to enhance the quality of indigent defense, monitor compliance with these standards, and distribute state funds to counties in compliance, the legislature attempted to assure substantial state oversight of indigent defense services.

The new system has led to some important improvements, such as earlier appointment of counsel and transparency in the appointment process so that the lawyers receiving cases can readily be determined.[45] In FY 2002, only seven counties had public defender programs, whereas in FY 2008, the number had grown to 15.[46] One of these is a regional death penalty defender office created by Lubbock County and serving 65 counties.[47] The Task Force also has established mental health defender offices, "with access to more resources to slow the recidivism of poor persons suffering mental illness facing criminal charges."[48] In 2005, the Texas Legislature allocated $800.000, to be administered by the Task Force, to assist the state's four public law schools in their work investigating the innocence claims of incarcerated defendants.[49] Overall, the Task Force reports that the number of persons receiving counsel to which they are constitutionally entitled has increased 38%, and Texas indigent defense expenditures have risen from $114 million in FY 2002 to $174 million in FY 2008.[50]

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45 *See* Tex. Code Crim. Proc. Ann. art. 1.051; Tex. Code of Crim. Proc. Ann. § 26.04 (2008).

46 Upholding the Constitution, Annual Report Texas Task Force on Indigent Defense 3 (2008).

47 *Id.*

48 *Id.* at 9.

49 *Id.* at 26.

50 *Id.* at 3.

However, the counties retain control over the mechanism by which defense representation is provided to indigent defendants, and local judges still control most aspects of the appointment of counsel, including whether defendants are eligible to receive counsel, selection of attorneys, and fee schedules to compensate assigned counsel.[51] Nevertheless, given the difficulty of ensuring compliance with performance standards, as well as the fact that local judges direct the delivery of indigent defense representation, the existing apportionment of power remains a hindrance to comprehensive reform.

The Commission on Indigent Defense Services in North Carolina, on the other hand, is a full authority oversight body but with one significant concession to local control. The legislature granted the commission the authority to "determine the methods for delivering legal services to indigent persons … and … [to] establish in each district or combination of districts a system of appointed counsel, contract counsel, part-time public defenders, public defender offices, appellate defender services, and other methods for delivering counsel services, or any combination of these services."[52] Yet, in order to establish a public defender office, the commission is required, by statute, to give notice to and consult with local judges and the "affected district bar."[53] After conferring with these parties, if the Commission decides that a public defender office is the best mechanism for providing indigent defense representation, a legislative act is then required to establish the local public defender office. This concession was made even though North Carolina's indigent defense system is fully state-funded.[54]

B. State Oversight Commissions

State oversight commissions or boards have shown a capacity to enhance the quality and independence of indigent defense representation.[55] The existence of an oversight body, however, is not a panacea for all that ails a failing or underperforming defense system. Absent adequate funding, the authority to make changes, and independence

51 Tex. Code of Crim. Proc. Ann. § 26.04 (2008). In fact, the law specifically requires a local judge's written approval before the Commissioners Court (the county governing board) may "appoint a governmental entity or nonprofit organization to serve as a public defender." *Id.* at § 26.044(b).

52 N.C. Gen. Stat. § 7A-498.5(d) (2008).

53 *Id.* at § 7A-498.7(a).

54 *See* N.C. Gen. Stat. § 7A-498.7(a) (2008): "A legislative act is required in order to establish a new office or to abolish an existing office." *See also supra* note 29 and Table I (Sources of Indigent Defense Funding in the 50 States), Chapter 2.

55 *See* ABA/TSG Indigent Defense Commissions, *supra* note 1, at i; ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-1.3(b).

of the defense function, an oversight body is likely to be unsuccessful in fully transforming a state's indigent defense system.

The main reasons for establishing an indigent defense oversight body are to protect the independence of the defense function from political and judicial interference and ensure quality representation. While quality representation can be addressed through responsibilities delegated to the commission, the way the commission is constructed has much to do with its independence. Statewide oversight of indigent defense and funding at the state level can enhance the equitable allocation of resources throughout the jurisdiction while seeking to ensure uniform representation and implementing efficiencies in the delivery of defense services. Although there is no single perfect statute that every state should enact, there are certain necessary components that would seem to be essential to include in legislation establishing a statewide oversight authority. If the principles underlying these components are ignored, it is unlikely that the oversight body will succeed in effectuating positive change.

Independence and Structure of State Oversight Commissions

The importance of establishing an independent indigent defense system cannot be overstated. Experience demonstrates that defense counsel will not fully discharge their duties as zealous advocates for their clients when their compensation, resources, and continued employment depend upon catering to the predilections of politicians or judges. Even when political or judicial oversight of the defense function does not actually impact the performance of counsel, clients and the general public may still have doubts about the loyalties of those providing defense services.

There are several ways a legislature can ensure the independence of a state's indigent defense delivery system. Distribution of the appointment authority, delineation of membership criteria, proper placement of the agency within the government, and statutory directives are all mechanisms states can employ to secure the independence of both the oversight body and the indigent defense system it supervises. In addition, special attention should be paid to the size of the commission and tenure of its members.

Appointing Authority

One of the most important mechanisms for ensuring independence is to have appointments to the oversight board originate from a variety of sources. At a minimum, the authority to appoint members to the commission should be allocated to all three branches of government and relevant bar associations. For example, North Carolina shares responsibility for making appointments among the chief justice, governor,

house, senate, and six different bar groups, with the commission appointing three additional members. In another state, the responsibility is shared among the governor, the chief justice, the chairman of the legislature, and the state bar association.[56] Models such as these ensure a diverse commission that is neither beholden to nor apt to do the bidding of any single branch of government, bar group, or individual who selects the commission's members.

In some states, the appointing authority is not distributed nearly as widely, but the person making the appointments must select members from candidates nominated by other government branches and specified groups. Thus, in Montana, although the entire commission is appointed by the governor, the governor must appoint two nominees whose names are submitted by the supreme court, three nominees submitted by the president of the state bar, and two non-attorney members of the general public submitted by the legislature. Other states grant appointment powers to groups such as the board of trustees of the state's criminal justice institute[57] or the interchurch conference.[58]

Membership Criteria

Some states also seek to achieve a diverse membership of the oversight body by requiring that members meet certain criteria. States have required that the geography of members,[59] their political affiliation,[60] and ethnicity[61] be considered. Some states also have required a certain number of non-attorney members,[62] advocates on behalf of underrepresented groups,[63] or representatives of special interest groups such as the mentally ill,[64] whereas others exclude certain categories of individuals from membership such as judges, prosecutors, and law enforcement officials.[65] While there are

56 North Dakota.

57 Indiana.

58 Louisiana.

59 *See, e.g.,* Arkansas, Georgia, Kansas, Oklahoma, North Dakota, and West Virginia.

60 *See, e.g.,* Colorado, Connecticut, Indiana, Missouri, and Ohio.

61 *See, e.g.,* Minnesota, North Carolina, and Tennessee.

62 *See, e.g.,* Colorado, Connecticut, Kansas, Montana, and Oregon.

63 For example, Kentucky requires that one member of its commission "shall be a child advocate or a person with substantial experience in the representation of children." Ky. Rev. Stat. Ann. § 31.015(1) (a) (2) (West Supp. 2008). Louisiana requires one member to be a juvenile justice advocate. Montana requires one member that advocates for indigent persons and one that advocates for racial minorities.

64 Both Montana and West Virginia require one member of its commission to be "a member of an organization that advocates on behalf of people with mental illness and developmental disabilities." Mont. Code Ann. § 2-15-1028 (2) (f) (2007); W. Va. Code § 29-21-3b(b) (5) (West Supp. 2008).

65 For instance, Indiana excludes law enforcement officers and court employees; Kentucky excludes prosecutors, law enforcement officials, and judges.

states that jeopardize their commission's independence by concentrating the authority to appoint in a single person, these states usually have some provisions regarding the backgrounds of persons who can be appointed as commission members in an effort to enhance diversity.

At the very least, it is essential that an oversight body be composed of persons devoted to improving the delivery of indigent defense services and who fairly and equally represent the state's various constituencies committed to enhancing defense representation. Ideally, a majority of members would have experience in providing indigent defense representation, and the membership would include leading members of the state's criminal defense bar. However, not all members need to have prior criminal law experience if they are otherwise persons likely to be respected by members of the state's executive, legislative, and judicial branches of government. Judges and legislators should not be statutorily excluded from membership consideration, as they can be effective contributors to a commission's ability to promote positive change.

Agency Placement

Ideally, an indigent defense oversight body should be an independent agency of state government. This allows the commission to retain decision-making authority and advocate for adequate indigent defense funding. If a state's indigent defense system is financed primarily by the state, it is especially important that its budget remain separate from those of other agencies, including the courts, so that resources directed towards indigent defense are not seen as having a negative impact on other worthwhile spending. For example, if the agency is housed in the judicial branch and is part of the judiciary's budget, the judiciary may be less likely to advocate for increased indigent defense funding if it means less money will be available for judges, court personnel, and facilities.[66]

Of the 43 states with agencies that have authority over indigent defense, 25 have placed their indigent defense programs in the executive branch[67] and 18 house their agencies within the judicial branch.[68] However, over one-third of the agencies are merely placed in a governmental branch for administrative purposes, while

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66 *See, e.g., MSBA (Maine State Bar Association) Summer Meeting Focuses on Judicial Budget Cut Impacts, Indigent Defense,* The Supplement, Aug. 2008, at 2 [hereinafter MSBA Summer Meeting] ("Because the state's indigent defense fund is part of the judiciary budget, paying rising indigent defense costs means taking money from other judiciary budget accounts, which in turn has forced such measures as temporary court closures").

67 Alaska, Arizona, Arkansas, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maryland, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Vermont, West Virginia, Wisconsin, and Wyoming.

68 California, Colorado, Connecticut, Illinois, Indiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, North Carolina, Oregon, Texas, Virginia, and Washington.

permitting them to maintain control over their decisions and budget.[69] For example, Connecticut, Minnesota, and Oregon all have classified their oversight bodies as autonomous divisions of the judicial department.[70] In Idaho, the state appellate defender office is a self-governing agency under the executive branch.[71] The Department of Public Advocacy in Kentucky and the Public Defender Commission in Montana are within the executive branch for administrative purposes only.[72] In Massachusetts, the Committee for Public Counsel Services is an independent agency whose budget appears as a line item in the judiciary's budget, but its submissions to the legislature are not in any way controlled by the judicial branch.[73]

Statutory Directives

The statutes of some states include language confirming that the delivery of indigent defense services is to remain independent. For instance, the Colorado State Public Defender is an agency of the judicial department. However, Colorado's statute states that "the state public defender at all times shall serve his clients independently of any political considerations…."[74] Some states, such as Kentucky and Minnesota, specifically prohibit the commission overseeing the indigent defense delivery system from interfering with the handling of individual cases.[75]

Unfortunately, simply declaring the independence of a commission does not make it so. In Georgia, the legislature created the Georgia Public Defender Standards Council (GPDSC) to assure that "adequate and effective legal representation is provided, independently of political considerations."[76] However, Georgia's indigent defense system has not been adequately funded, and the legislature threatened to withhold funding if changes to the system were not implemented. In 2007, the legislature moved the GPDSC from the judicial branch to the executive branch in order to allow greater state control over its budget.[77] In 2008, the Georgia Senate, dissatisfied

69 Connecticut, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New Jersey, North Carolina, Oregon, Texas, Washington, and Wisconsin.

70 Conn. Gen. Stat. § 51-289(j) (2007); Minn. Stat. § 611.215 (1) (a) (2008); Or. Rev. Stat. § 151.213(1) (2007).

71 Idaho Code Ann. § 19-869(1) (LexisNexis 2008).

72 Ky. Rev. Stat. Ann. § 31.010 (West Supp. 2008); Mont. Code Ann. § 2-15-1028(6) (2007).

73 E-mail from William Leahy, Chief Counsel, Committee for Public Counsel Services, to Norman Lefstein (Nov. 24, 2008, 14:48:00 EST) (on file with Reporters).

74 Colo. Rev. Stat. § 21-1-101(1) (2008).

75 Ky. Rev. Stat. § 31.015(7) (West Supp. 2008); Minn. Rev. Stat. § 611.215(3) (2008).

76 Ga. Code Ann. § 17-12-1(c) (2008).

77 Terry Wolf, *Public Defenders Cry Foul,* Dublin Courier Herald, Oct. 1, 2008, at 1.

with the costs of a pending death penalty case, even went so far as to pressure the GPDSC to intervene in the case.[78]

Commission Size and Membership Tenure

Across the country, indigent defense commissions range in size from as few as three members[79] to as many as 15 members.[80] Commissions need not be a particular size but commissions of at least seven to nine members may be preferable so that they can perform the necessary work, wield sufficient authority, and feel a sense of responsibility for the commission's performance. Conversely, the larger the commission, the less likely members may have a sense of personal responsibility for the commission's success. On the other hand, since members of oversight bodies are usually uncompensated except for expenses, a commission larger than nine to 13 members will more likely assure the presence of a quorum at meetings and sufficient persons to devote time to essential tasks. Moreover, large and diverse commissions may be more effective since there are more members to express public support on behalf of indigent defense.

The tenure of commission members is usually fixed by statute at three or four years. To achieve continuity, however, terms should be staggered, requiring some members initially to serve shorter terms so that all members are not up for reappointment at once. Some state statutes limit the number of terms a board member may serve.[81]

Ensuring Quality Representation and Responsibilities of an Oversight Commission

The responsibilities assigned to the oversight body should enable it to improve the quality of indigent defense representation. If the statewide authority is not allowed to perform certain tasks, the lack of power can undermine the rationale for its existence. Conversely, legislatures should not burden commissions with tasks that could undercut defender offices providing representation, are a conflict of interest, or waste limited resources.

In order to exercise their authority, oversight bodies require meaningful standards and guidelines with which to judge the adequacy of the indigent defense delivery system. These may be promulgated by the commission or delineated by statute. Some state

78 Stephen B. Bright, *Georgia Beggars Indigent Defense: As Lawyers for the Poor Get a Pittance, Prosecutors Enjoy a Blank Check, Want to Pick Opponents,* The Daily R., Jan. 24, 2008, at 4.

79 Maryland.

80 Massachusetts.

81 *See, e.g.,* Illinois and Kansas.

statutes spell out the responsibilities of the commission in great detail, whereas other statutes are skeletal, leaving the details to the commission and state public defender or director.[82] Arguably, the best statutory schemes permit the board to adopt broad policies but make it clear that it is not to interfere with the daily operations of the program.

To be successful, a commission should be empowered to determine the most appropriate method for delivering indigent defense services. As previously discussed, this is often a contentious subject, raising the issue of control between state and local jurisdictions. However, a commission has limited ability to ensure cost-effective, quality representation if it is unable to change an underperforming or expensive system from one delivery method to another.

In addition, oversight bodies should have the authority to establish procedures to certify that the defense attorneys providing representation are competent to do their jobs. Accordingly, boards should be able to establish performance standards for attorneys and require procedures to evaluate attorneys based on its standards or, alternatively, by standards enacted by the legislature or issued by the state's highest court. Minimum standards include ensuring that the attorneys have training in criminal law; that the attorneys are participating in a certain number of relevant continuing legal education classes; and that the experience level of the attorney matches the severity of the case.

The board must also be able to assure that defense attorneys have sufficient support services. Without adequate support staff such as trained investigators, paralegals, social workers, and secretaries, defense attorneys must necessarily handle fewer cases and will be less cost-efficient. Additionally, to provide quality representation, defense counsel require research and technology capabilities, training, and access to independent experts.

To ensure quality representation, the board also must be able to control the workload of defense attorneys. One of the board's most important responsibilities should be to devise workload standards and enforce compliance with those standards. Ideally, every commission should complete a comprehensive study of the state's indigent defense system to develop appropriate workload limits.[83] But since virtually all states rely to a considerable extent on public defender programs to furnish much of the

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82 For example, North Carolina's Indigent Defense Services Act of 2000 is comprehensive, with eight subsections regarding the commission's responsibilities and, within one subsection, a list of specific standards governing indigent defense that the commission is tasked with developing. N.C. Gen. Stat. § 7A-489.5 (2008). Conversely, Maryland's statute gives only a brief outline of the duties of the commission's Board of Trustees. Md. Code Ann., Crim. Proc. § 16-302 (West Supp. 2008).

