Summer 2010

Gideon's Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis

Heather P. Baxter
Nova Southeastern University - Shepard Broad Law Center, hbaxter@nova.edu

GIDEON'S GHOST: PROVIDING THE SIXTH AMENDMENT RIGHT TO COUNSEL IN TIMES OF BUDGETARY CRISIS

Heather Baxter, J.D.[*]

2010 MICH. ST. L. REV. 341

TABLE OF CONTENTS

---

* Assistant Professor of Law, Nova Southeastern University, Shepard Broad Law Center. I would like to first thank my incredibly supportive family for putting up with the many hours I spent locked away in my office. I also want to send a special thank you to Professor Roger Goldman, who has helped me with this Article from the beginning. Additionally, I want to recognize the faculty members at NSU who have fostered a truly supportive environment for scholarship. Specifically, I would like to say thanks to Professors Kathy Cerminara, Gail Richmond, Debra Moss Curtis, and Olympia Duhart for their help with this Article and to Professor Joel Mintz for his comments on an early draft. I would also like to say thanks to Professors Elena Langan and Camille Lamar Campbell for their friendship and guidance, and thank you to Michael Candiotti, Jeremy Singer, and Jessica Haayen for their valuable research assistance. I also truly appreciate the very helpful comments I received on this Article from Professor Christopher Slobogin and all of the attendees of the Southeastern Association of Law Schools New Scholars Panel on August 3, 2010, of which I was privileged to be a part.

ABSTRACT

This Article discusses how the budget crisis, caused by the recent economic downturn, has created a constitutional crisis with regard to the Sixth Amendment Right to Counsel. The landmark case of *Gideon v. Wainwright* required states, under the Sixth Amendment, to provide free counsel to indigent criminal defendants. However, as a result of the current financial crisis, many of those who represent the indigent have found their funding cut dramatically. Consequently, *Gideon* survives, if at all, only as a ghostly shadow prowling the halls of criminal justice throughout the country.

This Article analyzes specific budget cuts from various states and how those cuts have impacted indigent defense in this country. Further, the Article highlights recent litigation surrounding this issue from four states: Florida, New York, Michigan and Kentucky. It proposes that, while litigation may be one way to reform the system, fundamental reform is necessary in the criminal justice system. The Article offers three specific suggestions on how to bring Gideon back to life: change the tough on crime attitude to free up much needed funding; reform the overburdened misdemeanor system; and implore more prosecutorial discretion in charging crimes.

"We will not put a price tag upon constitutional rights."[1]

INTRODUCTION[2]

When Clarence Earl Gideon sat down to write a letter to the United States Supreme Court, he had no idea of the implications that would follow.[3] Mr. Gideon was merely upset because he had asked for a lawyer to represent him in his criminal trial, and the judge had refused his request.[4] That letter, when read by the Justices, began one of the most storied cases in Supreme Court history. In this landmark case, the United States Supreme Court announced that the states were required to provide free counsel to indigent criminal defendants.[5]

Gideon was a tall order to fill when it was announced, and recent budgetary crises have only made the situation worse.[6] Traditionally overworked and underpaid, public defenders have been the victims of steep budget cuts with the onslaught of the financial crisis, pushing their offices to the breaking point.[7] Caught between ethical obligations to their clients and the courts, many public defender offices have filed suit, asking for relief.[8] The real victims in this struggle, however, are indigent and unrepresented defendants.[9]

---

1. Smith v. Hooey, 393 U.S. 374, 380, n.11 (1969) (quoting State *ex rel.* Fredenberg v. Byrne, 123 N.W.2d 305, 310 (Wis. 1963)).

2. Many of the citations to various studies and research regarding the right to counsel were originally derived from THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), *available at* http://www.constitutionproject.org/manage/file/139.pdf [hereinafter JUSTICE DENIED].

3. *See* ANTHONY LEWIS, GIDEON'S TRUMPET 7-10 (1964).

4. Gideon v. Wainwright, 372 U.S. 335 (1963).

5. *Id.* at 344. Specifically, the Fourteenth Amendment Due Process clause required this result. *Id.* at 342.

6. *See infra* Section IV.A.

7. Bill Rankin, *Public Defender System in Crisis Again*, THE ATLANTA JOURNAL-CONSTITUTION, Nov. 16, 2007, *available at* http://www.nacdl.org/public.nsf/defenseupdates/georgia165?opendocument; *see also,* Renee Michelle Harris, *Public Defender's Office at "Breaking Point,"* SOUTH FLORIDA TIMES, Aug. 2, 2010, *available at* http://www.sfltimes.com/index2.php?option=com_content&do_pdf=1&id=2361.

8. *See* Vidhya K. Reddy, *Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing the* Gideon *Right to Counsel* (Wash. Univ. Sch. of Law, Working Paper No. 1279185, 2007), *available at* http://ssrn.com/abstract=1279185.

9. *See* Sonia Y. Lee, *OC's PD's Feeling The Squeeze—The Right To Counsel: In Light of Budget Cuts, Can the Orange County Office of the Public Defender Provide Effective Assistance of Counsel?*, 29 LOY. L.A. L. REV. 1895, 1897(1996) ("This lack of funding for public defenders is directly responsible for the perceived dumping problem: the less money supplied to the office, the less investigative and medical expert support, the fewer public defenders employed, and hence the fewer public defenders available for indigent defense. Consequently, indigent defendants receive inadequate assistance of counsel."); *see also* Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L.

This Article analyzes the current constitutional crisis of the right to counsel and how the budget crisis has exacerbated the problem. The Article discusses some specific cuts and how they have affected the right to counsel. The Article also discusses litigation in four states that has been brought to help relieve the problems. It proposes that, while litigation may be one way to reform the system, fundamental reform is necessary in the criminal justice system if any real changes are to be made. The Article recommends three specific suggestions that will generate more money for states and open up more time for those who represent the indigent defendants: abandoning the tough on crime mentality, reforming the misdemeanor system, and encouraging more prosecutorial discretion.

I. HOW *GIDEON* CAME TO BE

The seeds of *Gideon* began to sprout when the United States Supreme Court announced in *Powell v. Alabama*[10] that a state must appoint counsel, free of charge, to an indigent defendant in a capital case.[11] The Court seemed poised to continue down that path until it came to an abrupt halt in *Betts v. Brady*.[12] In this puzzling opinion, the Court refused to extend the *Powell* decision, holding that the states were not required to provide counsel in any non-capital case because it would be too burdensome for the states.[13] The Court conceded that a trial conducted without counsel may indeed be unfair, but it concluded there should not be a blanket requirement of counsel because not every charge necessitated representation by an attorney.[14] In fact, the Court was fearful that requiring the States to provide counsel would lead the country down a slippery slope in which counsel would have to be provided in "[c]harges of small crimes" and even "civil cases involving property."[15] In essence, the *Betts* majority opined that "counsel [was] not a fundamental right, essential to a fair trial."[16] In dissent, Justice Black forcefully exclaimed that "[a] practice cannot be reconciled with 'common and

---

REV. 1433, 1437 (1999) (lack of adequate funding for indigent defense voids the purpose of the adversarial system); Robert P. Mosteller, *Protecting the Innocent: Part of the Solution for Inadequate Funding for Defenders, Not a Panacea for Targeting Justice*, 75 MO. L. REV. 931, 933 (2010) (arguing that the systemic problem of reduction in funds decreases the possibility of protecting the innocent from wrongful conviction).

10. 287 U.S. 45 (1932).

11. *Id.* at 71.

12. 316 U.S. 455 (1942). Betts raised the very specific question of whether the states should be required to provide free counsel. *See id.* at 462. This was a controversial topic at the time because it raised a federalism and states' rights issue.

13. *See id.* at 472-73.

14. *Id.* at 473.

15. *Id.*

16. *Id.* at 471.

fundamental ideas of fairness and right,' which subjects innocent men to increased dangers of conviction merely because of their poverty."[17]

A. The Time for Change Had Come

In 1963, as civil rights leaders marched on Washington, the Supreme Court announced one of its most far-reaching opinions. *Gideon v. Wainwright*[18] changed the landscape of the American justice system, announcing that the Sixth Amendment right to counsel was a fundamental right, and the states were required, under the due process clause, to provide free counsel to all indigent defendants.[19] The Court explicitly overruled *Betts*, and Justice Black was able to turn his *Betts* dissent into a unanimous majority opinion.[20] The Court remanded the case to the Florida trial court, where Mr. Gideon was provided with an attorney.[21] Interestingly enough, Mr. Gideon was acquitted of the charges during his second trial.[22] This outcome provided a powerful illustration of the difference between having an attorney—and not having an attorney—in a criminal case.

As time went on, the Court gradually expanded the right to free counsel to any defendant who is actually imprisoned, including those charged with misdemeanors.[23] The Court has made it clear that actual imprisonment is the line drawn in the sand, not a mere *possibility* of imprisonment.[24] Juveniles are also entitled to counsel,[25] and defendants appealing their cases

17. *Id.* at 476 (Black, J., dissenting).

18. 372 U.S. 335 (1963).

19. *Id.* at 343-44. The Court also held that certain fundamental rights, safeguarded by the first eight amendments against federal action were also protected against state action by the due process of law clause of the Fourteenth Amendment. *Id.* at 343.

20. *Id.* at 342 ("We think the Court in *Betts* was wrong . . . in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.").

21. *See* LEWIS, *supra* note 3, at 223-38. The local attorney appointed to represent Gideon was able to attack the star witness for the prosecution and provide reasonable doubt for the jury. *Id.* at 237-38.

22. *Id.*; Gideon v. Wainwright 153 So. 2d 299, 300 (Fla. 1963).

23. *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial").

24. *See* Scott v. Illinois, 440 U.S. 367, 373 (1979). *But see* Alabama v. Shelton, 535 U.S. 654, 674 (2002) (holding that counsel must be provided in a case where a suspended sentence is imposed). In *Shelton*, the Court reasoned that if a prison term is activated by a probation violation, the time being served in prison actually goes to the original offense, not the probation violation. Therefore, the defendant should have been given counsel in the original proceeding related to the original offense. *Id.* at 662.

25. *In re* Gault, 387 U.S. 1, 38-39 (1967). This decision established, under the Fourteenth Amendment, that "[a]s a component part of a fair hearing required by due process . . . notice of the right to counsel should be required at all [juvenile delinquency proceedings] and counsel provided upon request when the family is financially unable to employ counsel." *Id.* at 39.

are entitled to an attorney for their first appeal as a matter of right.[26] Of course, these are the minimum guarantees required; each state is free to go above and beyond the national standard in providing counsel—and many do.[27]

B. Any Warm Body Will Do

Once the right to counsel was established, the logical question that followed was what kind of counsel is one entitled to? Will any warm body do? Can an indigent person pick his or her counsel?[28] The Court began to address these questions in *McMann v. Richardson*,[29] when it held that the right to counsel means the right to the "*effective* assistance of counsel."[30] In many ways, however, that statement just raised more questions. What does effective assistance of counsel mean? How bad does the attorney's performance have to be before it is considered ineffective?

The Court attempted to clarify those questions when it announced *Strickland v. Washington*.[31] In what has come to be known as a two-prong test, *Strickland* announced that a defendant must show: first, that his trial attorney's performance was deficient;[32] and second, that that performance prejudiced the outcome of the trial.[33] When evaluating the first prong regarding deficient performance, a "defendant must show that counsel's representation fell below an objective standard of reasonableness."[34] The Court made it clear that this was not an easy standard to meet by granting "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[35] The defendant must show that coun-

---

26. Douglas v. California, 372 U.S. 353, 355-57 (1963) (holding equal protection requires indigent defendants to be given the benefit of counsel on their first matter of right appeal). Interestingly enough, the *Douglas* decision was handed down the same day as *Gideon*. *Id.*; *Gideon*, 372 U.S. 335.

27. For example, in Florida, like many other states, the rules of Criminal Procedure require that counsel be provided in all cases where there is a *possibility* of imprisonment, not merely actual imprisonment. FLA. R. CRIM. P. 3.111(b)(1).

28. Over the years, the courts have easily dispelled the idea that you may be able to choose your counsel. *See, e.g.*, Wheat v. United States, 486 U.S. 153, 159 (1988) ("[W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.") (citation omitted). Interestingly enough, Gideon did just that at retrial. Gideon v. Wainwright, 153 So. 2d 299, 300 (Fla. 1963).

29. 397 U.S. 759 (1970).

30. *Id.* at 771 n.14 (emphasis added).

31. 466 U.S. 668 (1984).

32. *Id.* at 688.

33. *Id.* at 692.

34. *Id.* at 688.

35. *Id.* at 689.

sel's actions were not mere strategy;[36] and over the years, courts have dismissed many ineffective assistance claims on the basis that the counsel's questioned action should be considered trial strategy.[37]

Furthermore, even if the defendant is lucky enough to prove the first prong, he must then overcome a second hurdle by establishing prejudice.[38] Even if the error was blatant and unreasonable, if there was no effect on the outcome of the trial, then the ineffective assistance claim must fail.[39] The defendant has the ultimate burden of showing that there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[40] This is a difficult standard to prove. The prejudicial standard has proven so insurmountable, in fact, that a sleeping counsel may not be enough to overcome it.[41] It has been argued that the *Strickland* opinion has done more to undermine *Gideon* than anything.[42] With such a hard burden to overcome in proving ineffective assis-

---

36. *Id.* at 689-90 (explaining that "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way" (citing Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 343 (1983))).

37. Justice Marshall predicted this possibility when *Strickland* was announced. *Id.* at 715 (Marshall, J., dissenting) ("Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer."); *see also* Klein, *supra* note 9, at 1456-59 (explaining that courts are willing to say that most any decision by an attorney is "strategic," thereby defeating the first prong of *Strickland*).

38. *Strickland*, 466 U.S. at 692.

39. *Id.* at 694.

40. *Id.*

41. *See* Burdine v. Johnson, 262 F.3d 336, 382 n.28 (5th Cir. 2001) (holding that the court does not presume prejudice from the mere fact that counsel was sleeping, but must apply test); *see also* McFarland v. Texas, 519 U.S. 1119 (1997) (denying review of the defendant's capital conviction even though his attorney was sleeping at trial); Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993) (rejecting the argument that counsel was per se ineffective because of the alcohol abuse and that the defendant had failed to show that counsel was impaired during trial due to alcohol abuse); People v. Garrison, 765 P.2d 419, 440 (Cal. 1989) (counsel not ineffective even though he was notorious alcoholic who was arrested on his way to hearing); Jeffery L. Kirchmeier, *Drink, Drugs, And Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 445-60 (1996). *But see* Tippins v. Walker, 77 F.3d 682, 686 (2d Cir. 1996) ("Prejudice is inherent [in this case] because unconscious or sleeping counsel is equivalent to no counsel at all." (quoting Javor v. United States, 724 F.2d 831, 834 (9th Cir. 1984))); James M. Donovan, Burdine v. Johnson—*To Sleep, Perchance to Get a New Trial: Presumed Prejudice Arising from Sleeping Counsel*, 47 LOY. L. REV. 1585, 1589 (2001) (discussing all cases regarding sleeping counsel).

42. *See* Klein, *supra* note 9, at 1446, 1467 (discussing how the *Strickland* standard has damaged the right to counsel); *see also*, Russell L. Weaver, *The Perils of Being Poor: Indigent Defense and Effective Assistance*, 42 BRANDEIS L.J. 435, 441 (2004) (arguing that

tance of counsel, the courts have created an "any warm body will do" attitude toward the representation of criminal defendants.[43] Where an indigent defendant's counsel does next to nothing, the *Strickland* standard does little to help him, a result that seems squarely inconsistent with the intent of the *Gideon* decision.[44]

II. THE IMPLEMENTATION OF *GIDEON* AND ITS FAILURE FROM THE START

Though the state of indigent defense is arguably worse than ever, the situation described in this Article is scarcely new. The indigent defense system has practically been in crisis since it began.[45] Many studies conducted before the publication of *Justice Denied*[46] also came to the same conclusion that the state of indigent defense was woefully inadequate.[47] Defenders have traditionally faced funding problems, as well as public image issues.

