

# Eliminating Excessive Public Defender Workloads

BY LAURENCE A. BENNER

Criminal Justice Section Chair Bruce Green recently highlighted the need for innovative solutions to one of our most pressing criminal justice dilemmas: “the perennial financial crisis in indigent defense services.” (See *Chair’s Counsel*, 25 (4) CRIM. JUST. 1 (Winter, 2011).) This article attempts to address that concern by suggesting an approach that will enable the bar and judiciary to objectively identify when an excessive public defender caseload results in a pretrial violation of the Sixth Amendment right to counsel.

Our adversary system of criminal justice relies upon the effectiveness of counsel for both the prosecution *and* the defense in order to discover the truth concerning the guilt or innocence of the accused. A host of recent exonerations of the wrongfully convicted by innocence projects nationwide, however, have revealed there are serious flaws in our justice system. In theory, every person accused of a serious crime comes to court protected by the presumption of innocence and the promise of effective representation by a well-prepared and experienced defense counsel

supported by investigators, experts, and other resources needed to mount an effective defense. Today our system has broken faith with that basic premise and forgotten its primary mission, often operating under a presumption of guilt in which processing the “presumed guilty” as cheaply as possible has been made a higher priority than concern for the possibility of innocence.

A long-standing lack of political will to adequately fund defense representation—aggravated by the current economic downturn—has increased the number of defendants in need of public defense services at the same time as a stagnant economy has further decreased state and local tax revenue to support such programs. The perception that the public defender represents only the poor and society’s outcasts is an outdated stereotype. It is often “average” citizens or their children accused of crime who must rely upon the local public defender for representation. However, in the competition for scarce resources there are few lobbyists for indigent defense. The result has been an enormous disparity between the

resources given to prosecution and those allocated to public defenders, even though the public defender represents the overwhelming majority (85–95 percent) of defendants accused of serious crime. In California, for example, for every dollar spent on prosecution, only 53 cents is spent on indigent defense. (See Laurence Benner, *The Presumption of Guilt, Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. LAW REV. 263, 268 (2009) [hereinafter PRESUMPTION OF GUILT].)

This has led to unmanageable caseloads forced upon public defender offices in violation of nationally recognized maximum caseload standards endorsed by the American Bar Association as necessary to protect the Sixth Amendment right to the effective assistance of counsel (See *Ten Principles of a Public Defense Delivery System* (2002) ABA Standing Committee on Legal Aid and Indigent Defendants, available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>). Excessive caseloads in turn create a conflict of interest between new clients and existing clients, prevent counsel from performing core functions, and violate ABA Formal Ethics Opinion 06-441, which requires defense counsel to control their workload in order to provide competent representation. This article explains why reliance upon postconviction remedies has failed to stop this erosion of the right to counsel and proposes a pretrial litigation strategy for systemic reform.

### The Extent of the Problem

Most indigent defense systems are organized and funded at the county level. There are significant disparities, however, among counties in their commitment and ability to provide effective defense services for the indigent

#### National Caseload Standards

Maximum caseload per full-time attorney per year:

Felonies	150
Misdemeanors	400
Juvenile	200

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accused. Recent studies by the Department of Justice's Bureau of Justice Statistics reveal that almost three out of every four county-funded public defender offices have attorney caseloads that exceed nationally recognized maximum caseload standards. Defender systems organized and funded at the state level have fared no better. Fifteen of 22 statewide defender systems have attorney caseloads that exceed national standards. State defender systems have experienced a 20 percent increase in caseload but only a 4 percent increase in staffing.

Caseloads are so excessive that in many jurisdictions defense counsel are unable to perform even core functions, such as conducting an adequate factual investigation into guilt or innocence. In Florida, for example, the annual felony caseload of individual public defenders increased to 500 felonies per year, while the average for misdemeanor cases rose to an astonishing 2,225. In Tennessee, six attorneys handled over 10,000 misdemeanors annually, spending on average less than one hour per client. (See NATIONAL RIGHT TO COUNSEL COMMITTEE, JUSTICE DENIED, AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL at 68 (2009).)