83 *See generally* discussion of excessive caseloads, *supra* notes 96–124 and accompanying text, Chapter 2.

representation, in order for workload limits to be successful, defense systems must also make provisions for participation of the private bar, with adequate funds to compensate private assigned counsel or contract attorneys. For this reason, the ABA has long recommended that all systems of public defense provide for "the active and substantial participation of the private bar."[84]

In order to monitor compliance with performance standards and workload limitations, the board should have authority to collect data and confirm its accuracy. As part of its information gathering, the oversight body will need to define what constitutes a case and establish a uniform case reporting system to ensure statewide consistency in caseload numbers. At a minimum, this system should provide accurate figures regarding the number of new appointments and case dispositions, by case type and by the number of pending cases. It should also be the board's responsibility to maintain and publish records and statistics regarding the delivery of indigent defense services so that funding sources understand how appropriations are being spent and can plan for future needs.

Another significant commission responsibility is to provide vigorous support for indigent defense. Statutes should require commissions to submit budgetary requests each year, and commissions should be authorized to represent indigent defense interests before the legislature. Ensuring sufficient funding so that indigent defense providers are fairly compensated for their work should be among the most important goals of commissions. It should also be the function of commissions to formulate compensation plans for indigent defense counsel, whether they are public defenders, contract attorneys, or assigned counsel paid on a case-by-case basis.

Finally, commissions should be in charge of appointing the state public defender or director. If the commission is properly constructed, it will be an independent body that will be able to hire the best-qualified candidate without regard to politics or judicial interference. Chief defenders should be fired only for cause and should have a set term of employment rather than serve at will. This enables the chief defender or director to do his or her job knowing that he or she answers only to the commission and the needs of indigent defendants.

Some states have given their oversight bodies responsibilities that are not essential for the board to discharge. For example, in several states, the board is required to develop standards to determine whether a person is eligible for court-appointed counsel.[85]

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84 ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-1.2(b); *see also* ABA Ten Principles, *supra* note 70, Chapter 1, at Principle 2 ("Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar").

85 *See, e.g.,* Arkansas, North Carolina, and Texas.

While statewide standards are important to assure consistent determinations across the state, the preparation of such standards need not necessarily be handled by the board.

It is a problem, however, if an oversight body is assigned tasks that undermine the independence of the defense function, are a conflict of interest, or lead to a perception of misplaced loyalty. While a board can develop eligibility standards, neither the board nor defense providers should be asked to determine whether a particular individual meets the standards or be required to collect funds from defendants as partial payments for their representation. Legislatures, local governments, and judges may accuse providers of being too lax in their decisions about eligibility in order to obtain increased funding if they think too many people are being found eligible for defense services. Individual defendants may worry that their attorneys will not provide zealous representation or are not on their side at all if they are collecting monies for the state. Moreover, it is a waste of limited resources allocated to indigent defense to force the providers of services to undertake this responsibility.

Oversight bodies also should not be able to hire the personnel who work for the state public defender or director. In Louisiana, the statute allows the Louisiana Public Defender Board to hire and determine the salaries of the state public defender's senior management team.[86] Conceivably, this could lead to problems if the state's director disagrees with a hiring decision or a senior staff member complains to the board rather than resolves issues with the director.[87]

There are a multitude of other tasks that, if given to the board rather than the state public defender or director, could lead to overreaching by the board. For example, in Arkansas, the Public Defender Commission has the power to "allocate personnel for each public defender's office throughout the state"[88] and "approve the reassignment of cases from one public defender to another public defender in an adjacent area for the purpose of avoiding conflicts or adjusting caseloads." Language such as this potentially affords the commission the opportunity to micromanage defense services in the state and undermines the authority of the state's executive director to control the program's resources. Moreover, if the commission does not act expeditiously, it could lead to unwarranted delays in case reassignment or in maintaining proper office staffing levels.

86 La. Rev. Stat. Ann. § 15:150(A) (Supp. 2008).
87 Lefstein, Loy. J. Pub. Int. L., *supra* note 27, at 133–34.
88 Ark. Code Ann. § 16-87-203(3) (Supp. 2008).

Scope of Authority and Its Impact on Independence and Quality

The prior review of statewide systems of indigent defense can be summarized as follows: Twenty-seven states have organized their defense services either entirely or substantially on a statewide basis. Of these, there are 19 states that have a state commission with supervisory authority over the state's defense program headed by either a state public defender or state director; in the other eight states, there is a state public defender but not a state commission to provide oversight. In the remaining 23 states, there is either a state commission with partial authority over indigent defense (nine states); a state appellate commission or agency (six states); or no state commission of any kind (eight states). While it is always hazardous to generalize, usually, the greater the responsibility of the oversight body for managing the state's indigent defense services, the better and more consistent is the representation throughout the state.

Oversight bodies with full authority and clear independence are best equipped to have a positive impact on indigent defense. This is especially true when the commission controls most or all of the state's funds for indigent defense. The relationship between state funding and an indigent defense oversight body's level of authority is inextricable and, for the most part, directly proportionate. Without adequate funding, even a well-designed and empowered commission will struggle to keep the indigent defense system afloat.

Full Authority Oversight Commissions and State Public Defender Agencies with Commissions

Nineteen states have *either* a statewide public defender agency with a full-authority commission and chief public defender[89] *or* a full-authority commission with a state director who acts as a chief public defender.[90] Of these 19 states, 12 have public defender agencies and commissions and are entirely state funded, and all of the eight states with a state director are either entirely or almost entirely state funded.[91] Because these 19 commissions are overwhelmingly state funded, they are well situated to exercise authority over their states' indigent defense systems.

The commissions discussed in the preceding paragraph are in the best position to protect the independence of the defense function when selection of the state public

89 Arkansas, Colorado, Connecticut, Hawaii, Kentucky, Maryland, Minnesota, Missouri, Montana, New Hampshire, and Wisconsin.

90 Louisiana, Massachusetts, North Carolina, North Dakota, Oregon, South Carolina, Virginia, and West Virginia.

91 In some states, local governments provide office space and/or a minimal amount of additional funding. In South Carolina, the counties may not contribute less money to indigent defense than the amount they allocated the previous year. In Louisiana, for fiscal year 2008–2009, the state is contributing $28 million to indigent defense in addition to amounts contributed by the parishes.

defender or state director is made by the commission.[92] The proper construction of the commission as a non-political body should insulate the defense function from political influence because the state defender or director is accountable, not to just one publicly elected person, but to a diverse group of commission members. Moreover, while some chief defenders serve at the pleasure of the commission, others are even further protected from political pressures by having a fixed term with removal only for cause.

These same states are in the best position to improve and maintain quality indigent defense services throughout the state because they control the allocation of funds and resources. Full-authority oversight bodies with statewide public defender offices are usually responsible for monitoring costs and workloads, implementing and enforcing attorney experience and training requirements, setting attorney performance standards, and determining compensation levels. They can assure that attorneys comply with their standards by refusing to pay or hire those who do not meet requirements. Full-authority commissions can control quality and efficiency in the use of resources by modifying the delivery system for providing indigent defense services.[93]

Another crucial way that full-authority commissions and statewide public defender offices can seek to assure quality representation is to limit attorney workloads, assuming sufficient funds are available to implement a feasible plan. For appointed and contract counsel, it is possible to control workload by monitoring the number and types of cases assigned and refusing to compensate for appointments once a maximum permitted number of cases is reached. If attorneys will not be paid for cases beyond a certain maximum allowed number of cases, the attorneys will almost certainly seek to avoid being appointed.[94]

It is more difficult to control the caseloads of attorneys within public defender offices, mainly because statutes in many states designate the public defender to be appointed without regard to caseloads and the capacity of the defender to handle the cases. Arguably, however, state legislatures never intended that defender programs

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92 In Kentucky, the governor chooses the Public Advocate for a four-year term from a list of nominees submitted by the commission. In West Virginia, the Executive Director of Public Defender Services is chosen by the governor and serves as chair of the Indigent Defense Commission. West Virginia is the only state where the chief defender is formally a member of the commission, although the chief defender in Missouri is designated by statute as an *ex-officio* member.

93 Not all states grant their commissions this kind of broad authority. For example, Indiana has a partial-authority commission and each of the state's 92 counties may determine its own system for providing defense services. *See infra* note 110 and accompanying text

94 *See* ABA Defense Function, *supra* note 73, Chapter 1, at 4.13(e) ("Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations.").

would undertake representation in circumstances where attorneys could not possibly represent their clients competently in ways consistent with professional responsibility rules. New Hampshire is one of the few states in which the issue of caseloads for public defenders is addressed through an innovative agreement between the state public defender's office and the state's Judicial Council.[95] Pursuant to the agreement, the number of cases each public defender may have at one time is limited, and the public defender agency is required to distribute the proper types of cases to the attorney by level of experience. There also are contractual obligations regarding the number of homicides that the staff can handle simultaneously. Finally, and perhaps most important, the public defender's office is required to notify the courts if their caseload becomes too high, so that the courts may appoint private assigned counsel.

Even when a commission or public defender office is fully state-funded, the level and regularity of funding provided sometimes depends upon the source of funds from within the state government. The state government may pay for all indigent defense costs through its general funds, cover a portion of the expense through the use of special funds, or pay for all costs of indigent defense through special funds.[96] Because the amount of special funds available varies, and oftentimes does not correlate with indigent defense needs, funding defense services through the use of general funds is preferable, at least theoretically.[97]

While a state that funds a full-authority commission or a statewide public defender agency with a commission is in the best position to provide high quality indigent defense representation, this is not always the case. In Missouri, for example, the commission is appointed solely by the governor, thus failing to assure the body's complete independence. Moreover, although the state alone is responsible for paying for indigent defense, Missouri's public defenders are not well compensated, the program historically has had high turnover, and some districts are currently refusing to accept some types of cases due to unreasonably high caseloads, which has been a problem for some time.[98] As Missouri demonstrates, a commission and a statewide public defender agency are not sufficient unless there also are adequate personnel and resources.

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95 The New Hampshire Public Defender (NHPD) is a non-profit organization that contracts with the state to provide indigent defense representation. The Judicial Council enters into the contract on behalf of the state to hire NHPD to be the primary provider of indigent defense representation.

96 Our review of funding sources in preparation for this report revealed that Texas is apparently the only state in which state financing of indigent defense is derived entirely from special funds.

97 *See supra* notes 50–59 and accompanying text, Chapter 2.

98 Cavanaugh, *supra* note 120, Chapter 2. The Missouri Public Defender Commission promulgated a rule, effective July 30, 2008, limiting public defender caseloads and adopting procedures for refusing cases. Mo. Code Regs. Ann. tit 18, § 10-4.010. *See also* TSG MO Report, *supra* note 84, Chapter 2.

State Public Defender Agencies without an Oversight Commission

Eight states have statewide, state-funded, public defender programs without an oversight body.[99] Statewide public defender offices are in an excellent position to assure quality representation and can provide the same quality control as state public defender agencies with oversight commissions. Accordingly, they can monitor costs, limit workloads, implement attorney performance standards, and provide training and supervision to their attorneys.

The most significant difference between state public defender agencies with commissions and those without is that the independence of the latter is not protected from external influences. In all eight states without commissions, the chief public defender is appointed by the governor. Consequently, all of these agencies are housed in the executive branch of government, though Iowa's defense program is labeled an independent agency within the executive branch. In some states, the governor's appointee is subject to confirmation by the legislature.[100] In at least half of these states,[101] the state public defender serves at the pleasure of the governor. While the current public defender of Delaware has been in office since 1970, through both Democratic and Republican administrations,[102] other state chief defenders have been replaced for political reasons. In New Mexico, after the governor took office in 2003, he fired top executive officials throughout the state, including the chief public defender who was appointed by the previous governor. In 2001, Vermont's governor summarily dismissed the state's defender general for persistently advocating for more staff to meet rising caseloads.[103] As suggested earlier in this chapter, chief defenders in states with commissions designated by various appointing authorities enjoy greater protection from political interference than do state public defender chiefs who serve without oversight commissions.

Even if a chief defender retains employment with a new administration, the lack of independence may impact how the chief deals with recommendations from the governor to decrease the budget of the public defender program or proposed legislation detrimental to indigent defense. Obviously, it places a chief defender in an awkward

99 Alaska, Delaware, Iowa, Rhode Island, New Jersey, New Mexico, Vermont, and Wyoming. Iowa has a commission that only makes recommendations to the legislature regarding hourly rates and per case fee limitations; therefore, it provides no oversight and has no actual power. Vermont's Office of Defender General has seven county staff offices and five public defender contract offices, which are law firms that contract with the state to provide public defender services.

100 Alaska, New Jersey, Rhode Island, and Vermont.

101 Iowa, New Mexico, Vermont, and Wyoming.

102 *See* State of Delaware, Office of the Public Defender website, *available at* http://publicdefender.delaware.gov/aboutagency.shtml.

103 No Exceptions Campaign, *The Need for Independent Public Defense Systems,* Jul. 2008, *available at* http://www.noexceptions.org/pdf/july_pub.pdf.

position to speak out against such actions. For example, in New Mexico, some former assistant public defenders felt pressured by the chief defender to adhere to the governor's agenda for indigent defense.[104] This same chief defender opposed establishing a commission that would have provided more independence for the statewide public defender's agency.[105] There also is a separation of powers concern if the executive branch controls both the prosecution of crimes and the defense provided to those accused of crimes. Finally, because governors are elected officials, some with term limits, there may be frequent turnover at both positions.

State Commissions with Partial Authority

Nine states have partial-authority commissions that oversee certain aspects of the state's indigent defense system.[106] The theoretical benefit of such a system is that it encourages better practices while allowing for local autonomy. Unfortunately, partial-authority commissions have had limited success improving the quality of indigent defense representation statewide, and none provide satisfactory independence for defense services throughout the state.

The states with partial-authority commissions fall into two broad categories. Three states have oversight bodies that employ staff who provide representation in particular geographic areas or in specific types of cases.[107] The other four states use a supplemental funding model whereby counties are encouraged to improve their systems through supplemental state funding.[108] Of these seven states, only Kansas and Oklahoma provide more than 50% of indigent defense funding; in the remaining states, more than half of the funding for indigent defense comes from the counties.

Partial-authority commissions with staff who provide direct representation to indigent defendants are better able to ensure quality defense services than those commissions that merely award supplemental funding. In the three states where the state provides representation in some cases, the oversight bodies uphold standards with which indigent defense representation must comply only in those cases. Because the public defenders work for the state entity, the commissions can readily monitor

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104 David Alire Garcia, *On the Defensive: Public Lawyers Lobby for Independence,* Santa Fe Rep., Mar. 14, 2007, *available at* http://www.nmcoalitionforjustice.org/news_files/SF-Reporter_031407.pdf.

105 *Id.*

106 Georgia, Indiana, Kansas, Nebraska, Nevada, Ohio, Oklahoma, Texas, and Washington.

107 In Kansas, the Board of Indigents' Defense Services is responsible for all felony cases and counties may contract with the Board for coverage of misdemeanor and juvenile cases. The Georgia Public Defender Standards Council provides representation for felony and juvenile cases, along with appeals arising from these cases. As in Kansas, local governments may contract with the Council for coverage of misdemeanor cases. In Oklahoma, the Indigent Defense System provides all indigent defense services in 75 counties, excluding only Tulsa and Oklahoma counties.

108 Indiana, Ohio, Texas, and Washington.

and control quality. But, inadequate funding remains a constant problem that undermines progress within these programs.[109] Moreover, there is no oversight or quality control of defenders who provide representation outside the commission's jurisdiction. Therefore, the quality of indigent defense statewide is apt to be quite variable.

Likewise, statewide improvement through the use of the supplemental funding model has been modest. Under this format, all or part of the commission's authority is linked to supplemental state funding, which is available if local jurisdictions comply with state standards. Basically, states entice counties to improve their indigent defense systems by awarding funds to those counties willing to adhere to state indigent defense standards. County compliance is voluntary, except in Texas, where compliance is mandatory.

Experience suggests several problems with this model. First, unless these commissions are adequately funded, they will not have enough revenues to encourage county compliance with state standards. Partial-authority commissions need to cover a significant portion of the counties' indigent defense costs to make compliance with standards fiscally viable.