A. Different Models for Providing Indigent Defense

To fully comprehend the issues faced by indigent defense providers, it is necessary to understand the different indigent defense models employed throughout the United States. There are three general models: 1) public defender systems; 2) assigned counsel; and 3) contract counsel.[48] In a public defender model, there are essentially firms of attorneys whose sole practice focuses on defending the indigent.[49] These firms are funded by either the state or the county.[50] In contrast, assigned counsel models employ private attorneys on a case by case basis, and the attorneys are either paid by

---

the *Strickland* standard fails to insure more than minimum levels of competency in attorneys).

43. *See* Klein, *supra* note 9, at 1467.

44. *See* Weaver, *supra* note 42, at 443-45 (explaining that when counsel fails to act, he leaves no record of error, and therefore the *Strickland* standard is not met).

45. *See, e.g.*, A SPECIAL COMM. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y.C. & THE NAT'L LEGAL AID & DEFENDER ASS'N, EQUAL JUSTICE FOR THE ACCUSED 5, 40-45 (1959) [hereinafter EQUAL JUSTICE FOR THE ACCUSED]; LEE SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT 7-10 (1965).

46. JUSTICE DENIED, *supra* note 2.

47. *See, e.g.*, SILVERSTEIN, *supra* note 45, which actually began before *Gideon* was announced, and Robert B. von Mehren, *Introduction* to EQUAL JUSTICE FOR THE ACCUSED, *supra* note 45, at 13-17, which was a product of a special committee of the Association of The Bar of the City of New York and the National Legal Aid and Defender Association and completed in 1959.

48. JUSTICE DENIED, *supra* note 2, at 53.

49. *Id.*

50. *Id.* at 54.

the hour or by the case.[51] Additionally, in states with a public defender model, private attorneys are also sometimes used as "conflict counsel,"[52] i.e., in a situation where the public defender's office cannot represent a defendant because it would be a conflict of interest, the state will appoint a private attorney.[53] Finally, in what might be considered a hybrid of the public defender and assigned counsel models, some states employ a contract counsel approach.[54] In those states, attorneys are contracted to handle a certain number of cases per year, and are paid either a general stipend or on a case-by-case basis by the state.[55]

B. Funding

Historically, the biggest obstacle faced by providers of indigent representation has been a lack of money.[56] When *Gideon* was decided, there were about 150,000 defendants charged with felonies who needed representation.[57] One study estimated the cost for such representation at $25 million.[58] Gradually, after *Gideon*, funding for indigent representation did increase, slightly, but there was still not a large amount of money spent in this area.[59] In 1985, "criminal justice activities" were "less than 3% of all government spending,"[60] and only about 1.5% of that 3% was spent on indigent defense.[61] Put another way, states spent, on average, less than one half of

---

51. *Id.* at 53.

52. *Id.* Conflict counsel is assigned when the public defender's office may have a conflict in representing the defendant, for example if one of the co-defendants is already represented by the public defender's office. *See, e.g.*, Weis v. State, 694 S.E.2d 350 (Ga. 2010).

53. JUSTICE DENIED, *supra* note 2, at 53. In Florida, the state has created a separate system of public defenders that are known as Criminal Conflict and Civil Regional Counsel. The state found it would be more cost efficient to employ full-time conflict attorneys, rather than appoint them on a contract basis. There have been challenges to this system, mostly by the private bar, who are, coincidentally, the attorneys no longer getting appointments from the judges. *See* Crist v. Fla. Ass'n of Criminal Def. Lawyers, 978 So. 2d 134 (Fla. 2008). The Florida Supreme Court found this legislative creation was not unconstitutional because these Conflict Counsel are not public defenders, and therefore do not need to be elected under the Florida Constitution. *Id.* at 148.

54. JUSTICE DENIED, *supra* note 2, at 53.

55. *Id.*

56. *Id.* at 50.

57. *Id.*

58. *Id.* at 51.

59. *Id.* at 52.

60. *Id.*; *see* RICHARD KLEIN & ROBERT SPANGENBERG, THE INDIGENT DEFENSE CRISIS (1993). This report was prepared by Professor Klein and Mr. Spangenberg for the American Bar Association Section of Criminal Justice Ad Hoc Committee on the Indigent Defense Crisis.

61. JUSTICE DENIED, *supra* note 2, at 52.

one percent of their budgets on indigent defense. By 1990, that number had not increased.[62]

Further exacerbating the problem is the issue of who actually funds the offices: the states or the counties.[63] Most studies have found that indigent defense funding is much more effective when it comes primarily from the state.[64] This prevents inequities in the different jurisdictions that can occur from the larger population concentrations in bigger cities.[65] Fortunately, state funding—versus local funding—of indigent defense is on the rise.[66] *Un*fortunately, state budgets are facing numerous cuts, as is explained further in this Article.

C. Not Taken Seriously

Another problem encountered by those who provide indigent representation is a lack of respect from clients and peers. Many clients do not take their attorneys seriously, writing them off as brand-new attorneys, ignorant at worst and inexperienced at best. These attorneys are considered the stepchildren[67] of the justice system and are looked upon as biding their time

---

62. KLEIN & SPANGENBERG, *supra* note 60, at 1. Most of the justice system budget seems to go to the police (42.8%) and corrections (33.6%). *Id.* Ironically, attorneys who represent capital defendants are some of the lowest paid attorneys. *Id.* at 7. One study concluded that counsel providing representation to capital clients in Virginia were compensated at an average rate of $13.19 an hour, after taking into account all expenses. *Id.*

63. JUSTICE DENIED, *supra* note 2, at 54. Most states now fund these offices, with counties supplementing the budget. *Id.* at 53. The state fully funds the cost of its indigent defense in twenty-eight states: Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, Wyoming. *Id.* at 54. More than 50% of the funding in Kansas, Louisiana, Oklahoma and South Carolina comes from the state—with the slack being taken up by the individual county. *Id.* The county funds more than 50% of the costs for indigent defense in 16 states: Alabama, Arizona, California, Georgia, Idaho, Illinois, Indiana, Michigan, Mississippi, Nebraska, Nevada, New York, Ohio, South Dakota, Texas, and Washington. *Id.* Pennsylvania and Utah are the only two states where all the funding for indigent defense comes from the individual county. *Id.* at 53. State funding has been found to be more effective in most studies. *Id.* at 54-55.

64. *Id.*

65. *Id.*

66. *Id.*

67. SILVERSTEIN, *supra* note 45, at 149; *see also* Reddy, *supra* note 8, at 4 n.19 (discussing how the attorneys that were appointed to indigent defendants "tended to be young, inexperienced, and had few resources with which to defend. Moreover, the often improvised system of appointing counsel resulted in little scrutiny of qualifications. In fact, appointments often depended on which attorneys happened to be present at the courthouse when a prisoner was arraigned."); Nancy Albert-Goldberg & Marshall J. Hartman, *The Public Defender In America*, *in* THE DEFENSE COUNSEL 67, 80 (William F. McDonald ed., 1983) ("Perhaps in part due to popular sentiment, legal defense systems have long been the step-

until they can get a "real job."[68] Furthermore, even other attorneys scorn public defenders, thinking of them as doing the job somebody else has to do. Unfortunately, some of these accusations have some truth to them. The low salaries do tend to attract attorneys right out of law school, eager to get "trial experience."[69] Further, there is a high turnover rate in most public defender offices.[70] However, not all of those who represent the indigent follow that stereotype. There are many committed public servants who spend decades representing indigent defendants. Many have a passion for their work and for the notion that all citizens have a right to counsel.[71] As the following section describes, however, even those dedicated, experienced attorneys face formidable obstacles.

III. *GIDEON* IN TODAY'S WORLD

Jay Kolsky is an assistant public defender for the Eleventh Judicial Circuit of Florida, which handles the state criminal cases in Miami-Dade County.[72] Mr. Kolsky has thirty-eight years of experience as an attorney, having worked as a prosecutor and a private criminal defense attorney.[73] In 2008-09 fiscal year, Mr. Kolsky had a total caseload of 778 cases.[74] Mr. Kolsky usually becomes aware of a new case assignment when the client's arraignment is set, which is usually about three weeks after the defendant has been arrested.[75] Because arraignment is the first time Mr. Kolsky has

---

child of the criminal justice system in America; they have been said to suffer from financial anemia.").

68. SILVERSTEIN, *supra* note 45, at 149.

69. Klein, *supra* note 9, at 1474 (discussing how the low salary and high caseloads of public defenders make it difficult to attract quality attorneys).

70. *See, e.g.*, Aaron Bailey, *High Turnover Plagues Public Defenders: Increasing Caseloads, Student Loan Debt Put Some Missouri Lawyers in a Bind*, ST. JOSEPH NEWS-PRESS, July 9 2007, *available at* http://www.nacdl.org/public.nsf/DefenseUp dates/Michigan036 (discussing how one Missouri Public Defender's office has close to a 20% turnover rate).

71. *See generally* MOSTELLER, *supra* note 9 (discussing the author's life at the public defender's office and his experience with the Innocence project).

72. Affidavit of Jay Kolsky at 1, State v. Bowens, No. F09-019364 (11th Fla. Cir. Ct. Aug. 3, 2009), *available at* http://www.pdmiami.com/ExcessiveWork load/Mo_to_Withdraw_Exhibit_A.pdf [hereinafter Affidavit of Jay Kolsky]. Mr. Kolsky filed this affidavit in support of his Motion to Withdraw, which is the subject of litigation discussed *infra*, section V.A. Public defenders in PD-11 represent the indigent defendants in the state courts located in Miami-Dade County, Florida.

73. *Id.* at 1.

74. Assistant Public Defender's Motion to Withdraw and to Declare Section 27.5303(1)(d), Florida Statutes, Unconstitutional at 4, State v. Bowens, No. F09-019364 (11th Fla. Cir. Ct. Aug. 3, 2009) *available at* http://www.pdmiami.com/ExcessiveWork load/Filed_08-03-09_Motion_to_Withdraw.pdf [hereinafter Assistant Public Defender's Motion to Withdraw].

75. *Id.*

received the case, if the State makes a plea offer to his client at arraignment, Mr. Kolsky cannot intelligently offer any legal advice, other than the general procedures in Florida criminal courts.[76] Additionally, Mr. Kolsky cannot even discuss these options and procedures in private with his client, as most of these conversations occur while his client is "handcuffed to other defendants in the jury box."[77]

If a plea offer is not accepted at arraignment, Mr. Kolsky's cursory review of the file usually does not begin until at least four to five weeks after arraignment.[78] Mr. Kolsky gives up his lunch hour so that he can visit his clients who are in custody.[79] Many times, this is the only interview with his client before the case is resolved, either by a plea or going to trial.[80] Because Mr. Kolsky has to give priority to his in-custody clients, he rarely gets to interview his out-of-custody clients in person.[81] He almost never sets a deposition in an out-of-custody case because it would mean delaying a deposition in one of his in-custody clients' cases.[82]

Mr. Kolsky seldom visits a crime scene, and he files form motions on behalf of his clients because he does not have time to research the specifics of his clients' cases. He rarely submits requests for special jury instructions in writing. He makes every attempt not to file continuances in his cases because, not only does it waive his client's right to a speedy trial, it also prevents him from moving cases off his pending case list.[83] If one of his out-of-custody client's case goes to trial, Mr. Kolsky's sole trial preparation is "reading the [arrest affidavit], perhaps an offense incident report, and, at best, a brief conversation with the client, often in the hallway outside the courtroom."[84] If the client is found guilty, Mr. Kolsky almost never has the time to prepare a mitigation package to present to court at sentencing.[85]

Mr. Kolsky's situation is just an example of what many of those who represent the indigent are currently facing. Due to budget cuts, many Public Defenders' offices have been forced to furlough[86] attorneys, if not outright lay them off.[87] And the lucky ones who get to keep their jobs are thus faced

---

76. Affidavit of Jay Kolsky, *supra* note 72, at 3.
77. *Id.*
78. *Id.* at 4.
79. *Id.*
80. *Id.* at 4-5.
81. *Id.* at 5.
82. *Id.*
83. *Id.* at 6.
84. *Id.* at 7.
85. *Id.*
86. *See* Lee, *supra* note 9, at 1915-16 (discussing the bankruptcy of Orange County, California, and how that caused many attorneys to leave and then the lack of funds prevented new hires).
87. *Lawyers for the Poor Facing Layoffs, As Hard Times Hit Courts, Advocates Say Cuts Could Cost More in Long Run*, ASSOCIATED PRESS, June 15, 2009, *available at*

with overflowing case loads.[88] This lack of funding is even more critical when the cuts are not doled out proportionately, and the prosecutors' offices do not feel the cuts as deeply.[89] Additionally, many attorneys find themselves facing situations that make it very difficult to comply with the Model Rules of Professional Conduct.[90] This section will address each of these issues in turn.

A. Funding Has Gone the Wrong Way

As discussed above, funding has always been a problem for indigent defense, but today the problem has reached epic proportions. With the recent recession, many legislatures have been forced to cut billions of dollars from their budgets.[91] For the fiscal year beginning July 1, 2010, forty-six states will face budget shortfalls.[92] To make up these shortfalls, states have slashed funding to continue to operate; and when states go chopping, those who represent indigent defendants are usually at the top of the chopping block.

For example, in Georgia's Northern Judicial Circuit, which comprises five counties, the conflict counsel's budget was reduced from $129,166.00

---

http://rss.msnbc.msn.com/id/31374504/ ("Lawyers for the poor, who say they already are stretched to the breaking point by huge caseloads and dwindling staff, face layoffs across the country as local governments slash spending in these hard economic times.").

88. Jay Weiner, *A Stark Contrast in Courts: Upstairs, The Pricey Lawyer-filled Coleman-Franken Trial; Downstairs, an Overworked Public Defender*, MINN. POST, Feb. 19 2009, http://www.minnpost.com/stories/2009/02/19/6836/a_stark_contrast_in_courts_upstairs_the_pricey_lawyer-filled_coleman-franken_trial_downstairs_an_overworked_public_defender.

89. *See* JUSTICE DENIED, *supra* note 2, at 61. This disproportionate funding has become a real problem in many states and gives—at least the perception of—an unfair advantage to the prosecutors. *But see,* Missy Diaz, *Salaries Don't do Justice, State Measure Would Help Prosecutors, Public Defenders Make Ends Meet,* S. FLA. SUN-SENTINEL, Oct. 13, 2006, at C2 (discussing how both the public defenders *and* prosecutors lack funding in Florida).

90. The amount of litigation regarding the overload of cases affect on moral and ethical obligations can be found in almost every state, some of which will be discussed in more detail *infra* Section IV. This Article does not purport to cover all of the litigation, and will only show some as examples. *See, e.g.*, Public Defender v. Florida, 34 So. 3d 2 (Fla. 2010); Weis v. State, 694 S.E.2d 350 (Ga. 2010) (concerning habeas petition in death penalty case for ineffective counsel); Duncan v. Michigan, 780 N.W.2d 843 (Mich. 2010); Hurrell-Harring v. New York, 883 N.Y.S.2d 349 (N.Y. App. Div. 2009). For more cases see Reddy, *supra* note 8, at 38-54 (cataloging all recent relevant cases in an Appendix).

91. ELIZABETH MCNICHOL ET. AL., CTR. ON BUDGET AND POLICY PRIORITIES, STATES CONTINUE TO FEEL RECESSION'S IMPACT (2010), *available at* http://www.cbpp.org/files/9-8-08sfp.pdf. According to this study, the fiscal year 2011 gaps total $125 billion. The authors believe this will likely grow and could reach $140 billion for fiscal year 2012. *See id.*

92. *Id.*

to a mere $37,152.00 in 2009, a more than 70% decrease in funding.[93] Further, the budget cuts in Georgia forced the Georgia Public Defender Standards Council to lay off forty-one employees.[94] In Kentucky, the legislature cut $2.3 million from the indigent defense budget in 2008,[95] and in Minnesota, the legislature cut $4 million from the Board of Public Defense's Budget in 2009.[96]

Florida's indigent defense systems have seen particularly steep budget cuts.[97] In Florida's Ninth Judicial Circuit alone, which includes Orange and Osceola Counties,[98] the criminal justice system experienced budget reductions of $3 million in 2008.[99] In Miami-Dade County, the Public Defender of the Eleventh Circuit saw a decrease of over $1.5 million from its 2007-08 to its 2008-09 budget.[100] In two years, Miami-Dade had a 14% reduction in funds.[101]

When politicians make decisions about whether to cut teachers or indigent defense, political consideration dictate their choice.[102] The public is much more likely to support a politician when that politician can tell the public that he or she is avoiding cuts to emergency workers by taking money away from criminals. Conversely, a politician is much less likely to suffer any political consequences for cutting the public defender's budget.

