Gideon and the Effective Assistance of Counsel: The Rhetoric and the Reality

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Introduction

It is now fifty years since the Supreme Court responded to "Gideon's Trumpet"[1] by establishing a Sixth Amendment right to counsel for all persons accused of felony offenses, forty years after that right was extended to most misdemeanor defendants,[2] and close to thirty years after the Court ruled that the right to counsel includes the right to effective assistance of counsel.[3] Over this period of time, the Supreme Court has repeatedly emphasized that "[b]ecause the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits."[4] Indeed, as opposed to the judicial retrenchment from other landmark constitutional criminal procedure decisions, including significant Fourth and Fifth Amendment rulings of the Warren Court,[5] *Gideon* and its progeny

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1. Gideon v. Wainwright, 372 U.S. 335 (1963); ANTHONY LEWIS, GIDEON'S TRUMPET (1964).

2. Argersinger v. Hamlin, 407 U.S. 25, 37–40 (1972).

3. Strickland v. Washington, 466 U.S. 668, 686 (1984).

4. Evitts v. Lucey, 469 U.S. 387, 395 (1985). The Court has also correctly recognized that the right to counsel ensures that "all other rights of the accused are protected." Penson v. Ohio, 488 U.S. 75, 84 (1988).

5. Recent Fifth Amendment decisions have limited the protections originally granted by *Miranda*. *Compare* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (ensuring the adversarial system's protection against self-incrimination), *with* Berghuis v. Thompkins, 560 U.S. 370, 380–87 (2010) (holding that the *Miranda* right to counsel must be invoked "unambiguously" in order to make police stop an interrogation), *and* Davis v. United States, 512 U.S. 452, 459 (1994) (narrowing *Miranda* protections with respect to the right to silence by requiring an "unambiguous" request for an attorney). Recent Fourth Amendment rulings have also been less protective of privacy than past rulings. *Compare* Katz v. United States, 389 U.S 347, 358–59 (1967) (holding that the Fourth Amendment not only governs the search and seizure of tangible items but also protects recordings of oral statements), *with* California v. Greenwood, 486 U.S. 35, 37 (1988) (holding that the Fourth Amendment does not protect garbage left outside a residence for collection

have had solid supporters on the Court, in the academy, and among the public. The Supreme Court has repeatedly affirmed the broad right to counsel in pre-trial, trial, and appellate contexts.[6]

Yet, there is near unanimous agreement that the "promise" of *Gideon* has been systematically denied to large numbers of criminal defendants.[7] As the National Right to Counsel Committee of the bi-partisan Constitutional Project stated in 2009:

> Yet, today, in criminal and juvenile proceedings in state courts, sometimes counsel is not provided at all, and it often is supplied in ways that make a mockery of the great promise of the *Gideon* decision and the Supreme Court's soaring rhetoric. Throughout the United States, indigent defense systems are struggling. Due to funding shortfalls, excessive caseloads, and a host of other problems, many are truly failing. . . . As a consequence, defense lawyers are constantly forced to violate their oaths as attorneys because their caseloads make it impossible for them to practice law as they are required to do according to the profession's rules. They cannot interview their clients properly, effectively seek their pretrial release, file appropriate motions, conduct necessary fact investigations, negotiate responsibly with the prosecutor, adequately prepare for hearings, and perform countless other tasks that normally

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from warrantless search and seizure), *and* United States v. White, 401 U.S. 745, 750–53 (1971) (further limiting the expectation of privacy protections).

6. *See, e.g.*, Rothgery v. Gillespie Cnty., 554 U.S. 191, 194 (2008) (citing Michigan v. Jackson, 475 U.S. 625, 629 n. 3 (1986); Brewer v. Williams, 430 U.S. 387, 398–99 (1977)) ("This Court has held that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty."); Alabama v. Shelton, 535 U.S. 654, 674 (2002) (holding that a suspended sentence could result in deprivation of a person's liberty and cannot be imposed unless a defendant is afforded counsel).

7. *See, e.g.*, AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [hereinafter GIDEON'S BROKEN PROMISE] (systematically exploring the problem of inadequate defense of indigent clients); KAREN HOUPPERT, CHASING GIDEON (2013) (case studies in which defendants could not afford an attorney); NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009) [hereinafter MINOR CRIMES]; NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), *available at* http://www.constitutionproject.org/pdf/139.pdf [hereinafter JUSTICE DENIED]; *see also* The Gideon Symposia, 122 YALE L.J. 2106 (2013); Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 839 (2013) (exploring how indigent defendants can vindicate their rights to effective counsel); Donald A. Dripps, *Up From* Gideon, 45 TEX. TECH L. REV. 113 (2012) (explaining the paradox of the *Gideon* decision and challenging the generally prevailing celebration of it).

> would be undertaken by a lawyer with sufficient time and resources.[8]

The report of the National Association of Criminal Defense Lawyers (NACDL) explained the caseload problem in misdemeanor courts this way:

> Almost [forty] years later, the misdemeanor criminal justice system is rife with the same problems that existed prior to the *Argersinger* decision. Legal representation for indigent defendants is absent in many cases. Even when an attorney is provided to defend a misdemeanor case, crushing workloads make it impossible for many defenders to effectively represent clients. Too often, counsel is unable to spend sufficient time on each of their cases. This forces even the most competent and dedicated attorneys to run afoul of their professional duties.[9]

These developments are a consequence of two related institutional failures: the abdication of funding responsibilities by political entities and the lack of judicial implementation of the *Gideon* mandate.[10] In retrospect, the failure to adequately fund indigent defense services is not surprising, as *Gideon* imposed an unfunded mandate on state and local governments, and criminal defendants are among the most disliked and politically powerless constituencies in our polity.[11] Indeed, as the criminal justice

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8. JUSTICE DENIED, *supra* note 7, at 2–7. There is also significant debate as to the right to counsel in civil cases. The Supreme Court has largely refused to recognize a right to appointed counsel even where the consequences of the civil action may be severe. *See, e.g.*, Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) (holding that the Fourteenth Amendment does not automatically require the State to provide counsel in civil contempt proceedings, even where the indigent respondent faces incarceration); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31–32 (1981) (holding that the Constitution does not guarantee right to counsel in civil proceedings, and that trial courts decide whether due process calls for appointment of counsel). The ABA has endorsed a right to counsel in civil cases implicating basic human needs. ABA Resolution 112A (2006); *see also* John Pollock, *"You Have a Right to a Lawyer . . . If You Can Afford It": A Look at the History of the Right to Counsel in Civil Cases and the Current Efforts to Expand It*, 81 U.S.L.W. 1797 (2013) (examining the growing movement supporting the right to counsel in some civil cases).

9. MINOR CRIMES, *supra* note 7, at 14.

10. On the issue of governmental responsibility, see Carol S. Steiker, Gideon *at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694 (2013), which makes the argument for a combination of legislative, administrative, and substantive changes to criminal law to support *Gideon*'s promise of representation for indigent criminal defendants.

11. *See* Erwin Chemerinsky, *Lessons from* Gideon, 122 YALE L.J. 2676 (2013) (arguing that *Gideon*'s promise was not fulfilled due to an unfunded mandate and *Strickland*'s weak standards); Martin Guggenheim, *The People's Right to a Well-Funded Indigent Defender System*, 36 N.Y.U. REV. L. & SOC. CHANGE 395, 395 (2012) (insisting that structural protections guaranteed by the right to counsel go "well beyond an individual's due process rights"). The federal government provides financial assistance to state criminal justice systems, but indigent defense services

system expanded in terms of prosecutions and rates of incarceration, defender offices were easy targets for budget-cutting legislators.[12]

While the direct cause of the crisis is lack of funding, the courts share a large part of the blame. Having imposed a nearly universal duty to appoint counsel in all but the most minor of criminal prosecutions, the Supreme Court has failed to ensure that this assistance of counsel would be effective: in *Strickland v. Washington*,[13] the Court crafted highly deferential standards for assessing the effectiveness of defense counsel, and limited the judicial remedies for defendants seeking relief for the failings of ineffective lawyers.[14] Moreover, the *Strickland* standard failed to account for systemic or structural deficiencies in indigent defense systems.[15] It is sadly ironic that many elected officials and courts, who regularly point to *Gideon* as evidence of our commitment to fair trials and equal treatment in the criminal justice system, have failed to take the steps necessary to implement the *Gideon* promise.

A broad range of reforms have been proposed to deal with the widening gap between the rhetoric and reality of the right to counsel.[16] These include a vision of the right to counsel as "a collective right of the People,"[17] implementing free market

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receive almost none of this funding. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-569, INDIGENT DEFENSE: DOJ COULD INCREASE AWARENESS OF ELIGIBLE FUNDING AND BETTER DETERMINE THE EXTENT TO WHICH FUNDS HELP SUPPORT THIS PURPOSE 17 (2012).

12. THOMAS GIOVANNI & ROOPAL PATEL, *GIDEON* AT 50: THREE REFORMS TO REVIVE THE RIGHT TO COUNSEL 4 (2012) (explaining that in 2007, budgets for state prosecutors totaled $5.8 billion while defender offices received $2.3 billion). In a recent manifestation of this trend, the 2013 federal sequester resulted in large cuts to federal defender budgets, even as similar cuts to federal prosecutor budgets were avoided by congressional and DOJ action. Ron Nixon, *Public Defenders Are Tightening Belts Because of Steep Federal Budget Cuts*, N.Y. TIMES, Aug. 23, 2013, at A14, *available at* http://www.nytimes.com/2013/08/24/us/public-defenders-are-tightening-belts-because-of-steep-federal-budget-cuts.html?pagewanted=all&_r=0. Attorney General Eric Holder has made special note of this issue. Eric H. Holder, Jr., *Defendants' Legal Rights Undermined by Budget Cuts*, WASH. POST (Aug. 22, 2013), http://articles.washingtonpost.com/2013-08-22/opinions/41435818_1_defender-attorney-general-justice-department.

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

14. *See infra* Section II.

15. *See supra* note 11.

16. Of course, the problem of the right/remedy gap is not limited to Sixth Amendment issues. *Compare* David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199 (2005), *with* Harvey J. Wilkinson, III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CALIF. L. REV. 277 (2010).

17. Guggenheim, *supra* note 11, at 395.

principles as a means of providing independence to defender service programs,[18] application of equal protection principles,[19] congressionally imposed standards for indigent defense services,[20] and a strengthening of effective assistance of counsel standards under the Sixth Amendment and under state constitutions.[21] Other commentators have argued that institutional and fiscal restraints will not easily yield to judicial review and, therefore, the system should focus its resources on the most serious criminal cases,[22] or should take other steps to reduce the number of cases requiring the appointment of counsel or impose parity in funding for prosecutors and defense counsel.[23] There is also the view that reliance on "rights" rhetoric and the courts is futile, and that more fundamental challenges are necessary to protect the Sixth Amendment rights of the accused.[24]

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18. Stephen J. Schulhofer & David D. Friedman, *Reforming Indigent Defense: How Free Market Principles Can Help to Fix a Broken System,* CATO POLICY ANALYSIS, No. 666, Sept. 1, 2010 (suggesting that current issues with effective representation for indigent defendants may be alleviated by allowing indigent defendants the right to choose their counsel). *But see* NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE ch. 8 (2011) (looking at three different public defense systems that are successful without allowing indigent defendants to choose their own attorney).

19. Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197 (2013).

20. Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487 (2010); EVE BRENSIKE PRIMUS, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY ISSUE BRIEF: LITIGATION STRATEGIES FOR DEALING WITH THE INDIGENT DEFENSE CRISIS (2010), *available at* http://www.acslaw.org/files/Primus%20-%20Litigationpercent20Strategies.pdf.

21. LAWRENCE A. BENNER, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY ISSUE BRIEF: WHEN EXCESSIVE PUBLIC DEFENDER WORKLOADS VIOLATE THE SIXTH AMENDMENT RIGHT TO COUNSEL WITHOUT A SHOWING OF PREJUDICE 2–3 (2011), *available at* http://www.acslaw.org/files/BennerIB_ExcessivePD_Workloads.pdf; *see also* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 837–39 (2006) (advocating shifting burdens on ineffectiveness challenges based on defense resources and placing the burden on prosecutors to show similar charging and sentencing patterns for similarly situated defendants).

22. Stephanos Bibas, *Shrinking* Gideon *and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1290 (2013). Professor Bibas has suggested greater parity between funding for prosecutors and defenders and a more targeted prosecutorial approach that emphasizes quality over quantity. Stephanos Bibas, *Sacrificing Quantity for Quality: Better Focusing Prosecutors' Scarce Resources*, 106 NW. U. L. REV. COLLOQUY 138, 138 (2011).

23. Dripps, *supra* note 7, at 123.

24. *See* Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2203–04 (2013) (urging alternative challenges, including jury nullification, to the criminal justice system and the war on drugs).

New doctrinal approaches, alternative means of providing defense services, reforms in the operation of defender offices, and structural changes in the criminal justice system can help to vindicate the right to effective assistance of counsel. I make such a doctrinal argument in this article, but it is unlikely that these institutional reforms or the weaving of the right to effective assistance in different constitutional fabric will remove the central systemic barrier to the right to effective assistance of counsel: chronic and widespread underfunding and understaffing of defender and appointed counsel. Regardless of how the Supreme Court expresses the constitutional principles, and even with a more focused approach on felonies and serious misdemeanor cases, unless the courts require adequate funding for indigent defense programs to enable defense lawyers to provide essential services to all of their clients, there is little hope that this national crisis will be more than marginally ameliorated.[25]

We are not without good models. Funding for federal defender offices has generally been at a level sufficient to support high quality representation of indigent defendants in federal criminal cases.[26] There are also effective state indigent defense systems that have been developed through a combination of political independence, dedicated lawyers, high quality training, supervision, support services, and manageable caseloads.[27] On a

25. It is important to note that a lack of resources is not the only systemic problem which weakens *Gideon*'s promise. Political control of defender offices by elected officials, a culture of submission by some defenders to the courts and prosecutors, lack of training and weak commitment to zealous advocacy, and a fundamental shift in the balance of power in the criminal justice system to prosecutors all contribute to the undermining of *Gideon*. *See* Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049 (2013) (discussing systemic injustices which individual defenders may be powerless to correct, and concluding that the presence of defense counsel should not be a proxy for determining that a trial was fair); David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578 (2013) (examining systemic challenges that have been introduced to the federal system since the introduction of *Gideon* in 1963); Jonathan A. Rapping, *National Crisis, National Neglect: Realizing Justice Through Transformative Change*, 13 U. PA. J.L. & SOC. CHANGE 331 (2010) (giving an overview of challenges endemic to work as a defender); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2558 (2004) ("And where law does not reign, the district attorney's office generally does."). I discuss the "political" issues, *infra*, text accompanying note 108.

26. As noted, *supra* note 12, federal defender services are in jeopardy as a result of the stand-off on the federal budget. *See also* Editorial Board, *Justice Sequestered*, N.Y. TIMES, July 20, 2013, at SR10, *available at* http://www.nytimes.com/2013/07/21/opinion/sunday/justice-sequestered.html (discussing the various challenges to the justice system suffered as a result of the 2013 sequester).

27. *See* Rapping, *supra* note 25, at 347–48, 350–54.

daily basis, public defenders are committed to the principle and practice of zealous advocacy and equal justice, but funding of indigent defense programs is so seriously deficient, that even the most dedicated lawyers find themselves on all too frequent occasions fulfilling the Sixth Amendment requirement in name only.

In this Article, I set forth a litigation strategy as a means of confronting the funding and resources issues. Section I details the scope and depth of the crisis in funding and resources. Section II addresses the Supreme Court's failure to develop sufficient remedial doctrines to vindicate a defendant's right to effective assistance of counsel. Section III discusses models of litigation that might be pursued to deal with the systemic issues, with a focus on ethical obligations of defenders. Section IV discusses three cases, currently being litigated in Pennsylvania, that reflect both the promise and difficulties in finding a litigation response to these issues.

I. The Crisis in Real Terms

The national data regarding funding, caseloads, and support services for public defenders and assigned counsel reflect a worsening situation in many jurisdictions, and conditions of representation that make it impossible for many lawyers for indigent defendants to provide adequate services. At the time *Gideon* was decided there were far fewer prosecutions, and only 217,000 persons were incarcerated nationwide.[28] By 2012, defender caseloads had increased to unmanageable levels, fueled by a system that produces over 12 million arrests a year,[29] 2.3 million persons in custody, and many more on probation or parole.[30]

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals recommended that public defender caseloads not exceed 150 felony cases, 400 misdemeanor cases, or

28. GIOVANNI & PATEL, *supra* note 12, at 3.

29. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 2012: TABLE 29, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/29tabledatadecpdf (last visited Feb. 17, 2014).

30. *Id.*; *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 59 (2012) (explaining that the mass incarcerations which have taken place from the 1980s through to the present are largely the result of the War on Drugs); Paul J. Larkin, Jr., *Clemency, Parole, Good-Time, Credits and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL'Y 1, 12 (2013) (showing that the national rate of incarceration increased from 100 per 100,000 to 724 per 100,000 from the 1970s to 2007).

200 juvenile filings a year, and only where the defender office had adequate investigative and support services.[31] While these standards have been cited over the years, there is little empirical data to suggest that a public defender can adequately handle that large a caseload, and regardless of the situation in 1973, many believe that these numbers are quite unrealistically high today as criminal litigation has become far more complicated and both the direct sanctions and indirect consequences of convictions have become far more serious.[32] Moreover, the proper benchmark is attorney workload as opposed to caseload, since there is a high differentiation in the time and resources necessary for adequate representation. The complexity of the case, the experience of the lawyer, the support services available, and the seriousness of the consequences if a conviction results are critical factors in any analysis of defender representation. But regardless of the metrics used, professional standards are routinely and substantially exceeded in many jurisdictions.[33]

Studies of individual systems show shockingly high caseloads. In Florida, assistant public defenders handle as many as 500 felonies or 2225 misdemeanors each year.[34] From 2004 to 2008, the Miami-Dade County Defender budget was reduced by over twelve percent while its caseload increased by twenty-nine percent.[35] In a recent decision, the Florida Supreme Court addressed the caseload problem in the context of a motion by a public defender to withdraw from a case where he did not have the time or resources to provide basic services to his clients.[36] The court was "struck by the breadth and depth of the evidence of how the excessive caseload has impacted the Public Defender's

31. NAT'L LEGAL AID AND DEFENDER ASS'N, NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS: THE DEFENSE 9–10 (1973); *see also* AM. COUNCIL OF CHIEF DEFENDERS, STATEMENT ON CASELOADS AND WORKLOADS (Aug. 24, 2007) (on file with the author); Heidi Reamer Anderson, *Funding Gideon's Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest,* 39 HASTINGS CONST. L.Q. 421, 425–29 (2012) [hereinafter Anderson, *Funding Gideon's Promise*]; Heidi Reamer Anderson, *Qualitative Assessments of Effective Assistance of Counsel,* 51 WASHBURN L.J. 571, 575 (2012) [hereinafter Anderson, *Qualitative Assessments*].

32. *See* Anderson, *Qualitative Assessments*, *supra* note 31, at 576–77.

33. Professor Norman Lefstein has urged consideration of "weighted caseloads" to determine the amount of time defense lawyers need to provide effective assistance of counsel to all clients. NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 154 (2011). *See infra* note 86 for further discussion of studies and developments on caseload data.

34. JUSTICE DENIED, *supra* note 7, at 68.

35. *Id.*

36. Pub. Defender v. State, 115 So. 3d 261 (Fla. 2013).

representation of indigent defendants," and remanded the case for potentially wide ranging relief:[37]

> Witnesses from the Public Defender's office described "meet and greet pleas" as being routine procedure. The assistant public defender meets the defendant for the first time at arraignment during a few minutes in the courtroom or hallway and knows nothing about the case except for the arrest form provided by the state attorney, yet is expected to counsel the defendant about the State's plea offer . . . . The witnesses also testified that the attorneys almost never visited the crime scenes, were unable to properly investigate or interview witnesses themselves, often had other attorneys conduct their depositions, and were often unprepared to proceed to trial when the case was called.[38]

In Georgia, defendants are routinely denied counsel for many months as they await trial.[39] In Atlanta in 2007, twenty public defenders had a caseload of 21,000 misdemeanor cases, already an average of 1050 cases per lawyer, yet the budget was cut that year in a manner that would increase the caseload to over 2000 cases per lawyer.[40] In Michigan, contract attorneys had caseloads of over seven hundred cases, and in Detroit, caseloads were reported to be five to six times higher than the National Advisory Commission standards, with some defenders spending no more than approximately thirty minutes on many cases.[41] In Tennessee, six attorneys handle over ten thousand misdemeanor cases on a yearly basis, thus allowing about one hour of services for each case.[42] In Missouri in 2010, 368 public defenders handled over 84,000 cases, and a state commission determined that the public defender system would need more than a thirty percent increase in the number of lawyers to provide adequate services.[43]

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37. *Id.* at 273.

38. *Id.* at 278.

39. STEPHEN B. BRIGHT & LAUREN SUDEALL LUCAS, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY ISSUE BRIEF, OVERCOMING DEFIANCE OF THE CONSTITUTION: THE NEED FOR A FEDERAL ROLE IN PROTECTING THE RIGHT TO COUNSEL IN GEORGIA (2010).

40. Heather Baxter, Gideon's *Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341, 356 (2010).

41. *Id.* at 356–57.

42. JUSTICE DENIED, *supra* note 7, at 68. The situation in Louisiana is even starker. *See* Editorial Board, *Federal Oversight on Public Defense*, N.Y. TIMES, Sept. 8, 2013, at SR10 (stating that lawyers in New Orleans have on average only seven minutes to spend on misdemeanor clients and that New Orleans residents pay on average $367 in taxes annually to support policing but only $2 for public defense services).