The experience of Indiana, which is one of the more successful partial-authority commissions, illustrates the difficulty with such programs. In Indiana, the state provides less than half of the funding for indigent defense, although the commission has persuaded the more populous of the state's 92 counties to create independent local boards to oversee indigent defense in their jurisdictions, which includes determining the indigent defense delivery method. In order to qualify for 40% state reimbursement of the county's indigent defense expenses, counties have had to adhere to the commission's caseload standards and increase their overall expenditures. In some years, however, the commission has received less funding from the state than was needed for its reimbursements to the counties, so reimbursements were reduced to less than 40%, which in turn has frustrated the counties that were part of the program. In addition, many of the smaller counties have never agreed to become part of the commission's reimbursement program, and therefore, have not been obligated to increase their expenditures or improve their indigent defense systems. Thus, in Indiana, there is not full statewide oversight and, rather than having just one

[109] As of 2005, Kansas and Oklahoma were 35th and 39th in the nation, respectively, in per capita expenditures on indigent defense. In 2005, the population of Kansas was 2,774,687 and the state's total indigent defense expenditures were $23.4 million; the population of Oklahoma was 3,547,884 and the state's indigent defense expenditures were $28.4 million. ABA/TSG FY 2005 Indigent Defense Expenditures, *supra* note 26, Chapter 2, at 12, 25, 35–36. Dividing total expenditures by population yields roughly $8.44 and $8.01 per capita, respectively, as the amount spent on indigent defense. *See Id.* at 35. *See also* Greg Bluestein, *Ga. Public Defenders Reluctantly Agree to Cuts,* Forbes, Sept. 26, 2008 ("The system's budget has been whacked from $42 million to $35 million since it started in 2005").

commission with full authority over the entire state, there is a single partial commission and numerous local boards, all of which are independent of one another.[110]

Second, the commissions must have meaningful standards either adopted by the commission or statutorily defined, and be willing and able to withhold funds from counties in non-compliance. In Washington, state monies are disbursed to all counties that apply for indigent defense improvement grants so long as they are using it for an eligible purpose, although there are no mandatory state standards. However, the counties themselves are required by legislation to formulate minimum standards.[111] Whether or not the standards are binding, state commissions may overlook a county's non-compliance because they do not want to harm a struggling indigent defense system by withholding funding. While this is understandable, it may render the model less effective if county governments perceive they will receive funding regardless of whether they improve their systems.[112]

Another difficulty with the supplemental funding model is that commissions and their staffs are not always capable of adequately reviewing the performance of the counties' indigent defense systems. This has sometimes been due to a lack of sufficient personnel, such as in Indiana where there are only two full-time employees.[113] Commissions, therefore, must rely on self-reported data from the counties while lacking the necessary personnel to validate its accuracy. Moreover, because partial-authority commissions cannot mandate uniform case-counting methods and/or a statewide data system, the consistency and reliability of indigent defense data suffers.

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110 *See* the website of the Indiana Public Defender Commission and the Annual Report Cover Letter for 2007–2008 and Cover Letters for Annual Reports of prior fiscal years, *available at* http://www.in.gov/judiciary/pdc/.

111 "Each county or city under this chapter shall adopt standards for the delivery of public defense services, whether those services are provided by contract, assigned counsel, or a public defender office. Standards shall include the following: Compensation of counsel, duties and responsibilities of counsel, case load limits and types of cases, responsibility for expert witness fees and other costs associated with representation, administrative expenses, support services, reports of attorney activity and vouchers, training, supervision, monitoring and evaluation of attorneys, substitution of attorneys or assignment of contracts, limitations on private practice of contract attorneys, qualifications of attorneys, disposition of client complaints, cause for termination of contract or removal of attorney, and nondiscrimination. The standards endorsed by the Washington state bar association for the provision of public defense services should serve as guidelines to local legislative authorities in adopting standards." Wash. Rev. Code Ann. § 10.101.030 (West 2005).

112 *See* ABA/TSG Indigent Defense Commissions, *supra* note 1, at 11. In Georgia, the state legislature acknowledged that the supplemental funding model failed and switched to the current partial authority system in 2005. While using the supplemental funding model, Georgia did not provide an adequate monetary incentive to encourage county compliance with their extensive standards and counties in non-compliance still received state funds because the commission did not wish to withhold funds from struggling county indigent defense systems or anger state legislators.

113 *See* website of Indiana Public Defender Commission, *supra* note 110.

Partial-authority commissions also lack the authority to assure meaningful independence of the defense function throughout the state. Local authorities typically determine the method for delivering defense services, as in Indiana mentioned above, as well as the amount of county funding to be allocated for indigent defense. Consequently, in states with partial authority commissions, it is virtually inevitable that there will be significant statewide variations in the quality of representation.

When establishing a full state commission or statewide body for public defense cannot be achieved, it may make sense to start with a partial-authority commission. On the other hand, compromise legislation that ends with a partial-authority commission may actually serve to delay the achievement of lasting reform if the legislature believes that it has tackled the problem of indigent defense and that nothing further need be done. In the end, progress through partial-authority commissions is apt to be unsatisfactory because uniformity and independence of the defense function is not assured statewide, and funding typically continues to be inadequate.

State Commissions with Limited Scope

Four states have statewide commissions of limited scope that oversee particular aspects of indigent defense representation. California, Illinois, Michigan, and Tennessee have commissions overseeing statewide agencies that provide direct representation in appellate and/or capital post-conviction cases.[114] These commissions vary in their ability to protect the independence and quality of the defense function under their jurisdiction.

The sole responsibility of California's capital post-conviction board of directors is to appoint the Executive Director of the capital post-conviction office. While this protects the office's independence,[115] there is no external quality control or body to advocate for the office. Conversely, in Illinois, the State Appellate Defender is appointed by the Supreme Court and subject to removal for cause, so independence of the agency's chief executive is not ensured by the agency's oversight board. However, the board has authority regarding the quality of representation because it can advise the State Appellate Defender concerning policy and approve its budget. In contrast, in Michigan, the State Appellate Defender is appointed by the commission, which also is authorized to oversee the quality of the representation through its role in developing standards for the program. Similarly, in Tennessee, the Post-Conviction

114 *See supra* notes 7–8 and accompanying text.

115 California's Habeas Corpus Resource Center has a five-member board of directors. Each of California's five Appellate Projects appoints one member to the board. (These projects are nonprofit organizations that assign attorneys to non-capital appeals and provide training, as well as some direct representation of indigent appellants.)

Defender Commission appoints the Post-Conviction Defender, prepares the annual budget, and oversees the expenditures of funds.

Another commission of limited scope is Colorado's Alternate Defense Counsel Commission. In cases where the Colorado State Public Defender has a conflict, counsel is appointed through the Office of Alternate Defense Counsel.[116] The commission ensures the independence of that office, as it appoints the Alternate Defense Counsel.[117] The commission also advises the Office of Alternate Defense Counsel regarding "the development and maintenance of competent and cost-effective representation."[118] Thus, Colorado protects the independence of the defense function through two separate commissions because a commission also oversees the Colorado State Public Defender.

Keys to a Successful Oversight Commission

A successful oversight body ensures the independence of the defense function, seeks to secure quality indigent defense representation throughout the state, and directs the allocation of resources. Attributes that distinguish an effective commission include strong leadership, effective oversight, adequate staff, and the collection of accurate and reliable data.

Since members of an indigent defense commission represent the interests of a program that is usually unpopular, its leadership must be well-respected, persistent, and capable of communicating effectively with potentially adverse groups. In order to effectuate change, both the commission and the chief defender or state director need the assistance of diverse constituencies. Accordingly, the leadership must be politically knowledgeable, adept at garnering a consensus, and possess strong professional and interpersonal skills.

The capacity to provide effective oversight is another crucial component for a successful state commission. Thus, a commission needs to develop comprehensive standards for assessing the adequacy of representation provided. In order to confirm compliance with its standards and other requirements, a commission also must have sufficient staff and resources to evaluate indigent defense on a regular basis. Furthermore, these evaluations must be conducted in a manner that is transparent and fair so that both state officials and the indigent defense providers accept the results as credible.

116 Colo. Rev. Stat. § 21-2-101(1) (2008).
117 *Id.* at § 2 1-2-101(3).
118 *Id.* at § 21-2-101(4).

Another key ingredient to a commission's success is access to accurate and reliable data regarding indigent defense cases. A state should have a standardized statewide case-tracking system to compile information, and, if one does not exist, the commission should be empowered to establish one. Accordingly, all providers should have to report relevant statistics uniformly across the state, allowing for accurate individual assessments as well as precise comparisons among localities. Without reliable data, a commission cannot be confident about implementing changes, nor can it be an effective voice in communicating to the legislature the appropriate amount of funding for indigent defense across the state.

C. Study Commissions

Study commissions or task forces can act as catalysts to indigent defense reform. Many states have sought to improve their indigent defense delivery systems after the publication of a study commission or task force report. While some states that have formed study commissions needed a complete indigent defense overhaul, other states requested a report in order to update their existing system.

The purpose of a study commission is to conduct an exhaustive examination of the state's indigent defense delivery system and make detailed recommendations for improvement. Study commissions usually have been created by the legislature or the state's highest court or through the initiative of the state's bar. Typically, because the study commission's members are volunteers with outside employment, an expert consultant has been hired to conduct the broad-based evaluation, including data collection and analysis, site work, and interviews.

A successful study commission has many of the same characteristics as a permanent oversight body. First, the members of the task force should be diverse, well-respected individuals and should represent the numerous stakeholders in the criminal justice system. Generally, task forces have included judges, prosecutors, local government officials, legislative representatives, bar association members, criminal defense lawyers, and, in some instances, private sector attorneys.

Judges and prosecutors can be important members of study commissions, as their suggestions and support can be highly useful. While, in order to ensure the independence of the defense function, acting prosecutors should not be members of a permanent indigent defense oversight body, their presence on a task force can be beneficial. Judges and prosecutors can provide insights regarding necessary improvements and the impact of any changes on the criminal justice system as a whole. Their presence,

moreover, helps to establish the impartiality of the study commission and can lend credibility to its final report.

Successful study commissions also require a highly competent chairperson. The chairperson is responsible not only for directing the efforts of the task force but also for setting the appropriate tone for the other task force members and orchestrating the release of the commission's final report. The chairperson also should be someone who is capable of advancing the report's recommendations in the legislature. For this purpose, the chairperson may seek to assemble a coalition of respected and interested persons to work on securing the passage of reform legislation.

The work of study commissions should be as transparent as possible, which is necessary in order to attract support for its legislative proposals, and the commission should consult with affected constituencies. Thus, task force meetings should be open to the public and held in various geographic regions of the state to afford interested individuals the opportunity to voice their opinions. It is important for task force members to seek the views of the many affected parties involved in the criminal justice system, including public defenders, assigned counsel, judges, prosecutors, probation officers, law enforcement and county officials, and community members. Finally, prior task forces have found it helpful to hear from representatives of indigent defense programs in other states who can discuss their experiences in reforming and maintaining their defense programs.

Previous Study Commissions

Study commissions have had varying degrees of success implementing their recommendations. Study commissions in at least 15 states recommended permanent statewide oversight bodies that were then established.[119] Other state study commissions are still working to transform their recommendations into law.[120] New York, which has a study commission, has not yet enacted indigent defense reforms, whereas North Dakota has passed legislation as a result of its study commission's recommendations. The experiences of these two states illustrate the work and influence of study commissions and are discussed below.

New York has a county-operated and primarily county-financed system of indigent defense. In May 2004, the Chief Justice of New York's highest court formed the Commission on the Future of Indigent Defense Services to examine the effectiveness

[119] Arkansas, Iowa, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, New Mexico, North Carolina, North Dakota, Oregon, South Carolina, West Virginia, Wisconsin, and Texas.

[120] *See infra* note 129 for states that currently have groups studying their state's indigent defense systems.

of this system and consider alternative delivery models. Its 30 members were appointed from each of New York State's 12 judicial districts and had extensive experience in the prosecution, defense, and adjudication of criminal cases; experience in the legislative and budget processes; involvement in court and criminal justice improvement organizations; and academic scholarship regarding criminal justice and indigent defense systems.[121]

The commission undertook an exhaustive study over two years of all aspects of the provision of indigent defense services.[122] After holding four public hearings across the state, analyzing documentation provided by witnesses and other parties, and reviewing the comprehensive report compiled by its consultant, the commission determined there was a crisis in the delivery of defense services throughout New York State.[123] Overall, the commission concluded that the failure to provide the right to effective assistance of counsel was attributable to the lack of an independent statewide oversight authority that could set standards and ensure accountability in the provision of indigent defense representation, as well as to a grave lack of adequate state funding.

To resolve these problems, the commission made numerous recommendations, including adoption of a new statewide, state-funded defender program with a full-authority oversight commission. Other suggestions included achieving parity between prosecutorial and defense resources and the development of a comprehensive data collection system to provide a clear picture of indigent defense across the state. Consistently with the commission's recommendations, in April 2006, the New York State Association of Criminal Defense Lawyers issued a proposed draft bill calling for a statewide indigent defense delivery model overseen by a Public Defense Commission.[124] In November 2007, the New York Civil Liberties Union filed a civil rights lawsuit, citing the commission's findings and requesting declaratory and injunctive relief against the State of New York for failing to provide meaningful and effective legal representation to indigent defendants in five counties.[125] Meanwhile, as this report is completed at the beginning of 2009, no legislation to reform indigent defense in New York State has been enacted.[126]

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121 *See* Commission on the Future of Indigent Defense Services, Final Report to the Chief Judge of the State of New York (2006), *available at* http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf.

122 *Id.*

123 *Id.* at 5.

124 *See* John Caher, *Draft Bill Outlines Proposal for State 'Defender General',* N.Y. L. J., May 1, 2006.

125 *See NYCLU Files Systemic Lawsuit Challenging the Adequacy of New York's Indigent Defense System,* The Spangenberg Rep., Apr. 2008, at 1. *See also supra* notes 60–63 and accompanying text, Chapter 3.

126 *See also* Joel Stashenko, *Plan To Reform Indigent Defense Stalls In Albany,* N.Y. L. J., June 10, 2008, at 1.

In contrast, North Dakota was more successful in implementing the recommendations of its study commission. In 2003, at the direction of the North Dakota legislature, a State Bar Indigent Defense Task Force was formed to study indigent defense services across the state. At that time, North Dakota was the only state in the country that used an indigent defense model relying primarily on private attorneys working on an unlimited number of cases through a flat-fee contract with judges.[127]

A statewide study documented many systemic problems, including a lack of independence, inadequate funding, excessive caseloads, disparities in attorney compensation across the state, and a lack of standards and oversight.[128] In 2005, due to the study commission's report, the legislature passed a bill reforming the state's indigent defense system. The statute created an oversight body, the Commission on Legal Counsel for Indigents, to develop and monitor compliance with statewide standards governing the provision of indigent defense services. Three public defender offices were opened and the state's indigent defense budget more than doubled. Finally, a director was hired to administer and coordinate delivery of the state's defense services and supervise compliance with the commission's standards.

Current Study Commissions

Several states currently are reviewing their indigent defense systems.[129] Consider the situations today in Maine and Nevada. Neither state has a statewide oversight body or an entity that provides representation to indigent defendants statewide and, in both states, study commissions have been initiated by their respective supreme courts. Maine's study commission is still in the investigation stage, while Nevada's study commission has made recommendations that were incorporated into an order of the Nevada Supreme Court.

In Maine, indigent defendants are represented by attorneys appointed by the courts; there are no public defender offices in the state and no state oversight body. The indigent defense fund is part of the judicial branch's budget. As a result, when indigent defense expenditures rise, other court needs go unmet or unrelated court fees are increased.[130] There are no experience requirements for appointed counsel, no training

127 *Proposed North Dakota Legislation Could Overhaul State's Indigent Defense System,* The Spangenberg Rep., Nov. 2004, at 20–21.

128 *Id. See also* The Spangenberg Group, Review of Indigent Defense Services in North Dakota (2004), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/northdakotareport.pdf.

129 States with current study commissions include Alabama, Florida, Idaho, Maine, Michigan, Mississippi, Nebraska, Nevada, and New Mexico.

130 J. Harrison, *Indigent Defense Solutions Sought in Maine,* Bangor Daily News, Jun. 21, 2008.

requirements, no oversight of court-appointed counsels' caseloads, and no review of the performance of appointed counsel.[131] A review of indigent defense in Maine determined that the state fails to comply with nine of the ABA's Ten Principles of a Public Defense Delivery System.[132]

On May 12, 2008, by order of the Chief Justice of the Maine Supreme Court, the Indigent Legal Services Commission was established.[133] The commission's purpose is to study Maine's indigent defense system and suggest improvements.[134] Its stated goal is an "indigent defense system that makes quality legal representation available to Maine's indigent population from lawyers who receive adequate compensation, training, and support services based on a sustainable and responsible funding mechanism."[135]

The commission is a diverse body with over 25 members, including participants from all three branches of government, various stakeholder groups, and individual attorneys.[136] The commission is responsible for examining mechanisms for appointing counsel, compensation paid to appointed counsel, funding methods, and the adequacy of training and support services, as well as considering alternative ways of organizing and funding indigent defense services.[137] Like predecessor study commissions in other states, Maine is dealing with issues such as how to ensure the independence of the defense function and how to address concerns of criminal defense attorneys that they will be put out of business if the system is modified and full-time public defenders are introduced.