---

93. Bill Rankin, *Lawyerless Defendants File Lawsuit*, ATLANTA J. CONST., Apr. 8, 2009, *available at* http://www.ajc.com/services/content/printedition/2009/04/08/defender0408.html. The lawsuit explained here will be discussed *infra*.

94. JUSTICE DENIED, *supra* note 2, at 60.

95. *Id.*

96. *Id.*

97. Carlos J. Martinez, *Overview of Public Defender's Litigation to Protect Individuals' Right to Counsel*, U.S. DEPT. OF JUSTICE, NAT'L SYMPOSIUM ON INDIGENT DEFENSE: LOOKING BACK, LOOKING FORWARD 2000-2010 (Feb. 18-19 2010) [hereinafter OVERVIEW OF FLORIDA] (discussing the "$3.8 million (14%) in budget cuts to PD-11 the last 2 years").

98. The city of Orlando, Florida is located in Orange County.

99. JUSTICE DENIED, *supra* note 2, at 60. This included both the public defender and the prosecutor. *Id.*

100. *See* Response to Requests for Information in Court's February 26, 2009 Order at 6, No. 3D08-2272 & 3D08-2537, *available* at http://www.pdmiami.com/ExcessiveWorkload/Response_to_Courts_Request_for_Information.pdf.

101. OVERVIEW OF FLORIDA, *supra* note 97.

102. Lee, *supra* note 9, at 1923-24 & n.201 ("Politicians receive 'Brownie points' for making and enforcing laws and for adding more police, but none for funding the defense. This imbalance simultaneously slows down the system and fuels appeals based upon the argument of ineffective assistance of counsel." (quoting Rhonda Bodfield, *Help Sought for Public Defenders*, TUCSON CITIZEN, Jan. 4, 1996, at 1C)).

B. Overwhelming Number of Cases[103]

Another problem facing indigent defense attorneys is the increasing number of cases versus the decreasing number of attorneys representing the indigent, which is also a result of budget cuts.[104] A large cause of this increased workload is the cutting of positions and failure of the state or county to fund contracts.[105] The National Advisory Commission on Criminal Justice Standards and Goals has stated that the maximum caseload for trial level public defenders should be no more than 150 felony cases per year, 200 juvenile cases per year, or 400 misdemeanor cases per year.[106] The rules go on to say that "[m]ixed caseloads exceeding 363 cases per year have been found to be excessive."[107] In a 2007 study, the Department of Justice found that more than 60% of state public defense programs and county offices "exceeded the nationally recommended felony caseload standard."[108]

---

103. This Article examines only a snapshot of the overburdened public defenders' offices across the country and does not purport to discuss all of the offices in crisis.

104. Klein, *supra* note 9, at 1474. Professor Klein posits that the decreasing number of those who are willing to represent the indigent is a direct result of *Strickland*. *See id.* at 1474-75. Although Justice O'Connor's opinion was an attempt to protect those attorneys, says Klein, it actually drives people away from indigent defense. *Id.* If the opinion had created a higher standard, it would have also "required more funding for the additional time the assigned counsel would have had to devote to each case. The work, therefore, would become more attractive." *Id.* at 1475 (emphasis omitted). Professor Klein goes on to say that "attorneys who are expected to work so few hours on a case lose respect for themselves and their work, and fewer new lawyers wish to join their ranks." *Id.* It must also be noted that the economy itself has put defendants in a worse financial state, enabling more to qualify as indigent, which has also increased the caseloads of public defenders. *See* Monica Davey, *In Missouri, State Budget Problems Take Toll on Lawyers for the Indigent*, N.Y. TIMES, Sept. 10, 2010, at A15.

105. Kate Leckie, *Court Ruling to Increase Public Defenders' Caseload*, FREDERICK NEWS POST, May 29, 2010, *available at* http://www.fredericknewspost.com /sections/news/display.htm?storyid=105545 (quoting Maryland Public Defender Paul B. DeWolfe, Jr.: "Our caseloads are increasing as budgets are being cut. But we'll find a way to find a resolution. We'll all adjust as best as we can.").

106. NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, TASK FORCE ON COURTS, CHAPTER 13, THE DEFENSE (1973), *available at* http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense. The writers of JUSTICE DENIED caution the use of these numbers because there was never any empirical evidence shown why these numbers were chosen and the standards were written over thirty-five years ago. JUSTICE DENIED, *supra* note 2, at 66. The National Right to Counsel Committee posits that these numbers are actually very large because the criminal law has become much more complicated and time consuming. *Id.*

107. John Delaney, *DPA Budget Cuts*, KY. BENCH & B., Mar. 2009, at 13.

108. BUREAU OF JUST. STAT., DEP'T OF JUSTICE, CENSUS OF PUB. DEFENDERS OFFICES (2007), *available at* http://www.ojp.usdoj.gov/BJA/topics/Plenary4/Workshops/Workshop4F/D_Banks1-BJS_IndigentDef-CompatibilityMode.pdf.

To point out some specific examples, attorneys who work for the Department of Public Advocacy in Kentucky are facing caseloads close to 40% above the national standards.[109] Even though the number of defendants has risen dramatically in the last decade, the number of attorneys has not.[110] The National Association of Criminal Defense published a report showing that the number of misdemeanor cases has increased from five million cases in 1972, to over 10.2 million in 2006, while the number of public defense attorneys overall has decreased.[111] In Atlanta, for example, the Atlanta City Public Defender Office had twenty lawyers in 2007. Those twenty lawyers, who handled the "low level city court cases," had a caseload of about 21,000 cases.[112] This averages out to 1,050 cases per attorney.[113] Budget cuts hit that office hard, and the director had to lay off six lawyers. Additionally, four other attorneys resigned, so the director was left with ten attorneys to handle what she estimated would be about 24,000 cases that next year.[114] This equated to "2,400 per attorney, or six times the national standards."[115] And in Florida, one assistant public defender (APD) was assigned a total of 778 cases for the fiscal year of 2008-09.[116] According to his calculations, this allowed him a mere three hours a year to spend on each case.[117]

In Michigan, where funding of its indigent defense ranks forty-fourth out of the fifty states,[118] it was reported that some contract attorneys had an

---

109. Delaney, *supra* note 107. In the Kentucky DPA office, the caseload per attorney averaged 544 cases in Fiscal Year 2008. *Id.* at 14. This office is facing even more budget cuts, which will raise the caseload count even further.

110. In 2000, the Kentucky DPA handled 97,818 cases. In the fiscal year 2007, that number grew to 148,518, a more than 50% increase. *See* Petition for Declaratory Judgment at 11, Lewis v. Hollenbach, *available at* http://www.clearinghouse.net/chDocs/public/PD-KY-0001-0001.pdf.

111. ROBERT C. BORUCHOWITZ, ET. AL, NAT'L ASS'N OF CRIM. DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S MISDEMEANOR COURT 11 (Apr. 2009), *available at* http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf [hereinafter MINOR CRIMES, MASSIVE WASTE].

112. *Id.* at 27.

113. *Id.*

114. *Id.*

115. *Id.*

116. *See* Assistant Public Defender's Motion to Withdraw, *supra* note 74, at 4. This particular Assistant Public Defender, Mr. Jay Kolsky, filed a Motion to Withdraw based on his caseload, which was granted, although that motion was overturned by Florida's Third District Court of Appeal. See discussion *supra* in Section IV.

117. *Id.* at 5.

118. Ed Brayton, *State Slammed in Report Detailing Public Defender Deficiencies*, THE MICH. MESSENGER, Feb. 19, 2009, *available at* http://michiganmessenger.com/13476/state-slammed-in-report-detailing-public-defender-deficiencies (citing Nat'l Legal Aid & Defender Ass'n, *Executive Summary*, *in* A RACE TO THE BOTTOM—SPEED & SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS i, i (June 2008), *available at* http://www.mynlada.org/michigan/michigan_report_execsum.pdf, [hereinafter RACE TO THE BOTTOM]).

average of 746 cases per attorney.[119] Even more alarming, a study conducted by the National Legal Aid and Defender Association found that the Misdemeanor Defender Professional Corporation, which maintains a contract with the City of Detroit to represent indigent defendants, had case loads 500-600% greater than the standard set by the National Advisory Commission on Criminal Justice Standards and Goals.[120] That office handles between 12,000 and 14,000 cases a year—with just five part-time attorneys and a handful of law students.[121] Dividing the number of cases by each attorney, that comes out to between 2,400-2,800 cases per year, per attorney.[122] The authors of the study then went on to surmise that if each of those attorneys worked 75% of their time on these cases (note that these are part-time attorneys who, presumably, have other cases), these attorneys spend only thirty-two minutes per case.[123]

Only nine states have a formal policy regarding the maximum caseload number for public defenders.[124] Of those nine, only two have a mandated state law that actually codifies the requirement.[125] Furthermore, two of the state programs that have caseload limits, Colorado and Wisconsin, have no authority to refuse appointments due to caseload, effectively nullifying the limit.[126] Interestingly enough, only one quarter of all cases received by state public defender programs are felony non-capital cases.[127] Furthermore, in county-funded offices, more than 50% of the cases were misdemeanors.[128] This amount went down significantly, however, in state programs with caseload limits or the ability to refuse cases.[129] In fact, attor-

---

119. *See* Complaint at 36, Duncan v. Michigan, No. 112997 (Mich. Cir. Ct. Feb. 22, 2007), *available at* http://www.sado.org/fees/duncan_v_state.pdf. It must be remembered that these attorneys represent other clients; the cases referred to here are only the contracts they are given from the court.

120. RACE TO THE BOTTOM, *supra* note 118, at 23.

121. *Id.*

122. *Id.*

123. *Id.*

124. LYNN LANGTON & DONALD J. FAROLE, JR., BUREAU OF JUSTICE STATISTICS, CENSUS OF PUBLIC DEFENDER OFFICES, 2007—STATISTICAL TABLES 6 (2007), http://bjs.ojp.usdoj.gov/content/pub/pdf/pdo07st.pdf [hereinafter 2007 CENSUS]. The states are Colorado, Connecticut, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, Vermont, and Wisconsin. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*; *see also* MINOR CRIMES, MASSIVE WASTE, *supra* note 111, at 26-28 (discussing how the misdemeanor indigent defenders take the brunt of budget shortages).

128. 2007 CENSUS, *supra* note 124, at 13.

129. *Id.* at 16. Some jurisdictions have the ability to refuse to take on more misdemeanor cases. *See id.*

neys have almost half the number of misdemeanor cases in programs where they have the ability to refuse cases or where there are caseload limits.[130]

Another source of case overload stems from personnel decision-making in the public defenders offices themselves. Some offices are making the choice not to fill vacancies in an effort to save money and "spread the wealth."[131] These offices have chosen to redistribute their allocation of funds rather than pay a new attorney.[132] These funds may go to a raise for a senior attorney or to help fund investigatory costs. In an era of continued budget cuts, many of these workers are seeing their health care costs rise and have not seen more than a cost of living increase—and most are lucky to get that—in years. As such, offices have had to be creative with their financing to keep high quality attorneys.

C. Ethical Implications

Another problem with these burgeoning caseloads is the inability of many public defenders to meet the needs of their clients under the ethical rules.[133] Among others, Model Rule of Professional Conduct 1.1 requires that a lawyer shall provide competent representation to a client.[134] Model Rule of Professional Conduct 1.2 requires that an attorney consult with his client to determine the "objectives of representation."[135] Furthermore, Rule

130. *Id.* at 12. Programs that allow limits or refusals have approximately 140 cases per attorney, while programs without limits have close to 275. The numbers were about the same, however, with regard to felony, non-capital cases. *Id.*

131. Florida v. Pub. Defender, 12 So. 3d 798, 805 (Fla. Dist. Ct. App. 2009) (discussing how the Miami-Dade County Public Defender, Bennett H. Brummer, "acknowledged that he opted to increase employee salaries rather than hire additional staff").

132. *Id.*

133. *See* Roberta G. Mandel, *The Appointment of Counsel to Indigent Defendants is Not Enough: Budget Cuts Render the Right to Counsel Virtually Meaningless*, 83 FLA B.J. 43 (2009). This Article does not examine all the ethical implications facing those who represent the indigent, but merely touches on some of the largest challenges.

134. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2006). In full, the rule reads: "RULE 1.1 Competence: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id.*

135. *Id.* R. 1.2. The rule requires:

> Scope of Representation and Allocation of Authority Between Client and Lawyer:
> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

1.3 requires that a lawyer act with "diligence and promptness in representing a client."[136] Comment 2 of that rule states that a lawyer's caseload "must be controlled so that each matter may be handled competently."[137] Rule 1.4 requires the attorney to keep the client reasonably informed.[138] Additionally, Rule 5.1 addresses the ethical responsibilities of a lawyer supervising a public defender.[139] This rule requires supervisors to ensure that the attorneys under them are following all of these rules and providing competent representation.[140]

If an attorney is averaging no more than thirty-two minutes per client, as the contract attorneys in Detroit,[141] it is simply impossible to meet the needs of each defendant. To be diligent, as required by Rule 1.3, cases must

---

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Id.

136. *Id.* R. 1.3 (describing the requirement of diligence).

137. *Id.* R. 1.3, cmt. 2; *see also* ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006) (citing *id.*).

138. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(3).

139. *Id.* R. 5.1. The rule requires that:

Responsibilities of Partners, Managers, and Supervisory Lawyers:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Id.

140. *Id.* R 5.1(b).

141. RACE TO THE BOTTOM, *supra* note 118, at 23.

be investigated. This includes talking to witnesses and arresting officers, as well as reading police reports and taking depositions.[142] Cases need to be evaluated for weaknesses and, if found, motions to suppress or dismiss need to be filed.[143] This requires legal research and drafting and arguing motions. Additionally, attorneys must consult with their clients to discuss the representation under Rule 1.2 and keep the client informed of the case under Rule 1.4. To accomplish all of this in thirty-two minutes per case would be a tall order—to do it for 2,400 reported cases a year would appear to be impossible.[144]

D. Disproportionate Funding

When discussing funding, another issue that must be raised is the disparity in many states between the funding of counsel to represent indigent defendants and the offices that prosecute those defendants.[145] This lack of parity violates number eight of the ABA's Ten Principles of a Public Defense Delivery System.[146] There is no doubt that prosecutors are involved in

---

142. *See* Mosteller, *supra* note 9, at 932 (explaining that good defense work generally means fewer erroneous convictions).

143. *See* Weaver, *supra* note 42, at 441-44 (discussing *Strickland*'s failure to address the repercussion from failing to file appropriate motions due to incompetency of counsel).

144. MINOR CRIMES, MASSIVE WASTE, *supra* note 111, at 22 (noting that if an attorney has 400 cases per year, he or she can allocate around six hours per case; if 1200, 2 hours; if 2000, 70 minutes; 19,000, 7 minutes.) It must be noted that a large portion of these cases could end up being resolved by a plea agreement that would obviously require a shorter amount of work. In New York City, for instance, of the 177,965 new cases assigned to defense counsel in the year 2000, 124,177 were "disposed of at the first appearance—most by a plea of guilty entered after no more than a 10-minute consultation with their lawyers." *Id.* at 31 (internal citation omitted). This "meet and plead" practice, though freeing up precious time for defenders, does not allow for the appropriate amount of attention to individual cases to offer effective assistance of counsel. *Id.* at 31-32.