43. State *ex rel.* Mo. Pub. Defender Comm'n v. Waters, 370 S.W.3d 592 (Mo. 2012) (en banc). Only nine states limit the maximum caseload of defenders, and of these only two states have adopted regulations that effectively codify these

In New York, a commission appointed by Chief Judge Judith Kaye found systemic structural impediments to effective assistance of counsel:

> [T]he indigent defense system in New York State is both severely dysfunctional and structurally incapable of providing each poor defendant with the effective legal representation that he or she is guaranteed by the Constitution of the United States and the Constitution and laws of the State of New York . . . . [This] has resulted in a disparate, inequitable, and ineffective system for securing constitutional guarantees to those too poor to obtain counsel of their own choosing.[44]

There is not good data with respect to the hours spent by defenders on their work, but even assuming that many defenders work ten hour days, weekends included, log as many as 1850–2000 hours on an annual basis,[45] and have a relatively "low" caseload of three hundred cases, the defender would have approximately six hours for each case. Furthermore, since some of these cases are homicides, serious violent felonies, or complicated appeals, and some are tried to a jury, it is essentially impossible for that defender to provide adequate assistance—indeed, any assistance—to all of his clients. If as few as fifteen cases are tried to a jury, with an average of four days of trial time per case, thirty percent of the defender's time will be expended on five percent of the caseload. One does not have to be a math major or an expert on

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requirements. LYNN LANGTON & DONALD J. FAROLE, JR., CENSUS OF PUBLIC DEFENDER OFFICES, 2007—STATISTICAL TABLES 10 (2010). On a national level, public defenders receive far less funding than prosecutor offices (which of course have enormous support from police departments, forensic laboratories, and other governmental agencies) and that imbalance is only increasing. GIOVANNI & PATEL, *supra* note 12, at 4; STEVEN W. PERRY & DUREN BANKS, PROSECUTORS IN STATE COURTS, 2007 STATISTICAL TABLES (2011); Hannah Levintova et al., *Charts: Why You're in Deep Trouble If You Can't Afford a Lawyer*, MOTHER JONES (May 6, 2013), http://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts (describing that in 2007, spending for prosecutors nationwide exceeded that for appointed counsel by $3.5 billion and that in California, spending for prosecutors was double that by defender offices).

44. COMM'N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 3 (2006). In one county in New York, attorneys had annual caseloads of 1000 misdemeanor cases and 175 felony cases, and even with these crushing assignments, the chief public defender was asked to prepare for a ten to twelve percent budget reduction. *Id.* at 18. In this context, the New York Court of Appeals has ruled that indigent criminal defendants may challenge the public defender system where public defenders did not communicate with clients after appointment, took few if any defense efforts following arraignment, waived important rights, and acted as mere conduits for plea offers. Hurrell-Harring v. State, 930 N.E.2d 217, 226 (N.Y. 2010). In effect, the court ruled that this "representation" was no representation at all and that "merely nominal attorney-client pairings" were unconstitutional. *Id.*

45. *See* LEFSTEIN, *supra* note 18, at 16 (using similar estimates while discussing defender workload).

defense services to understand that the lawyer will be spending almost no time on many of her cases.[46]

A number of states provide indigent defense services by appointing private counsel on a case-by-case basis or by issuance of low-bid contracts. In these jurisdictions, the issue is less one of case overload, as it is of extremely low compensation schedules. A survey conducted by the NACDL found an average compensation rate in thirty states of sixty-five dollars per hour, with some states paying as little as forty dollars per hour.[47] These states also sharply limit payments to investigators, experts, and social workers, whose assistance may be critical to the defense efforts. By contrast, the Federal Criminal Justice Act compensates attorneys appointed for indigent defendants in federal court at the rate of $125 an hour (and $177 for capital appointments).[48] In many jurisdictions, the rate of pay has remained constant for over twenty years and most jurisdictions impose low "caps" per case.[49] As the NACDL summarized the impact:

> Inadequate compensation restricts the pool of attorneys willing to represent indigent defendants and threatens the quality of indigent defense because of perverse economic incentives. It creates conflicts of interest for attorneys by encouraging them to limit the amount of work they perform on a case for an indigent client. A stagnant hourly rate leads to a decrease in the overall number of attorneys willing to accept court appointments. More experienced attorneys refuse to participate in assigned counsel systems that pay hourly rates far below the market rate. Younger attorneys, who are often

46. *Id.* at 17. For a statistical analysis of the caseload problem on a national scale, see Levintova, et al., *supra* note 43, which warns that caseload recommendations are exceeded by over forty percent, and that lawyers spend less than two-thirds of the time necessary for case preparation; LANGTON & FAROLE, *supra* note 43 (stating that in 2007 on a national average each public defender handled 371 cases for the year, or more than one a day).

47. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 8 (2013).

48. H.R. REP. NO. 111-366, at 905 (2009); *see also* 7A GUIDELINES FOR ADMINISTERING THE CRIMINAL JUSTICE ACT AND RELATED STATUTES, GUIDE TO JUDICIARY POLICY ch. 2 § 230.16(a). As the Third Circuit has recently noted, this hourly fee "is universally recognized as a below-market rate for criminal defense lawyers." United States v. Konrad, 730 F.3d 343, 351 (3d Cir. 2013).

49. RATIONING JUSTICE, *supra* note 47, at 13–14; *see also* Cyn Yamashiro, *Juvenile Injustice: $350 to Defend a Child*, L.A. TIMES (July 29, 2013), http://articles.latimes.com/2013/jul/29/opinion/la-oe-yamashiro-juvenile-appointed-attorneys-20130729 (reporting on the L.A. juvenile justice system and assessing outcomes in cases where defendants were represented by public defenders, with adequate resources, and defendants represented by court appointed counsel at a rate of $350 per case and finding that thirty-four percent of defendants represented by court appointed counsel ended up with more serious sanctions).

burdened by student loans, never even consider joining the defense bar.[50]

II. Standards for Assessing Effectiveness of Counsel

In *Strickland v. Washington*,[51] the Court recognized a right to effective assistance of counsel, but required the defendant to show both that counsel failed to engage in representation efforts that a reasonably competent defense counsel would normally provide, and that counsel's ineffectiveness caused actual prejudice.[52] The stories of *Strickland*'s manifest shortcomings have been told—and told well—by many others.[53] On the issue of whether defense counsel provided competent representation, the Court adopted a standard that looked to whether the lawyer's performance was "reasonable[] under prevailing professional norms."[54] The Court warned against "hindsight" judgments or critiques and ruled that courts should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[55] Under this test, if the defense lawyer can point to any rational basis for her trial strategy, she will be deemed to have provided effective assistance. Justice Marshall's view that effectiveness should be judged from the viewpoint of whether the lawyer actually took all of the steps required of defense lawyers by prevailing standards was rejected, thus leaving the inquiry without objective standards.[56]

Regarding the prejudice prong, no relief would be ordered unless the defendant could show that "but for counsel's unprofessional errors" there was a "reasonable probability that . . . the result of the proceeding would have been different."[57]

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50. RATIONING JUSTICE, *supra* note 47 at 15–16. Equally troubling are low salaries for public defenders, lack of parity with prosecutors, and low-bid contracts for defense services, where private firms agree to represent indigent clients for a flat annual fee, where the funds are almost always insufficient to provide competent counsel. *See* Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150, 2166 (2013).

51. 466 U.S. 668 (1984).

52. *Id.* at 686.

53. *See, e.g.*, Chemerinsky, *supra* note 11.

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

55. *Id.* at 689.

56. *Id.* at 716–17 (Marshall, J., dissenting). This dissent mirrors in part the approach urged by Judge Bazelon in *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973), a ruling vacated by an *en banc* court in *United States v. DeCoster*, 624 F.2d 196 (D.C. Cir. 1976). Judge Bazelon urged that a presumption of prejudice should be found where a lawyer did not adhere to certain specific duties necessary in virtually all cases. *Id.* at 1203–04.

57. *Strickland*, 466 U.S at 694.

The ineffectiveness of counsel must be such that a court finds that "confidence in the outcome" has been undermined.[58] Prejudice would be presumed only in those rare cases in which no counsel was present or in which the lawyer was forced to provide representation in circumstances evidencing a direct conflict of interest.[59]

The *Strickland* standards have proven to be highly forgiving, as the courts routinely reject ineffectiveness of counsel claims based on supposed (and often highly strained) "strategic" decisions made by trial counsel.[60] Even where counsel's performance has been plainly below professional norms, relief is often denied on the ground that said counsel's errors were not prejudicial.[61] Equally problematic, the *Strickland* test appears to render irrelevant systemic or structural limits on counsel's performance, such as high caseloads, even though structural deficiencies are attributable to the state, while individual attorney error in a particular case may not be.

The deterrent impact of the case-by-case post-conviction review process is too slight to remedy systemic deficiencies. First, application of the prejudice component insulates a significant number of cases with proven ineffectiveness from judicial relief. Second, many cases (specifically those that result in short prison sentences or probation) will not be subject to judicial review since almost all jurisdictions require that the challenge to counsel's performance be made on post-conviction proceedings, following the

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58. *Id.* at 694.

59. *Id.* at 692; *see also* United States v. Cronic, 466 U.S. 684, 659 (1984) (rejecting a "no prejudice" test except where there was a "complete denial of counsel" or in circumstances amounting to a similar total denial).

60. *See, e.g.*, Moore v. Mitchell, 708 F.3d 760 (6th Cir. 2013) (holding that defense counsel was not ineffective when in trial, counsel failed to explain or challenge their own expert's changed testimony which undermined the defense mitigation strategy, placed a witness on the stand without knowing the content of his testimony, and made no argument against the imposition of the death penalty); Commonwealth v. Michaud, 70 A.3d 862 (Pa. Super. Ct. 2013) (holding that defense counsel did not provide ineffective assistance when he failed to introduce good character evidence).

61. *See, e.g.*, Holsey v. Warden, 694 F.3d 1230 (11th Cir. 2012) (upholding a death sentence where defendant's lawyer drank a quart of vodka every day during trial and was under the stress of imminent prosecution for stealing client funds); Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 243 (1997) ("The *Strickland* inquiry into counsel's effectiveness *ex post* should be supplement[ed] by an *ex ante* inquiry into whether the defense [was] institutionally equipped to litigate as effectively as the prosecution."); Brandon L. Garrett, *Validating the Right to Counsel*, 70 WASH. & LEE L. REV. 927, 950 (2013) (discussing *Strickland* being "at war with itself," and examining new empirical data on the failure of the "prejudice" analysis by many courts).

end of the direct appeal process.[62] There is little incentive for a defendant to challenge a conviction where the sentence has already been served; indeed, in many states, and as a matter of federal habeas corpus review, there is no post-conviction jurisdiction where the sentence has been fully served.[63] Third, there is no federal right to appointed counsel on post-conviction review, and even where states provide counsel at this stage, there is no right to effective assistance of post-conviction counsel.[64] Fourth, a significant number of ineffectiveness challenges are made in federal habeas corpus proceedings, and as the Supreme Court has emphasized, under the Antiterrorism and Effective Death Penalty Act's (AEDPA) standards, a court must give "double" deference to a state court's rejection of a claim of ineffective assistance of counsel.[65] Finally, even if the *Strickland* test were replaced by a more demanding standard, it is highly doubtful that the reversal rate would increase sufficiently to cause jurisdictions to increase funding or institute other measures to ensure more effective representation.

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62. *See, e.g.*, Commonwealth v. Grant, 821 A.2d 1246 (Pa. 2003).

63. *See* Maleng v. Cook, 490 U.S. 488, 490 (1989) (denying defendant's habeas corpus petition).

64. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (holding that the "right to appointed counsel extends to the first appeal of right, and no further"). The Supreme Court has ruled that the failure of post-conviction counsel to provide effective assistance on the first post-conviction opportunity by asserting ineffectiveness of trial or direct appeal counsel will excuse procedural defaults caused by prior counsel's ineffectiveness for federal habeas purposes. Martinez v. Ryan, 132 S. Ct. 1309 (2012). The impact of *Martinez* on right to counsel in post-conviction proceedings is subject to debate. *See* Alper, *supra* note 7 (discussing the need for counsel in ineffective assistance of trial counsel claims); Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After* Martinez *and* Pinholster, 41 HOFSTRA L. REV. 591 (2013) (explaining the need for appropriate representation throughout the legal process for those facing the death penalty); Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 YALE L.J. 2428, 2431 (2013) ("[The] effort to expand habeas review of ineffective assistance of counsel claims in *Martinez* . . . will make little difference in either the enforcement of the right to . . . effective assistance of counsel or the provision of competent representation in state criminal cases.").