Nevada's study commission was established in April 2007, after a series of articles highlighting the problems in indigent defense representation in Las Vegas.[138] The Commission on Indigent Defense is comprised of judges, public defenders, private

131 *See* Maine Indigent Defense Center, *available at* http://www.meidc.org/background.html.

132 *MSBA Summer Meeting, supra* note 66, at 2. For the ABA Ten Principles of a Public Defense Delivery System, *see supra* note 71, Chapter 1, and accompanying text.

133 Order of Chief Justice Saufley, Judicial Branch Indigent Legal Services Commission 1 (May 12, 2008), *available at* http://www.courts.state.me.us/committees/ilsc_charter.pdf.

134 *Id.*

135 *Id.*

136 *Id.* There are six members from the judicial branch, five from the executive branch and six from the legislative branch. The "stakeholder group" includes the Maine Association of Criminal Defense Lawyers, Maine Civil Liberties Union, Maine State Bar Association, Maine Indigent Defense Center, and Maine Trial Lawyers. For a complete list of commission members, *see* http://www.courts.state.me.us/committees/ilsc_charter.pdf.

137 *See* Order of Chief Justice Saufley, *supra* note 133, at 1–2.

138 *See* Alan Maimon, *Indigent Defense Changes Endorsed,* Las Vegas Rev. J., May 16, 2007, at 7B; Riley, *Nevada High Court Orders Indigent Defense Reforms, supra* note 31.

defense attorneys, prosecutors, and several other interested parties.[139] It was created "for the purposes of studying the issues and concerns with respect to the selection, appointment, compensation, qualifications, performance standards, and caseloads" of assigned counsel.[140]

After conducting a statewide survey of the condition of indigent defense representation, the study commission wrote a report containing recommendations on a range of topics. Public hearings were then held to obtain reactions to the report's findings and make recommendations. Based on the commission's report, the Nevada Supreme Court issued an order on January 4, 2008, which made comprehensive changes to the state's indigent defense delivery system. These included: (1) preparing a statewide standard for determining indigency; (2) instructing each judicial district to formulate and submit for approval a procedure for the appointment of counsel that is independent of the judiciary; (3) requiring performance standards for court-appointed counsel; (4) ordering several large jurisdictions to conduct weighted caseload studies; and (5) forming a permanent statewide oversight body.[141] Because of objections from various counties and some judges, however, the court modified its order and reconvened the Rural Issues Subcommittee of the Commission on Indigent Defense Services to review the court's recommendations and consider their impact on rural counties.[142] A hearing was scheduled for January 2009 to examine the subcommittee's findings.[143]

139 *See* In the Matter of the Review of Issues, *supra* note 31. A list of commission members may be found at http://www.nvsupremecourt.us/ccp/commissions/idc/index.php?pageNum_rs_documents=0.

140 *See* In the Matter of the Review of Issues, *supra* note 31.

141 *Id. See also supra* note 31 and accompanying text, which addresses the status of the permanent state oversight body at the time of the completion of this report.

142 *See* In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Nev. Mar. 21, 2008), *available at* http://www.nvsupremecourt.us/documents/orders/ADKT411Order03_21_08.pdf.

143 For the report of the Rural Issues Subcommittee, *see* http://www.nvsupremecourt.us/documents/reports/IDCRuralSubcommitteeReport.pdf

CHAPTER 5

Recommendations and Commentary

A. Introduction

Based upon the foregoing report on indigent defense and after due deliberation, the Committee has concluded that a number of important reforms of indigent defense services are urgently needed. We are by no means the first group to offer recommendations, and ours are not nearly as lengthy as those urged by the American Bar Association (ABA)[1] and the National Legal Aid and Defender Association.[2] Instead, the Committee has limited itself to those matters that we deem absolutely critical to achieving lasting improvements in defense representation. The first four chapters of this report provide ample support for the 22 recommendations that follow.

We begin, in Recommendation 1, with a plea to legislators, judges, and prosecutors—persons entrusted with primary responsibility for implementing the right to counsel—to do what is necessary to assure compliance with the Constitution. In Recommendations 2 through 11, we call for each state to establish an independent, statewide organization to oversee all aspects of providing defense services, and we address the duties of such an organization. Absent such an approach, we are convinced that states will not succeed in meeting their obligations to provide effective legal representation of the indigent. But full implementation of the promise of the Sixth Amendment will still likely remain elusive even if each state establishes a statewide oversight organization. For this reason, in Recommendations 12 and 13, we call upon the *federal* government to assist the states in discharging their duty to provide effective representation, as required by the nation's *federal* Constitution.

Recommendations 17 and 18 reflect our recognition that reform in the indigent defense area is exceedingly difficult and typically cannot be achieved without a coalition of partners dedicated to achieving improvements. Accordingly, we call upon state and local bar associations, as well as a wide variety of other groups and persons, to work together to seek indigent defense reforms. Finally, if other efforts do not succeed or appear unlikely to do so, we conclude with Recommendations pertaining to indigent defense litigation based upon our analysis of prior litigation contained in Chapters 1 and 3.

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1 *See* ABA Providing Defense Services, *supra* note 58, Chapter 1.

2 *See* NLADA Guidelines for Legal Defense Systems, *supra* note 1, Chapter 2.

B. Recommendations and Commentary

What States Should Do

Compliance with the Constitution

Recommendation 1—States should adhere to their obligation to guarantee fair criminal and juvenile proceedings in compliance with constitutional requirements. Accordingly, legislators should appropriate adequate funds so that quality indigent defense services can be provided. Judges should ensure that all waivers of counsel are voluntary, knowing, intelligent, and on the record, and that guilty pleas are not accepted from accused persons absent valid waivers of counsel. Prosecutors should not negotiate plea agreements with accused persons absent valid waivers of counsel and should adhere to their duty to assure that accused persons are advised of their right to a lawyer.

Commentary—First and foremost, this report is about implementing the right to counsel guaranteed to accused persons under the Sixth Amendment to the United States Constitution.[3] For this Constitutional requirement to be implemented effectively, adequate funding of defense services is indispensable.[4] Our recommendations begin, therefore, with the fervent request that those responsible for assuring that defense services are provided do what is necessary to make sure that the right to counsel is honored. This means that legislators must appropriate sufficient funds for indigent defense and that judges and prosecutors must discharge their duties in compliance with decisions of the United States Supreme Court and their ethical responsibilities.

A recent opinion column published in a Portland, Maine, newspaper succinctly summarized the problem of indigent defense funding in state legislatures. Noting that Maine's Legislature was not providing sufficient financial support for indigent defense, the writer explained: "This issue is not going to get the attention it deserves from the Legislature because it has come up at a time when budgets are being cut, not increased…. [A]nd there is not political muscle behind indigent defense." Then, comparing indigent defense with health care for senior citizens and education, the writer concluded: "But the difference is, none of those programs is required by the U.S. Constitution. According to the Supreme Court, indigent defense is, so failing to meet that responsibility is against the law."[5]

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3 The duty of governments under the Constitution to provide defense services for the indigent is explained in detail in this report. *See infra* notes 6–55 and accompanying text, Chapter 1,.

4 The wide range of problems in indigent defense due to inadequate financial resources is set forth in Chapter 2.

5 Greg Kesich, *Criminal Defense Costs Could Be the State's Next Crisis,* Portland Press herald, December 17, 2008.

The ABA's Model Code of Judicial Conduct requires that judges "uphold and apply the law, and … perform all duties of judicial office fairly and impartially."[6] Among the many responsibilities of judges is the duty to make certain that no waiver of counsel is accepted unless it is "voluntary, knowing, intelligent, and on the record." Moreover, no guilty plea should be accepted from an accused unless there has been a valid waiver of the right to counsel. Not only are these requirements of U.S. Supreme Court decisions,[7] but also the duty is often spelled out in court rules or in statutes.[8] Yet, this report and other studies point to evidence that judges do not always take the necessary steps, especially in misdemeanor cases, to assure that all waivers of counsel are in fact valid.[9] Because of concerns about waiver of counsel, the ABA has long recommended steps that go well beyond this Recommendation and constitutional requirements. The ABA urges that judges not accept waivers of counsel unless the accused has spoken to a lawyer and that judges renew the offer of counsel at each new stage of the proceedings when the accused appears without counsel.[10]

In discussing the role of the United States Attorney, the U.S. Supreme Court in 1935 spelled out basic precepts to guide prosecutors that are as important today as when they were written. The prosecutor's responsibility in a criminal case, the Supreme Court noted, "is not that it shall win a case, but that justice shall be done…. But while he may strike hard blows, he is not at liberty to strike foul ones."[11] The Supreme Court's admonition is expressed today in the ABA Model Rules of Professional Conduct, which have been adopted in states throughout the country.[12] In explaining the Special Responsibilities of a Prosecutor, the Comment section notes that prosecutors have "the responsibility of a minister of justice and not simply of an advocate."[13] This means that prosecutors must take steps to assure that "the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[14]

In addition, the black-letter provisions of the Model Rules prohibit prosecutors from "seeking waivers of … important pretrial rights from unrepresented accused

6 ABA Model Code of Judicial Conduct R. 2.2 (2007), *available at* http://www.abanet.org/judicialethics/ ABA_MCJC_approved.pdf.

7 *See supra* notes 47–52 and accompanying text, Chapter 1.

8 *See, e.g.,* Fla. R. Crim. P. 3.111(d); Md. Rule 4-215(b); Pa. R. Crim. P. 121. For a statute that deals with waiver of the right to counsel, *see* Or. Rev. Stat. § 135.045(c) (2007).

9 *See supra* notes 207–08, 226–35, and accompanying text, Chapter 2. *See also* ABA Gideon's Broken Promise, *supra* note 108, Chapter 2, at 24–26.

10 ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-8.2.

11 Berger v. United States, 295 U.S. 78, 88 (1935).

12 *See supra* notes 80–85, Chapter 1.

13 ABA Model Rules, *supra* note 67, Chapter 1, at R. 3.8 cmt. 1.

14 *Id.*

persons,"[15] which obviously includes the right to counsel. Specifically, respecting the right to an attorney, the Model Rules require that prosecutors "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel."[16] Yet, evidence is cited in this report[17] and in other studies[18] that prosecutors sometimes seek waivers of counsel from and negotiate plea agreements with unrepresented indigent persons. When unrepresented defendants plead guilty pursuant to negotiations with prosecutors, the prosecutors likely have violated their duty "not [to] give legal advice to an unrepresented person, other than the advice to secure counsel," as required by the Model Rules.[19] Accordingly, the Committee recommends that prosecutors neither engage in securing waivers of counsel nor negotiate plea agreements with persons who have not validly waived their rights to legal representation.

Independence

Recommendation 2—States should establish a statewide, independent, non-partisan agency headed by a Board or Commission responsible for all components of indigent defense services. The members of the Board or Commission of the agency should be appointed by leaders of the executive, judicial, and legislative branches of government, as well as by officials of bar associations, and Board or Commission members should bear no obligations to the persons, department of government, or bar associations responsible for their appointments. All members of the Board or Commission should be committed to the delivery of quality indigent defense services, and a majority of the members should have had prior experience in providing indigent defense representation.

Commentary—This recommendation embodies fundamental cornerstones for establishing a successful program of public defense. Thus, the Committee recommends that public defense programs be "independent," organized at the state level, and that members of the program's governing Board or Commission, with authority "for all components of indigent defense," be appointed by a diverse group of officials and organizations.

The need for independence has been repeatedly stressed in national reports and standards dealing with public defense. The first of the ABA's Ten Principles of a Public Defense Delivery System, approved in 2002, calls for "the selection, funding, and

15 ABA Model Rules at R. 3.8 (c).

16 ABA Model Rules at R. 3.8 (b). ABA Standards provide that, at an initial court appearance, a prosecutor "should not communicate with the accused unless a waiver of counsel has been entered, except for the purpose of aiding in obtaining counsel or in arranging for the pretrial release of the accused." ABA Prosecution Function, *supra* note 228, Chapter 2, at 3-3.10 (a).

17 *See* discussion at *supra* notes 227–235 and accompanying text, Chapter 2.

18 ABA Gideon's Broken Promise, *supra* note 108, Chapter 2, at 24.

19 ABA Model Rules, *supra* note 67, Chapter 1, at R. 4.3.

payment of defense counsel … [to be] independent."[20] In fact, the call for independence was embodied in the first edition of standards dealing with Providing Defense Services, approved by the ABA in 1968.[21] Independence also was stressed by the National Study Commission on Defense Services, organized by the National Legal Aid and Defender Association, which in 1976 issued a lengthy report and numerous recommendations dealing with all aspects of indigent defense.[22]

It is exceedingly difficult for defense counsel always to be vigorous advocates on behalf of their indigent clients when their appointment, compensation, resources, and continued employment depend primarily upon satisfying judges or other elected officials. In contrast, prosecutors and retained counsel discharge their duties with virtually complete independence, subject only to the will of the electorate in the case of prosecutors and to rules of the legal profession. Judges, moreover, do not select or authorize compensation for prosecutors or for lawyers retained by persons able to afford an attorney's fee. At a minimum, judicial oversight of the defense function creates serious problems of perception and opportunities for abuse.

What is needed are defense systems in which the integrity of the attorney-client relationship is safeguarded and defense lawyers for the indigent are just as independent as retained counsel, judges, and prosecutors. The system most frequently recommended to achieve this goal includes an independent Board or Commission vested with responsibility for indigent defense.[23] In a number of states, this recommendation has been effectively implemented, as noted earlier in this report.[24] The reason for having a number of different officials appoint the Board or Commission is to reduce the

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20 ABA Ten Principles, *supra* note 70, Chapter 1, at Principle 1. *See also* ABA Providing Defense Services, 5-1.3, *supra* note 58, Chapter 1, at 5-1.3. NLADA Guidelines for Legal Defense Systems, *supra* note 1, Chapter 2, at 2.10.

21 "The plan should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice." ABA Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services, 1.4 (1st ed. 1968).

22 "Whether organized at the state, regional, or local level, the goal of any system for providing defense services should be to provide uniformly high quality legal assistance through an *independent advocate.*" NLADA Guidelines for Legal Defense Systems, *supra* note 1, Chapter 2, at 145 (emphasis added).

23 "An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board." ABA Providing Defense Services, *supra* note 58, Chapter 1, at 1, 5-1.3(b); ABA Ten Principles, *supra* note 1, Chapter 1, at Principle 1 cmt: "To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems." *See also* NLADA Guidelines for Legal Defense Systems, *supra* note 1, Chapter 2, at 2.10.

24 *See supra* Table II, Chapter 4, p. 151.

likelihood that members of the governing board may feel in some way beholden to the persons or organizations responsible for their appointment. To guard against this possibility, the Committee recommends that "Board or Commission members should bear no obligations to the persons, department of government, or bar associations responsible for their appointments." It is also preferable if no single person or organization is authorized to appoint a majority of the Board or Commission members.[25] In some states, for example, the governor appoints a majority of the commission or board members,[26] but this approach is not recommended.

The kinds of persons to be appointed to the statewide Board or Commission are not specified, except for providing that "all [appointees] should be committed to the delivery of quality indigent defense services, and a majority of the members should have had prior experience in providing indigent defense representation."[27] The recommendation, therefore, does not preclude service on Boards or Commissions by judges and active indigent criminal defense practitioners. But while such persons may, in fact, make important contributions to the work of the governing body, including advocating effectively on behalf of adequate indigent defense appropriations and explaining to the public the importance of defense counsel in our adversary system of justice, it is important that they remain vigilant, respecting possible conflicts of interest, and that they not intrude upon the independence of the defense function.[28]

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25 Consistent with this approach, the NLADA National Study Commission on Defense Services urged that "[n]o single branch of government should have a majority of votes on the commission." NLADA Guidelines for Legal Defense Systems, *supra* note 1, Chapter 2, at 2.10(c).

26 This approach is followed, for example, in Missouri and Oklahoma. Montana's governor also appoints commission members but must follow certain requirements, such as selecting from among candidates submitted by the state supreme court, the president of the state bar, and the houses of the legislature. Kentucky's governor appoints five of the nine members, two with no restrictions, two appointed from a list submitted by the Kentucky Bar Association, and one appointed from a list supplied by the Kentucky Protection and Advocacy Advisory Board. *See* ABA/TSG Indigent Defense Commissions, *supra* note 1, Chapter 4, at Appendix A.