145. JUSTICE DENIED, *supra* note 2, at 61.

146. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, 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]. These principles were adopted by the American Bar Association House of Delegates in February 2002 and are meant to be recommendations for all jurisdictions. The Ten Principles are as follows:

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.

more cases than the public defenders because they are a party in the prosecution of every crime, not only those that involve indigent defendants. Therefore, it is reasonable that their budgets may be larger on a raw dollar to dollar scale.[147] The problem arises, however, when the proportion of funding is not equal to the amount of cases both sides represent.[148] This disproportionate funding creates an unfair advantage to the state in an adversarial system such as ours, where a defendant is deemed innocent until proven guilty.[149]

---

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.

Id.

147. There is research to suggest, however, that the indigent are the most prevalent kind of defendant in criminal courts, even encompassing 90% of all criminal cases in one jurisdiction. JUSTICE DENIED, *supra* note 2, at 62 & n.75 (citing John Martins, *Tight Resources at Heart of Criminal Case Backlog*, PRESS OF ATLANTIC CITY, Apr. 21, 2008, at C1) (discussing the disparity between the prosecutor and indigent defense attorneys in Cumberland County New Jersey)). More than 80% of the defendants were indigent in another jurisdiction in California. LAURENCE A. BENNER, ET. AL., 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. *But see* Heather Ratcliffe, *Public Defenders Threaten to Refuse St. Louis County Cases*, ST. LOUIS POST DISPATCH, July 29, 2010 (citing Prosecuting Attorney Robert McCulloch as saying that the public defenders only handle about 28% of that county's criminal cases.). Even though it is expected that prosecutors will have larger budgets, it is clear that the gaps are wider than they should be.

148. RACE TO THE BOTTOM, *supra* note 118, at 5. One of the problems with the disparity in funding is that failing to provide inadequate resources for indigent defense is patently unfair when the State spends large amounts of money to prosecute defendants. *Id.* Without parity, "the defense is unable to play its role of testing the accuracy of the prosecution evidence, exposing unreliable evidence, and serving as a check against prosecutorial or police overreaching." *Id.*

149. The presumption of innocence is a term attributed to the English lawyer Sir William Garrow (1760-1840), although there is some debate as to the actual origin. *See The Meaning and Origin of the Expression: Innocent Until Proven Guilty*, THE PHRASE FINDER, http://www.phrases.org.uk/meanings/innocent-until-proven-guilty.html (last visited Jan. 28, 2011).

In *Justice Denied*, the National Right to Counsel Committee highlighted several examples of this inequity, the most shocking of which was described in a study performed by The Spangenberg Group, which reviewed the funding of the prosecution and the public defenders in Tennessee.[150] Even when considering only the total funds attributed to indigent prosecutions in Tennessee, the study found a disparity of over $73 million between the offices for fiscal year 2005.[151] Another study in California found that the state's indigent defense system was "'under-funded statewide by at least 300 million dollars.'"[152] Further, in Houston, Texas, the budget for the indigent defense system there was half of the District Attorney's budget.[153]

These disparities are not limited to overall funding, either; the amount of staff and compensation for the attorneys is also disproportionate.[154] In Cumberland County, New Jersey, for instance, the public defender has half the number of attorneys as the prosecutor, and one-seventh of the investigators.[155] This funding is entirely disproportionate in a county where 90% of the cases are handled by the public defender.[156] However, Cumberland County public defenders are lucky to have investigators because some indigent defense attorneys have none, like those in Harris County, Texas.[157] Though there is no doubt a prosecutor's office may have some need for its own investigative unit, one must remember that the ultimate investigators—the police—work very closely with the prosecutors to convict defendants. The attorneys representing the defendants have no such relationship and must rely on their own investigators to help mount a defense. Therefore, in an office with no investigators, much of that work would likely fall to the

---

150. JUSTICE DENIED, *supra* note 2, at 61 n.71 (citing THE SPANGENBERG GROUP, RESOURCES OF THE PROSECUTION AND INDIGENT DEFENSE FUNCTIONS IN TENNESSEE (2007)).

151. The total prosecution budget was between $130 and $139 million dollars, while the indigent defense budget was a mere $56.4 million. *See id.*

152. *Id.* at 61 n.73 (quoting LAURENCE A. BENNER & 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).

153. *Id.* at 62. The budget for the District Attorney's office is around $50 million, while the county spent about $24 million on indigent defense in Houston in 2007. *See* Lisa Falkenberg, *An Idea Whose Time Has Come?*, HOUS. CHRON., Mar. 12, 2008, *available at* http://www.chron.com/disp/story.mpl/metropolitan/falkenberg/5615104.html.

154. JUSTICE DENIED, *supra* note 2, at 62.

155. *Id.*

156. *Id.*

157. Falkenberg, *supra* note 153. While the contract attorneys who represent indigent defendants have no investigators, the District Attorneys' office has thirty investigators on staff. *Id.*

attorneys, on top of all the other work they must do in defending their clients.[158]

Moreover, in many jurisdictions, the salaries of public defenders are well below those of prosecutors.[159] In one report, it was noted that Westchester County, New York prosecutors made anywhere from $6,000 to $21,000 more than their counterparts who represent the indigent defendants.[160] In another New York county, five part-time public defenders earned a combined $135,000 a year, while the District Attorney's office in that county had five full-time attorneys who earned a combined $300,000.[161] A similar disparity was found in Missouri, which led to a 100% cumulative turnover rate in one office from 2001 to 2005.[162] As discussed above, in an effort to boost morale and prevent turnover, public defenders in some jurisdictions have chosen not to fill current vacancies in order to raise the salaries of the attorneys already there.[163] This decision, of course, leads to a higher caseload per attorney.[164] Consequently, the supervisors are faced with a Hobson's choice: higher caseloads and lower turnover or lower salaries and higher turnover.[165]

---

158. Faced with large caseloads, it is unlikely that many attorneys would actually take the time to do the proper investigation needed.

159. JUSTICE DENIED, *supra* note 2, at 63.

160. *Id.* (citing 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), *available at* http://www.courts.state.ny.us/ip/indigentdefense-commission/SpangenbergGroupReport.pdf [hereinafter KAYE REPORT]).

161. *See* KAYE REPORT, *supra* note 160, at 84. That prosecutor's office, located in Greene County, also had a part-time attorney, whose salary is unknown. *Id.* At first blush, it may appear that this disparity is justified because the public defenders are only part-time. Those defenders, however, handled 80-85% of the criminal cases. *Id.* Therefore, the District Attorneys only had about 15-20% more cases, but were compensated more than twice what the public defenders were. *Id.*

162. JUSTICE DENIED, *supra* note 2, at 63 (citing THE SPANGENBERG GROUP, ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM (2006)); *see also* Susan McGraugh & Patricia Harrison, *Public Defenders Must Give Adequate Time to Clients*, ST. LOUIS POST DISPATCH, Aug. 3, 2010 (arguing that the Prosecuting Attorney in St. Louis County made an annual salary of $135,000, while the district defender, "who supervises only slightly fewer employees, was paid $71,544 in 2009").

163. *See* Martinez, *supra* note 97; *see also* Florida v. Pub. Defender, 12 So. 3d 798, 805 (Fla. Dist. Ct. App. 2009). The Third District Court of Appeals in Florida used this fact as an argument to deny the Public Defenders' motions to withdraw because of excessive workload, which will be discussed *infra* Subsection V.A.

164. *See* Leckie, *supra* note 105. Fewer attorneys per office, combined with the already discussed increase in cases, creates a non-linear and exponential growth in the amount of cases each attorney receives. *Id.*

165. Even lead defenders who choose to hire additional attorneys face a hard time recruiting due to low funding, high caseload burden and lack of job security. *See* Klein, *supra* note 9, at 1474-76 (discussing how even an 80% increase in caseload did not come with increase in attorneys, and that 60% of lead public defenders stated that increase in case loads prevents recruiting of additional attorneys).

E. Politics as Usual

Another factor inhibiting reform of indigent defense systems is, perhaps surprising, the criminal defense attorneys themselves. Even though most research points to the fact that a public defender's office is the most cost effective way to provide for indigent defense,[166] the defense bar is not always willing or able to expedite the process of developing such a system. In many states with an assigned counsel system, the private defense bar depends on appointments from judges for their livelihood. This is especially true in an assigned counsel system, where an attorney is guaranteed a certain number of appointments because he has "a Saturday tee time with the judge."[167] Harris County, Texas, where Houston is located, is the largest urban area that still employs the assigned counsel system.[168] Reform efforts have all failed in this area not because the state could not pay for the new system, but because politics ruled the day.[169] Even judges have fought the change.[170] In March 2008, some people believed the changes were coming; however, as of 2010, it was still politics as usual in Houston.[171]

Even in a jurisdiction where reform has occurred, the pushback from the defense bar is still heavy. In Broward County, Florida, the judges used a discretionary appointment system for assigning conflict counsel[172] to criminal defendants well into 2003. Because of complaints about fairness, however, the Seventeenth Circuit instituted what was commonly known as "the wheel."[173] This was a computer-generated list of available conflict counsel.

---

166. JUSTICE DENIED, *supra* note 2, at 62.

167. Falkenberg, *supra* note 153. It has been reported that one attorney in Florida made $567,000 per year taking assigned cases. *See* Jan Pudlow, *Lawsuit Delays Conflict Counsel Facilities Request*, THE FLA. B. NEWS, Nov. 15, 2007, *available at* http://www.floridabar.org/DIVCOM/JN/JNnews01.nsf/Articles/C2D2033E099F556A8525738B0053F333.

168. Falkenberg, *supra* note 153; *see* Cynthia Hujarr Orr & Norman Lefstein, *County Can Save Money With Public Defenders*, HOUS. CHRON., Sept. 24, 2009, *available at* http://www.chron.com/disp/story.mpl/editorial/outlook/6636177.html.

169. Falkenberg, *supra* note 153.

170. *Id.*

171. Chris Moran, *Harris County Sweetens Public Defender Proposal*, HOUS. CHRON., July 26, 2010, *available at* http://www.chron.com/disp/story.mpl/metropolitan/7125943.html (discussing how Harris County (Houston) is trying to change its system, but has not yet done so).

172. Conflict counsel is a private attorney appointed to a criminal defendant when the public defender's office cannot represent defendant due to a conflict of interest. This occurs when, for example, the public defender's office represents or has represented a co-defendant. *See, e.g.*, Administrative Order Establishing Procedure for Appointment of Counsel in Criminal and Civil Proceedings and Establishment of Due Process Service Provider Rates, No. 2009-84-Gen (Fla. Cir. Ct. 2009), *available at* http://www.17th.flcourts.org/2009-84-Gen.pdf.

173. *Id.*

The wheel was intended to rotate the number of appointments between private bar attorneys so that no one attorney was getting a lion's share of the appointments. This arrangement caused quite a bit of discord amongst the private defense bar, which had come to depend on these appointments. In 2007, things became even worse for the private bar when the legislature created a separate state-funded office to handle conflict cases.[174] This new office, called the Office of Criminal Conflict and Civil Regional Counsel, was not even in operation before the private bar filed a lawsuit to dismantle it.[175] They were not successful, however, and the office still operates today.[176]

An example of how local politics paves the way for ineffective lawyering can be found in the state of New York. Kimberly Hurell-Harring was arrested for attempting to sneak marijuana to her husband in a New York state prison.[177] She was represented by Patrick Barber, who had been awarded a contract to be the chief public defender in Washington County, New York, simply because he submitted the cheapest bid.[178] This was despite the fact that he had been reprimanded twice by the Committee on Professional Standards for neglecting his cases and, according to one newspaper account, struggled with depression, had panic attacks, and "had daily drinks to cope."[179] Mr. Barber was a hometown guy, however, and had been born and raised in the small community—a trait that no doubt helped him get awarded the chief public defender contract.[180] Because of Mr. Barber's ineffective representation of Ms. Hurell-Harring, however, Ms. Hurell-Harring was convicted of a felony,[181] and Mr. Barber was later disbarred due to an unrelated matter.[182]

---

174. 2007 Fla. Laws 2010–62 (codified in FLA. STAT § 27.511 (2007)).

175. *See* Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc., 978 So. 2d 134, 138-39 (Fla. 2008).

176. *Id.* at 145-47. The Supreme Court of Florida found that this legislative creation was not unconstitutional because these Conflict Counsel are not public defenders, and therefore do not need to be elected under the Florida Constitution—they are not de facto Public Defenders. *Id.*

177. William Glaberson, *The Right to Counsel: Woman Becomes a Test Case*, N.Y. TIMES, Mar. 19, 2010, at MB1, *available at* http://www.nytimes.com/2010/03/21/nyregion/21lawyer.html.

178. *Id.*

179. *Id.*

180. *Id.*

181. There are reports that Mr. Barber encouraged Ms. Hurrell-Harring to plead guilty to a felony, even though there was current litigation arguing that the crime for which she was charged should not be considered a felony. *Id.*

182. *In re* Barber, 894 N.Y.S.2d 776 (N.Y. App. Div. 2010). Mr. Barber admitted to fabricating court orders "in an effort to mislead and deceive his clients into believing he had undertaken the tasks for which he was retained." *Id.* For more about Ms. Hurrell-Harring's case, see *infra* Section IV.D.

F. Budget Cuts and the Right to Counsel: An Example from Georgia

A specific illustration of how budget cuts may affect a defendant's right to counsel may be found in a capital case in Georgia. In 2006, Jamie Ryan Weis was arrested for the first-degree murder of Catherine King.[183] Because this was a death penalty case, Mr. Weis was appointed two attorneys, Robert H. Citronberg and Thomas M. West, who were to be paid by the Georgia Public Defender Standards Council [hereinafter "Standards Council"].[184] Representation continued for about six months, and counsel filed motions and began to investigate Mr. Weis's case.[185] Then, in March 2007, the attorneys filed motions asking for funds for further investigation of the case.[186] Those motions were denied based on a lack of funds.[187] In September 2007, the Standards Council stopped paying the attorneys altogether.[188] The Director of the Standards Council, Mack Crawford, testified that sufficient funds would not be available until June 2008, if then.[189] The *prosecutor*[190] then moved to have public defenders from the Griffin Judicial Circuit Public Defender's Office step in to represent Mr. Weis.[191] In November 2007, the Court granted this motion, relieved Citronberg and West from their duties, and appointed the public defenders, even though the public defenders themselves objected to the appointment.[192]

Less than a month later, on December 10, 2007, the public defenders moved to withdraw, citing workload issues as well as their clients' inability to cooperate, but no action was taken.[193] On January 17, 2008, the public defenders renewed their motion, but still no action was taken.[194] In Febru-

183. Weis v. State, 694 S.E.2d 350, 353 (Ga. 2010).

184. *Id.* The Georgia Public Defender Standards Council is an independent agency under the Georgia Executive Branch that provides counsel to indigent defendants when there is a conflict. *See* GA. PUB. DEFENDER STANDARDS COUNCIL, http://www.gpdsc.com/index.htm (last visited Jan. 28, 2011).

185. *Weis*, 694 S.E.2d at 353.

186. *Id.*

187. *Id.* at 359.

188. *Id.*

189. *Id.*

190. The word prosecutor is italicized to emphasize that this is not a typo. The prosecutor even identified the public defenders by name when moving to have them appointed. Adam Liptak, *Defendants Squeezed by Georgia's Tight Budget*, N.Y. TIMES, July 6, 2010, at A13, *available at* http://www.nytimes.com/2010/07/06/us/06bar.html.

191. *Weis*, 694 S.E.2d at 359. Interestingly enough, the public defenders in question here objected to the appointment, saying they were overworked as it was and could not take on a death penalty case.

192. *Murder Defendant Denied Counsel, Sues Public Defenders*, JD J., Jan. 3, 2009, http://www.jdjournal.com/2009/01/03/murder-defendant-denied-counsel-sues-public-defenders/.

193. *Weis*, 694 S.E.2d at 353.