65. Harrington v. Richter, 131 S. Ct. 770, 786 (2011) (describing habeas corpus as a "guard against extreme malfunctions in the state criminal justice systems"); *see also* Michael M. O'Hear, *Bypassing Habeas: The Right to Effective Assistance Requires Earlier Supreme Court Intervention in Cases of Attorney Incompetence*, 25 FED. SENT'G REP. 110 (2012) (discussing Supreme Court effective assistance jurisprudence in habeas and non-habeas contexts). Even in capital cases, where the Court has at times imposed higher standards in assessing effectiveness of counsel, for instance in *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Williams v. Taylor*, 529 U.S. 362 (2000), the higher rate of reversals has not resulted in significant changes in funding practices. *See infra* Part IV(A).

III. Is There an Effective Strategy?

In addressing systemic underfunding of public defenders and appointed counsel for the indigent, various strategies may have utility, including the use of innovative constitutional theories, the restructuring of defense services and criminal case disposition processes, and the reform of substantive criminal law doctrine. Unless the courts are willing to compel the governmental funders to provide adequate resources, however, even the most elegant constitutional theories will remain a matter of theory, not political reality. Furthermore, restructuring and similar reforms that might reduce the number of cases in the system is unlikely to ensure adequate funding for defense services, as many legislatures, left to their own devices, will reduce funding for public defenders if caseloads are decreased.[66]

Litigation challenging systemic faults has been successful in some jurisdictions, but these successes have been too few and too limited in remedial measures to effectuate broad-based changes in the funding and operation of defender services.[67] As a result, some commentators and practitioners have become pessimistic about judicial intervention and now urge alternative approaches.[68] I understand these responses, and I do not underestimate the doctrinal, procedural, and political hurdles that a litigation strategy must overcome. However, properly presented, challenges

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66. Indeed, a number of proposals for restructuring the criminal justice system could place even greater demands on defense counsel. *See* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 129–56 (2012). Limits on plea bargaining by their very nature will require more trials, contested motions, and the need for well-prepared defense counsel. The Supreme Court's recent rulings on effectiveness of counsel in the plea negotiation process, while limited in scope, place a useful focus on links between the right to counsel, fair plea processes, and pre-trial discovery. *See* Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013) (using empirical evidence to show issues with and discuss the extent of plea bargaining's innocence problem); Susan R. Klein, *Monitoring the Plea Bargaining Process*, 51 DUQ. L. REV. 559, 562 (2013) (viewing *Lafler* and *Frye* as chances to "police equality of sentences for the guilty and mandate better investigation of the underlying offense to ferret out the innocent"); *see, e.g.*, Lafler v. Cooper, 132 S. Ct. 1376, 1391 (2012) (holding in relevant part that the proper remedy for counsel's ineffective assistance is to order the prosecutor to reoffer the plea agreement); Padilla v. Kentucky, 559 U.S. 356, 368–69 (2010) (holding that failure to inform a client whether their plea carries a risk of deportation is grounds for alleging constitutional deficiency of counsel).

67. *See* Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 428–58 (2009) (discussing challenges faced in earlier cases).

68. *See, e.g.*, Dripps, *supra* note 7, at 119–31 (arguing that the "[a]dvocates of the rights of the accused . . . and of the right to counsel" should not expect judicial intervention but suggests an alternative approach to the problem).

to the core flaws in institutional defense systems are capable of effectuating some necessary changes in the delivery of defense services.[69]

Prospective relief should be available on a showing of structural or other across-the-board barriers to the provisions of effective representation. The New York Court of Appeals has permitted a class action to proceed on allegations that lack of funding for defender services in local jurisdictions has resulted in a systemic failure to provide legal representation to indigent criminal defendants at critical stages of the proceedings.[70] As the court ruled:

> Wrongful convictions, however, are not the only injustices that command our present concern. As plaintiffs rightly point out, the absence of representation at critical stages is capable of causing grave and irreparable injury to persons who will not be convicted. *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.[71]

"A structural challenge," as the Iowa Supreme Court explained, "involves a realistic assessment of whether the state has provided an adequate framework for ensuring that the right to counsel is realized in cases involving indigent defense."[72] This reasoning is particularly true where violations are structural, systemic, and tend to produce omissions by lawyers rather than obvious errors of commission. In such circumstances, plaintiffs

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69. *See* Drinan, *supra* note 67, at 462–77 (discussing relevant general litigation strategies).

70. Hurrell-Harring v. State, 930 N.E.2d 217, 217 (N.Y. 2010); *see also* Wilbur v. Mount Vernon, No. C11-1100RSL, 2012 WL 600727, at *3 (W.D. Wash. Feb. 23, 2012) ("The Court finds that case-by-case requests for new counsel, appeals, and/or malpractice actions would not resolve the systemic problems identified by plaintiffs, making a request for injunctive and declaratory relief necessary.").

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

72. Simmons v. State Pub. Defender, 791 N.W.2d 69, 76 (Iowa 2010); *see also* Lavallee v. Justices in Hamden Superior Court, 812 N.E.2d 895, 904 (Mass. 2004), New York Cnty. Lawyers' Ass'n v. State, 745 N.Y.S.2d 376, 384 (N.Y. Sup. Ct. 2002) ("[T]he [pre-trial] claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case."); State v. Peart, 621 So. 2d 780, 787 (La. 1993). The Superior Court of Washington later concluded that:

> Harm is not limited to locking up innocent people. The accused is prejudiced if he or she is forced to plead guilty rather than run the risk of going to trial without competent counsel or if counsel doesn't bother to call witnesses who can support the accused, or when the accused must evaluate the pros and cons of a plea offer without competent counsel to explain the plea and its consequences or when counsel doesn't bother to move to suppress inadmissible evidence.

Best v. Grant Cnty., No. 04-2-00189-0, slip op. at 8 (Wash. Super. Ct. Oct. 14, 2004).

must satisfy the traditional requirements for the grant of equitable relief. As the Eleventh Circuit has explained:

> This [*Strickland*] standard is inappropriate for a [claim] seeking prospective relief. The [S]ixth [A]mendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the "ineffectiveness" standard may nonetheless violate a defendant's rights under the [Si]xth [A]mendment . . . . Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief—whether the defendant is entitled to have his or her conviction overturned—rather than to the question of whether such a right exists and can be protected prospectively . . . . Where a party seeks to overturn his or her conviction, powerful considerations warrant granting this relief only where that defendant has been prejudiced . . . . These considerations do not apply when only prospective relief is sought.[73]

The supreme courts of Florida and Missouri have recently charted new paths for assessing claims of ineffectiveness based on evidence of high caseloads and lack of attorney resources. In Florida, the state supreme court ruled that a public defender could seek to withdraw from current cases and to refuse future appointments in non-capital felony cases on the grounds that excessive caseloads and underfunding interfered with its legal and ethical obligations to its clients.[74] The State of Florida had, by statute, barred defender offices from withdrawing from cases on the ground that their caseloads were too high or their funding was too low to provide effective assistance of counsel, but the Florida Supreme Court ruled that Sixth Amendment rights of defendants, and ethical obligations of attorneys, permitted withdrawal or refusal of new appointments if the caseloads and funding prevented defender offices from providing effective assistance of counsel.[75]

The court permitted this challenge to caseloads and funding in the pre-trial context and ruled that the *Strickland* post-conviction test for assessing effectiveness of trial counsel was not the sole means of enforcing Sixth Amendment rights.[76] The court

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73. Luckey v. Harris, 860 F.2d 1012, 1017–18 (11th Cir. 1988). *Luckey* was eventually dismissed on *Younger* abstention grounds. Luckey v. Miller, 976 F.2d 673, 674 (11th Cir. 1992); *see also* Younger v. Harris, 401 U.S. 36 (1971) (*Younger* abstention doctrine). In *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975) the Supreme Court noted that the harm resulting from the constitutional violation (unlawful detention) would not likely be grounds for reversal on appeal and therefore ordered prospective relief of a forty-eight hour probable cause determination after warrantless arrests to remedy the systemic violation.

74. Pub. Defender v. State, 115 So. 3d 261, 261 (Fla. 2013).

75. *Id.* at 266–70.

76. *Id.* at 276.

also rejected arguments that resolution of this issue was a legislative matter and that the courts could not remedy constitutional violations by ordering funding or reductions in caseloads.[77] Aggregate or systemic relief was appropriate in circumstances where a defender could show that extremely high caseloads posed "a substantial risk that representation of one or more clients will be materially limited by the lawyer's responsibilities to another client."[78] Allegations that felony caseloads were in the range of four hundred cases per year and that the number of cases had increased by twenty-nine percent over a period of three years, while at the same time the defender budget was cut by over twelve percent, were sufficient to establish this "substantial risk."[79]

The Missouri Supreme Court has also permitted a public defender to withdraw from a case in which he was appointed pursuant to statewide administrative protocols on defender caseloads and processes for withdrawal from cases.[80] As the court framed the issue, "whether the duty of public defenders to provide a defense . . . requires them to accept a judge's appointment . . . no matter the size of their existing caseload and their ability to provide effective representation to their existing or additional clients . . . ."[81] The court expressly rejected the *Strickland* test in deciding whether a lawyer's ethical and constitutional obligations to provide effective assistance of counsel are compromised by caseloads too large to offer anything more than *pro forma* representation.[82] Specifically, under the state's rules of professional conduct, there is an independent duty to provide effective assistance in criminal cases, and an impermissible conflict of interest arises where the public defender is compelled by caseload considerations to "choose between the rights of [her] various indigent" clients.[83] The court further made clear that these ethical obligations provide important "parallel" standards in assessing the constitutional duties of public defenders.[84] As the court stated:

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77. *Id.* at 279–82.

78. *Id.* at 275 (citing Fla. Bar Rule 4–1.7(a)(2)).

79. *Id.* at 273.

80. State *ex rel.* Mo. Pub. Defender Comm'n v. Waters, 370 S.W.3d 592, 593–94 (Mo. 2012) (en banc).

81. *Id.* at 605.

82. *Id.* at 588.

83. *Id.* at 608.

84. *Id.* (citing State *ex rel.* Kinder v. McShane, 87 S.W.3d 256, 265 (Mo. 2002) (en banc).

> No exception exists to the ethics rule for lawyers who represent indigent persons. To the contrary, as the American Bar Association has aptly noted, there is an "implicit premise that governments, which establish and fund providers of public defense, never intended that the lawyers who furnish the representation would be asked to do so if it meant violating their ethical duties pursuant to professional conduct rules."[85]

For this reason, "public defenders are risking their own professional lives" when appointed to an excessive number of cases.[86]

A federal district court followed a similar route in finding that the public defense systems of two cities in the State of Washington failed to provide the assistance of counsel required by the Sixth Amendment.[87] The court ruled that on a pre-trial challenge the *Strickland* standard was not applicable; rather, the issue was whether injunctive relief was necessary to remedy systemic deprivations of assistance of counsel that created the substantial risk that the prosecution's case would not be subjected to "meaningful adversarial testing."[88] As the court stated:

> The point here is that the system is broken to such an extent that confidential attorney/client communications are rare, the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned. Advising a client to take a fantastic plea deal in an obstruction of justice or domestic violence case may

85. *Id.* at 608 (citing AM. BAR ASS'N, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS 11 (2009)).