27 The Committee's recommendation can be contrasted with those of the NLADA National Study Commission on Defense Services: "A majority of the Commission should consist of practicing attorneys." NLADA Guidelines for Legal Defense Systems, *supra* note 1, Chapter 2, at 2.10(e). Similarly, ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-1.3(b) provides that "[a] majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction."

28 The ABA recommends that "[b]oards of trustees … not include prosecutors or judges." ABA Providing Defense Services, 5-1.3(b). The commentary to this black-letter provision explains: "This restriction is necessary in order to remove any implication that defenders are subject to the control of those who appear as their adversaries or before whom they must appear in the representation of defendants, except for the general disciplinary supervision which judges maintain over all members of the bar." *See also* NLADA Guidelines for Legal Defense Systems, at 2.10(f): "The commission should not include judges, prosecutors, or law enforcement officials." *See also* the discussion of prosecutors serving on statewide commissions at *supra* Chapter 4, p. 175.

The recommendation also calls for defense services in each state to be organized on a statewide basis.[29] Only in this way is it possible to assure that the quality of defense services throughout the state is substantially the same. Experience demonstrates that there is virtually certain to be wide variations in the quality of services if each county or other jurisdictional subdivision is able to structure defense services in a way that it deems best. On the other hand, organizing defense services at the state level enables management of the defense function to be centralized, promotes the equitable distribution of resources, and provides improved cost effectiveness. The agency should also be "responsible for all components of indigent defense," which should include not only those kinds of cases in which counsel is extended as a matter of constitutional right, but also to cases where the state requires counsel to be provided, even though not constitutionally required.[30]

Finally, a statewide agency with responsibility for all components of indigent defense establishes a permanent mechanism for achieving many of the vital objectives of an effective public defense delivery system, including:

- Establishing qualification standards for appointment of counsel;
- Assisting in the development of eligibility standards for the appointment of counsel and ensuring that persons are screened to ensure their eligibility for counsel;
- Matching attorney qualifications with the complexity of cases;
- Tracking caseloads, as well as monitoring and evaluating attorney performance;
- Developing and providing training for all in persons in the state who provide indigent defense services, including both entry-level attorneys and advanced practitioners;
- Offering access to technology and vital resources and support services; and
- Providing an important voice in the political sphere by serving as an advocate in support of indigent defense.

29 Currently, 27 states have a centralized state agency for administering either entirely or substantially trial-level indigent defense services. *See supra* notes 2–10, Table II, and accompanying text, Chapter 2.

30 *See supra* note 31 and accompanying text, Chapter 1.

Recommendation 3—The Board or Commission should hire the agency's Executive Director or State Public Defender, who should then be responsible for hiring the staff of the agency. The agency should act as an advocate on behalf of improvements in indigent criminal and juvenile defense representation and have the authority to represent the interests of the agency before the legislature pertaining to all such matters. Substantial funding for the agency should be provided by the state from general fund revenues.

Commentary—One of the most important responsibilities of the Board or Commission is to retain the Executive Director or State Public Defender, who should have broad responsibilities for the administration of indigent defense services in the state pursuant to policies established by the agency's governing authority. Although not specifically mentioned in the recommendation, consistent with other standards in this area, the Executive Director or State Public Defender should be appointed for a fixed term and not be subject to removal except for good cause.[31] Among the chief duties of the agency's head should be hiring the agency's staff.[32] This person, however, will likely want to consult with the Board or Commission respecting hiring procedures, as well as many other critical administrative matters.

In every state, the cause of indigent defense requires persistent and articulate advocates to speak both in support of reforms to enhance the fairness of the justice system and address the need for adequate funding of the defense function. The latter is especially important because the indispensable role of defense counsel in the adversary system of criminal and juvenile justice is not always appreciated or fully understood by the public and legislators. While the head of the statewide agency should be a leading spokesperson on behalf of indigent defense and systemic reform, members of the agency's governing body should also be involved in such efforts.

As noted earlier, there are now 28 states in which all, or almost all, of the funding for indigent defense is provided by the state's central government.[33] Moreover, statewide programs generally tend to be better financed than indigent defense systems funded through a combination of state and county funds.[34] But in recent years, in a number of states, special fines, taxes, and assessments have been imposed frequently either

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31 *See* ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-4.1; National Guidelines for Legal Defense Systems, *supra* note 1, Chapter 2, at 2.11(f).

32 This is the approach most commonly used among the states. For example, Montana's new statute authorizes the state director for defense services to hire or contract for the necessary personnel. *See* ABA/TSG Indigent Defense Commissions, *supra* note 1, Chapter 4, Appendix A. *But see* LA. Rev. Stat. Ann § 15:150(A), which gives the Public Defender Board the authority to hire not only the director of the office but also the senior management team. *See also supra* notes 86–87 and accompanying text, Chapter 4.

33 *See supra* notes 29–30, Table I, and accompanying text, Chapter 2.

34 *Compare* Table I at *supra* note 28, Chapter 2, *with* ABA/TSG FY 2005 State and County Expenditures, *supra* note 44, Chapter 2.

against indigent defendants, who are the least able to afford the expense, or others as a means of covering the state's indigent defense budget.[35] Because such charges can sometimes chill the exercise of the right to counsel and serve as an excuse for the legislature not to appropriate sufficient funds for indigent defense, the recommendation provides that "[s]ubstantial funding for … [indigent defense] should be provided by the state from general fund revenues."

States Without a Board or Commission

Recommendation 4—In states that do not have a statewide, independent, non-partisan agency responsible for all components of indigent defense services, a statewide task force or study commission should be formed to gather relevant data, assess its quality as measured by recognized national standards for the delivery of such services, and make recommendations for systemic improvements. The members of the task force or study commission should be appointed by leaders of the executive, judicial, and legislative branches of government, as well as by officials of bar associations, and task force or study commission members should bear no obligations to the persons, departments of government, or bar associations responsible for their appointments.

Commentary—The second recommendation of this report expresses the Committee's strong preference for "a statewide, non-partisan agency, headed by a Board or Commission … responsible for all components of indigent defense services." Although this approach has been embraced by a number of states, the movement toward centralized state control of indigent defense overseen by a board or commission is by no means complete, as structures of this kind do not exist in a majority of states.[36] Accordingly, the Committee recommends that in states without such statewide programs, there should be "a statewide task force or study commission" for gathering data and assessing the quality of the state's indigent defense system against national standards for the delivery of indigent defense services. This approach often has served as the forerunner to establishment of a statewide indigent defense agency headed by an independent board or commission, as discussed earlier in this report.[37]

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35 *See* The Spangenberg Group Report, Public Defender Application Fees: 2001 Update (2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/pdapplicationfees2001-narrative.pdf. For examples of state statutes imposing public defender application fees, *see* Colo. Rev. Stat. § 21-1-103 (3); N.M. Stat. § 31-15-12 (c) (2001). A constitutional problem is present, however, if such fees cannot be waived. *See* State v. Tennin, 674 N.W.2d 403, 410 (Minn. 2004) (statute requiring a $50 co-payment for public defender assistance that could not be waived violated indigent defendant's right to counsel and was, therefore, unconstitutional). *See also supra* note 50, Chapter 1.

36 *See supra* notes 2–21, 100–02, Table II, and accompanying text, Chapter 4. As reflected in Table II, there are only 19 states that have a state public defender or a state director, as well as an oversight board or commission with responsibility for indigent defense throughout the state.

37 *See supra* note 119 and accompanying text, Chapter 4.

To assure independence of the undertaking, the Committee recommends the same procedure for selecting members of the task force or commission as specified in Recommendation 2, for the selection of members of a permanent statewide indigent defense board or commission.

Qualifications, Performance, and Supervision of Counsel

Recommendation 5—The Board or Commission should establish and enforce qualification and performance standards for defense attorneys in criminal and juvenile cases who represent persons unable to afford counsel. The Board or Commission should ensure that all attorneys who provide defense representation are effectively supervised and remove those defense attorneys who fail to provide quality services.

Commentary—No system of public defense representation for indigent persons can be successful unless the lawyers who provide the representation are capable of rendering quality representation. Regardless of whether assigned counsel, contract attorneys, or public defenders provide the defense services, states should require that the attorneys be well qualified to do so. A tiered system of qualifications for appointment to different levels of cases, depending on the training and experience of the lawyers, will help to ensure that the defender has the requisite knowledge and skills to deliver high quality legal services, whether the charge is juvenile delinquency, a simple misdemeanor, or a complex felony.[38]

A meaningful assessment of attorney qualifications, however, should go beyond objective quantitative measures, such as years of experience and completed training. States should also implement other more substantive screening tools, including audits of prior performance, in-court observations, inspection of motions and other written work, and peer assessments.[39] In assessing attorney qualifications, the use of performance standards such as those developed by the National Legal Aid and Defender Association can be quite useful.[40]

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38 The same concept has been embraced by the ABA: "Defense counsel's ability, training, and experience should match the complexity of the case." ABA Ten Principles, *supra* note 70, Chapter 1, at Principle 6, n.21.

39 Recommendations of the American Bar Association (ABA) pertaining to death penalty representation contain provisions related to attorney qualifications and monitoring of attorney performance. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003) [hereinafter ABA Death Penalty Guidelines] Guidelines 5.1 and 7.1. England also has developed extensive procedures for monitoring the performance of private lawyers who provide representation in criminal legal aid. *See* Lefstein, *Lessons from England, supra* note 57, Chapter 1, at 899–900.

40 *See* NLADA Performance Guidelines, *supra* note 72, Chapter 1.

It is not sufficient, however, just to make sure that attorneys who provide defense services are qualified when they begin to provide representation. It is also essential that they be supervised during the early years of their careers as indigent defense counsel, whether they serve in a public defender agency or other program for indigent defense. The oversight called for in this recommendation should not be undertaken by members of the Board or Commission, but rather by experienced staff of the agency or members of the bar with whom there are special arrangements to provide supervision or assessments.[41]

In addition, there should be procedures for removal from the list of lawyers who may serve as assigned counsel or contract attorneys.[42] The ABA has long called for procedures to remove from the roster of lawyers who provide legal services "those who have not provided quality representation."[43] More recently, the ABA specifically endorsed procedures for removal of unqualified lawyers from the list of defense lawyers who provide representation in capital cases.[44]

Workload

Recommendation 6—The Board or Commission should establish and enforce workload limits for defense attorneys, which take into account their other responsibilities in addition to client representation, in order to ensure that quality defense services are provided and ethical obligations are not violated.

Commentary—The most well trained and highly qualified lawyers cannot provide "quality defense services" when they have too many clients to represent, i.e., when their "caseload" is excessively high. It is critical, moreover, that in addition to caseload, an attorney's other responsibilities (e.g., attendance at training programs,

41 This is consistent with recommendations of the ABA, which urge that Boards overseeing the defense function be responsible for establishing policy of the agency but "precluded from interfering in the conduct of particular cases." *See* ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-1.3.

42 Removal from a list of lawyers eligible to receive appointments is different than the situation when a defense lawyer seeks to withdraw from a case. Normally, court approval to withdraw from an assigned case is required. *See infra* notes 92–93 and accompanying text.

43 "The roster of lawyers should periodically be revised to remove those who have not provided quality legal representation or who have refused to accept appointments on enough occasions to evidence lack of interest. Specific criteria for removal should be adopted in conjunction with qualification standards." *See* ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-2.3(b).

44 "Where there is evidence that an attorney has failed to provide high quality legal representation, the attorney should not receive additional appointments and should be removed from the roster. Where there is evidence that a systemic defect in a defender office has caused the office to fail to provide high quality legal representation, the office should not receive additional appointments." ABA Death Penalty Guidelines, *supra* note 39, 7.1 (c).

administrative matters, etc.) be considered in assessing an attorney's overall "workload." Accordingly, the Committee urges that workload limits, which take caseload into account, be established and enforced for all attorneys furnishing indigent defense representation.

Similarly, the ABA Ten Principles call for the workload of defense counsel to be "controlled to permit the rendering of quality representation."[45] This objective is among the most important in this report, since excessive caseloads in public defense is a pervasive national problem.[46] As a result, indigent defense counsel are frequently unable to render "competent" representation to their clients as required by rules of professional conduct,[47] let alone provide "quality" services as recommended in ABA standards[48] and in this report.

Although national annual caseload standards have been cited for many years and both the ABA and the American Council of Chief Defenders have indicated that the numbers of cases in these standards should not be exceeded,[49] the determination of the numbers of cases that a lawyer should undertake during the course of a year must necessarily be a matter of assessment. This point was emphasized in an ethics opinion in 2006 issued by the ABA Standing Committee on Ethics and Professional Responsibility, which made clear that there could be no "mathematically set number of cases a lawyer may handle as an ethical norm."[50] Ultimately, responsibility for a lawyer's ethical conduct rests with the independent professional judgment of the individual attorney and cannot be determined by policies regarding caseloads, by a

45 "Defense counsel's workload is controlled to permit the rendering of quality representation." ABA Ten Principles, *supra* note 70, Chapter 1, at Principle 5. The commentary distinguishes workload from caseload in that workload is "caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties." *Id.* at cmt.

46 *See supra* notes 105–24 and accompanying text, Chapter 2.

47 "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." ABA Model Rules, *supra* note 67, Chapter 1, at R. 1.1. The requirement of "competent representation" has been accepted by state rules of professional conduct throughout the country. The ABA's rules are the model for ethics rules for almost all states. *See* http://www.abanet.org/cpr/mrpc/model_rules.html

48 "The objective in providing counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel pursuant to this chapter. The bar should educate the public on the importance of this objective." ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-1.1.

49 "National caseload standards should in no event be exceeded…." ABA Ten Principles, *supra* note 70, Chapter 1, at Principle 5 cmt. The same position has been adopted by the American Council of Chief Defenders. *See also supra* notes 81–90, Chapter 1; and *supra* notes 96–107, Chapter 2.

50 ABA Formal Op. 06-441, *supra* note 86, Chapter 1.

contract with a governmental body, or by the directions of a supervisor.[51] Obviously, a lawyer's annual caseload must take into account a wide variety of factors, such as the extent of support services, especially including investigators and paralegals, complexity of the cases, the extent of the lawyer's experience, the speed at which cases proceed through the courts, and the lawyer's other duties as a professional.

The issue of workload is important not only to public defenders but also to assigned counsel and to private attorneys who provide services pursuant to contracts. In the case of private attorneys, this should include oversight of the extent of their private practice in order to ensure that they have adequate time to devote to their indigent cases.[52] The goal should be to make sure that all attorneys who provide defense services have adequate time to devote to their cases and are thus able to meet established performance standards for each client's case, including fulfilling basic responsibilities related to interviewing the client, conducting investigations, discovery and motions practice, trial preparation, sentencing, and post-conviction matters.

This Recommendation should be read in conjunction with Recommendation 14, which deals with the duties of defense lawyers and defender programs faced with excessive numbers of cases. Also, Recommendation 15 addresses the duties of judges, prosecutors, and defense lawyers to report to disciplinary agencies knowledge of serious ethical violations.

Compensation

Recommendation 7—Fair compensation should be provided, as well as reasonable fees and overhead expenses, to all publicly funded defenders and for attorneys who provide representation pursuant to contracts and on a case-by-case basis. Public defenders should be employed full time whenever practicable and salary parity should be provided for defenders with equivalent prosecution attorneys when prosecutors are fairly compensated. Law student loan forgiveness programs should be established for both prosecutors and public defenders.

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51 However, if an attorney and supervisor disagree about whether competent representation has been or can be provided to the client, and the matter is "arguable" as a matter of professional duty, the attorney does not violate his or her professional duty in complying with a supervisor's "reasonable resolution" of the matter. *See* ABA Model Rules, *supra* note 67, Chapter 1, at R. 5.2 (b).

52 Although the work of most private defense lawyers who serve as assigned counsel is not monitored, there are a few notable exceptions in which there is some oversight. For example, in Massachusetts, the Committee on Public Counsel Services (CPCS), which is the state's agency for providing indigent defense services, makes an effort to evaluate the services of assigned counsel. Also, the CPCS imposes strict limitations on the numbers of cases for which assigned counsel can be compensated during the year. Also, assigned counsel may only be compensated for 1800 billable hours of service per year. *See* Lefstein, *Lessons from England, supra* note 57, Chapter 1, at 909–10.