194. *Id.* at 359.

ary 2008, Weis filed a *pro se* writ of mandamus in an attempt to force the judge to grant the motion to withdraw and re-appoint Citronberg and West.[195] No action was taken until April 25, 2008, when a stipulation was entered that Citronberg and West would be reinstated.[196] The reinstatement did not actually occur, however, until February 11, 2009.[197] In order for this reappointment to happen, Weis had to agree that he would not seek any further continuances in the case based "upon any alleged or actual lack of funds or manpower or time to prepare said case for trial."[198]

Meanwhile, the Standards Council had still not come up with adequate funds to defend the case. As a result, Weis's attorneys filed a motion for discharge and acquittal claiming his right to a speedy trial had been violated.[199] The motion was denied,[200] and the Supreme Court of Georgia affirmed the denial. According to the Supreme Court of Georgia, Mr. Weis was the cause of his delay.[201] He should have cooperated with his public defenders, they said, and the delay cannot be attributed to the State.[202] A writ of certiorari was filed with the United States Supreme Court, but the high court declined to hear the case.[203]

---

195. *Id.*

196. *Id.*

197. *Id.* Therefore, Mr. Weis sat in jail, unrepresented, for almost a year.

198. *Id.* at 354.

199. *Id.*

200. Interesting allegations have surfaced about the trial judge who granted the prosecutors motion to force the public defenders on the case and denied the motion for discharge filed by Citronberg and West. Judge Johnnie L. Caldwell Jr. resigned from the bench amidst an investigation by Georgia's Judicial Qualification Commission in which a lawyer testified Judge Caldwell offered a favorable ruling in exchange for sex. Liptak, *supra* note 190; *see also* Alexis Stevens, *DA: Deputy Caught Judge, Public Defender Having Sex*, THE ATLANTA J.-CONST., June 11, 2010, *available* at http://www.ajc.com/news/fayette/da-deputy-caught-judge-547307.html. *But see* Sheila A. Marshall, *Judge Johnnie Caldwell Resigns*, THE GRIFFIN DAILY NEWS, Apr. 20, 2010, *available at* http://www.griffindaily news.com/view/full_story/7146589/article-Judge-Johnnie-Caldwell-resigns? (quoting Caldwell as saying, "I am 63-years-old and want time to visit with my grandkids and maybe practice law," as his reason for retirement).

201. *Weis*, 694 S.E.2d. at 358.

202. The Court may be right that the delay could not be attributed to the *prosecutor*, but there is certainly an argument that the delay was caused by the *state* and its lack of funding. The Supreme Court of Georgia did not find this persuasive, however.

203. *See* Petition for Writ of Certiorari, Weis v. State, No. 09-10715, (May 10, 2010) *available at* http://standdown.typepad.com/WEIS-CertPetition-5-10-10.pdf [hereinafter Petition for Certiorari], *cert. denied*, 2010 WL 1903558 (Oct. 4, 2010). By declining to hear the case, the Court avoided answering the question of whether this would be considered a "systemic 'breakdown in the public defender system,'" a question left open by *Vermont v. Brillon*. 129 S. Ct. 1283, 1292 (2009). In *Brillon*, the Court held that a defendant's speedy trial right was not violated because the delays in the case were attributable to his and his attorneys' actions. *Id.* at 1293. The actions of the defendant and his attorneys in that case were much more egregious than those of Mr. Weis and were not a result of budgetary issues

IV. LITIGATION AS A REMEDY

In an effort to overcome these overwhelming burdens and draw attention to the state of the right to counsel, many lawsuits have been filed across the country.[204] The outcomes of those suits have been mixed, with the majority not ruling in favor of the attorneys (or granting the relief they have requested). In a recent trend, the successful lawsuits seem to be those filed by indigent defendants themselves, rather than the attorneys who represent them. For illustrative purposes, this Article considers lawsuits initiated in four different states, with differing degrees of success.

A. Florida

In Miami-Dade County, where Jay Kolsky[205] works, the Public Defender's Office [hereinafter PD-11] filed a lawsuit asking the trial court to "appoint other counsel in unappointed non-capital felony cases."[206] PD-11 claimed the caseloads of its attorneys were so excessive that they were not able to meet the needs of their clients.[207] During an evidentiary hearing on

---

like those faced in Mr. Weis's case. *Id.* The questions that were presented for review in Petitioner's Brief to the Supreme Court of the United States are below:

> 1. Whether a court, on motion of the prosecutor, may remove appointed counsel who has developed an attorney-client relationship with an indigent defendant in circumstances in which a retained counsel could not be removed and, if so, whether any procedural protections apply?
> 2. Whether leaving a poor, mentally ill man facing the death penalty virtually defenseless—without counsel and without investigative and expert assistance—for over two years between arrest and trial because the state indigent defense agency could not pay for his representation constitutes a "systematic breakdown of the public defender system," Vermont v. Brillon, 129 S.Ct. 1283, 1292 (2009), which should be weighed against the State for speedy trial purposes?
> 3. Whether the denial of counsel by failing to provide resources for representation for over two years during the critical pre-trial period and the removal of defense counsel for a period of time on motion of the prosecutor despite an ongoing attorney-client relationship, which irreparably harmed the defendant's ability to prepare for trial, presents issues of violations of the rights to counsel and a speedy trial directly appealable under the collateral order doctrine?

Petition for Certiorari, *supra*, at i.

204. *See* Reddy, *supra* note 8, at 38-54 (cataloging all the lawsuits that had been filed at the time of publication of that article).

205. Mr. Kolsky is the attorney profiled, *supra* notes 72-85.

206. *See* Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases Due to Conflict of Interest, Florida v. Munoz, No. F08-2314 (June 24, 2008), *available at* http://www.pdmiami.com/ExcessiveWorkload/Motion_to_Appoint_Other_Counsel_Certificate_of_Conflict-Oscar_Munoz.pdf [hereinafter Motion to Appoint Other Counsel]. The Eleventh Circuit referred to here is Florida's state court system.

207. In its motion, PD-11 claimed a budget cut of $2.48 million in fiscal year 07-08 seriously undermined its ability to represent its clients. *Id.* at 2. The office was not able to fill positions, and it had a high turnover rate with overworked and underpaid attorneys jump-

the case, testimony was heard that 60% of PD-11's caseload came from "C" (third-degree)[208] felonies.[209] The trial court agreed with PD-11 and ordered that all "C" felonies would be assigned to the Office of Criminal Conflict and Civil Regional Counsel for the Third District [hereinafter RRC-3].[210] In so finding, the trial court held that the PD-11 caseload was "excessive by any reasonable standard."[211]

The Office of the State Attorney in the Eleventh Circuit [hereinafter referred to as SAO-11],[212] appealed this finding to the Third District Court of Appeal.[213] In reversing the trial court, the Third District Court of Appeal found that there was no evidence that the caseload was "excessive by any reasonable standard."[214] The Third District Court of Appeal opined that there is no "magic number of cases" that allows an attorney to competently represent clients, and even if such a number was determined, it would certainly apply to the individual attorney, not the office as a whole.[215] Furthermore, the Third District found that an aggregate withdrawal based on a conflict of interest was inappropriate.[216] Instead, the trial court should determine the competence of an attorney on a case-by-case basis.[217]

The Third District went on to address section 27.5303 of the Florida Statutes, which allows public defenders to withdraw based on a conflict of interest.[218] According to the statute, the Third District opined, a public de-

---

ing ship. *Id.* The complaint continued to assert that taking on new cases would pose a conflict of interest to its existing clients because any additional defendants would prevent attorneys from providing to provide effective assistance of counsel to their current clients. *Id.* at 2-3, 5.

208. In Florida, third degree felonies are those that do not exceed a term of imprisonment of five years. FLA. STAT. § 775.082(4)(b)-(d) (2010).

209. *See* Order Granting in Part and Denying in Part Public Defender's Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases, Admin. Order No 08-14, at 4 (Fla. Cir. Ct. 2008), *available at* http://www.pdmiami.com/Order_on_motion_to_appoint_other_counsel.pdf.

210. *See id.* at 4-5.

211. *Id.* at 6. In its order, the trial court also found that further appointment of cases to the PD-11 would create a conflict with its existing clients. *Id.*

212. The State Attorney is the prosecuting entity in Florida.

213. Florida v. Pub. Defender, 12 So. 3d 798 (Fla. Dist. Ct. App. 2009).

214. *Id.* at 801-02.

215. *Id.*

216. *Id.* at 802-03.

217. *Id.*

218. *Id.* at 803-05 (citing FLA. STAT. § 27.5303 (2007)). FLA. STAT. § 27.5303(1)(a) reads, in pertinent part, as follows:

> If, at any time during the representation of two or more defendants, a public defender determines that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his or her staff without conflict of interest . . . then the public defender shall file a motion to withdraw and move the court to appoint other counsel.

fender is not permitted to withdraw based merely on inadequate funding.[219] The Third District found that because the trial court's order required PD-11 to initially accept representation and then relinquish it after arraignment—when it became clear the representation would be for a third degree felony—such a scheme is clearly a withdrawal and is therefore covered by the statute.[220] The court conceded that PD-11's budget decreased from fiscal year 2007-08 to fiscal year 2008-09, and that such budget constraints are difficult.[221] It did not find any correlation, however, between these budget cuts and PD-11's inability to handle all third-degree felony cases.[222] In fact, it found that such a withdrawal, which would amount to 60% of its cases, would be "entirely disproportionate" to the budget cuts it suffered.[223] Though it appeared that litigation would not be the basis for relief that PD-11 thought it might be, the office has not given up. Shortly after the Third District announced its ruling, PD-11 sought an appeal in the Supreme Court of Florida.[224] The Supreme Court of Florida recently accepted jurisdiction, and the briefing has begun.[225]

In the meantime, the PD-11 office sought another avenue of attack. Following the Third District's opinion in *State v. Public Defender, Eleventh Circuit*, which held that motions to withdraw must be filed on a case-by-case basis, one assistant public defender in PD-11 filed a motion to withdraw and to declare the previously mentioned statute, section 27.5303, unconstitutional.[226] In considering the withdrawal, the court found the APD's

---

The statute goes on to read: "In no case shall the court approve a withdrawal by the public defender or criminal conflict and civil regional counsel based solely upon inadequacy of funding or excess workload of the public defender or regional counsel." § 27.5303(1)(d). In determining whether there is a conflict of interest, the statute gives this guidance:

> In determining whether or not there is a conflict of interest, the public defender or regional counsel shall apply the standards contained in the Uniform Standards for Use in Conflict of Interest Cases found in appendix C to the Final Report of the Article V Indigent Services Advisory Board dated January 6, 2004.

§ 27.5303(1)(e).

219. *See Pub. Defender*, 12 So. 3d at 806.

220. *Id.* at 804.

221. *Id.* at 805 nn. 8-9.

222. *Id.* at 805 ("Although PD11's budget decreased during the past fiscal year, the record does not demonstrate any correlation between the State budget reductions and a complete inability on the part of PD11 to handle any third-degree felony cases.").

223. *Id.*

224. *See* Brief of Petitioner on Jurisdiction, Pub. Defender v. Florida, 2009 WL 2192596 (No. SC09-1181) (Fla. 2009).

225. *See* Order Accepting Jurisdiction, Pub. Defender v. Florida, 34 So. 3d 2 (Fla. May 19, 2010) (No. SC09-1181), 2010 WL 2025545.

226. *See* Assistant Public Defender's Motion to Withdraw, *supra* note 74. This motion was filed by Jay Kolsky, the attorney profiled *supra* notes 72-85.

representation of the specific client to be ineffective, and that the defendant had suffered prejudice.[227] Among other things, the trial court found that the APD had not gotten a list of defense witnesses, had not taken any depositions in the case, had not visited the scene of the crime, and had not prepared a mitigation package.[228] Furthermore, the APD had to take a continuance, as he was not prepared for trial, effectively waiving his client's right to a speedy trial.[229] The court mentioned that neither section 27.5303, Florida Statutes, nor the Third District Court of Appeal's Decision in *State v. Public Defender, Eleventh Circuit*, precluded a finding in favor of the defendant if there was actual prejudice to a defendant's constitutional rights.[230] As a result, the trial court found the APD had made the individualized showing that his client was prejudiced by this ineffective representation and, therefore, granted the motion to withdraw.[231] The trial court declined to find section 27.5303 of the Florida Statutes unconstitutional,[232] however, and both sides filed petitions for review in Florida's Third District Court of Appeal.[233]

On July 7, 2010, the Third District Court of Appeal reversed the trial court's order that allowed the APD to withdraw from the case.[234] In a very simple opinion, the Third District Court of Appeal agreed with the trial court that a showing of actual prejudice could allow for judicial relief, but found that such prejudice was not present in this case.[235] The court held that

---

227. *See* Order Denying Public Defender's Motion to Declare Section 27.5303(1)(d), Florida Statutes, Unconstitutional and Granting Public Defender's Motion to Withdraw, State v. Bowens, No. F09-019364, at *4 (Fla. Cir. Ct. Oct. 23, 2009), *available at* http://www.ojp.usdoj.gov/BJA/topics/Plenary3/Workshops/Workshop3E/C_Martinez-FLW%20Bowens%20Order%20112709.pdf [hereinafter Order Denying Motion to Declare].

228. *Id.* at *2.

229. *Id.* The court also noted that due to time restrictions, arraignment conversations with clients are within earshot of other defendants, violating the client's right to confidentiality, "as a result . . . making it very difficult to provide meaningful assistance or begin establishing the trust necessary for an attorney-client relationship." *Id.*

230. *Id.* at *4 ("When examining the plain language of the statute, as interpreted by the Third District . . . there exists a cognizable difference between a withdrawal based solely on workload, and a withdrawal where an individualized showing is made that there is a substantial risk that a defendant's constitutional rights may be prejudiced as a result of the workload.").

231. *Id.* at *5.

232. *Id.* at *3-5.

233. *See* Plaintiff's Petition for Writ of Common Law Certiorari, State v. Bowens, No. 3D09-3023 (Fla. Dist. Ct. App. Nov. 6, 2009), *available at* http://www.pdmiami.com/ExcessiveWorkload/States_Petition_for_Writ_of_Common_Law_Certiorari_11-6-09.pdf; Response_to State's Petition for Writ of Common Law Certiorari and Cross Petition for Common Law Certiorari, State v. Bowens, No. 3D09-3023 (Fla. Dist. Ct. App. Nov. 6, 2009), *available at* http://www.pdmiami.com/ExcessiveWorkload/Response_to_Petition_and_Cross-Petition.pdf.

234. State v. Bowens, 39 So. 3d 479, 482 (Fla. Dist. Ct. App. 2010).

235. *Id.* at 481. According to the court:

merely needing to file a continuance did not "rise to the threshold level of actual prejudice."[236] Therefore, the conflict here was merely "speculative."[237] The Third District did agree with the trial court's opinion as to the constitutionality of the statute, however, and denied the APD's cross-petition on that issue.[238] It then certified the following question as one of great public importance:

> Whether section 27.5303(1)(d), Florida Statutes (2007), which prohibits a trial court from granting a motion for withdrawal by a public defender based on "conflicts arising from underfunding, excessive caseload or the prospective inability to adequately represent a client," is unconstitutional as a violation of an indigent client's right to effective assistance of counsel and access to the courts, and a violation of the separation of powers mandated by Article II, section 3 of the Florida Constitution as legislative interference with the judiciary's inherent authority to provide counsel and the Supreme Court's exclusive control over the ethical rules governing lawyer conflicts of interest?[239]

At first glance, this opinion seems to be another crushing blow to the public defenders' cause, but the ultimate conclusion may work in favor of PD-11. If the Third District had affirmed the trial court and allowed Mr. Kolsky to withdraw, the case would presumably be transferred to the Office of Criminal Conflict and Civil Regional Counsel for the Third District [hereinafter referred to as RC3], the office that was supposed to receive all the third degree felonies as a result of *State v. Public Defender, Eleventh Judicial Circuit*.[240] It should be noted that the RC3 moved to join in the appeal to challenge the trial court's order in *State v. Public Defender, Eleventh Judicial Circuit*, claiming it should not receive the appointments as contemplated in the trial court's order.[241] Known as the "second public defender's

---

> If the trial court's order stands, all that the PD11 must do to show prejudice is swear that he or she has too many cases or that the workload is so excessive as to prevent him or her from working on the client's case prior to the scheduled trial, and that he or she will be forced to file for continuance, thereby waiving the client's speedy trial rights.