### The Failure of Postconviction Remedies

The legal remedy, which in theory should deter such abridgement of the Sixth Amendment right to counsel, traditionally has been to raise an ineffective assistance of counsel claim after conviction under *Strickland v. Washington*, 466 U.S. 668 (1984). A recent study of over 2,500 ineffective assistance of counsel (IAC) claims found, however, that only a tiny fraction (4 percent) of such claims were successful. (PRESUMPTION OF GUILT at 311). To establish a violation of the Sixth Amendment under *Strickland's* two-pronged test, counsel's deficient performance must be both professionally unreasonable and prejudicial. To establish prejudice a defendant must show there is a reasonable probability that the outcome would have been different. While establishing the "prejudice" prong has always been extremely difficult, the Supreme Court has recently raised the bar even further, declaring in *Harrington v. Richter*, 131 S. Ct. 770, 792 (2011), that the "likelihood of a different result must be substantial, not just conceivable." The prejudice requirement thus presents a substantial obstacle to efforts to reform inadequately funded defense systems. Even if counsel conducted little or no investigation due to an excessive caseload, for example, how does one determine, sometimes years after the event, what a prompt and thorough investigation would have uncovered? Moreover, if favorable evidence is later uncovered, it is often, as one judge candidly admitted, "impossible to know" in a postconviction proceeding what effect the evidence would have had on the jury. (*Sears v. Upton*, 130 S. Ct.

3259 (2010), Appendix to Petition for Certiorari 30B). Attempting systemic reform through postconviction ineffective assistance of counsel claims is thus not an effective option. Even when successful, the deterrent impact of an individual case is small and further marginalized by the fact that relief is usually granted only after years of protracted litigation.

### Pretrial Strategy that Does Not Require Showing of Prejudice

There is a litigation strategy that avoids *Strickland's* prejudice prong by focusing on the constructive *absence* of counsel at a critical stage of the proceedings, rather than the *ineffectiveness* of counsel's conduct. As *Gideon v. Wainwright*, 372 U.S. 335 (1963), and its progeny established, the Sixth Amendment guarantees the assistance of counsel at each critical stage of the proceedings against an accused. In *U.S. v. Cronin*, 466 U.S. 648 (1984), a companion case to *Strickland*, Justice Stevens observed, "The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally

ed, the framework in which the trial proceeds results in a criminal justice system that "cannot reliably serve its function as a vehicle for the determination of guilt or innocence." (*Rose v. Clark* 478 U.S. 570, 577–578 (1986).) Therefore *Strickland* does not apply and proof of prejudice is not required. This strategy makes it possible to bring a cause of action that focuses not on the individual case, but instead on the system as a whole by showing a systemic violation of the right to counsel prior to trial. Because the Sixth Amendment violation is established at the time the inability to investigate arises, this makes class action injunctive relief an appropriate remedy prior to the trial of any individual case.

### Failure to Investigate Violates the Sixth Amendment

The failure to investigate factual innocence and circumstances mitigating punishment violates the Sixth Amendment's guarantee of the right to the assistance of counsel. The Supreme Court first recognized the importance of defense counsel's duty to conduct a "prompt

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absent, or prevented from assisting the accused during a critical stage of the proceeding." (*Id.* at 659 n.25, emphasis added.) The strategy outlined here is premised upon the argument that the period between arraignment and trial—the investigatory stage—is a critical stage during which an accused is entitled to counsel's assistance. The essential argument is that because excessive caseloads make it impossible for defense counsel to conduct a reasonable investigation into factual innocence and/or mitigating circumstances relevant to punishment, the inability to provide "core" assistance of counsel renders counsel constructively absent at a critical stage of the proceedings.