Commentary—The compensation paid to defenders, as well as the fees provided through contracts and to assigned counsel on a case-by-case basis, often discourages well qualified lawyers from representing the indigent and adversely impact the quality of services provided by those who do. In defender offices, low salaries contribute to high turnover and difficulty in recruiting experienced and skilled attorneys. Inadequate compensation of court-appointed lawyers and contract attorneys contributes to lawyers accepting a high volume of cases that can be disposed of quickly as a way of maximizing income and may serve as a disincentive to invest the essential time required to provide quality representation. To avoid these kinds of problems, the ABA urges "reasonable" compensation for defense counsel and, similar to the above standard, "parity between defense counsel and the prosecution in resources…."[53]

This recommendation also calls for all salaried public defenders to be employed full time "whenever practicable." The Committee's recommendation is largely consistent with the approach of the ABA[54] and the National Study Commission,[55] while recognizing that, in some jurisdictions. there may be especially rural areas in which full-time defenders may not make sense. Overall, however, the Committee believes that full-time defenders are more likely to have sufficient time to develop the requisite knowledge and skills necessary to provide quality legal services while avoiding the temptation to devote a disproportionate amount of time to paying clients. Also, funding sources cannot use the prospect of defenders acquiring retained clients as a justification for keeping defender salaries unreasonably low.

Because of high student loan indebtedness, recent law school graduates are sometimes discouraged from applying for positions in public interest law, including serving as prosecutors and defenders.[56] Recently, Congress enacted legislation that includes "loan forgiveness," pursuant to which law graduates who work as public defenders and prosecutors may have a portion of their student loans forgiven.[57] This legislation is much needed and will assist the states in attracting recent law graduates to serve as defense attorneys and prosecutors.[58] But the need for loan forgiveness is enor-

53 ABA Ten Principles, *supra* note 70, Chapter 1, at Principle 8.

54 "Defense organizations should be staffed with full-time attorneys. All such attorneys should be prohibited from engaging in the private practice of law." ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-4.2.

55 NLADA Guidelines for Legal Defense Systems, *supra* note 1, Chapter 2, at 2.9.

56 *See* ABA Commission on Loan Repayment and Forgiveness, Lifting the Burden: Law Student Debt as a Barrier to Public Service (2003), *available at* http://www.abanet.org/legalservices/downloads/lrap/lrapfinalreport.pdf.

57 The College Cost Reduction and Access Act, Pub. L. No. 110-84, § 401 (2007).

58 *See generally* Philip G. Schrag, *Federal Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations,* 36 Hofstra L. Rev. 27 (2007).

mous, and thus, the Committee recommends that states also adopt and fund loan forgiveness legislation for the benefit of prosecutors and defense lawyers.

Adequate Support and Resources

Recommendation 8—Sufficient support services and resources should be provided to enable all defense attorneys to deliver quality indigent defense representation, including access to independent experts, investigators, social workers, paralegals, secretaries, technology, research capabilities, and training.

Commentary—"Support services and resources," as well as "training," are indispensable if attorneys are to provide quality defense representation. In their absence, criminal and juvenile proceedings become fundamentally unfair. Yet, an enormous disparity exists between the resources available to prosecutors, who can draw upon police and state law enforcement agencies, and those furnished to public defenders, assigned counsel, and contract attorneys. Providing defense lawyers with resources such as "independent experts,[59] investigators, social workers, paralegals, secretaries, technology, [and] research capabilities" not only creates a more level playing field between prosecution and defense, but also is substantially more efficient than asking overburdened defenders to somehow compensate for their absence. Professionally trained and experienced investigators, for instance, can conduct factual investigations at lower expense than attorneys, while freeing attorneys to devote their time to other important tasks, such as filing motions, communicating with their clients, and preparing for court appearances.[60]

Training is another of those requirements essential for providing quality service as defense attorneys.[61] Not only must those serving as defense counsel possess the requisite knowledge, especially in countless and sometimes complex subject areas of criminal and juvenile law that are not covered in law schools, but they also need to hone their advocacy skills in order to be effective in representing their clients. Training is especially important when lawyers begin their service as counsel for the indigent, just as new policemen and firemen must undergo training before they begin serving

59 The constitutional basis for furnishing experts on behalf of the indigent is discussed at *supra* notes 33–36, Chapter 1, and accompanying text.

60 The importance of support services is emphasized in prior standards related to defense services. *See, e.g.,* ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-1.4; NLADA Guidelines for Legal Defense Systems, *supra* note 1, Chapter 2, at 3.1.

61 Training has been emphasized in prior standards related to indigent defense. "Counsel and staff providing defense services should have systemic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors." ABA Ten Principles, *supra* note 70, Chapter 1, at Principle 9, cmt. *See also* ABA Providing Defense Services, 5-1.5; NLADA Guidelines for Legal Defense Systems, 5.7–5.8.

to protect the public. As in other areas of law practice, training of defense lawyers should continue throughout their careers, whether they are serving as public defenders, assigned counsel, or contract attorneys.[62]

Eligibility and Prompt Assignment

Recommendation 9—Prompt eligibility screening should be undertaken by individuals who are independent of any defense agency, and defense lawyers should be provided as soon as feasible after accused persons are arrested, detained, or request counsel.

Commentary—Consistent with this recommendation, the ABA has long recommended that lawyers "be provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest."[63] As discussed earlier in this report, the U.S. Supreme Court recently reaffirmed the proposition that the Sixth Amendment right to counsel "attaches" when the accused is brought to court for an initial judicial hearing regardless of whether the prosecutor is aware of the proceeding.[64] In the vast majority of states, in the District of Columbia, and in the federal courts, counsel is made available for the indigent accused before, at, or just after the initial court appearance.[65]

In order to provide defense counsel as soon as feasible in accordance with this Recommendation, "prompt eligibility screening" is essential. It is also highly desirable that screening be undertaken pursuant to uniform written standards used throughout the jurisdiction.[66] An agency with authority to administer indigent defense services statewide, as urged in Recommendation 2, is in a position to adopt uniform

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62 Forty-two states currently require some form of mandatory continuing legal education for all attorneys, not just for lawyers practicing in the area of criminal defense. *See* Summary of MCLE Jurisdiction Requirements, *available at* http://www.abanet.org/cle/mcleview.html.

63 ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-6.1.

64 *See supra* notes 39–40 and accompanying text, Chapter 1.

65 Rothgery v. Gillespie County, 128 Sup. Ct. 2578, 2586 (2008).

66 *See* Brennan Center for Justice, Eligible for Justice: Guidelines for Appointing Defense Counsel at 6–8 (2008) *available at* http://brennan.3cdn.net/c8599960b77429dd22_y6m6ivx7r.pdf. This report recommends that "screening for eligibility must compare the individual's available income and resources to the actual price of retaining a private attorney. Non-liquid assets, income needed for living expenses, and income and assets of family and friends should not be considered available for purposes of this determination…. [P]eople who receive public benefits, cannot post bond, reside in correctional or mental health facilities, or have incomes below a fixed multiple of the federal poverty guidelines should be presumed eligible for state-appointed counsel." *Id.* at 2. The ABA recommends, and the great majority of states provide, that the test to qualify for appointed counsel is whether the person is financially capable, without substantial financial hardship, of retaining a private attorney. *See* ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-7.1 and accompanying Commentary.

eligibility standards for the state. Uniformity also helps states predict future costs of the state's indigent defense program while enhancing the public trust of the state's justice system.

It is also important to focus on the persons who conduct eligibility screening. This Recommendation urges that all such screening be conducted by persons "who are independent of any defense agency." A recent national report on eligibility screening in indigent defense sums the matter up this way: "Conflict of interest concerns, confidentiality rules, and harm to the attorney-client relationship all caution against screening by either the defender or the public defender program that represents a particular client. As a practical matter, many public defender programs do screen their own clients, but as an ethical matter, they should not."[67] The report then provides illustrations of defenders inappropriately limiting their caseloads through the use of strict eligibility standards and notes the risk that defenders and defender programs are sometimes tempted to reject cases because they appear to be time-consuming or unpopular, or for other reasons. Instead of screening by defenders, it makes far better sense for screening to be conducted by court personnel or by individuals employed by a pretrial services agency.

Reclassification

Recommendation 10—In order to promote the fair administration of justice, certain non-serious misdemeanors should be reclassified, thereby reducing financial and other pressures on a state's indigent defense system.

Commentary—A significant way in which the need to provide defense counsel can be reduced is by reclassifying certain non-serious misdemeanors as civil infractions, for which defendants are subject only to fines. If the potential for incarceration of the accused is eliminated, counsel need not be furnished under the Sixth Amendment.[68] There are a number of examples in which states have reclassified offenses, typically involving violations where incarceration was rarely sought or imposed,[69] but there are

67 Brennan Center for Justice, Eligible for Justice, *supra* note 66, at 10.

68 *See supra* notes 22–26 and accompanying text, Chapter 1.

69 For example, between 1971 and 2001, 25 states decriminalized sodomy and the state supreme courts in 10 other states ruled that their statutes were unconstitutional. In 2003, the U.S. Supreme Court effectively ruled that sodomy statutes in 15 states were unconstitutional. Starting with the passage of the 21st Amendment in 1933, which left decisions to criminalize alcohol to state and local control, there has been a steady decriminalization of alcohol sales and use. Many aspects of gambling also have been decriminalized over the years, as states now often operate lotteries or allow casinos and off-track betting. Darryl Brown, *Democracy and Decriminalization,* 86 Tex. L. Rev. 223, 235 (2007). *See also* Kara Godbehere Goodwin, *Is the End of the War in Sight: An Analysis of Canada's Decriminalization of Marijuana and the Implications for the United States War on Drugs,* 22 Buff. Pub. Int. L. J. 199 (2004). *See also supra* notes 140–50 and accompanying text, Chapter 2.

undoubtedly other situations in which the approach is feasible. Not only does such action reduce crowded court dockets, freeing up the time of judges and prosecutors to devote to more serious matters, but it also decreases jail costs. Moreover, it lightens defender caseloads, permitting savings to be used to fund other defense expenses. Additional civil fines collected in lieu of jail time are also a revenue source.

Data Collection

Recommendation 11—Uniform definitions of a case and a consistent uniform case reporting system should be established for all criminal and juvenile delinquency cases. This system should provide continuous data that accurately contains the number of new appointments by case type, the number of dispositions by case type, and the number of pending cases.

Commentary—Among the most vexing problems in indigent defense are predicting the number of lawyers needed to provide quality representation in all cases eligible for the appointment of counsel, as well as the costs of additional personnel such as investigators, paralegals, and expert witnesses. If a public defense system is organized on a statewide basis, as urged in Recommendation 2, the state agency is able to gather uniform data throughout the state, thereby enabling annual budget projections to be based upon "the number of new appointments by case type, the number of dispositions by case type, and the number of pending cases" that typically remain open at the end of a fiscal year. For instance, Louisiana's legislation enacted in 2007, which established a statewide public defense system, provides that the agency's governing board shall ensure that "data, including workload, is collected and maintained in a uniform and timely manner throughout the state to allow the board sound data to support resource needs."[70] But even a "uniform case reporting system," as the Committee recommends, will not be successful unless there also are "uniform definitions of a case," which will ensure that the reported data is consistent throughout the state. To remedy this kind of deficiency, at least one state has required, by statute, uniform case standards for reporting purposes.[71] If possible, the definition of a case adopted for the defense should be consistent with the definition used by prosecutors

[70] La. Rev. Stat. Ann. § 15-148 (B) (f) (11) (Supp. 2009).

[71] A Tennessee statute provides as follows: "District attorneys general shall treat multiple incidents as a single incident for purposes of this statute when the charges are of a related nature and it is the district attorney general's intention that all of the charges be handled in the same court proceeding. If a case has more than one charge or count, then the administrative office of the courts shall count the case according to the highest class of charge or count at the time of filing or disposition…." T.C.A. 16-1-117 (a) (1) (2008).

within the state, thereby facilitating comparisons between prosecution and defense caseloads.[72] .

What the Federal Government Should Do

A National Center for Defense Services

Recommendation 12—The federal government should establish an independent, adequately funded National Center for Defense Services to assist and strengthen the ability of state governments to provide quality legal representation for persons unable to afford counsel in criminal cases and juvenile delinquency proceedings.

Commentary—As discussed earlier in this report, the duty of providing defense representation in criminal and juvenile cases derives from decisions of the U.S. Supreme Court and is based upon interpretations of the *federal* Constitution's Sixth Amendment.[73] Taken together, the Court's decisions are an expensive unfunded mandate with which state and/or local governments have been struggling for more than 45 years.[74] Although the federal government established the Legal Services Corporation in 1974 to assist states in providing legal services in civil cases, in which there is not a constitutional right to counsel,[75] the federal government has not enacted comparable legislation to assist states in cases where there is a constitutional right to counsel or where states require that counsel be appointed, even though it is not constitutionally mandated. The Committee applauds the establishment of the Legal Services Corporation but believes there should also be a federal program to help the states defray the costs of defense services in criminal and juvenile cases.

Thirty years ago, the ABA endorsed the establishment of a federally funded "Center for Defense Services," and the Association reiterated its support for such a program in 2005.[76] The Center's mission would be to strengthen the services of publicly

72 Standardized definitions for felony and misdemeanor cases have been recommended. *See* State Court Guide to Statistical Reporting, National Center for State Courts 67–68 (n.d.), *available at* http://www.ncsconline.org/D_Research/csp/StCtGuide_StatReporting_Complete_color10-26-05.pdf.

73 *See supra* notes 1–26 and accompanying text, Chapter 1.

74 The Supreme Court has made relatively few comments about the cost to the states in providing indigent defense services. *See supra* notes 58–65 and accompanying text, Chapter 1.

75 *See* The Legal Services Corporation Act, 42 U.S.C. 2996 (1974).

76 ABA Standing Committee on Legal Aid and Indigent Defendants, Recommendation for Establishment of a Center for Defense Services (1979), *available at* http://www.abanet.org/legalservices/downloads/sclaid/121.pdf; ABA Gideon's Broken Promise, *supra* note 108, Chapter 2, at 41 (Recommendation 2).

funded defender programs in all states by providing grants, sponsoring pilot projects, supporting training, conducting research, and collecting and analyzing data. The original report submitted to the Association's House of Delegates in 1979 explained the proposal's importance: "If adequately funded by the Congress, the Center could have far-reaching impact in eliminating excessive caseloads…, providing adequate training and support services … and in facilitating representation as well as ensuring that quality defense services are available in all cases where counsel is constitutionally required."[77]

Federal Research and Grant Parity

Recommendation 13—Until a National Center for Defense Services is established, as called for in Recommendation 12, the United States Department of Justice should use its grant and research capabilities to collect, analyze, and publish financial data and other information pertaining to indigent defense. Federal financial assistance through grants or other programs as provided in support of state and local prosecutors should also be provided in support of indigent defense, and the level of federal funding for prosecution and defense should be substantially equal.

Commentary—As noted in the Commentary to Recommendation 12, the call for a National Center for Defense Services is not new. Although Congress has not been persuaded to enact such a program, the Committee is convinced that the proposal still makes excellent sense. However, in the absence of such a program, there are valuable steps that the federal government can take through existing agencies of the U.S. Department of Justice (DOJ) to enhance indigent defense.

The Office of Justice Programs (OJP) of the DOJ, for example, develops and disseminates data about crime, administers federal grants, provides training and technical assistance, and supports technology development and research. The OJP's bureaus include, among others, the Bureau of Justice Assistance (BJA), which gives assistance to local communities to improve their criminal justice systems, and the Bureau of Justice Statistics (BJS), which provides timely and objective data about crime and the administration of justice at all levels of government.[78] Also, the National Institute of Justice (NIJ), the research and evaluation agency of DOJ, offers independent, evidence-based knowledge and tools designed to meet the challenges of criminal justice, particularly at state and local levels.[79]

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77 ABA Standing Committee on Legal Aid and Indigent Defendants, Recommendation for Establishment of a Center for Defense Services, *supra* note 76, at 4.

78 *See* Bureau of Justice Assistance (BJA) website, *available at* http://www.ojp.usdoj.gov/BJA/about/aboutbja.html.

79 *See* National Institute of Justice website, *available at* http://www.ojp.usdoj.gov/nij/.

Although the overwhelming majority of expenditures by these agencies have been devoted to enhance law enforcement, crime control, prosecution, and corrections,[80] a few successful defense-oriented projects have been funded, which suggest that increased federal attention to indigent defense could have significant positive impact. For instance, in both 1999 and 2000, BJA hosted two symposia that brought together from all 50 states criminal justice professionals, including judges and leaders in indigent defense, to explore strategies to improve the delivery of defense services.[81] The National Defender Leadership Project, supported by a grant from BJA, offered training and produced a series of publications to assist defender managers in becoming more effective leaders.[82] Grant awards by the Office of Juvenile Justice and Delinquency Prevention, another bureau of OJP, have supported a national assessment of indigent defense services in delinquency proceedings as well as numerous individual state assessments of access to counsel and of the quality of representation in such proceedings.[83]

While the foregoing projects and programs are commendable, the financial support of DOJ devoted to indigent defense is substantially less than the sum spent on the improvement of prosecution services at the state and local level. For this reason, the Committee calls for the financial support of "prosecution and defense … [to] be substantially equal."