Id. Unfortunately, it appears that the Third District did not give much consideration to the findings of fact in the Eleventh Circuit, or to the ethics of the PD who filed the motion.

236. *Id.* at 482.

237. *Id.* at 481.

238. *Id.* at 482. The court's decision may have been influenced in light of the pending review in the Supreme Court of Florida.

239. *Id.*

240. 12 So. 3d 798, 800 (Fla. Dist. Ct. App. 2009), *review granted*, 34 So. 3d 2 (Fla. 2010).

241. *Id.* at 800 n.2. Interestingly enough, the RC3 did not join in the *Bowens* case. *See* State v. Bowens, 39 So. 3d 479, 482 n.3 (Fla. Dist. Ct. App. 2010). Presumably, the office does not take issue with merely taking on one client, as opposed to a whole class of clients; although a victory in this case would undoubtedly open the proverbial floodgates.

office"[242] in some circles, the RC3 office would no doubt be overwhelmed by taking on all these cases, and it would not be receiving any extra funding for these extra cases. In fact, with the prospect of adding cases to an already strained RC3 office, it could be argued that the defendants would merely be jumping from the proverbial frying pan to the fire. This office, also funded by the state, has even fewer resources than PD-11. Because the RC3 office would not be able to handle this many additional cases, a third option could be implemented, which would be to contract the cases to private attorneys. Though this may afford some defendants a more meaningful day in court, the necessary funds would certainly cost Florida's taxpayers much more, thereby causing the state to cut the PD's budgets even further, invoking a vicious circle.[243]

With the certified question being presented to the Supreme Court of Florida, however, the public defenders may actually have a better shot at a real solution, rather than a mere band-aid. The Supreme Court of Florida could find section 27.503 unconstitutional, which would eliminate the need of an individualized showing of prejudice, other than an excessive caseload, to withdraw from a case. Further, the Supreme Court of Florida would also be poised for a holding that the legislature has failed to properly fund the court system. If the Florida legislature was finally forced to fund the court system properly, the benefits to all of Florida's citizens could go above and beyond the indigent defense system.

B. Kentucky

In a strange twist of fate, on the same day that *State v. Public Defenders, Eleventh Judicial Circuit* was decided by the Florida's Third District Court of Appeal, the Supreme Court of Kentucky announced the disposition of a similar suit by the Kentucky Department of Public Advocacy [hereinafter "DPA"].[244] Unfortunately, May 13, 2009 would not be a day to celebrate for Kentucky Public Defenders, either.

---

242. Gary Blankenship, FACDL Fights Regional Conflict Counsel Plan: 'We Don't Think It's Funded Properly and Don't Think It Can Adequately Represent the Clients', FLA. B. NEWS, June 1, 2007, at 7, *available at* http://goliath.ecnext.com/coms2/gi_0199-6650255/FACDL-fights-regional-conflict-counsel.html (discussing the funding drawbacks to SB 1088—the bill that created the RC3).

243. *See* David Ovalle, *Miami-Dade Judge Blasts Flawed Public Defender System*, MIAMI HERALD, Apr. 25, 2009, *available at* http://www.nlada.org/DMS/Documents/1241527326.01/1016750.html.

244. *See* Order, Lewis v Hollenbach, No. 2009-SC-0164-TG (Ky. May 13, 2009), *available at* http://dpa.ky.gov/NR/rdonlyres/DF84F58C-BA3C-46F9-BF04-CAA417244487/0/OrdergrantingAppellantsMotion.pdf (decided on same day as Florida's decision).

At the beginning of the 2008-09 fiscal year, the DPA began reducing its services in an effort to relieve its budget shortfalls.[245] The DPA stopped providing representation in parole-revocation cases, class B misdemeanors,[246] and involuntary-commitment orders.[247] The service reduction was short-lived, however, when a trial court ordered the office to resume services in September 2008.[248] In response, the DPA filed a declaratory action in June 2008 seeking to "clarify the legal and ethical parameters under circumstances in which defender caseloads are so high that professional responsibilities and effective assistance of counsel for poor people across Kentucky are compromised and threatened."[249] The heart of the DPA's claim was that it would run out of money for the fiscal year 2008-09.[250] Recognizing this need, the Governor of Kentucky, Steve Beshear, provided for an emergency allocation to the agency to keep it afloat.[251] When this allocation occurred, the executive and legislative branches of the Kentucky

245. *See* Burton Speakman, *Public Defenders Face Budget Problems*, THE DAILY NEWS, Mar. 23, 2008, *available at* http://bgdailynews.com/articles/2008/03/23/news/news8.prt (citing Kentucky Public Defender Advocate Ernie Lewis).

246. *Id.* In Kentucky, class B misdemeanors are those that sentence to a definite term of imprisonment with a maximum of less than ninety (90) days. KY. REV. STAT. ANN. § 532.020(3) (West, Westlaw through 2010 legislation).

247. Owen Covington, *Funding Shortfall 'a Dilemma'*, MESSENGER-INQUIRER, Jan. 28, 2009.

248. *See* Order, *supra* note 244; Motion to Dissolve or Modify Temporary Injunction, Lewis v. Hollenbach, No. 08-CI-1094 (Franklin Cir. Ct. Sept. 19, 2008), *available at* http://dpa.ky.gov/NR/rdonlyresD160145C-7E8D-46868316893E2DADEDC/0/MotiontoModifyTemporaryInjunction.pdf; *Pleadings and Orders in Public Defender Case*, KY. DEP'T OF PUB. ADVOCACY, http://dpa.ky.gov/ci/efl.htm (last updated June 26, 2009).

> At the beginning of the current fiscal year, DPA reduced services in order to be able to continue providing competent representation to as many needy clients as possible through the entire fiscal year while still observing and complying with the Rules of Professional Conduct as required by the Kentucky Supreme Court. However, on September 19, 2008, the Franklin Circuit Court ordered DPA to cease service reductions and provide attorneys to all of Kentucky's indigent defendants in all cases in which court appointments were entered. It is now estimated that DPA will run out of money in late April or early May 2009, and then be unable to provide any representation whatsoever in any Court.

Id.

249. *Pleadings and Orders in Public Defender Case*, *supra* note 248; *see also* Petition for Declaratory Judgment, Lewis v. Hollenbach, No. 08-CI-1094 (Franklin Cir. Ct. June 30, 2008), *available at* http://www.clearinghouse.net/chDocs/public/PD-KY-0001-0001.pdf.

250. *See* Petition for Declaratory Judgment, *supra* note 249, at 3-5.

251. Governor Beshear redirected $2 million from a state fund set aside to help agencies offset increased costs of retirement contributions. Deborah Yetter, *State's Public Defenders Get $2 Million Reprieve*, THE COURIER-JOURNAL, Apr. 17, 2009.

state government came together to make a motion to dismiss the lawsuit as moot;[252] the Supreme Court of Kentucky agreed and granted the motion.[253]

While Governor Beshear should be lauded for stepping in and helping the DPA, it is but a temporary fix. The caseloads have seen no reduction, and although the DPA did not have to shut its doors last year, the problems have not been solved.[254] In dismissing the suit, the Supreme Court of Kentucky was able to avoid answering some of the many questions raised by the lawsuit, such as the duty of the legislature to fund the courts and the ability of the public defenders to limit their caseloads,[255] especially in death penalty cases.[256] These questions will have to be answered soon, however, if change is to come to the Bluegrass state.

C. Michigan

In Michigan, a different outcome in its appellate courts has paved the way for an avenue of reform. Beginning in early 2007, the American Civil Liberties Union filed a class action lawsuit in the Ingham County Circuit Court on behalf of indigent defendants in three Michigan counties.[257] The suit targeted the State of Michigan and then-Governor Jennifer Granholm in her official capacity.[258] The complaint alleged, *inter alia*, that the State did not provide adequate funding to, or proper oversight of, Michigan's Indigent Defense system.[259] According to the lawsuit, this inadequate funding denied the plaintiff class effective assistance of counsel.[260] As relief, the

252. *See* Motion to Dismiss at 1, Lewis v. Hollenbach, No. 2009-SC-000164-TG (Ky. May 13, 2009), *available at* http://dpa.ky.gov/NR/rdonlyres/6CBAD5CF-FAA0-40BD-9104-5F4FC77CCF81/0/SCtMotiontoDismiss.pdf.

253. *See* Order, *supra* note 244.

254. *See Presentation to Budget Review Subcommittee*, KY. DEP'T OF PUB. ADVOCACY, http://dpa.ky.gov (last updated Sept. 16, 2010) (discussing how the DPA's projected caseload for Fiscal Year 2010 is approximately 453 cases per attorney, while the more urban areas caseloads are even higher).

255. *See id.*

256. *See* Ronnie Ellis, *Conway Calls For Executions While Others Call for Moratorium*, MCCREARY COUNTY REC., Nov. 24, 2009, *available at* http://mccrearyrecord.com/statenews/x546247946/Conway-calls-for-executions-while-others-call-for-moratorium (discussing that "50 Kentucky capital cases have received full review by the Kentucky Supreme Court and Sixth Circuit Court of Appeals and 42 were reversed because of serious errors").

257. *See* Complaint at 1, 2, 49, Duncan v. State, No. 07-000242-CZ (Ingham Cnty. Cir. Ct. 2007), *available at* http://www.sado.org/fees/duncan_v_state.pdf. The lawsuit concerned the defendants in Berrien, Genesee, and Muskegon counties. *Id.* at 2.

258. *Duncan*, 774 N.W.2d 89, 90, 97 (Mich. Ct. App. 2009).

259. *See* Complaint, *supra* note 257, at 25-36.

260. *Id.* at 44. The complaint is rife with specific allegations of ineffective assistance of counsel. *Duncan*, 774 N.W.2d at 99. Some that the Court of Appeals found relevant were:

complaint requested that the court declare the defendants' action to be unconstitutional and to enjoin them from such practices.[261] Further, the class moved for the court to order the defendants to provide a proper indigent defense program consistent with the Constitution.[262]

Defendants moved to summarily dispose of the lawsuit, claiming the plaintiffs lacked standing, the trial court lacked jurisdiction, the plaintiffs failed to state a claim upon which relief could be granted, and the defendants were entitled to governmental immunity.[263] The trial court disagreed with Defendants, denied their motion, and granted class certification to the plaintiffs.[264] Defendants appealed the decision to the Michigan Court of Appeals who affirmed the trial court's ruling.[265] Although the Court of Appeals decision did not rule on the merits of Plaintiffs' claims, its ruling paved the way for the plaintiffs to proceed.[266] Furthermore, the court noted

---

> [C]ounsel speaking with plaintiffs, for the first time, in holding cells for mere minutes before scheduled preliminary examinations while in full hearing range of other inmates; counsel advising plaintiffs to waive preliminary examinations without meaningful discussions of case-relevant matters; counsel failing to provide plaintiffs with police reports; and counsel generally neglecting throughout the entire course of criminal proceedings to discuss with plaintiffs the accuracy and nature of the charges, the circumstances of the purported crimes, and any potential defenses. Further alleged instances include: counsel entering into plea negotiations without client input or approval; counsel perfunctorily advising plaintiffs to plead guilty as charged absent meaningful investigation and inquiry; counsel improperly urging plaintiffs to admit facts when pleas were taken; and counsel neither preparing for hearings and trials nor engaging in any communications with plaintiffs concerning trials.

Id. The specific allegations from each of the plaintiffs are as follows:

> Plaintiff . . . Duncan alleges that he pleaded guilty [to] an overcharged crime that was factually unwarranted because of his attorneys [sic] inadequate representation. Plaintiff . . . Burr . . . alleges that he had to endure a delay before an acceptable misdemeanor plea was offered to him, which only occurred after counsel advised him to plead guilty [to] the charged felony and after Burr demanded that counsel speak further to the prosecutor. Plaintiff . . . Connor alleges that there was a basis to suppress a search without a warrant that was ignored by counsel. Plaintiff . . . Taylor alleges that there existed a valid defense predicated on forensic evidence and witness accounts had counsel bothered conducting an investigation and inquiry. Plaintiff . . .Davila alleges that counsel failed to discuss the charges with Davila, lied to the court about it, and failed to challenge a revision of the charges. Plaintiffs . . . O'Sullivan, . . . Manies, and . . . Secrest allege that counsel had effectively gone missing in action, despite the fact that they faced serious charges and that hearings and trials were pending.

Id. at 132.

261. *See* Complaint, *supra* note 257, at 48.

262. *Id.*

263. *Duncan*, 774 N.W.2d at 100. Defendants also maintained that the wrong parties were sued, among other claims. *Id.*; U.S. CONST. amend. XI.

264. *Duncan*, 774 N.W.2d at 100, 145.

265. *Id.* at 145.

266. *See id.*

that the "plaintiffs have sufficiently alleged facts that, if true, establish standing, establish that the case is ripe for adjudication, and state claims upon which declaratory and injunctive relief can be awarded."[267] The court also found that the defendants were the appropriate parties, the trial court had jurisdiction, and the trial court also had authority to order declaratory, prohibitory, and a certain level of mandatory injunctive relief.[268]

In April 2010, the suit passed one more hurdle when the Supreme Court of Michigan approved the Court of Appeals decision and allowed the lawsuit to go forward.[269] It is unclear, at this point, what effect a positive outcome of this lawsuit would actually have on the indigent defendants in the state of Michigan. If the suit forces the state to properly fund the indigent defense system in Michigan, however, it could have far-reaching consequences.

D. New York

A similar suit has also passed scrutiny in New York. As discussed briefly above, Kimberly Hurrell-Harring was arrested in Washington County, New York for trying to sneak marijuana to her husband, an inmate in a state prison.[270] Pressured by her court-appointed lawyer, Ms. Hurrell-Harring pleaded guilty and was convicted of a felony.[271] Her case was noticed by the New York Civil Liberties Union, which then filed suit on her behalf, as well as nineteen other defendants in five New York counties.[272]

In their suit, the plaintiffs allege many of the same complaints found in similar suits around the country. There are allegations of excessive ca-

---

267. *Id.* at 98.

268. *Id.* at 107.

269. Duncan v. State, 780 N.W.2d 843, 844 (Mich. 2010) [hereinafter *Duncan II*]. The Supreme Court of Michigan did not comment on the merit of any of the claims and merely entered a summary order affirming the Court of Appeals. The court did give some hint as to its reasoning when it said: "[t]his case is at its earliest stages and, based solely on the plaintiffs' pleadings in this case, it is premature to make a decision on the substantive issues. Accordingly, the defendants are not entitled to summary disposition at this time." *Id.*

270. Glaberson, *supra* note 177. See more discussion of this case *supra* Section III.E.

271. *Id.* According to Ms. Hurrell-Harring's court-appointed attorney, Patrick Barber, he and four other part-time defenders juggle 1,661 cases appointed to them. *See* Deborah Hastings, *Public Defenders, and Defendants, Feel the Squeeze*, RICHMOND TIMES-DISPATCH, June 13, 2009, *available at* http://www2.timesdispatch.com /lifestyles/2009/jun/13/i-defe0604_20090611-213005-ar-40477/. Other reports of Mr. Barber have not been so favorable, however. *See* Glaberson, *supra* note 177; *supra* Section IV.E.