As discussed below, *Powell v. Alabama*, 287 U.S. 45 (1932), *Geders v. United States*, 425 U.S. 80 (1976), and the Supreme Court's recent decision in *Kansas v. Ventris*, 129 S. Ct. 1841(2009), involving the timing of a Sixth Amendment violation, establish that a constitutional violation occurs without any showing of prejudice when counsel is prevented from providing assistance during a critical stage of the proceedings. There is thus a completed violation of the Sixth Amendment prior to trial. This is a "structural defect" rather than a product of erroneous decision making by counsel in an individual case. Because core assistance by counsel has not been provid-

ed and thorough-going investigation" in *Powell v. Alabama*, 287 U.S. 45, 58 (1932). In that case, six black youths were charged with the rape of two white women, a capital offense in Alabama at the time. Although attorneys were appointed to represent the defendants, the trial commenced almost immediately without giving counsel an opportunity to conduct any meaningful investigation. The Supreme Court held that the state's duty to provide counsel in a capital case was "not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case" (*Id.* at 71). The court emphasized that the time between arraignment and trial was "perhaps the most critical period of the proceedings" because that is when "consultation, thoroughgoing investigation and preparation [are] vitally important." (*Id.* at 57). The fact counsel were unable to conduct any meaningful investigation was thus central to *Powell's* holding that the defendants' right to counsel was violated.

### National Standards

It was against this constitutional backdrop that the ABA promulgated Standards for Criminal Justice that marked out the duties of defense counsel. (See ABA, STANDARDS

FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993) available at [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_dfunc\\_blk.html#4.1](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk.html#4.1)). Standard 4-4.1 of the Defense Function Standards provides: “Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. . . . The duty to investigate exists regardless of the accused’s admissions or statements to defense counsel. . . .”

In decisions ruling that counsel’s failure to conduct a proper investigation violated the right to the effective assistance of counsel, the Supreme Court has expressly relied upon Standard 4-4.1 and other ABA standards as evidence of the norms of professional conduct. (See, e.g., *Wiggins v Smith*, 539 U.S. 510 (2003) (failure to investigate defendant’s family and social history); *Rompilla v. Beard*, 545 U.S. 374 (2005) (failure to review a readily available court file); *Porter v. McCollum*, 130 S. Ct. 447 (2009) (failure to investigate defendant’s military records that would have disclosed defendant had received two purple hearts and suffered from PTSD); and *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (failure to investigate the immigration consequences of a felony guilty plea and advise defendant of the risk of deportation).)

Standard 4-1.3(e) also provides that “Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client’s interest in the speedy disposition of charges, or may lead to the breach of professional obligations.”

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals (NAC) adopted national caseload standards, which were recognized in the ABA’s *Ten Principles of a Public Defense Delivery System* as a maximum that “should in no event be exceeded.” These national standards specify that one full-time attorney should be assigned no more than 150 noncapital felony defendants per year, or 400 nontraffic misdemeanor defendants, or 200 juvenile clients respectively. Because criminal justice systems differ significantly from state to state and even within a state, these national standards undoubtedly are too high in some jurisdictions, given local laws, court structure, logistical considerations, prosecutorial charging and plea bargaining policies, and judicial sentencing norms. Only an actual workload assessment based upon time studies can determine the maximum number of defendants an individual attorney can effectively represent in a given jurisdiction. The National Center for State Courts, for example, undertook a workload assessment for the Maryland Public Defender Office in 2005, and

recommended substantially lower caseloads than those set by the national standards. Nevertheless the national standards are a reliable barometer of caseload pressure. (See BRIAN J. OSTROM, MATTHEW KLEIMAN, & CHRISTOPHER RYAN, *Maryland Attorney and Staff Workload Assessment*, NATIONAL CENTER FOR STATE COURTS, 1, 35 (2005), [http://www.ncsconline.org/WC/Publications/Res\\_WorkLd\\_MDAtty&StaffWkLdAs05Pub.pdf](http://www.ncsconline.org/WC/Publications/Res_WorkLd_MDAtty&StaffWkLdAs05Pub.pdf).)