What Individuals, Criminal Justice Agencies, and Bar Associations Should Do

Adherence to Ethical Standards

Recommendation 14—Defense attorneys and defender programs should refuse to compromise their ethical duties in the face of political and systemic pressures that undermine the competence of their representation provided to defendants and juveniles unable to afford counsel. Defense attorneys and defender programs should, therefore, refuse to continue representation or accept new cases for

80 Examples of such programs include the Targeting Violent Crime Initiative, The Bulletproof Vest Partnership Program, Counter-Terrorism Training and Recourses for Law Enforcement, and Project Safe Neighborhoods. *See* website for list of current BJA projects, *available at* http://www.ojp.usdoj.gov/BJA/programs/index.html.

81 *See, e.g.,* National Symposium on Indigent Defense 2000, Final Report (Office of Justice Programs 2000).

82 *See* The National Defender Leadership Institute webpage, *available at* http://www.nasams.org/Defender_NDLI/Defender_NDLI_About.

83 For an example of such reports, *see* Office of Juvenile Justice and Delinquency Prevention, Juvenile Delinquency Guidelines: Improving Court Practices in Juvenile Delinquency Cases (2005), *available at* http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/JDG/juvenile delinquencyguidelinescompressed.pdf.

representation when faced with excessive workloads that will lead to a breach of their professional obligations.

Commentary—This recommendation is based squarely on the rules of professional conduct that govern lawyers throughout the United States in representing their clients. It is also a recommendation that has long been endorsed in standards of the ABA,[84] in the ABA's 2004 national report on indigent defense,[85] and, finally, in a 2006 ethics opinion issued by the ABA's Standing Committee on Ethics and Professional Responsibility.[86] In this opinion, the most prestigious ethics committee in the country summed up the duty of defense counsel:

> If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyers should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation…. Lawyer supervisors, including heads of defenders' offices and those within such offices having intermediate managerial responsibilities, must make reasonable efforts to ensure that the other lawyers in the office conform to the Rules of Professional Conduct.[87]

While the discussion that follows is based on the ABA Model Rules of Professional Conduct (Model Rules), the key provisions cited here have been adopted almost verbatim by states virtually everywhere. Lawyers who fail to comply with the rules of the legal profession are subject to disciplinary sanction, which can include a reprimand, suspension from the practice of law, and even disbarment.[88]

Rules 1.1 and 1.3 of the Model Rules require lawyers to furnish competent and diligent representation, which means that they possess "the legal knowledge, skill,

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84 ABA Providing Defense Services, *supra* note 58, Chapter 1, at 5-5.3.

85 ABA Gideon's Broken Promise, *supra* note 108, Chapter 2, at 43 (Recommendation 4).

86 *See* ABA Formal Op. 06-441, *supra* note 86, Chapter 1.

87 *Id.* at 1.

88 *See, e.g.,* Martin v. State Bar, 20 Cal. 3d 717, 144 Cal. Rptr. 214 (1978) (suspension from practice of law justified because of failure to perform legal services for clients and not excused by attorney having accepted too many retained cases); Disciplinary Bd. v. Amundson, 297 N.W.2d (N.D. 1980) (public reprimand justified for failure to communicate sufficiently with beneficiaries of estate and not excused by attorney's heavy workload); and Matter of Whitlock, 441 A.2d 989 (D.C. 1982) (suspension from practice justified for failure to file briefs in two criminal appeals and attorney's conduct not excused by reason of caseload and other factors). Notwithstanding these few decisions, defense attorneys who represent the indigent are rarely disciplined even when their caseloads are excessive, and they fail to provide competent representation. *See* discussion *supra* note 91, Chapter 1, and accompanying text.

thoroughness and preparation reasonably necessary for the representation"[89] and that they are able to "act with reasonable diligence and promptness in representing a client."[90] If a lawyer cannot provide competent and diligent representation, whether attributable to excessive workload, inadequate supervision, training, or other reasons, the lawyer cannot discharge his or her duty as required by the rules of the legal profession. In addition, if the lawyer's difficulty in complying with Model Rules 1.1 and 1.3 is attributable to an excessive number of cases, the lawyer is faced with a conflict of interest, pursuant to Model Rule 1.7, since "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client…."[91]

But what is the lawyer to do if confronted with continued defense representation that will violate the rules of professional conduct? Pursuant to Model Rule 1.16, the lawyer has a mandatory duty to "withdraw from the representation …"[92] and must resist appointments to additional cases. When the lawyer's cases are obtained by court appointment, applicable court rules typically require that judicial approval be obtained in order to withdraw from representation and to avoid additional case assignments.[93] In moving to withdraw and in resisting additional appointments, the lawyer should make a detailed statement on the record of the reasons for the request, thus preserving the issue for appeal. Also, in the event a client is currently being represented, the lawyer should inform the client that competent, conflict-free representation cannot be provided.[94] Similarly, if a plea offer is extended by the prosecution and the lawyer has not had adequate time to investigate the client's case or otherwise formulate a recommendation about the plea offer, the client should be advised that counsel is unable to provide competent advice about whether the offer should be accepted. Such direct communication with the client is required by Model Rules, which state that a "lawyer shall keep the client reasonably informed about the status of the matter."[95] If a defendant nevertheless decides to enter a plea of guilty, counsel should state on the record that he or she has been unable to competently advise the defendant with regard to the plea and that defendant has not had effective assistance of counsel in agreeing to the plea. Similarly, if forced to trial in circumstances when counsel has not had adequate time to prepare, counsel should state on the record that he or she

89 ABA Model Rules, *supra* note 67, Chapter 1, at R. 1.1.

90 *Id.* at R. 1.3 (2008).

91 *Id.* at R. 1.7(b).

92 *Id.* at R. 1.16(a).

93 *Id.* at R. 1.16(c). As stated in comment 2 to Model Rule 1.16: "When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority."

94 ABA Formal Op. 06-441, *supra* note 86, Chapter 1, at 3, n.8.

95 ABA Model Rules, at R. 1.4.

is unable to furnish competent representation or the effective assistance of counsel at the ensuing trial.

Supervisors and heads of defender programs must also be concerned when their lawyers are struggling with excessive caseloads, because these persons have a duty to make sure that lawyers for whom they have either supervisory or overall responsibility do not violate rules of the profession. If supervisors and heads of defender programs fail to make reasonable efforts to prevent lawyers under their control from violating ethical rules, they, too, will have violated the rules of the legal profession and are subject to disciplinary sanction.[96] (The duty of judges, prosecutors, and defense lawyers to report ethical violations in conjunction with excessive workloads of defense attorneys is discussed in the Commentary below to Recommendation 15).

Recommendation 15—Judges, prosecutors, and defense lawyers should abide by their professional obligation to report to disciplinary agencies knowledge of serious ethical violations that impact indigent defense representation when the information they possess is not confidential. Appropriate remedial action should be taken by persons with responsibility over those who commit such ethical violations.

Commentary—Pursuant to the ABA's Model Rules, members of the bar have a duty to report to "appropriate professional authority" another lawyer when they know that the "lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer…."[97] This duty also extends to reporting judges when "a lawyer knows that a judge has committed a violation of applicable rules of judicial conduct" that raise a similar kind of "substantial question as to the judge's fitness for office…."[98] Although a lawyer is not authorized to disclose information protected pursuant to principles of confidentiality (i.e., "information relating to the representation of the client"), such information may be disclosed with client consent or if disclosure is impliedly authorized.[99] In addition, the ABA's Code of Judicial Conduct requires judges to report to "the appropriate authority" if they have "knowledge that a lawyer has committed a violation of … the Rules of Professional Conduct that raises a substantial question of the lawyer's honesty, trustworthiness, or fitness as a lawyer…."[100] Consistent with the foregoing provisions, this recommendation relates specifically to

96 *Id.* at R. 5.1(c).

97 *Id.* at R. 8.3(a).

98 *Id.* at R. 8.3(b).

99 *Id.* at R. 1.6, cmt.5, R. 8.3(c).

100 ABA Model Code of Judicial Conduct 2.15 (B) (2007). *See also* Section 2.15 (D), which imposes a duty on judges to "take appropriate action" when "information" is received that suggests "a substantial likelihood" that a lawyer has violated a rule of professional conduct.

reporting non-confidential "serious ethical violations that impact indigent defense representation…."

This report discusses instances in which both lawyers and judges have violated their professional responsibilities in relation to the administration of justice. We have noted, for example, that judges do not always properly advise the accused of their right to counsel and that prosecutors sometimes improperly encourage waivers of the right to counsel.[101] Also, defense lawyers sometimes proceed to represent clients when they have inordinately high caseloads that prevent their providing competent representation, but the lawyers do not seek to withdraw or otherwise take steps to protect the rights of their clients.[102] In addition, when defenders represent excessive numbers of clients with the knowledge of supervisors and directors of defender programs, these supervisors and agency heads commit professional misconduct.[103]

When the conduct of lawyers and judges raises a "substantial question" about their "fitness" for the practice of law, the Committee recommends that such instances of professional misconduct be reported. It has been forcefully argued, for example, that if a public defender is ordered by a supervisor or agency head to undertake representation in an excessive number of cases, thereby preventing the lawyer from competently representing his or her clients, the defender should report these persons to the appropriate disciplinary authority.[104] Similarly, if a judge forces a defender to provide representation in circumstances where the defender cannot provide competent service, the defender's duty is to report the judge to the appropriate authority.[105]

While the Committee appreciates that such actions by lawyers require substantial fortitude, it also believes that the profession's rules about reporting misconduct are clear and that compliance with the rules could lead to significant positive reform. The Committee's call for action, moreover, is not unprecedented. In 2005, for example, the ABA House of Delegates passed a resolution calling on judges, in accord with "canons of professional and judicial ethics … [to] take appropriate action with regard to defense lawyers who violate ethical duties to their clients … [and] take appropriate action with regard to prosecutors who seek to obtain waivers of counsel and guilty

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101 *See supra* notes 207–35 and accompanying text, Chapter 2. *See also supra* notes 7–19 and accompanying text, which contains Recommendation 1 and addresses such practices.

102 *See supra* notes 96–108 and accompanying text, Chapter 2.

103 ABA Model Rules, *supra* note 67, Chapter 1, at R. 5.1.

104 *See* Monroe Freedman, *An Ethical Manifesto for Public Defenders,* 39 Val. U. L. Rev. 911, 921 (2005).

105 "A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as the judge's fitness for office shall inform the appropriate authorities." ABA Model Rules, at 8.3(b). Judges have a duty to "comply with the law" and to accord all persons "the right to be heard according to law." *See* ABA Model Code of Judicial Conduct 1.1, 2.6 (a) (2007).

pleas from unrepresented accused persons, or who otherwise give legal advice to such persons, other than the advice to secure counsel."[106]

Open File Discovery

Recommendation 16—Prosecutors should adopt open file discovery policies in order to promote the fair administration of criminal and juvenile justice.

Commentary—As discussed in Chapter 2, adherence to broad open file discovery policies by prosecutors promotes just results while reducing the workload burden on indigent defense providers.[107] Such policies also promote the early resolution of cases while ameliorating a lack of investigative resources available to the defense. A similar recommendation was adopted by the ABA many years ago in its criminal justice standards, which urge that documentary evidence, tangible objects, and witness lists, among numerous other matters, be made available to the defense "within a specified and reasonable time" prior to trial.[108] In the absence of open file discovery, criminal and juvenile proceedings remain a form of trial by ambush, in which far less information is available to the defense prior to disposition than is typically available in ordinary civil proceedings.[109]

Education, Advocacy and Media Attention

Recommendation 17—State and local bar associations should provide education about the professional obligations and standards governing the conduct of defense attorneys, prosecutors, and judges in order to promote compliance with applicable rules. State and local bar associations, defense attorneys, prosecutors, judges, and their professional associations should support and advocate for reform of indigent defense services in compliance with the recommendations contained in this report.

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106 ABA House of Delegates, Resolution 107 (adopted August 9, 2005) § 5(b), (c), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/res107.pdf. However, underreporting of lawyer misconduct by judges is a problem, as noted by the California Commission on the Fair Administration of Justice. Under California law, judges are required to report to the State Bar whenever a judgment in a judicial proceeding is reversed or modified due to "misconduct, incompetent representation, or willful misrepresentation of an attorney." Based upon its research over a 10-year period, the Commission concluded in 2007 that "reliance on the State Bar as the primary disciplinary authority is hampered by underreporting." *See* http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20REPORTING%20MISCONDUCT.pdf.

107 *See supra* notes 168–77 and accompanying text, Chapter 2.

108 ABA *Standards for Criminal Justice: Discovery and Trial by Jury,* 11-2.1 (3d ed., 1996).

109 There is an "expansive—and intrusive—approach to pre-trial discovery followed in most American civil cases … discovery is much more limited in criminal cases than it is under civil rules." Joseph Glannon, Civil Procedure: Examples and Explanations, 363 (Aspen Publishers, 5th ed. 2006).

Commentary—Among national bar associations, the ABA for many years has been at the forefront of educating the legal profession, the public, and policymakers about the criminal and juvenile justice systems; developing standards,[110] principles,[111] and guidelines for its improvement;[112] advocating on behalf of indigent defense; and providing technical assistance to indigent defense programs across the country.[113] In recent years, the National Association of Criminal Defense Lawyers (NACDL) also has been an important voice for indigent defense reform.[114] And, while not a bar association, the National Legal Aid and Defender Association (NLADA) has constantly developed informational materials, promulgated guidelines and standards, offered technical assistance, and lobbied for improvements.[115] Despite these vigorous national efforts, the adversary system of justice and especially the function of defense lawyers are still not always well understood or readily accepted by the public and legislators. This lack of understanding and acceptance contributes to inadequate funding of defense services, especially in comparison to the prosecution function.[116] In order to inform the public and legislators about the adversary system, including the role of defense counsel and the importance of sufficient funding, state and local bar associations need to add their voice to those of national bar associations and other organizations.

In its most recent report on indigent defense, the ABA Standing Committee on Legal Aid and Indigent Defendants urged greater involvement of state and local bar associations, as well as others, in indigent defense reform.[117] While a number of state and local bar associations have demonstrated their commitment to improving indigent defense, the Committee believes there is still much more to be done. Bar associations,

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110 *See, e.g.,* ABA Providing Defense Services, *supra* note 58, Chapter 1.

111 *See, e.g.,* ABA Ten Principles, *supra* note 67, Chapter 1.

112 *See, e.g.,* ABA Death Penalty Guidelines, *supra* note 39.

113 For more than 25 years, the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID) contracted with The Spangenberg Group to provide technical assistance to defense programs across the United States. Studies and other reports prepared by The Spangenberg Group are on SCLAID's website. *See* http://www.indigentdefense.org.

114 *See* National Association of Criminal Defense Lawyers website dealing with indigent defense matters, *available at* http://www.nacdl.org/public.nsf/DefenseUpdates/Index?OpenDocument.

115 *See* NLADA website dealing with indigent defense matters, *available at* http://www.nlada.org/Defender/Defender_NIDC/Defender_NIDC_Home.

116 *See supra* notes 70–95 and accompanying text, Chapter 2.

117 "State and local bar associations should be actively involved in evaluating and monitoring criminal and juvenile delinquency proceedings to ensure that defense counsel is provided in all cases in which the right to counsel attaches and that independent and quality representation is furnished. Bar associations should be steadfast in advocating on behalf of such defense services." ABA Gideon's Broken Promise, *supra* note 108, Chapter 2, at 44 (Recommendation 6). "In addition to state and local bar associations, many other organizations and individuals should become involved in efforts to reform indigent defense systems." *Id.* at 45 (Recommendation 7).

for example, can evaluate, monitor, and assess their respective systems of criminal and juvenile justice, issue reports, and thereby educate lawyers and the public about their jurisdiction's justice systems. If, for example, accused persons are being represented by defenders who are routinely overwhelmed with cases, this should be a matter of enormous concern to state and local bar associations. If persons are not being offered the right to counsel in compliance with constitutional requirements, state and local bar associations should speak out on behalf of those who lack legal representation. In order to do so, however, state and local bar associations need to make indigent defense a priority, devote resources to the activity, and at the very least, establish a permanent committee with responsibility for oversight of the adversary system and indigent defense.