86. *Id.* (citing State *ex rel.* Mo. Pub. Defender Comm'n v. Pratte, 298 S.W.3d 870, 880 (Mo. 2009)). In the wake of the Florida and Missouri supreme court rulings, both states are engaged in workload and caseload studies to attempt to quantify the appropriate case-weighted caseload for public defenders. The initial Missouri report develops data-supported workload standards designed to inform the inquiry into maximum workloads for defenders. AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (2014), *available at* http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf. In Texas, as of 2014, public defenders are required by statute to maintain data for caseload studies, and guidelines for refusing appointments have been adopted. H.B. 1318, 83rd Sess. (Tex. 2013) (describing the appointment of counsel to represent certain youths and indigent defendants and counsel's duties). Careful studies will be critical to the adoption of appropriate caseload limits.

87. Wilbur v. City of Mount Vernon (*Wilbur II*), No. C11-1100RSL, 2013 WL 6275319, at *5–6 (W.D. Wash. Dec. 4, 2013).

88. *Id.* at *5. Because the case had originally been filed in state court, but was removed by the defendant cities to the federal district court, there were no *Younger* abstention bars to federal jurisdiction. Previously, the Eleventh Circuit had dismissed a similar lawsuit on abstention grounds, but there the case was filed as an original federal matter. Luckey v. Miller, 976 F.2d 673, 673–74 (11th Cir. 1992).

> appear to be effective advocacy, but not if the client is innocent, the charge is defective, or the plea would have disastrous consequences for his or her immigration status. It is the lack of a representational relationship that would allow counsel to evaluate and protect the client's interests that makes the situation in Mount Vernon and Burlington so troubling and gives rise to the Sixth Amendment violation in this case.[89]

Applying this standard, the court found that the indigent systems "systematically deprived" defendants of the assistance of counsel at critical stages and did so as a result of massive caseloads and too few attorneys.[90] For several years, two part-time lawyers were each handling approximately one thousand cases.[91] They spent less than an hour on each case, and in the overwhelming majority did nothing more than "meet and plead" their clients on the day of trial.[92] Remarkably, even after the filing of the lawsuit, and with new counsel retained by the cities, very little changed: few clients were interviewed before their appearance in court, one lawyer spoke to only three or four witnesses over an entire year, files lacked any record of legal research, and in 2012 there was evidence of only one pre-trial motion and only five or six actual trials.[93]

The court refused to order "hard" caseload caps, but imposed a number of requirements designed to ensure that lawyers for indigents accused of crimes had sufficient time and resources to conduct the normal defense functions, starting with confidential client interviews, and thereafter necessary investigation, discovery, research, motion practice, counseling on disposition options, and trials where appropriate.[94]

The United States Supreme Court has recognized the relevance of state ethical rules, a lawyer's professional judgments and obligations, and American Bar Assocation (ABA) professional standards in defining ineffectiveness of counsel doctrine.[95] The

89. *Wilbur II*, at *4.
90. *Id.* at *6.
91. *Id.* at *2.
92. *Id.*
93. *Id.* at *4.
94. *Id.* at *9–12.
95. *E.g.*, Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) (holding that the ABA Standards are "important guides" on the ineffective counsel issue); Rompilla v. Beard, 545 U.S. 374, 387 (2005) (quoting the ABA Standards to describe defense counsel obligations); Wiggins v. Smith, 539 U.S. 510, 524 (2003) (looking to the ABA guidelines to determine acceptable conduct for capital defense counsel); *see also* U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, KEEPING DEFENDER WORKLOADS MANAGEABLE 4 (2001) (explaining how public defenders often fail to

Court has also stressed that in deciding whether alleged conflicts of interest render a lawyer ineffective, substantial deference should be given to a lawyer's judgment regarding the impact, if any, of a potential or even a real conflict of interest.[96]

The ABA addressed this issue in 2006 and advised that lawyers must make the judgment of whether workloads prevent them from fulfilling their ethical obligations of competent representation. The ABA stated:

> If a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she must not continue the representation of that client or, if representation has not yet begun, she must decline the representation .... When an existing workload does become excessive, the lawyer must reduce it to the extent that what remains to be done can be handled in full compliance with the Rules.[97]

In *Nix v. Whiteside*,[98] the Court rejected a claim of ineffectiveness of counsel made by a defendant who argued that his lawyer improperly persuaded him not to testify in support of his claim of self-defense where the lawyer believed that such testimony would be false.[99] The lawyer told the defendant that if he insisted on testifying, he would inform the court that it constituted perjury, would impeach him, and would withdraw from representation.[100] A majority of the Court found that the lawyer's conduct was not ineffective under "accepted norms of professional conduct," as a defendant has no right to present false testimony.[101] The concurring opinion properly questioned the lawyer's "judging" of his client's proposed testimony (a belated statement that the victim was armed) as false,[102] but whatever the merits of the Court's ruling, a key point in *Nix* is the strong deference provided

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acknowledge the conflict of interest caused by excessive caseloads). *Cf.* Bobby v. Van Hook, 558 U.S. 4, 8 n.1 (2009) (arguing that the ABA standards are not controlling norms under Sixth Amendment).

96. *See* Holloway v. Arkansas, 435 U.S. 475, 485 (1978) ("An 'attorney . . . is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.'" (quoting State v. Davis, 514 P.2d 1025, 1027 (Ariz. 1973))).

97. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441, 4–5 (2006) (discussing the "Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation").

98. 475 U.S. 157 (1986).

99. *Id.* at 184–88.

100. *Id.* at 161.

101. *Id.* at 171.

102. *Id.* at 190–91 (Stevens, J., concurring).

to lawyers in making reasonable judgments regarding their professional obligations.[103]

The combination of the Supreme Court's recognition of defense counsel's ethical judgments, the ABA standards, and the rules of professional responsibility[104] provide persuasive support for the constitutionally based proposition that public defenders must manage their caseloads to avoid the inherent and destructive conflicts that arise when a defender has an excessive number of cases.[105] If a lawyer can properly refuse to present a defense on the good faith judgment that the presentation of such testimony would be false and thus impermissible under the rules of professional conduct, a lawyer's similar good faith judgment that she cannot represent more clients than her time and resources allow for competent and zealous representation should also carry strong weight on the Sixth Amendment conflict question.

Consideration of ethical and professional obligations in assessing effectiveness of counsel is consistent with the rulings in *Strickland* and *Cuyler v. Sullivan*.[106] To the degree that excessive caseloads present conflicts of interest for the public defender, which are similar in impact to the conflicts of interest created by joint representation of clients with conflicting interests, the *Cuyler v. Sullivan* test is appropriate. The dangers of an excessive caseload are likely to cause a lawyer to act outside of her professional obligations, and post-trial remedies will likely be illusory as the errors will often be that of omission due to lack of time and resources. Moreover, to the extent that excessive caseloads are seen as structural and thus equivalent to cases in which lawyers do not act as adversaries to the prosecution,

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103. I recognize that the assertion of ethical restraints on caseloads requires defender offices (or individual defenders) to challenge practices that have been established by the local government or court system, and such challenges may create risks for those who make these challenges. *See infra* notes 190–194 and accompanying text. But to the extent the courts recognize the ethical basis for such actions, it may be that more defenders will take the risks that are inherent in this litigation.

104. The Model Rules of Professional Conduct require lawyers to provide "competent" representation, require "diligence" in representation matters, provide "communications" with clients, and to avoid of conflicts of interest. MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3, 1.4, 1.7, & 1.8 (1983). Under the Rules, a conflict of interest exists if there is a "significant risk" that representation of another client will "materially limit" the lawyer's representation of another client. *Id.* at 1.7 & cmt.

105. *See* Anderson, *Funding Gideon's Promise*, *supra* note 31, at 442–44, 448–56.

106. Strickland v. Washington, 466 U.S. 668, 669–71, 687–91 (1984); Cuyler v. Sullivan, 446 U.S. 335, 345–48 (1980).

prejudice may be presumed.[107] Finally, from the angle of deference, judicial respect of a lawyer's judgment as to the dangers of excessive caseloads is supported by *Cuyler*, *Strickland*, and the presumption that the defense lawyer is acting in a professionally responsible manner.[108]

Of course, even if this doctrinal approach supports structural remedial relief, there is no guarantee that public defenders will challenge their own practices and caseloads or that the courts will use these remedial powers to compel state and local governments to expend the necessary resources for defender services. On the issue of legal challenges, political control of defender offices by state governments, and a culture of accepting all case appointments regardless of the consequences on effective representation are harsh realities in many defender offices.[109] Assuming that legal challenges are brought, where serious constitutional violations can be remedied only by intrusive orders, courts are often hesitant to intervene, but in some cases have done so. Thus, the Supreme Court has recently affirmed an order requiring the release of 46,000 inmates from the California prison system based on evidence of persistent and pervasive patterns of cruel and unusual conditions of confinement, including serious overcrowding and the denial of necessary medical services to large numbers of inmates.[110] Whether the courts will respond to the national crisis in indigent defense with remedial orders for adequate funding remains to be seen.

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107. *See* Luckey v. Harris, 860 F.2d 1012, 1016–18 (11th Cir. 1988); Benner, *supra* note 21, at 2–3. The Court has stressed the defense lawyer's obligation to act as an advocate by testing the state's case. Ferri v. Ackerman, 444 U.S. 193, 204 (1979).

108. *Strickland*, 466 U.S. at 669, 689–91; *Cuyler*, 466 U.S. at 346–47. As Professor Anderson also notes, the conflict created by excessive caseloads is entirely a product of government policy and is structural in nature. Anderson, *Funding Gideon's Promise*, *supra* note 31, at 453–54.

109. JUSTICE DENIED, supra note 7, at 80–84. ABA Formal Op. 06-441, *supra* note 97, permits and may require legal challenges to excessively high caseloads.

110. Brown v. Plata, 131 S. Ct. 1910, 1947 (2011). On August 2, 2013, the Court denied an application for a stay of the injunction, thus requiring the release of the final group of ten thousand inmates. Lyle Denniston, *No Delay of Prisoner Release*, SCOTUSBLOG (Aug. 2, 2013, 2:56 PM), http://scotusblog.com/2013/08/no-delay-of-prisoner-release/; *see also* Ass'n of Surrogates v. State of New York, 969 F.2d 1416, 1417–18 (2d Cir. 1992) (stating that the court has the power to order the state to fund constitutionally mandated services). The United States Department of Justice has recently urged a federal district court to appoint a monitor to assist in developing constitutional standards for funding of a defender office in Washington State, if the court finds that current funding violates the Sixth Amendment. *See* Statement of Interest of the United States at 7, Wilbur v. City of Mount Vernon, No. 11-1100RSL, 2012 WL 600727 (W.D. Wash. Feb. 23, 2012).

IV. The Pennsylvania Experience

To illustrate both the promise and difficulties of litigation, I discuss three cases in Pennsylvania in which targeted efforts are currently underway to address varying manifestations of ineffective defense services.[111]

A. Commonwealth of Pennsylvania v. McGarrell: *The Crisis in Capital Representation*

Pennsylvania is the only state that has no state funding for defender services.[112] Each county is responsible for funding prosecutorial and defense functions, and each is fully autonomous in terms of the structure, compensation rates, and operation of programs for indigent defense services.[113] In all counties except Philadelphia, a public defender office, with a chief defender appointed by county-elected officials, handles the large majority of appointed cases for indigent defendants.[114] Private counsel is appointed on a case-by-case basis in conflict matters.