### A Case Study: Crisis in California

Having established the first public defender office in Los Angeles in 1914, California has always been looked to as a leader in providing indigent defense services. A recent study conducted by the author for the California Commission on the Fair Administration of Justice, however, disclosed that over half of the institutional public defender offices in that state have caseloads that exceed the maximum attorney workloads established by national standards. (See PRESUMPTION OF GUILT at 266 n.4 and 285). Excessive attorney workloads are compounded by the lack of sufficient investigative resources. All of the responding California offices employing staff investigators reported having excessive investigator workloads. The recommended standard is one investigator for every three attorneys. (See National Study Commission on Defense Services, GUIDELINES FOR LEGAL DEFENSE SYSTEMS, Standard 4.1 (1976).) In three counties there was only one investigator for every eight attorneys. One of these offices handled 10 death penalty cases during a single year. Several rural offices had no investigator on staff or had significant difficulty in obtaining court-approved funding for investigative assistance. Also revealing was the fact that all of these California defender offices reported that they had difficulty interviewing prosecution witnesses with more than one-quarter classifying the problem as “serious.”

Several additional factors further aggravated the situation. First, virtually all of these offices had no contact with an indigent defendant until they were appointed at the arraignment, several days after arrest, jeopardizing the ability to preserve evidence and making it more difficult to locate witnesses favorable to the defense. Second, there was substantial evidence that prosecutors did not comply with their obligation to provide essential information to the defense through discovery procedures. An overwhelming majority (more than 90 percent) of both defenders and experienced private criminal defense attorneys reported that prosecutors failed to turn over evidence favorable to the defendant (*Brady* evidence) and delayed in providing even routine information. Third, and perhaps most important, it was documented that felony cases were routinely disposed of at a disposition conference held approximately one week after the arraignment. Where the prosecutor presents a “take it now

or lose it” offer at this stage, pressure is thus placed upon the defendant to accept the plea bargain before there has been time to conduct any meaningful investigation.

The failure to have adequate investigative assistance, coupled with systemic factors such as delayed appointment of counsel, incomplete discovery, and pressure to resolve cases early, seriously exacerbates the problem of excessive caseloads. The California experience, however, is not atypical. In fact in many jurisdictions it is worse. Forty per cent of county-based public defender offices across the country do not have staff investigators. With respect to those that do, only 7 percent have a sufficient number of investigators to meet the national standard. (See D. J. Farole, Jr. and L. Langton, Bureau of Justice Statistics, *Special Report: Census of Public Defender Offices 2007, County-Based and Local Public Defender Offices, 2007.*)

### When Does a Violation of the Right to Counsel Occur?

The Supreme Court’s recent decision in *Kansas v. Ven-tris*, 129 S. Ct. 1841 (2009), sheds new light on the timing of a Sixth Amendment violation. *Ventris* involved a violation of *Massiah v. United States*, 377 U.S. 201 (1964). *Massiah* held that the government cannot use a secret undercover informant to deliberately elicit incriminating statements from an indicted defendant who is represented by counsel. The rationale for the *Massiah* rule is that the confrontation between a defendant and a government informant seeking to obtain incriminating statements is a critical stage of the prosecution against the accused, and a surreptitious interrogation deprives the defendant of counsel’s assistance.

In *Ventris*, the defendant was arrested for murder. At trial *Ventris* took the stand and portrayed himself as a mere bystander. In rebuttal, the prosecutor called a jailhouse informant who had been placed in *Ventris*’ cell to obtain incriminating statements. The informant testified that *Ventris* had admitted shooting and robbing the deceased. On appeal it was conceded that the manner in which the jailhouse snitch had been employed violated *Massiah*. However, the court held it was permissible to use the tainted statements for impeachment in rebuttal. In an opinion by Justice Scalia, the Supreme Court held that the Sixth Amendment is violated at the time the statement is improperly elicited by the government informant in the absence of counsel rather than when the statement is admitted at trial. Because the right to counsel was not violated at the time the statement was introduced at trial, the issue turned on whether the exclusionary rule should be applied regarding the prior violation that occurred in the jail cell. The court found that exclusion of the tainted statement from the prosecutor’s case in chief was a sufficient sanction to deter

future violations and allowed the statement to be admitted in rebuttal.