Although it is essential that bar associations and those who provide defense services participate in efforts to achieve reform, they also may be regarded with suspicion by some persons since they are virtually certain to emphasize, among other matters, financial support for fellow lawyers. On the other hand, because judges and prosecutors have very different roles from defense counsel in the adversary system, their advocacy on behalf of indigent defense services is apt to be especially persuasive.

Recommendation 18—Criminal justice professionals, state and local bar associations, and other organizations should encourage and facilitate sustained media attention on the injustices and societal costs entailed by inadequate systems of indigent defense, as well as those systems that function effectively.

Commentary—Since media attention about the shortcomings of indigent defense can play a vital role in educating the public and promoting public support for reform, it should be encouraged and facilitated. In recent years, many compelling news articles have highlighted deficiencies in the justice system, such as those dealing with defendants wrongfully convicted, excessive caseloads of public defenders, and the routine failure of jurisdictions to implement effectively the right to counsel. As noted earlier in this report, in addition to educating the public, the media can help to pave the way for improvements.[118] Although public opinion polling suggests that the public generally supports the right to counsel,[119] history demonstrates that this is not normally enough to persuade elected officials to act. But when favorable public opinion is combined with news articles that pull back the curtain on a host of problems in the delivery of defense services, it is considerably easier for legislators to support reform measures because the public is more likely to understand the reasons for action.

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118 *See supra* notes 29–31 and accompanying text, Chapter 4.

119 *See Public Opinion Research Finds Fairness Key to Support for Indigent Defense,* Indigent Defense, Vol. 4, No. 2 (October/November 2000), *available at* http://www.nlada.org/Publications/Indigent_Defense/OctNovArticle5.

Litigation

Recommendation 19—When indigent defense systems require defense attorneys to represent more clients than they can competently represent or otherwise fail to assure legal representation in compliance with the Sixth Amendment, litigation to remedy such deficiencies should be instituted.

Commentary—Chapter 3 of this report contains a detailed analysis of the various litigation approaches to improving indigent defense that have been pursued. While there have been notable successes[120] that have brought about reforms, some lawsuits have failed completely[121] or have otherwise been unsuccessful in achieving systemic change.[122] Litigation, moreover, is time consuming, expensive (especially if pro bono counsel is unavailable), and the results are uncertain. Yet, when other options have failed to achieve necessary improvements, there may be no alternative except to institute a lawsuit since the rights of accused persons are not being protected and/or defense lawyers are unable to furnish competent representation.

In Recommendation 14, the Committee urges that "[d]efense attorneys and defender programs should … refuse to continue representation or to accept new cases for representation when faced with excessive workloads that will lead to a breach of their professional obligations." In order to implement this admonition, defenders have sometimes filed motions to withdraw from cases and/or to stop the assignment of additional cases.[123] Moreover, as noted earlier, litigation has on occasion prompted reforms, which would not have occurred except for the pressure of a lawsuit that challenged the jurisdiction's indigent defense system.[124] When the goal is broad systemic reform, Recommendation 20 addresses the timing of such litigation and the persons for whom lawsuits should be filed.

Recommendation 20—When seeking to achieve remedies that will favorably impact current and future indigent defendants, litigation should be instituted pretrial on behalf of all or a large class of indigent defendants.

Commentary—This recommendation is based upon lessons learned from the analysis of indigent defense litigation set forth in Chapter 3. If the goal is broad systemic reform, it is important that litigation "be instituted pretrial" and that it be "on behalf of all or a large class of indigent defendants." As noted earlier, a lawsuit that is brought post-conviction requires that prejudice be demonstrated, which is invariably

120 *See, e.g., supra* notes 42–58 and accompanying text, Chapter 3.
121 *See, e.g., supra* notes 64–66, 109–112 and accompanying text, Chapter 3.
122 *See, e.g., supra* notes 76–79 and accompanying text, Chapter 3.
123 *See, e.g., supra* notes 81–101 and accompanying text, Chapter 3.
124 *See, e.g., supra* note 6 and accompanying text, Chapter 3; and *supra* note 22 and accompanying text, Chapter 4.

a significant hurdle to overcome.[125] Litigation consistent with this recommendation takes considerable time to prepare and, to be successful, should be supported with ample empirical and anecdotal evidence.[126] Moreover, unless the action is on behalf of a class of indigent defendants, a court's relief is unlikely to reach many defendants.[127] Similarly, litigation that challenges the extent of attorney compensation, while it may be entirely justified, is less likely to impact other significant areas of indigent defense reform, even if it succeeds.[128]

Recommendation 21—Whenever possible, litigation should be brought by disinterested third parties, such as private law firms or public interest legal organizations willing to serve as pro bono counsel, who are experienced in litigating major, complex lawsuits and accustomed to gathering and presenting detailed factual information. Bar associations and other organizations should encourage law firms and public interest legal organizations to undertake indigent defense litigation and should recognize in appropriate ways the contributions of private counsel in seeking to improve the delivery of indigent defense services.

Commentary—Litigation dealing with issues in public defense requires expertise in civil litigation, as well as resources that public defense programs typically lack. Fortunately, some public interest organizations and private law firms have been willing to litigate a variety of indigent defense issues, such as challenges to defense delivery systems, the adequacy of compensation paid to assigned counsel, and the size of public defender caseloads.[129] Moreover, even if defender programs had the resources and expertise to pursue these kinds of lawsuits, they invariably lack sufficient time to prepare and conduct them due to their indigent defense commitments, not the least of which are their caseloads, which often is one of the main reasons that litigation is undertaken.

The Committee commends the commitment of public interest organizations and law firms to engage in pro bono indigent defense lawsuits, believing that their service is in the highest traditions of the legal profession.[130] While public recognition is undoubtedly not the motivation for private lawyers and their law firms to seek public defense improvements through litigation, it is nonetheless appropriate that their contributions be recognized by bar associations and other organizations, which may in turn, encourage others to become involved in the struggle for reform.

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125 *See supra* notes 176–77 and accompanying text, Chapter 3.

126 *See supra* notes 181–86 and accompanying text, Chapter 3.

127 *See supra* notes 173–75 and accompanying text, Chapter 3.

128 *See supra* note 174 and accompanying text, Chapter 3.

129 *See, e.g., supra* note 100, Chapter 3, which mentions private law firms that have made significant contributions in litigating indigent defense issues.

130 The ABA Model Rules recognize that the pro bono responsibility of lawyers may be discharged through "participation in activities for improving the law [and] the legal system…." ABA Model Rules, *supra* note 67, at R. 6.1(b) (3).

Recommendation 22—Defense lawyers who provide representation in appellate and post-conviction cases and organizations that advocate as amicus curiae should urge the United States Supreme Court and state Supreme Courts to adopt a test for ineffective assistance of counsel that is substantially consistent with the ethical obligation of defense counsel to render competent and diligent representation.

Commentary—In Chapter 1 of this report, we noted that the accused in our adversary system of justice is entitled under the Sixth Amendment to the effective assistance of counsel. And we also observed that, after a person has been convicted, the test for determining whether the accused was provided effective assistance is embodied in the Supreme Court's decision in *Strickland v. Washington*,[131] decided in 1984. Pursuant to *Strickland*, the question is whether counsel's representation was "within the wide range of professional assistance"[132] to be expected of a lawyer; and, if it was not, whether counsel's conduct was prejudicial to the defendant, i.e., did it lead to a result that was different than would otherwise have occurred?[133] Finally, we pointed out that, while *Strickland* is the standard for determining ineffective assistance under the Sixth Amendment, it has been widely accepted by state supreme courts in determining ineffective assistance of counsel under right-to-counsel provisions in state constitutions.[134]

Further, as we noted earlier, the *Strickland* two-pronged test for determining ineffective assistance of counsel has been harshly criticized, proven to be difficult to apply, and has led to appellate courts affirming convictions that should be unacceptable in a society that genuinely values due process of law. In addition, the *Strickland* standard has made it possible during more than three decades for states and local jurisdictions to underfund indigent defense services, as this report and many others have amply demonstrated. The Committee, therefore, calls for the *Strickland* standard to be replaced by a straightforward test: has the accused received "competent" and "diligent" representation, as required by the rules of professional conduct adopted by the legal profession?[135] When defense counsel has failed to meet this requirement, thereby

131 Strickland v. Washington, 466 U.S. 668 (1984).

132 *Strickland*, 466 U.S. at 687.

133 *See supra* notes 101–11 and accompanying text, Chapter 1.

134 *See supra* notes 126–28 and accompanying text, Chapter 1.

135 ABA Model Rules, *supra* note 67, Chapter 1, at R. 1.1, 1.3. The Constitution Project's report on death penalty representation contains a recommendation concerning use of the *Strickland* standard at capital sentencing proceedings. "Once a defendant has demonstrated that his or her counsel fell below the minimum standard of professional competence in death penalty litigation, the burden should shift to the state to demonstrate that the outcome of the sentencing hearing was not affected by the attorney's incompetence." Mandatory Justice: The Death Penalty Revisited, The Constitution Project, Rec. 3, at 7 (2005), *available at* http://www.constitutionproject.org/pdf/MandatoryJusticeRevisited.pdf.

justifying discipline under professional conduct rules, surely defendants have not received the effective assistance of counsel under the Sixth Amendment.

A requirement that defense counsel's conduct conform to the disciplinary rules of the profession is seemingly no different than what the Supreme Court called for in *Strickland*. The Court in *Strickland* asked whether counsel's performance was "within the range of professional assistance" expected of attorneys and whether "attorney performance" … was "reasonable … under prevailing professional norms."[136] At the same time, the Court cited with approval one of its prior decisions in which it held that a guilty plea could not "be attacked as based on inadequate legal advice unless counsel was not 'a reasonably *competent* attorney' and the advice was not 'within the range of *competence* demanded of attorneys in criminal cases.'"[137] The Court also spoke of the need for counsel "to bring to bear such *skill and knowledge* as will render the trial a reliable adversarial testing process."[138] "Competence" and "skill and knowledge" is the language of the rules of professional conduct.[139] However, we do propose that the prejudice prong of the *Strickland* standard be eliminated. We agree with Justice Marshall's dissent in *Strickland,* who argued that you cannot determine prejudice to the defendant because "the evidence of injury to the defendant may be missing from the record because of the incompetence of defense counsel."[140]

While the Committee appreciates that courts may be reluctant to alter the *Strickland* standard, especially since it has endured for a number of years, it is nevertheless convinced that the standard should be changed. For this reason, we call upon defense lawyers and organizations that advocate as amicus curiae to seek a new test for determining ineffective assistance of counsel. Moreover, if the *Strickland* standard were replaced with a less stringent test, there would be significant positive impact, whether the decision was rendered by the U.S. Supreme Court or by a state supreme court interpreting its state constitution. If, for example, the new test adopted by a state supreme court was consistent with this Recommendation, it would become readily apparent to the state's legislature and to others in authority that, once and for all, indigent defense must receive the essential resources in order to implement a defense system consistent with the promise of *Gideon* and the Supreme Court's other right-to-counsel decisions.

136 *Strickland,* 466 U.S. at 688.
137 *Strickland,* 466 U.S. at 687 (emphasis added).
138 *Id.* (emphasis added).
139 ABA Model Rules, *supra* note 67, Chapter 1, at R. 1.1.
140 *Strickland,* 466 U.S. at 710 (Marshall, J., dissenting).

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Appendix C: State Statutes Establishing Public Defense Programs

Alaska (ALASKA STAT. §§ 18.85.010–18.85.180 (2008))

Arizona (Ariz. Rev. Stat. Ann. §§ 41-4301–41-4302 (West Supp. 2008))

Arkansas (Public Defender Act, Ark. Code Ann. §§ 16-87-101–16-87-307 (West Supp. 2008))

California (Cal. Gov't Code §§ 15400–15404 and §§ 15420–15424 (West 1992 & Supp. 2008) (State Public Defender); §§ 68660–68666 (Habeas Corpus Resource Center))

Colorado (Colo. Rev. Stat. Ann. §§ 21-1-101–21-1-106 (West 2005))

Connecticut (Conn. Gen. Stat. §§ 51-289–51-300 (2007))

Delaware (Model Defender Act, Del. Code Ann. tit. 29, §§ 4601–4608 (West 2007))

Florida (Fla. Stat. Ann. §§ 27.50–27.562 (West Supp. 2008))

Georgia (Georgia Indigent Defense Act of 2003, Ga. Code Ann. §§ 17-12-1–17-12-80 (West Supp. 2008))

Hawaii (Haw. Rev. Stat. Ann. §§ 802-1–802-12 (LexisNexis 2007))

Idaho (State Appellate Public Defender Act, Idaho Code Ann. §§ 19-867–19-872 (West 2007))

Illinois (State Appellate Defender Act, 725 Ill. Comp. Stat. 105/1–11 (2006 & Supp. 2007))

Indiana (Ind. Code §§ 33-40-5-1–33-40-5-5 (2008))

Iowa (Iowa Code §§ 13B.1–13B.11 (2007 & Supp. 2008))

Kansas (Indigents' Defense Services Act, Kan. Stat. Ann. §§ 22-4501–22-4529 (2007))

Kentucky (Ky. Rev. Stat. Ann. §§ 31.010–31.219 (West 2006 & Supp. 2008))

Louisiana (Louisiana Public Defender Act, La. Rev. Stat. Ann. §§ 15:141–15:183 (Supp. 2009))

Maryland (Md. Code Ann., Crim. Proc. §§ 16-101–16-403 (West Supp. 2008))

Massachusetts (Mass. Gen. Laws Ann. ch. 211D, §§ 1–15 (West 2005 & Supp. 2008))

Michigan (Appellate Defender Act, Mich. Comp. Laws Ann. §§ 780.711–780.719 (West 2007))

Minnesota (Minn. Stat. §§ 611.14–611.35 (2008))

Mississippi (Mississippi Capital Defense Litigation Act, Miss. Code Ann. §§ 99-18-1–99-18-19 (2007); Mississippi Capital Post-Conviction Counsel Act, §§ 99-39-101–99-39-119; § 99-40-1 (Office of Indigent Appeals))

Missouri (Mo. Rev. Stat. §§ 600.011–600.101 (2007))

Montana (Montana Public Defender Act, Mont. Code Ann. §§ 47-1-101–47-1-216; § 2-15-1028 (Public Defender Commission) (2007))

Nebraska (Neb. Rev. Stat. §§ 29-3923–29-3933 (1995 & Supp. 2006))

New Hampshire (N.H Rev. Stat. Ann. §§ 604-B:1–8 (2001); 494:1–7 (1997))

New Jersey (N.J. Stat. Ann. §§ 2A:158A-1–2A:158A-25 (West 1985 & Supp. 2008))

New Mexico (Public Defender Act, N.M. Stat. Ann. §§ 31-15-1–31-15-12 (West 2003))

North Carolina (Indigent Defense Services Act of 2000, N.C. Gen. Stat. Ann. §§ 7A-498–7A-498.8 (2004 & Supp. 2008))

North Dakota (N.D. Cent. Code §§ 54-61-01–54-61-04 (2008))

Ohio (Ohio Rev. Code Ann. §§ 120.01–120.41 (West 2002 & Supp. 2008))

Oklahoma (Indigent Defense Act, Okla. Stat. Ann. tit. 22, §§ 1355–1369 (West 2003 & Supp. 2008))

Oregon (Or. Rev. Stat. §§ 151.101–151.505 (2007))

Rhode Island (R.I. Gen. Laws Ann. §§ 12-15-1–12-15-11 (West 2006))

South Carolina (S.C. Code Ann. §§ 17-3-5–17-3-550 (1976 & Supp. 2008))

Tennessee (Post-Conviction Defender Commission Act, Tenn. Code Ann. §§ 40-30-201–40-30-210 (West 2008))

Texas (Tex. Gov't. Code Ann. §§ 71.051–71.063 (Vernon 2005 & Supp. 2008))

Vermont (Vt. Stat. Ann. tit. 13 §§ 5201–5277 (West 2007))

Virginia (Va. Code Ann. §§ 19.2-163–19.2-163. 8 (LexisNexis 2008))

Washington (Wash. Rev. Code §§ 2.70.005–2.70.050 (2008))

West Virginia (W.Va. Code Ann. §§ 29-21-1–29-21-21 (West 2002))

Wisconsin (Wis. Stat. Ann. §§ 977.01–977.085 (West Supp. 2008))

Wyoming (Public Defender Act, Wyo. Stat. Ann. §§ 7-6-101–7-6-114 (West 2007 7 Supp. 2008))

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.

The Constitution Project

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