In Philadelphia County, the Defender Association of Philadelphia, a highly regarded and well-staffed defender office with a current lawyer component of over 240 lawyers (and full investigative and social work staffs) handles approximately eighty percent of the indigent defense appointments in misdemeanor and non-homicide felony cases.[115]

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111. I am co-counsel in two of these cases (*McGarrell* and *Flora*) and, as President of the Board of Directors of the Defender Association of Philadelphia, a "client" in the third set of cases discussed below. Some of the factual observations in this section are based on my experience litigating issues related to the right to effective assistance of counsel and familiarity with the Defender Association of Philadelphia.

112. JUSTICE DENIED, supra note 7, at 54. In 2009 only Utah and Pennsylvania had no state funding; since that time Utah has provided state funding. UTAH CODE ANN. § 77-32-701 (West 2011) (establishing a state fund for indigent defense).

113. John Rudolph, *Pennsylvania Public Defenders Rebel Against Crushing Case Loads*, HUFFINGTON POST (Oct. 23, 2012), http://www.huffingtonpost.com/2012/05/30/pennsylvania-public-defenders_n_1556192.html.

114. *Id.*

115. *See* Commonwealth v. King, 57 A.3d 607, 633 (Pa. 2012) (Saylor, J., concurring); James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 161 (2012); Samantha Melamed, *50 Years After Establishing a Right to Counsel, Is Justice Still Being Served*, PHILA. CITY PAPER (March 14, 2013), http://www.citypaper.net/news/Tipping_the_Scales.html. A major reason for the success of the Defender Association of Philadelphia is its structured independence from the political process in Philadelphia. The Association is a non-profit corporation that contracts with the City of Philadelphia to provide defense services and is controlled by an independent board of directors. *History*, DEFENDER ASS'N OF PHILA., http://www.philadefender.org/history.php (last visited Mar. 4, 2014).

Historically, private counsel was appointed in all homicide cases.[116] In 1993, the court adopted a protocol under which the Defender Association was appointed for indigent homicide defendants in twenty percent of homicide cases.[117] As part of this process, the Defender Association created a homicide unit, staffed by its most experienced lawyers, investigators, social workers, and mitigation specialists. Over the past twenty years, this unit has received funding sufficient to permit the assignment of two attorneys and necessary support services in every case, with manageable caseloads that permitted expenditure of hundreds (and sometimes thousands) of hours in homicide case preparation and trial. By contrast, private defense lawyers assigned to capital cases were being paid a *flat fee* of $1800 for all pre-trial proceedings and preparation for trial, but only $1333 if the case was resolved by a guilty plea.[118] At trial, lead counsel was compensated at a rate of $400 per day. Mitigation counsel was paid $1700 for pre-trial proceedings and preparation, and $200 per day at trial.[119]

These rates for capital representation were among the lowest in the nation.[120] Appointed counsel who properly prepared and litigated capital cases and expended the hundreds of hours necessary to provide effective assistance of counsel, were often

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Thus, while funding for the operation of the office comes from the City of Philadelphia, there has been a strong tradition established of independence and zealous representation. For a history of the early struggle for independence, see *In re* Defender Ass'n of Phila., 307 A.2d. 906 (Pa. 1973). For studies on the comparative effectiveness of assigned counsel, defenders, and private defense lawyers, see THOMAS H. COHEN, WHO'S BETTER AT DEFENDING CRIMINALS? DOES TYPE OF DEFENSE ATTORNEY MATTER IN TERMS OF PRODUCING FAVORABLE CASE OUTCOMES (2011), *available at* http://ssrn.com/abstract=1876474; Yamashiro, *supra* note 49.

116. Joseph A. Slobodzian & Nancy Phillips, *Philadelphia Defendants with Court-Appointed Lawyers Fare Worse in Murder Trials, Study Says*, PHILLY.COM, (Dec. 18, 2011), http://articles.philly.com/2011-12-18/news/30531398_1_court-appointed-lawyers-murder-trials-public-defenders.

117. *Id.*

118. *Id.*

119. Commonwealth v. McGarrell (*McGarrell II*), 57 A.3d 639 (Pa. 2012); *see* FIRST JUDICIAL DISTRICT OF PENNSYLVANIA MODIFIED GUARANTEED FEE SYSTEM (PHILADELPHIA COUNTY) TRIAL DIVISION ATTORNEY PAYMENT VOUCHER (2009), *available at* http://www.courts.phila.gov/pdf/forms/criminal/30-1084D-CP-Trial-Division-Attorney-Payment-Voucher-and-Instructions.pdf.

120. *See* JON B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES JUDICIAL CONFERENCE OF THE UNITED STATES UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES 27–28 (2010), *available at* http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/FDPC2010.pdf.

working for less than fifteen dollars an hour. Lawyers who expended the necessary time in the preparation and trial of homicide cases, notwithstanding the low rates of compensation, did so at significant financial costs. In many instances, lawyers failed to devote sufficient time and resources to their cases, and a large number of convictions were later overturned on ineffectiveness of counsel grounds.[121] Further, many lawyers refused to take these appointments, as they could not afford to spend the necessary time and resources.[122] This left a group of lawyers who often provided no more than marginal representation, and the lack of lawyers created a significant backlog of capital cases.[123]

There was also a dramatic discrepancy in outcomes based on whether a homicide defendant was represented by a public defender or private counsel. A Rand Institute study determined that public defenders had a murder conviction rate nineteen percent lower than private counsel, a life sentence rate sixty-two percent lower than private counsel, and an overall reduction of prison sentence time by twenty-four percent.[124] Indeed, over the past twenty years in fifteen hundred cases of Defender Association representation, no Defender client has been sentenced to death.[125]

A legal challenge to this system was filed in the state supreme court on behalf of three persons with pending capital charges who were represented by appointed counsel, on the ground that the capital defense fee schedule was so inadequate that it established a presumption that court-appointed counsel would not provide effective assistance.[126] The court granted the request of

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121. Thomas G. Saylor, *Distinguished Jurist in Residence Lecture: Death Penalty Stewardship and the Current State of Pennsylvania Capital Jurisprudence*, 23 WIDENER L.J. 1 (2013); *see also* Commonwealth v. King, 57 A.3d 607, 634–35 (Pa. 2012) (Saylor, J., concurring) (stating that the attorney in this case was not given enough resources to properly defend the defendant). *Cf.* Martinez-Macias v. Collins, 979 F.2d 1067 (5th Cir. 1992) (reversing conviction on ineffectiveness grounds and stating that at a rate of $11.84 an hour for capital counsel, "the justice system got what it paid for").

122. *See* Report and Recommendations at 9, *McGarrell II* [hereinafter Lerner Report], *available at* http://www.atlanticcenter.org/images/LernerReport.pdf.

123. *Id.* at 2–3, 13–14.

124. Slobodzian & Phillips, *supra* note 116.

125. Anderson & Heaton, *supra* note 115, 183 n.73; *see also* TERANCE D. MIETHE, ESTIMATES OF TIME SPENT IN CAPITAL AND NON-CAPITAL MURDER CASES: A STATISTICAL ANALYSIS OF SURVEY DATA FROM CLARK COUNTY DEFENSE ATTORNEYS (2012), *available at* http://www.deathpenaltyinfo.org/documents/ClarkNVCostReport.pdf (detailing the amount of time spent on capital cases as compared to non-capital murder cases).

126. Commonwealth v. McGarrell (*McGarrell I*), Nos. 77–79 EM 2011 (Pa. Sept. 28, 2011).

extraordinary jurisdiction and ordered an evidentiary hearing in the state trial court.[127]

The trial court issued a Report and Recommendations finding that the "existing compensation system unacceptably increases the risk of ineffective assistance of counsel . . . and is primarily responsible for the [court's] growing inability to attract a sufficient number of qualified attorneys willing to accept court appointments in capital cases."[128] The court ruled that a showing of defects in the system "so extreme as to cause structural defects that tainted the entire mechanism of his trial and sentencing" could be sufficient to reverse the usual presumption of effectiveness.[129]

The court determined that the fee schedule was "grossly inadequate"[130] when compared to the enormous preparation time necessary for preparation and trial of capital cases. [131] Further, the capital fee schedule increased the risk of ineffectiveness of counsel by "maintaining a compensation system which punishes counsel for handling these cases correctly and awards them only if they take every case to trial without adequate preparation or the exploration of appropriate non-trial options."[132] The court recommended an hourly fee of ninety dollars for court appointed counsel.[133]

In response, the Administrative Judge of the Court of Common Pleas increased the flat fee to $10,000 for lead counsel ($7,500 for mitigation counsel) with trial time compensated on a $400 per day basis, but only after the first five full days of trial.[134] Thereafter, on a remand of the case from the state supreme court, the trial court reversed ground and found that the new fee schedule was not clearly inadequate, that sufficient numbers of lawyers were willing to accept appointments, and that a "flat fee" does not present an inherent conflict of interest for the appointed lawyer.[135]

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127. *Id.*

128. Lerner Report, *supra* note 122, at 2.

129. *Id.* at 7 (citing Commonwealth v. Martin, 5 A.3d 177, 192–93 (Pa. 2010)).

130. *Id.* at 9.

131. *Id.* at 11.

132. *Id.* at 17.

133. *Id.*

134. Compensation for Conflict Capital Case Representation, Admin. Order No. 1 of 2013 (First Judicial Dist. of Penn. Admin. Governing Bd., Jan. 17, 2013), *available at* http://www.courts.phila.gov/pdf/regs/2013/AGB-Administrative-Order-01-2013a.pdf [hereinafter Compensation for Conflict Capital Case Representation].

135. Updated Report and Recommendations, Commonwealth v. McGarrell (*McGarrell III*), 2014 WL 1226001 (Nos. 77–79 EM 2011) (Pa. Mar. 14, 2014).

The opinion on remand reflected a questionable shift in focus from the question of what fees are necessary to ensure competent representation at trial, to the issue of what fees are necessary to attract a sufficient number of lawyers to represent capital defendants and thereby speed up disposition of capital cases. The court assumed that the new fee schedule would attract lawyers who would provide effective assistance, notwithstanding that the new schedule provided less funding than the same court had previously recommended.[136]

Moreover, the court accepted a flat fee structure that has been seriously questioned by the ABA, state courts, and commentators.[137] National legal ethics expert, Professor Lawrence J. Fox, addressed this issue:

> In accordance with the Rules of Professional Responsibility, a lawyer may only undertake a court-appointed capital defense representation if she believes that she will be able to provide the high quality competent and diligent representation required for such serious matters. When a lawyer is forced to proceed with a capital defense matter with a limited budget, the lawyer does not have the luxury of making this balancing decision *ex ante*. The lawyer must work every day knowing that the financial demands of life and legal practice may ultimately force her to choose between working uncompensated on a capital case and working to keep the lights running in her office.[138]

On appeal from the trial court's ruling, the Pennsylvania Supreme Court, in a four to three decision, discontinued "oversight" of the fee issue.[139] The dissenting Justices protested that the systemic problems of funding indigent defense services continued and that "Pennsylvania's capital punishment regime is in disrepair."[140] The dissent also argued that the flat fee approach was flawed and that there was still abundant evidence of "chronic underfunding that has debilitated the system to date."[141]

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136. *Id.*

137. The Kansas Supreme Court found that flat fee agreements presented an actual conflict of interest as this arrangement pits the client's interests against the lawyer's interest in doing "no more than what is minimally necessary to qualify for the flat payment." State v. Cheatham, 292 P.3d 318, 340 (Kan. 2013). Flat fees are presumed improper by the ABA. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Guideline 9.1.B (rev. ed. 2003); *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial,* 117 HARV. L. REV. 2463, 2477 (2004) (citations omitted).