272. The Counties are: Onondaga, Ontario, Schuler, Suffolk and Washington. *See* Amended Class Action Complaint, Hurrell-Harring v. State, 2008 N.Y. Misc. LEXIS 5479 (N.Y. Sup. Ct. 2008), *available at* http://www.nyclu.org/files/Amended%20Class %20Action%20Complaint.pdf.

seloads, lack of training, lack of funding, lack of supervision, etc.[273] According to the plaintiffs, all of these situations have led to the complete breakdown of the indigent defense system in five counties in New York and have deprived the plaintiffs of their right to counsel.[274] In support, the plaintiffs frequently cited to a recent report regarding the status of indigent defense in New York, referred to here as the "Kaye Report."[275] The plaintiffs asked the trial court to enter an order declaring that the plaintiffs' rights were being violated, as well as to enjoin the state of New York to overhaul the system so as to comply with the state and federal constitutions.[276]

The State moved to dismiss the complaint on the grounds that the remedies sought were not justiciable.[277] Namely, the State alleged that each of the plaintiffs could pursue their action via ineffective assistance of counsel motions in their individual criminal cases.[278] Further, the State argued that the named plaintiffs did not have standing to assert the constitutional violations on behalf of future indigent defendants.[279] The State also asserted that the proper avenue to pursue the implementation of the Kaye Report was in the legislature, not the courts.[280] The trial court granted the motion to dismiss for the reasons articulated by the State, but the intermediate appellate

---

273. The Complaint alleges that the New York's failure to provide a proper indigent defense system harms plaintiffs in myriad ways. Some of the harms suffered include:

> wrongful denial of representation; unnecessary or prolonged pretrial detention; excessive or inappropriate bail determinations, which have been shown [to] increase the likelihood of conviction; waiver of meritorious defenses; guilty pleas to inappropriate charges; guilty pleas taken without adequate knowledge and awareness of the full, collateral consequences of the pleas; wrongful conviction of crimes; harsher sentences than the facts of the case warrant and few alternatives to incarceration; and waiver of the right to appeal and other post-conviction rights.

Id. at 5.

274. *See, e.g.*, *id.* Even though the complaint centers on five counties, it does state that these inadequacies are not limited to those counties. Those are just the counties where the plaintiffs are from, and are therefore the subject of the suit. *See id.*

275. In 2004, Chief Judge of the State of New York, Judith S. Kaye, commissioned a group to study the indigent defense system in New York. The group, called the New York Commission on the Future of Indigent Defense Services, issued its report in June 2006. In its detailed report, the Commission found that the state of New York "is currently failing to provide a substantial number of indigent defendants with adequate and meaningful representation as required by the state and federal constitutions and the laws of New York State." 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 vi (2006) [hereinafter KAYE REPORT], *available at* http://www.courts.state.ny.us/ip/indigentdefense-commission/SpangenbergGroupReport.pdf.

276. Amended Class Action Complaint, *supra* note 272, at 103.

277. Hurrell-Harring v. State, 2008 N.Y. Misc. LEXIS 5479 (N.Y. Sup. Ct. 2008).

278. *Id.*

279. *Id.*

280. *Id.*

court reversed.[281] The State then appealed to New York's court of last resort,[282] the Court of Appeals, where a more favorable ruling for indigent defendants occurred.

The Court of Appeals denied the State's motion to dismiss, allowing the case to proceed.[283] In its opinion, New York's highest court disputed that the State's allegation in this case was merely an ineffective representation issue. Instead, the court held that the issue was one of Sixth Amendment *deprivation* of counsel and was therefore cognizable in a civil action of the sort brought by Plaintiffs. As the court explained, "[t]he questions properly raised in this Sixth Amendment-grounded action, we think, go not to whether ineffectiveness has assumed systemic dimensions, but rather to whether the State has met its foundational obligation under *Gideon* to provide legal representation."[284]

As to the second question, whether this is an issue within the purview of the legislature and not the courts, the Court of Appeals countered that claim with one of the oldest constitutional doctrines, that of judicial review.[285] Plaintiffs' claim that they are being deprived of a constitutional right was certainly justiciable in the courts, according to the Court of Appeals of New York, just as it was justiciable in *Gideon*.[286] Even if a remedy would require the "reordering of legislative priorities,"[287] according to the court, it is the essential obligation of the judiciary to correct a "violation of a fundamental constitutional right."[288] In concluding its opinion and reinstating the lawsuit, the Court of Appeals reminded us that "*Gideon's* guarantee to the assistance of counsel does not turn upon a defendant's guilt or innocence, and neither can the availability of a remedy for its denial."[289]

E. What Do These Lawsuits Tell Us?

When comparing these lawsuits, the most notable difference between the successful lawsuits and the unsuccessful lawsuits lies in who the plain-

---

281. Hurrell-Harring v. State, 883 N.Y.S.2d 349 (N.Y. App. Div. 2009).

282. The Court of Appeals is New York's highest appellate court. *See* STATE OF NEW YORK, COURT OF APPEALS, http://www.nycourts.gov/ctapps (last visited Feb. 1, 2011).

283. *Hurrell-Harring*, 883 N.Y.S.2d at 361.

284. Hurrell-Harring v. State, 930 N.E.2d 217, 221-22 (N.Y. 2010) [hereinafter *Hurrell-Harring II*].

285. *Id.* at 227 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803)).

286. *Id.* "There is no argument that what was justiciable in *Gideon* is now beyond the power of a court to decide." *Id.* "There is no dispute that both our Federal and State Constitutions guarantee the right to counsel to all criminal defendants where loss of liberty is at stake and, where a defendant is unable to retain an attorney, require that the state provide counsel." *Hurrell-Harring*, 883 N.Y.S.2d at 358.

287. *Hurrell-Harring II*, 930 N.E.2d at 227.

288. *Id.* (citing *Marbury*, 5 U.S. (1 Cranch) 137).

289. *Id.*

tiffs are. Public defenders bringing suit, while perhaps garnering some sympathy from the courts, have not actually prevailed.[290] On the other hand, when the plaintiffs are the indigent defendants themselves,[291] and, therefore, are those who have presumably suffered the constitutional violation, the courts seem much more likely to at least let the lawsuit survive. The downside to such suits, however, is the lack of general effect they may have on the criminal justice system. Although they may generate relief for some individual defendants, it is unlikely that they can affect the kind of change necessary to make a difference in the indigent defense system as a whole.

V. WHY THIS PROBLEM NEEDS TO BE SOLVED

This Article has shown that the problem of non-representation of indigents still exists today, possibly more so than it did before *Gideon*. Although lawsuits are one way to remedy the problem, a larger systemic change needs to occur. A question remains, however, as to what remedy can be employed today, in a time when the economy is worse than ever. Some critics would say, after all, these are criminals, the dregs of society. Why should we afford them protection when schools are losing teachers and policemen and firefighters are losing their jobs? Why should those accused of crime be a top concern?

One of the most obvious reasons is that the Constitution says so.[292] *Gideon* and its progeny mandate that all indigent defendants be provided effective counsel, and this Article shows that many are not being provided with this fundamental constitutional right. We do not want to fall further into the abyss of having a system of justice where only the rich can defend themselves. Cases in the news from O.J. Simpson[293] to Donté Stallworth[294]

---

290. See Kentucky and Florida cases discussed *supra* Subsections IV.A., IV.B.

291. This also applies to those who are represented by a national interest group such as the National Legal Aid and Defender Association, National Association of Criminal Defense Lawyers, America Civil Liberties Union, etc., such as *Hurrell-Harring* (represented by the New York Civil Liberties Union Foundation) and *Duncan* (represented by American Civil Liberties Union).

292. *See supra* notes 10-22.

293. Mr. Simpson was accused of killing his ex-wife and her friend Ron Goldman. *See* http://sportsillustrated.cnn.com/vault/article/magazine/MAG1005334/index.htm The civil suit can be found at Rufo v. Simpson, 103 Cal.Rptr.2d 492 (Cal. Ct. App. 2001). The judge presiding at the civil trial was Hiroshi Fujisaki.

294. Brian Kapur, *Cooperative Stallworth Gets 30 Days; DUI Plea Criticized*, USA TODAY, June 17, 2009, *available at* http://www.usatoday.com/sports/football/nfl/browns/2009-06-15-stallworth-dui-case_N.htm?csp=34. Though convicted of DUI manslaughter, Stallworth received only thirty days in jail. Chuck Hurley, CEO of Mothers Against Drunk Driving (MADD), was not happy with the settlement. "MADD is profoundly disappointed in the outcome of the Stallworth settlement," Hurley said in a statement. "MADD will not accept any monies from the settlement. This is a clear test of the NFL's continued tolerance

highlight the belief that if you have enough money, you can buy justice. America was founded on the principle that justice should be provided for all, not only those who can afford it.

Further, our system is based on the belief that all defendants are innocent before proven guilty. In fact, more and more evidence surfaces every day to show us that the system convicts innocent people more often than we are aware.[295] The crisis in funding for public defenders is likely to exacerbate this problem. If a public defender has only hours to work on the entirety of a case, how is he to distinguish those clients who are truly innocent from those who merely claim they are?[296]

Additionally, most Americans believe in a system of public defense.[297] In a survey conducted by the National Committee on the Right to Counsel, it was found that "88 [%] of Americans believe that the quality of justice a person receives should not be determined by how much money he or she has."[298] Further, 94% of Americans "believe it is important for low-income defendants to be represented by attorneys with small enough caseloads to provide the time necessary to prepare a defense."[299] Almost 60% believe this should be a guaranteed right.[300]

Finally, providing competent counsel to indigent defendants could actually save the states much needed resources. It is possible that fewer ineffective assistance of counsel claims would be filed, freeing up time for prosecutors to focus on prosecuting crime. There would also likely be fewer appeals. Further, defendants would most likely receive lighter sentences if their defenses were actually investigated and handled correctly, instead of being shuffled off to jail on plea agreements. In turn, this would serve as a reduction in the states' burden of housing these prisoners in jail.

VI. WHAT WE CAN DO TO BRING *GIDEON* BACK TO LIFE

So, now having established that it should be fixed—how do we go about accomplishing that goal? In a way, the economy may be a blessing in

---

of drunk driving. We are closely watching what the NFL does." *See id.* The same article also discusses Atlanta Falcons quarterback Michael Vick, who was sentenced to two years in prison after he pleaded guilty to federal dogfighting charges, and Leonard Little of the Rams, who received only an eight-game suspension from the NFL after he pled guilty to involuntary manslaughter for hitting and killing a woman while he was driving drunk. *Id.*

295. *See* Mosteller, *supra* note 9.

296. *Id.*

297. Nat'l Comm. on the Right to Counsel, *Facts and Figures*, NAT'L LEGAL AID & DEFENDER ASS'N (2004), *available at* http://www.nlada.org/Defender/Defender_Kit/facts#howfunded [hereinafter NLDA FACTS AND FIGURES].

298. *Id.*

299. *Id.*

300. *Id.*

disguise, forcing us to make big changes in how we prosecute crime—changes we may not have chosen to undertake without facing such financial dire straits. The three suggestions below may not be heralded by prosecutors and law enforcement officers at first glance, but in reality, these suggestions would not only help those who represent the indigent accused of crimes, but would also bring needed relief to law enforcement agencies as well.

A. Abandon the Tough-on-Crime Mentality

We have long fostered the idea in this country that being "tough on crime" is a way to curtail the criminal acts and help form a more peaceful society. Such a belief has its origins in some of the more conservative presidential administrations, beginning with President Nixon.[301] In 1970, one in every 400 Americans was incarcerated.[302] Today, that number has quadrupled, with nearly one in every 100 adults being incarcerated, more than in any other affluent country.[303] America has five times more people incarcerated than in Britain, nine times more than Germany, and twelve times more than Japan.[304]

Part of the increase in prison populations is directly related to the war on drugs.[305] Over the past thirty years, stricter drug laws and tougher sentences for drug offenses have contributed to a much larger prison population.[306] The number of people in prison for drug crimes has increased from 40,000 in 1980, to 500,000 today.[307] This wave of incarceration has swept up many unintended victims in its wake. One example is Richard Paey, a disabled man convicted of drug trafficking because he had exactly the amount of medicine he was prescribed.[308] Mr. Paey is a car accident victim

301. Adam Liptak, *Right and Left Join Forces on Criminal Justice*, N.Y. TIMES, Nov. 23, 2009, *available at* http://www.nytimes.com/2009/11/24/us/24crime.html.

302. *Rough Justice In America: Too Many Laws, Too Many Prisoners*, THE ECONOMIST, July 22, 2010, at 26 [hereinafter *Rough Justice*].

303. *Id.*

304. *Id.*

305. As far back as 1986, Professor Wisotsky opined that the war on drugs was futile and a drain on our law enforcement system. *See* STEVEN WISOTSKY, BREAKING THE IMPASSE IN THE WAR ON DRUGS 8 (1986); STEVEN WISOTSKY, BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY 8 (1990).

306. While the number of people imprisoned for violent crime has decreased 28%, non-violent offenders being imprisoned rose 189%. *See Rough Justice*, *supra* note 302, at 29.

307. Marc Mauer, *Tough Sentencing Harder on Budgets Than on Crime*, LEXINGTON HERALD-LEADER, June 7, 2009, at D1; *see also*, Robert G. Lawson, *Drug Law Reform—Retreating from an Incarceration Addiction*, 98 KY. L.J. 201, 201 (2010).

308. Daniel Schorn, *Prisoner Of Pain: How One Man's Quest For Pain Relief Landed Him In Jail*, CBS NEWS, Jan. 29, 2006, http://www.cbsnews.com/stories/2006/01/25/60minutes/main1238202.shtml?tag=contentMain;contentBody; *see also*,

who is confined to a wheelchair and suffers from multiple scleroris.[309] As a result, Mr. Paey endures an excruciating amount of pain each day.[310] In order to ease that pain, Mr. Paey takes a large amount of Vicodin, Percocet, and other medications.[311] The more he takes those medicines, the more his body builds up a tolerance to them, and the more painkillers he has to ingest to get any relief.[312] The large amount of prescriptions filled by Mr. Paey caught the eye of law enforcement agents, who were convinced Mr. Paey was selling the painkillers.[313] He was arrested, tried, and convicted of drug trafficking.[314] Because of the mandatory minimum sentencing scheme in Florida, the judge had no choice but to sentence Mr. Paey to twenty-five years in prison.[315] Mr. Paey served four years of that sentence before Florida Governor Charlie Crist granted him a full pardon.[316] Mr. Paey still proclaims he never sold one pill and sat in prison for four years for a crime he did not commit.[317]

Another problem with the over incarceration of drug crimes is the almost inevitable recidivism of incarcerated prisoners. Today, two-thirds of released prisoners are expected to be rearrested within three years of release.[318] A first-time drug offender may receive a light sentence the first time, but, when released, the chances are high that he or she will go back to using drugs or alcohol and be rearrested. If not rearrested on new charges, these offenders may be out on parole, and many are sent back to prison for parole violations. Interestingly enough, in one state, it was found that 60% of parole violations were a result of the parolee using alcohol or drugs, or merely failing to report to their parole officer.[319] Many of those then rearrested are subject to even harsher sentences based on laws designed to deter repeat offenses.[320] These victimless crimes are creating a vicious circle of

---

John Tierney, *Punishing Pain*, July 19, 2005, N.Y TIMES, *available at* http://www.nytimes.com/2005/07/19/opinion/19tierney.html?_r=1&oref=slogin; Radley Balko, *Richard Paey Speaks: An Interview with the Paraplegic Man Sentenced to 25 Years in Prison for Treating His Own Pain*, REASON MAG., Nov. 20, 2007, *available at* http://reason.com/archives/2007/11/20/richard-paey-speaks.

309. Schorn, *supra* note 308.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. Balko, *supra* note 308.

317. *Id.* Ironically, Mr. Paey received the most relief from his pain while he was in prison, where the State paid for a constant morphine drip directly into his spine. *Id.*

318. Mauer, *supra* note 307.

319. *Id.* ("In Kansas, for example, 60% of admissions to prison had consisted of parolees who had been using drugs or alcohol or who failed to report to their parole officer.").

320. *Rough Justice*, *supra* note 302, at 26, 29.

incarceration that overburdens and drains the resources of the states. At an average annual cost of $25,000[321] per prisoner, the incarceration of these drug offenders is costing the states $12.5 billion dollars a year.[322] If this money were to be divided amongst the fifty states, each state would see a windfall of $230 million per year.[323] This money could then be used to combat violent crime and create more diversion programs that would actually help stop the cycle of incarceration that has become so prevalent. Of course, this money could also be used to help fund a failing indigent defense system.[324]

Some critics argue that these harsher penalties help deter crime and have a direct result on the falling crime rate.[325] While no one denies that the crime rate has dropped, one study shows that for every 10% increase in the number of people in jail, the crime rate would only be reduced by half of 1%.[326] Is this over-incarceration worth it? Most Americans actually do not think so. In fact, the attitudes of most Americans have changed dramatically over the past fifteen years with regard to crime and punishment.[327] In a survey conducted in 2006, more than half of those asked believed that alternative sentencing should "often" be employed over incarceration for non-violent offenders.[328] Additionally, the public seems to be dissatisfied with mandatory minimum sentencing schemes that take away the discretion of judges.[329] Furthermore, more than 75% of the people believe that sentencing reform is needed.[330]

Fighting crime is most certainly an important societal goal, but the balance between fighting crime and the resources afforded to those accused of committing crimes is unequal in today's society. We have increased the likelihood of being accused of a crime with the imposition of harsh drug laws, yet we have made it much harder to defend oneself against such an

---

321. This number is derived by multiplying 50,000 (number of prisoners incarcerated for drug crimes) by 25,000 (cost to states per prisoner per year). Some estimates are even as high as $50,000 per prisoner, per year in California, which would make the total amount of money spent on incarcerating prisoners considerably larger. *Id.* at 29.