The *Ventris* holding regarding the timing of a right to counsel violation is relevant to the excessive caseload problem because it logically follows that a violation of the Sixth Amendment likewise occurs at the time a public defender has such an excessive caseload that he or she is precluded from being able to conduct a prompt investigation. As Justice Scalia recognized in *Ventris*, the “core” of the Sixth Amendment right to counsel “has historically been and remains today, the opportunity for a defendant to consult with an attorney, and to have him investigate the case and prepare a defense for trial.” (129 S. Ct. 1841 (2009) at 1844–55.) In *Powell v. Alabama*, the court recognized that the period between arraignment and trial was “perhaps the most critical period” of the proceedings against an accused, 287 U.S. 45, 57 (1932). Today the emphasis on speedy disposition coupled with powerful inducements to plead guilty shortly after arraignment, makes the need for prompt defense investigation especially critical.

As Professor LaFave of the University of Illinois has observed, one test the court has used for determining when a stage is critical is whether “a potential opportunity for benefiting the defendant as to the ultimate disposition of the charge through rights which could have been exercised by counsel” has been lost and whether that “lost opportunity” could be “regained by actions subsequently provided counsel could have taken.” (See WAYNE LAFAVE, ET AL., *CRIMINAL PROCEDURE* 599 (5th ed. 2009).) When the opportunity for investigation is lost due to appointment of counsel with an excessive caseload, the opportunity to conduct a prompt investigation cannot be regained by subsequent appointment, on appeal or postconviction, counsel who may not investigate until many months or years after the event.

When defense counsel is unable to conduct a prompt investigation, it amounts to nonrepresentation at this critical investigative stage. Because excessive workloads prevent defense attorneys from fulfilling this “core” investigative function, it can thus be argued that their constructive absence at a critical stage constitutes a violation of the Sixth Amendment *prior to trial*, thus forming the constitutional predicate for a public defender’s office to refuse to take additional cases, and for pretrial litigation, if necessary, to obtain systemic reforms. Following *Ventris*, the violation occurs at the moment a public defender office accepts new indigent appointments under circumstances that preclude the ability to promptly investigate the merits of the defendant’s case, both with respect to factual guilt or innocence and mitigating circumstances reducing punishment. That inability can be shown mathematically by conducting a workload assessment using time studies similar to those designed by

the National Center for State Courts in order to determine when additional judges are needed.

### Time Studies and Objective Workload Assessments

Using the National Center for State Courts' methodology, time studies have been employed to create objective data that can translate raw caseload filings into actual workload. By measuring real events such studies accurately reflect the unique practice environment in a particular jurisdiction, including logistical considerations and other operational characteristics that impact defense representation.

To provide a much simplified explanation, one component of the study involves making a determination of the number of hours staff attorneys have available for case-related activities and in-court representation. The second component involves recording the amount of time actually spent providing representation for different types of cases.

Analyzing time spent on particular aspects of representation for different types of cases makes it possible to classify cases based upon their complexity, thus creating a more precise tool for measuring the workload created by a given mix of cases. The workload assessment conducted by the University of Nebraska's Public Policy Center for the Lancaster County Public Defender, for example, identified 17 different case types. (See Workload Assessment available at <http://ppc.unl.edu/project/LancasterCountyPublicDefenderWorkloadAssessment>.) Dividing the amount of time needed to provide representation for a given annual caseload by the number of hours available from an individual staff attorney determines the number of attorneys needed to handle that caseload.

The workload assessment provides an objective evidentiary basis to support a chief defender's judgment that additional staff are needed or to declare a public defender office temporarily unavailable to take additional cases. The sixth guideline of the *ABA Eight Guidelines of Public Defense Related to Excessive Workloads* (2009), specifically states that a public defender "is obligated to seek relief from the court" when alternative options for dealing with an excessive caseload have been exhausted or are unavailable. By documenting that the office has inadequate resources to conduct the necessary client interviews and investigations, this data objectively establishes that the acceptance of additional cases will result in a substantive violation of the Sixth Amendment right to counsel's assistance.