138. Fox Affidavit at 8–9, Commonwealth v. McGarrell (*McGarrell II*), 57 A.3d 639 (Pa. 2012) (Nos. 77–79 EM 2011) (Affidavit on file with author).

139. *McGarrell III.*

140. *Id.* (Saylor, J., dissenting).

141. *Id.* (McCaffery, J., dissenting).

Litigation of the Philadelphia capital case fee schedule has thus far produced mixed results. The courts have recognized that egregiously low fees for appointed counsel will inevitably result in ineffective counsel, and as a result the courts have increased compensation for appointed counsel.[142] Yet, the system still fails to provide fees that will adequately compensate diligent counsel and has refused to recognize that "flat fee" provisions create difficult ethical conflicts for lawyers. Significantly, however, the relationship between funding and effective assistance of counsel has become part of the debate on criminal justice in Pennsylvania. In a recent capital case, Justice Saylor set forth the disastrous systemic results of a system in which appointed counsel is unprepared, unqualified, and underpaid:

> Having been charged by the trial judge to perform, effectively on a shoestring, a task for which she was plainly unprepared and unqualified, I have no doubt that this lawyer did what she was able to do while also managing her regular practice. . . . Counsel failed entirely to conduct what any competent attorney should recognize to be an indispensable centerpiece of a capital defense case (particularly where, as here, there is very strong evidence of guilt)—namely, a mitigation investigation. . . . No presumption or platitude can sweep aside this attorney's intolerably poor performance or the damage it has caused. Of greatest concern, these sorts of exceptionally costly failures, particularly as manifested across the wider body of cases, diminish the State's credibility in terms of its ability to administer capital punishment and tarnish the justice system, which is an essential component of such administration.[143]

Justice Saylor has commented more broadly on the problems of capital representation in Pennsylvania and has recognized that the "atrocious representation" in the *King* case was not an aberration.[144] Over the years, the state and federal courts (on habeas petitions) have reversed the guilt or sentencing verdicts in a large number of cases in Pennsylvania. As of 2011, over 125 capital murder convictions were vacated in whole or part based on ineffectiveness of counsel (over seventy in Philadelphia County), and in almost all of these cases new proceedings resulted in no death penalty.[145] Whether this record will lead the courts (and legislature) to upgrade the system remains to be seen, but the

142. *See* Compensation for Conflict Capital Case Representation, *supra* note 134.

143. Commonwealth v. King, 57 A.3d 607, 634–35 (Pa. 2012) (Saylor, J., concurring).

144. Saylor, *supra* note 121, at 24–25.

145. *Id.* at 22–28.

litigation strategy in Philadelphia can only be considered a partial success.

B. State Court and Prosecutorial Attempts to Remove Federal Habeas Defense Lawyers from State Court Proceedings

Under current federal habeas corpus law, a federal constitutional claim made by state prisoners can be adjudicated in federal court only if the habeas petitioner has fully exhausted state remedies and has not procedurally defaulted the claim by failing to properly litigate and preserve claims in the state courts.[146] Further, under AEDPA,[147] the federal court must defer to "reasonable" state court factual findings and legal rulings.[148] Thus, the success of a state post-conviction or federal habeas petitioner will often turn on the effectiveness of post-conviction counsel in the state courts. However, the Supreme Court has ruled that in general there is no federal constitutional right to counsel in state or federal post-conviction proceedings and, therefore, even where counsel is appointed or retained in the state proceedings, but fails to present and preserve constitutional issues, there is no federal remedy.[149] Congress has mandated representation in federal habeas *capital* cases[150] and federal defender offices have established capital habeas units ("CHU") to provide this representation. Over the past twenty years, the Philadelphia CHU, which is a national model for effective and zealous post-conviction representation, has obtained relief in over thirty capital cases in Pennsylvania.[151] Part of the reason for the success of the

146. *See* 28 U.S.C. § 2254(b) (1996); Martinez v. Ryan, 132 S. Ct. 1309 (2012); Rose v. Lundy, 455 U.S. 509 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977).

147. Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 (1996).

148. *See* Cullen v. Pinholster, 131 S. Ct. 1388, 1392 (2011).

149. Pennsylvania v. Finley, 481 U.S. 551 (1987); Ross v. Moffitt, 417 U.S. 600 (1974). In *Martinez*, 132 S. Ct. at 1322, the Court permitted certain "defaulted" claims to be presented in federal habeas proceedings where state post-conviction counsel was ineffective.

150. 18 U.S.C. § 3599 (2008).

151. Saylor, *supra* note 121, at 31–34. In Pennsylvania, there are close to two hundred persons on death row, yet no one has been executed in the past forty-five years (except for three persons who voluntarily gave up their appeals). *See* Peter Hall, *State Has Hundreds of Death Row Prisoners, But They're Seldom Executed*, THE MORNING CALL (May 22, 2011), http://articles.mcall.com/2011-05-22/news/mc-pa-death-penalty-ballard-explainer20110521_1_death-penalty-death-row-first-degree-murder ("Only three men, and no women, have been put to death since capital punishment was restored in the mid-1970s after a brief nationwide suspension, and each volunteered by abandoning his rights to appeal."); *Persons Sentenced to Execution in Pennsylvania*, PENN. DEP'T OF CORR.,

Philadelphia CHU has been its representation of death-sentenced inmates in *state* post-conviction proceedings, either as a result of an order of a federal court to provide such representation to exhaust state remedies, on a pro bono basis with funding from private sources, or as part of the preparation for the filing of a federal habeas petition.[152]

This successful enterprise has produced a host of critics. Prosecutors in Pennsylvania have asserted that the CHU should not provide counsel in state post-conviction proceedings, except in cases where a federal court has specifically ordered such representation for exhaustion purposes and has authorized federal funding for the representation.[153] In 2011, the chief justice of the state supreme court accused the Philadelphia CHU of improperly using federal funds in state cases, over-zealous and unethical lawyering, and improper briefing and advocacy efforts.[154] He condemned the CHU for its supposedly extravagant expenditures on behalf of death row inmates, to a degree, he lamented, that "is beyond remarkable, something one would expect in major litigation involving large law firms."[155]

In a later capital appeal, the state supreme court ordered a hearing on the issue of whether the CHU lawyers were improperly using federal funds to represent the capital defendant in the state

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http://www.portal.state.pa.us/portal/server.pt/document/915857/execution_list1_pdf (last visited Mar. 4, 2014).

152. The CHU's representation of capital defendants in Pennsylvania state post-conviction proceedings has been necessitated by the lack of qualified and properly compensated defense counsel in the state appointment system. Efforts by these lawyers are severely compromised by funding limitations, and counsel who are appointed for capital defendants at trial, appeal, and state post-conviction proceedings are often without the resources necessary to provide effective assistance. In many cases, court-appointed counsel have forfeited issues for federal habeas by inexcusable defaults. *See* Saylor, *supra* note 121, at 32–22.

153. The debate about the CHU's representation of defendants in state post-conviction proceedings revolves, in part, on the proper construction of the statute establishing the right to counsel in federal capital habeas proceedings. *See* 18 U.S.C. § 3599 (2008).

154. Commonwealth v. Spotz, 18 A.3d 244, 330–31 (Pa. 2011) (Castille, J., concurring) ("But, the Defender has decided that federal tax dollars should be deployed to conduct appellant's state collateral attacks; and, the federal authorities who finance their state litigation strategy apparently approve the tactic. The resources the Defender was able to bring to bear in litigating this state collateral attack border on the perverse, and this fact, combined with the tactics employed, and the obvious global efforts of the Defender to obstruct capital punishment in Pennsylvania at all costs, strongly suggests that there is more at work here than non-political, professionally responsible, 'zealous advocacy.'").

155. *Id.* at 332–33.

post-conviction proceeding.[156] In the wake of this order, prosecutors across the state filed additional petitions to remove the CHU lawyers in state post-conviction proceedings.[157] In response, the CHU filed federal removal petitions on the counsel issue.[158]

The prosecutors argue that the CHU lawyers employed by the Federal Community Defender Organization ("FCDO"), a federal grantee under the Criminal Justice Act, are not permitted to use any federal funds in state post-conviction representation, absent an order expressly permitting such representation by the federal court, or where the state court activities are supported entirely with private resources.[159] The Commonwealth further argues that, regardless of the interpretation of the statute by the Administrative Office of the United States Courts ("Administrative Office"), and even if the CHU's activities and resource usage were found by the federal agency to be proper under federal law, state courts may reach their own determination about the meaning of federal law and federal grants, and disqualify the CHU attorneys for unethical conduct.[160]

The FCDO argues that its representation of capital defendants in state post-conviction proceedings complies with federal law and that whatever the constraints of federal law, Congress has not authorized state courts or prosecutors to enforce § 3599.[161] According to the Court, Congress entrusted the Administrative Office to administer funding under these statutes, and that the Administrative Office has special competence to determine whether a federal grantee's activities conform to its

156. Commonwealth v. Mitchell, No. 617 CAP (Pa. 2013) (order remanding to the post-conviction relief act court to determine whether appellant's current counsel may continue representation).

157. *See* Saranac Hale Spencer, *Battle over Federal Defenders Flares Again in Pa. Courts*, THE LEGAL INTELLIGENCER (Sept. 10, 2013), http://www.thelegalintelligencer.com/id=1202618664136?slreturn=20140108163754.

158. *See In re* Pennsylvania, 13-CV-1871, 2013 WL 4193960, at *1 (E.D. Pa. Aug. 15, 2013).

159. *Id.* ("The essence of the Commonwealth's claim is that the FCDO should be disqualified from representing Mitchell in his state post-conviction proceeding because it is using federal monies in that representation, in violation of the Criminal Justice Act and 18 U.S.C. § 3599.").

160. *Id.* at *1.

161. *Id.* at *3 ("[The Commonwealth] argued that the Pennsylvania Supreme Court had jurisdiction to remove the FCDO as counsel by way of its power to govern the practice of law as well as the general doctrine of concurrent jurisdiction . . . . The FCDO submitted a brief opposing the Commonwealth's motion.").

grant, to sanction any non-compliance, and to require whatever adjustments may be needed for a grantee to maintain compliance.[162] As framed by the CHU, a central question is whether the potential for conflicting applications of federal law provides a basis for preemption.[163]

In *Mitchell,* the district court found the removal to be proper under the federal officer removal statute.[164] On the merits, the court dismissed the Commonwealth's petition to disqualify the CHU from state court proceedings.[165] The court ruled that there was not a private cause of action under the funding statute and, therefore, the Commonwealth had no power to enforce that law.[166] The court further rejected, as without precedent under the private cause of action doctrine, the Commonwealth's argument that a violation of funding regulations could be viewed as a violation of the rules of professional conduct and the state rules simply incorporated the federal funding regulations.[167] Finally, the court

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162. *Id.* at *5–7.

163. *See* Arizona v. United States, 182 U.S. 1, 10–11 (2012) (invalidating three state provisions which interfered with federal immigration law enforcement laws). The Court explained:

> Arizona contends that § 3 can survive preemption because the provision has the same aim as federal law and adopts its substantive standards. This argument not only ignores the basic premise of field preemption—that States may not enter, in any respect, an area the Federal Government has reserved for itself—but also is unpersuasive on its own terms. Permitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted.