322. Mauer, *supra* note 307.

323. Based on calculations of 460,000 x 25000 = 11,500,000,000 / 50 = 230,000,000.

324. Klein, *supra* note 9, at 1439.

325. *Rough Justice*, *supra* note 302, at 28.

326. *Id.* at 29.

327. *See* PRINCETON SURVEY RESEARCH ASSOCS. INT'L FOR THE NAT'L CTR. STATE COURTS, NCSC SENTENCING ATTITUDES SURVEY (2006), *available at* http://www.ncsconline.org/D_Research/Documents/NCSC_SentencingSurvey_Report_Final060720.pdf [hereinafter NCSC SURVEY].

328. *Id.* at 5.

329. *Id.* at 6. The survey found that 56% of Americans believe that judges should have *more leeway* in sentencing. *Id.*

330. *Id.* at 7. Over a quarter of those surveyed believed that *major* change is needed. *Id.*

accusation. This appears fundamentally unfair and inapposite to the system of justice upon which our country was founded.

B. Misdemeanor Reform

Another way to find more money for state budgets—and free up public defenders—is to reform the misdemeanor system as it currently exists in this country. Right now, the misdemeanor system is a "black hole for justice and resources."[331] Misdemeanor prosecutions have more than doubled in the last thirty years, going from five million in 1972 to 10.5 million in 2006.[332]

Much of the reason for the rise in misdemeanor cases is the over-criminalization of so many offenses.[333] Some examples of offenses now classified as "crimes" include sleeping in a cardboard box,[334] occupying more than one seat on the subway,[335] and feeding the homeless.[336] Other offenses that tend to clog the misdemeanor courts are those related to driver's licenses. The charge of driving with a suspended license ("DWLS") consumed 41% of the cases heard in one misdemeanor court in Washington State on the day of a site visit from the writers of the National Association of Criminal Defense Lawyers ("NACDL") report, "Minor Crimes, Massive Waste."[337] The prevalence of these charges is due to the ease in which a person can pick up a DWLS charge. Many people have their license suspended for failing to pay a fine or failure to appear in court, and many times this suspension is done *in absentia*, so the defendant does not even know the license has been suspended until he or she is arrested for the offense.[338] Many of these defendants fail to pay their fines because they simply cannot afford it, particularly in these tough economic times. And if they cannot

331. *See* Tim Klass, *Study Finds 'Massive Waste' in Misdemeanor Cases*, N.Y. TIMES, Apr. 29, 2009 (quoting John Wesley Hall, president of National Association of Criminal Defense Lawyers).

332. MINOR CRIMES, MASSIVE WASTE, *supra* note 111, at 11.

333. *Id.*

334. *Id.* at 25 (citing *Betancourt v. Bloomberg*, 448 F.3d 547, 554 (2nd Cir. 2006) (upholding arrest for sleeping in a cardboard box against constitutional vagueness challenge)).

335. *Id.* at 25 (citing N.Y. COMP. CODES R. & REGS. tit. 21 § 1050.7 (2010)).

336. *Id.* (citing *In Orlando, a Law Against Feeding Homeless—and Debate Over Samaritans' Rights*, ASSOCIATED PRESS, Feb. 3, 2007, *available at* http://www.iht.com/articles/ap/2007/02/04/america/NA-FEA-GEN-US-Do-Not-Feed-the-Homeless.php.

337. MINOR CRIMES, MASSIVE WASTE, *supra* note 111, at 25-26. Another 21% of the cases were minors in possession of alcohol, making more than 60% of the misdemeanor cases in the Lower Kittias District Court that day either DWLS or minor in possession of alcohol. *Id.*

338. *Id.*; *see also* discussion *infra* notes 347-49 regarding the King County, Washington diversion program.

afford to pay a traffic ticket, they probably cannot afford to pay an attorney and, therefore, turn to the public defender.

The idea that many offenses are over-criminalized is not merely a liberal inspiration. There is a rising consensus from both the right and left that the criminal justice system needs massive reform, and there are too many laws criminalizing minor acts.[339] Even Edwin Meese, former attorney general under Ronald Reagan, has spoken publicly about the rise of criminal offenses.[340] As discussed *supra*, much of the caseload burden in public defenders' offices stems from this rising misdemeanor caseload.[341] Decriminalizing many of these offenses would free the public defenders offices to represent those who are accused of serious crime, allowing for a more thorough defense.[342] Additionally, decriminalizing them would save the states millions of dollars.[343]

---

339. Liptak, *supra* note 301. Although both sides tend to agree that reform is needed, the reasons for the reform are at odds. The conservatives, for example, believe that the criminal justice system has become so over encompassing of crimes because of the liberal tendency to promote "big government." *Id.* The liberals, on the other hand, blame the conservative war on drugs. HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT 45-47 (2009). According to Mr. Silverglate, the federal laws are so "comprehensive and vague that all Americans violate it every day, meaning prosecutors can indict anyone at all." Liptak, *supra* (citing SILVERGLATE, *supra*, at xxx-xxxi).

340. Liptak, *supra* note 301 ("There are . . . more than 4400 criminal offenses in the federal code," according to the Heritage Foundation, a conservative think tank in which Mr. Meese is a fellow. The foundation takes issue with the fact that many of these offenses do not require the prosecutors to prove any kind of criminal intent.); *see also* SILVERGLATE, *supra* note 339, at xxxi. It must be noted that the conservative criticism of the justice system comes at a time when many prominent businessman are being prosecuted for financial dealings, no doubt influencing this new-found criticism.

341. *See* MINOR CRIMES, MASSIVE WASTE, *supra* note 111, at 26-28.

342. Logic follows that a more thorough defense would also result in fewer ineffective assistance of counsel claims and possibly more dismissal of charges if they were thoroughly investigated. Furthermore, it would also free the prosecutors from having to litigate these cases and allow them to focus on the bigger, more important crimes.

343. *See* MINOR CRIMES, MASSIVE WASTE, *supra* note 111, at 27-30. The authors make four recommendations that would help ease the caseload problem in misdemeanor courts:

> 1. Offenses that do not involve a significant risk to public safety should be decriminalized.
>
> . . . .
>
> 2. Diversion programs should be expanded.
>
> . . . .
>
> 3. Funding for misdemeanor defense should permit the maintenance of appropriate caseloads.
>
> . . . .
>
> 4. Counties and states should discontinue the use of flat-fee contracts as a means of providing indigent defense services.

Id.

Recognizing this need, some states have begun this process. In Hawaii, for example, the State legislature passed an act that required a nonpartisan research group "to identify minor criminal offenses for which typically only a fine is imposed and which may be decriminalized without undermining the ability of government to enforce laws within its jurisdiction."[344] Following the recommendation of the group, the Hawaii legislature decriminalized a host of agricultural, conservation-related, transportation, and boating offenses.[345] In Massachusetts, the citizens of the state voted to decriminalize possession of small quantities of marijuana; and in Nebraska, the public defender has recommended the decriminalization of various dog leash and trespass offenses.[346]

Another recommendation by a major study is to expand diversion programs.[347] King County, Washington has such a program for those whose license has been suspended.[348] Under the guidelines of that program, the defendant can pay the fines associated with the suspended license through community service or work crew. If the person completes the program, the prosecutor dismisses any associated charges. When the program was studied in 2004, it was found that the diversion program allowed for an 84% reduction in prosecuting filings of DWLS and a 24% reduction in jail costs, with 1,330 fewer jail days. Further, the study found that the program actually generated twice as much revenue as it cost.[349] Because there would be no possible jail time associated with these charges, the states would not be required to assign counsel to the defendants. If other jurisdictions follow the lead of states such as Hawaii and Washington and choose to decriminalize many of these petty offenses, there would be fewer charges for public defenders to defend. This would free up the precious time of public defenders to spend representing those charged with serious crimes.

---

344. *Id.* at 27. After undertaking the research, the group found that in Hawaii:

> numerous criminal offenses remain on the books outside the Penal Code that are routinely disposed of by a fine but which, because they are technically criminal, require at least one court appearance and all of the time and expense that goes with it. Some of these are traffic offenses but many are offenses that have become arcane, sometimes perceived as being irrelevant with the passage of time.

Id. (quoting Edwin L. Baker, *Decriminalization of Nonserious Offenses: A Plan of Action*, LEGISLATIVE REFERENCE BUREAU, Report No. 3 (2005), *available at* http://www.state.hi.us/lrb/rpts05/decrim.pdf).

345. *Id.* (citing S.B. 2400, 24th leg. (Haw. 2008), *available at* http://www.capitol.hawaii.gov/session2008/Bills/SB2400_CD1_.pdf).

346. *Id.* at 28.

347. *See id.*

348. *Id.*

349. *Id.*

C. Prosecutorial Discretion

Though statutory reform is a start, prosecuting agencies must also play their part by employing more prosecutorial discretion.[350] One Philadelphia prosecutor has embraced this idea.[351] R. Seth Williams took over the job as the new district attorney in crime-ridden Philadelphia in January 2010. One of the first things on his agenda was to get "smart on crime," instead of tough on crime. In following his word, Mr. Williams downgraded penalties for possessing small amounts of marijuana from jail time to community service and fines.[352] Even more important are the changes Mr. Williams is making in the unit that decides what charges to file.[353] That unit previously consisted of five lawyers, mostly new prosecutors, who were told to file "the widest and harshest charges they could."[354] This idea of "throwing everything at the wall and seeing what sticks" is prevalent amongst many prosecuting offices.[355] Under Mr. Williams' administration, however, the unit has been increased to eighteen lawyers who are told to spend time considering what charges will be likely to succeed. They have also been authorized to offer more plea bargains earlier in the process.[356]

Although the outward motivation of Mr. Williams may be to obtain more successful convictions, his philosophy is one that will have far-reaching effects. If minor drug crimes result in only community service and fines, drug addicts are kept out of jail and better able to get help dealing with their addictions. Furthermore, if the office is more selective about the charges it brings, public defenders are liberated to represent those accused of more serious crimes. It will be interesting to see how this new idea plays out in Philadelphia. Hopefully, it will attract the attention of other prosecut-

---

350. In the report MINOR CRIMES, MASSIVE WASTE, the writers observed public defenders preparing to try a solicitation of alcohol case that apparently involved "an exotic dancer accused of improperly soliciting a patron to purchase an alcoholic beverage." *Id.* at 26.

351. Erik Eckholm, *'Smart on Crime' Mantra of Philadelphia Prosecutor*, N.Y. TIMES, June 19, 2010, *available at* http://www.nytimes.com/2010/06/20/us/20philly.html?_r=1.

352. *Id.*

353. *Id.*

354. *Id.*

355. See Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceiling*, 82 TUL. L. REV. 1237, 1254 (2008) ("[P]rosecutors can be expected to, and do routinely, overcharge simply because overcharging gives prosecutors bargaining leverage.").

356. Eckholm, *supra* note 351. Much of the motivation behind this shift in ideals stems from the failure of the office to successfully convict many violent criminals. In fact, an investigative report done by the Philadelphia Inquirer found that the city "failed to obtain convictions in two-thirds of cases involving violent crimes" in the city. The report also found that "thousands of cases were dismissed because prosecutors were not prepared or witnesses did not appear." *Id.*

ing offices across the country, and Mr. Williams's approach will herald the beginning of a new philosophy in criminal justice.

CONCLUSION

Although the litigation discussed above is one way to bring attention to the plight of the indigent in this country, such litigation is not likely to bring about the changes that are needed in the criminal justice system. For one thing, much of the litigation surrounding this issue seems to be reaching a dead end. There is some hope with the lawsuits filed in Michigan and New York, and most recently in Missouri,[357] but much of this litigation is focused on particular defendants. Additionally, a victory for the public defender in these cases may relieve the attorneys of some of their burden, but it could very well leave the indigent defendants with no one to represent them. To truly make a meaningful difference in the way the indigent are afforded their guaranteed right to counsel, fundamental reform is needed.

It is unrealistic to believe that all three of the reforms in this Article will happen forthwith. There is still much debate and opposition from the public, as well those involved in the criminal justice system.[358] In a time when schools and hospitals are facing major budget shortfalls, it is hard to get public support behind a reform to help the indigent accused of a crime.[359] Accordingly, the public must be educated as to why the reforms discussed here would be beneficial for not only those accused of crime, but

---

357. Amidst complaints of underfunding, public defenders in Missouri began refusing to accept new cases in July 2010. *See* Kathryn Wall, *Suspect's Case on Hold, Caught in Public Defender Case Overload*, COLUMBIA MISSOURIAN, Sept. 6, 2010, *available at* http://www.columbiamissourian.com/stories/2010/09/06/suspect-caught-public-defender-caseload. Despite this refusal, a trial court appointed the public defenders to defendant Jared Blacksher's case. *Id.* The Missouri Public Defender Commission sought a writ of prohibition in the Missouri Supreme Court, and the Court issued an Order to Show Cause on September 3, 2010. *See* Preliminary Writ of Prohibition, *In re* State *ex. rel.* Mo. Pub. Defenders Comm'n, No. SC91150 (Mo. Sept. 10, 2010), *available at* http://graphics8.nytimes.com/packages/pdf/Scan001.PDF. Though this was obviously not a substantive ruling, the fact that the Missouri Supreme Court did not deny the petition outright is a victory for the public defenders.

358. *See* Davey, *supra* note 104. In response to complaints from Missouri public defenders about their workload and lack of resources, one prosecutor has said, "[t]hey just need to suck it up and get out there and get it done." *Id.*

359. *See* Weaver, *supra* note 42, at 445 ("In the best of times, because criminal defendants are not popular with the public, there is no political will to revamp the system or to give significant budgetary increases to indigent defense. This is especially true today when the states face massive budget deficits, and they are being forced to cut more popular items such as health care and education. Under such circumstances, it is hard to believe that elected leaders are prepared to revamp the system of indigent representation or to provide significant funding increases. It is equally inconceivable that the United States Supreme Court will mandate such a revamping.").

also for society at large. At least two of the suggestions discussed in this Article would conform to that requirement. Reforming the misdemeanor system would not necessarily benefit hardened career criminals, but would help to alleviate some of the backlog in traffic courts. Instituting diversion programs, like the one in place in King County, Washington,[360] would still penalize traffic violators, but would have the added benefit of those violators contributing to society through community service and labor in work crews. Although abandoning tough on crime and the war on drugs would appear to be a tougher sell to the public, recent polls suggest that American's attitudes are changing in this regard.[361] Consequently, the time may have come to begin a true shift in the paradigm of our justice system.

Regardless of whether litigation or the recent attention to this crisis forces the states to make any real changes immediately, the states need to examine their treatment of indigent criminal defendants and find a way to truly honor the *Gideon* decision. Although *Gideon*'s trumpet has been muted, its volume must be raised so the criminal justice system can hear the plight of the indigent in America's criminal justice system. As Robert Kennedy so eloquently stated: "The poor man charged with a crime has no lobby. Ensuring fairness and equal treatment in criminal trials is the responsibility of us all."[362]

360. See discussion *supra*, Section VII.B.

361. See discussion *supra*, Section VII.A.

362. Ken Armstrong & Justin Mayo, *Frustrated Attorney: 'You Just Can't Help People'*, Apr. 6, 2004, *available at* http://seattletimes.nwsource.com/news/local/unequaldefense/stories/three.