Id.

164. *In re* Pennsylvania, 13-CV-1871, 2013 WL 4193960, at *1 (E.D. Pa. Aug. 15, 2013) ("The Court denies the Commonwealth's motion to remand. The FCDO's removal was proper under 28 U.S.C. § 1442(a) and § 1446(g), in that the hearing was directed to a person acting under a federal agency, pled a colorable defense that the proceeding was related to an act taken under color of federal office, and was timely removed."); *see also* 28 U.S.C. § 1442(a)(1); 18 U.S.C.A. § 1442(d)(1) (Supp. 2013); *In re* Proceedings in Johnson, No. 13-2242, 2013 WL 4774499, at *1 (E.D. Pa. Sept. 6, 2013) ("[T]he FDCO [sic] has met all requirements of the federal officer removal statute and thus jurisdiction in this Court is proper."); *In re* Commonwealth's Motion to Appoint New Counsel v. Harris, No. 13-62, 2013 WL 4501056, at *5 (E.D. Pa. Aug. 22, 2013) ("To the extent the general state interest in regulating the practice of law may be implicated, it is insufficient to override the policy underlying federal officer removal statute which supports removal in this matter"). At the time of this Article going to press, these cases are all under consideration by the Third Circuit Court of Appeals on cross appeal. Another court has remanded cases to the state courts, finding that the FCDO is not "acting under" a federal officer in its state court representation. *In re* Commonwealth v. Sepulveda, Civ. A. No. 3:13-CV-511, 2013 WL 4459005, at *8–10 (M.D. Pa. Aug. 16, 2013).

165. *In re* Pennsylvania, 2013 WL 4193960, at *1.

166. *Id.* at *12.

167. *Id.* at *16.

determined that even if incorporation of the federal laws and regulations could be the basis of state attorney disqualification, the preemption doctrine would bar such a proceeding as an attempt to "'police' alleged misrepresentations and violations in an area that is within the purview of a federal agency."[168]

Something more fundamental is at stake in this litigation than the legal issues regarding removal of these cases from state to federal court, private rights of action, and preemption. The concerted attempt by Pennsylvania courts and prosecutors to disqualify the most experienced and effective counsel for capital defendants in Pennsylvania presents a disturbing effort to tilt the scales of justice. Disqualification of counsel of choice is controversial in any event,[169] but where there is no asserted conflict of interest, lack of experience, or other ground that supports the state's interest in a fair adjudication of the case, wholesale removal of defense counsel threatens the integrity of these proceedings. While the state has an interest in enforcing ethical obligations and professional responsibility, the supposed violations of funding rules administered by the Administrative Office seem very far afield from these core interests.

Fifty years ago, civil rights activists and protesters in states throughout the South invoked a different removal statute as a means of defending against racially biased state court prosecutions.[170] Ultimately, the Supreme Court narrowed the scope of this statute and made it almost impossible to remove the state prosecution.[171] Today, in a period marked by sharp debate on the functioning of the criminal justice system, it is noteworthy that the strategy of removal of cases to federal court that involve the fundamental right to counsel is again being used to protect against hostile state systems.

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168. *Id.* at *17–18 ("Even if the Court were to apply a presumption against preemption, it would still find that the Commonwealth's application of state law is preempted.").

169. *See* David Rudovsky, *The Right to Counsel Under Attack*, 136 U. PA. L. REV. 1965 (1988).

170. *See* Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 803 (1965).

171. *See* City of Greenwood v. Peacock, 384 U.S. 808 (1966); Georgia v. Rachel, 384 U.S. 780, 805–06 (1966).

C. Flora v. Luzerne County: *A Compromised Defender Office and a Tale of Political Interference and Grossly Inadequate Funding*

The judicial system of Luzerne County, Pennsylvania achieved much notoriety recently as a result of a scandal known as "kids for cash."[172] Two state court judges who handled juvenile criminal cases denied thousands of defendants their right to counsel and to a fair hearing in juvenile proceedings and invariably imposed custodial sentences for even the most minor infractions.[173] These judges were primarily motivated in this enterprise by financial considerations; they had significant investments in juvenile centers where the defendants were incarcerated, and were otherwise financially rewarded for sentencing the defendants to these institutions.[174]

Others in the criminal justice system were complicit in these criminal acts.[175] Prosecutors and defenders failed to object to the railroading that occurred in thousands of cases over a several year period, and the Pennsylvania Supreme Court ignored legal petitions seeking judicial intervention in what became one of the largest judicial scandals in the state's history. Only when federal authorities indicted the judges did the state supreme court order the expungement of thousands of convictions.[176]

It also became clear that the systemic flaws in the county's criminal justice system were not limited to juvenile court. The County Public Defender reported a severe lack of resources for representation of its adult cases, with caseloads far in excess of professional standards.[177] For years, the chief defender had sought budget increases, and for years these requests were denied.[178] Ultimately, the chief defender became the lead plaintiff in litigation seeking additional resources.[179]

In this class action, the following evidence regarding representation by the public defender office was developed:

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172. United States v. Ciavarella, 716 F.3d 705, 713 (3d Cir. 2013).

173. *See id.* at 713–14 (upholding RICO convictions by the state court judges).

174. *Id.* at 715.

175. *Id.* at 714–15.

176. *In re* Expungement of Juvenile Records & Vacatur of Luzerne Cnty. Juvenile Court Consent Degrees or Adjudications from 2003–2008, No. 81 MM 2008 (Pa. 2008).

177. Complaint and Notice of Removal at 8, Flora v. Luzerne Cnty., Civ. Act. No. 3:13-1478, 2013 WL 4520854, (M.D. Pa. 2013) [hereinafter Complaint and Notice of Removal].

178. *Id.* at 8–12.

179. *Id.* at 4.

1. A staff with the equivalent of 13.5 full-time attorneys was handling an average of approximately 450 cases each and appearing at 10,000 hearings annually;

2. There were no trained or specifically assigned appellate attorneys;

3. There was insufficient investigative and clerical staff to handle basic case investigation and case management;

4. The physical facilities at the defender office did not provide space for confidential interviews or communications with clients or for storage of case files;

5. There was inadequate information technology including a lack of computers and case management and scheduling software; and

6. Personnel and other resources were far less than those provided to the Luzerne County District Attorney.[180]

As in other jurisdictions where severe underfunding and high caseloads unfairly compromised the right to counsel, the key litigation questions focused on the standards for assessing effectiveness of counsel faced with very high caseloads and whether a judicial remedy was available at the pre-trial stage of the proceedings. Plaintiffs claimed that defender clients were being denied assistance of counsel at critical stages of the proceedings, that whatever assistance was eventually provided was highly likely to be ineffective due to high caseloads and lack of defense resources—including investigators, experts and social workers—and that the deficiencies in the system were so pervasive as to permit a court to assess the "ineffectiveness" issue pre-trial, in the context of a civil rights lawsuit.[181]

Plaintiffs alleged that the County's practices violated criminal defendants' rights under the Sixth Amendment, the Pennsylvania State Constitution, the Pennsylvania Rules of Professional Conduct, and ABA standards.[182] In particular, plaintiffs relied upon Rule 1.1 of the Pennsylvania Rules of Professional Conduct, requiring that a "lawyer shall provide competent representation . . . [with] the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"[183] and an ABA Ethics Opinion that provides that

180. *See* Report of Expert for Plaintiff, Professor Norman Lefstein at 11, Flora v. Luzerne Cnty., Civ. Act. No. 3:13-1478 (2013) (on file with author) [hereinafter Lefstein Report]; Complaint and Notice of Removal, *supra* note 177.

181. Complaint and Notice of Removal, *supra* note 177, at 12.

182. *Id.* at 2–14.

183. *Id.* at 14.

"[a] lawyer's primary ethical duty is owed to existing clients."[184] Under these rules, "a lawyer must decline to accept new cases, rather than withdraw from existing cases, if the acceptance of a new case will result in her workload becoming excessive."[185]

Plaintiffs secured preliminary relief based on evidence establishing the inability of defenders to provide effective assistance given the serious structural deficiencies in the system.[186] The court ordered the County to take certain steps on an interim basis, including filling vacant attorney positions, developing a plan to meet the constitutional obligations for indigent representation, and providing adequate office space to ensure confidentiality in attorney-client communications.[187]

Following discovery on the caseload issues, plaintiffs' expert Professor Norman Lefstein concluded that the combination of very high caseloads, lack of investigative and support services, use of "part-time" defenders, and lack of satisfactory office space prevented the Defender from providing proper representation.[188] He stated that "the Public Defender and its lawyers are not in compliance with Pennsylvania Rules of Professional Conduct in providing representation in adult criminal cases," and further that "an unknown number of the agency's clients are not receiving reasonably competent counsel as required by the Sixth Amendment."[189]

The political side of this litigation became evident as the case was nearing trial in 2013. The County insisted that there was insufficient proof that caseloads were too high and that with more efficient allocation of resources, effective counsel could be provided to Defender clients.[190] The chief defender continued to press county officials for additional funding and became critical of a number of failures on the part of the County to deal with its obligations to expunge juvenile records in the wake of the "kids for cash" scandal.[191] In early 2013, the County dismissed the chief

184. ABA Formal Opinion 06-441, *supra* note 97, at 4.

185. *Id.* at 5.

186. Order of June 15, Flora v. Luzerne Cnty., Civ. Act. No. 2012-04517 (Ct. of Common Pleas of Luzerne Cnty. 2012).

187. *Id.*

188. Lefstein Report, *supra* note 180, at 16.

189. *Id.* at 16–17.

190. Order of October 22, Flora v. Luzerne Cnty., Civ. Act. No. 2012-04517 (Ct. of Common Pleas of Luzerne Cnty. 2013) [hereinafter Order of October 22].

191. Complaint and Notice of Removal, *supra* note 177, at 9–11.

defender[192] and was then successful in dismissing the case on lack of standing.[193] The case is currently on appeal to the Commonwealth Court of Pennsylvania.[194]

Litigation strategies and political disputes aside, the funding, resource and ethical issues in this case are well defined and present the court with a full record on which to make the constitutional determinations. To be sure, county-by-county, or even state-by-state litigation is a difficult and inefficient means of implementing constitutional standards on a national basis for the operation of Defender offices. However, with a number of state supreme courts permitting pre-trial challenges seeking adequate funding, a litigation model for similar challenges is being developed.

Conclusion

The failure of the *Gideon* promise and the crisis in indigent criminal defense is the direct result of a lack of political and judicial responsibility. There are a number of complementary political measures, legislative reforms, and judicial interventions that could begin to remedy the structural causes of ineffective counsel, but it is highly unlikely that the necessary changes will be effectuated without judicial mandates for adequate funding and resources. The problem is not one of legal doctrine or lack of factual proof; rather, it is one of judicial "will," and whether the status quo will be altered depends in large part on the how the courts view their role in enforcing Sixth Amendment protections for the criminally accused.

192. Jennifer Learn-Andes, *County Public Defender Fired*, TIMESLEADER.COM (Apr. 18, 2013), http://www.timesleader.com/news/local-news/442381/County-public-defender-fired.

193. Order of October 22, *supra* note 190.

194. Notice of Appeal, Flora v. Luzerne Cnty., Civ. Act. No. 2012-04517 (Ct. of Common Pleas of Luzerne Cnty. Nov. 20, 2013), *available at* http://www.aclupa.org/download_file/view_inline/1459/695/.