### Identifying and Establishing Sixth Amendment Violation

The approach suggested here for identifying and establish-

ing a Sixth Amendment violation of the right to counsel can be applied to responses to the current crisis in indigent defense that are based upon ethical obligations, litigation to achieve systemic reform, and legislative solutions.

**Ethical Considerations.** This article has focused thus far only on the constitutional violation that occurs when an excessive caseload makes reasonable investigation impossible and renders defense counsel constructively absent at a critical stage of the proceedings. Defense counsel's duties to their clients, however, encompass much more. The National Legal Aid and Defender Association has established a detailed and comprehensive set of standards governing a defense attorney's duties. (See PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (4th Printing) (Nat'l Legal Aid and Defender Assoc. 2006).) The ABA Model Rules of Professional Conduct also establish the ethical duty to provide competent representation, which includes at a minimum the obligation to "exercise diligence [to] keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; communicate effectively on behalf of and with clients; [and] control workload so each matter can be handled competently" (See Model Rules 1.1, 1.2(a), 1.3, and 1.4). Formal Opinion 06-441 established that no exception to these rules will be made for lawyers who represent indigent persons charged with crimes.

In assessing whether a staff attorney's workload is so excessive that it has an adverse impact on a his or her ability to provide competent representation to all clients, the *ABA Eight Guidelines of Public Defense Related to Excessive Workloads* (2009) state that the following factors should be considered:

- Whether sufficient time is devoted to interviewing and counseling clients;
- Whether prompt interviews are conducted of detained clients and of those who are released from custody;
- Whether pretrial release of incarcerated clients is sought;
- Whether representation is continuously provided by the same lawyer from initial court appearance through trial, sentencing, or dismissal;
- Whether necessary investigations are conducted;
- Whether formal and informal discovery from the prosecution is pursued;
- Whether sufficient legal research is undertaken;
- Whether sufficient preparations are made for pretrial hearings and trials; and
- Whether sufficient preparations are made for hearings at which clients are sentenced.

By using the workload assessment to determine the number and type of pending cases an individual attor-

ney has open, and the number of hours needed to provide competent representation to those clients, it can be shown when an individual staff attorney's workload has risen to a level that it prevents him or her from meeting ethical and constitutional obligations to existing clients.

The workload assessment also provides an evidence-based method for determining when an attorney has an ethical duty not to accept new assignments, by demonstrating that it would create a conflict of interests between new and presently existing clients. The Model Rules of Professional Conduct expressly provide that

a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client."

(Model Rule 1.7 (a) (2).)

ABA Formal Ethics Opinion 06-441 declares that a lawyer's "primary ethical duty is owed to existing clients" and provides detailed guidance regarding a lawyer's obligation when faced with a conflict of interest created by an excessive caseload:

If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation.

(See *In Re Order on Prosecution of Criminal Appeals* by the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130, 1135 (Fla. 1990) (providing judicial relief with respect to an excessive appellate caseload).)

### State Litigation to Achieve Systemic Relief

As the New York Court of Appeals, the state's highest court, recently held in *Hurrell-Harring v. New York*, 930 N.E. 2d 217 at 224–226 (2010), a civil action to obtain injunctive relief will lie where "systemic" deficiencies result in the denial of "core" assistance by counsel, despite the nominal appointment of counsel. This action was brought under New York's civil procedure rules permitting declaratory judgments. The complaint in *Hurrell-Harring* alleged that due to inadequate funding and staffing the indigent defense system was "structurally incapable" of providing legal representation at critical stages prior to trial as required by the Constitution. A multitude of sys-

temic deficiencies were asserted, including the fact that in some circumstances misdemeanor defendants were not provided counsel at arraignment. Even after counsel was appointed, however, the complaint alleged as an independent claim that attorneys did not have any meaningful contact with their clients nor were investigative services that were essential to preparing a defense provided. One plaintiff, for example, was held in jail awaiting disposition of misdemeanor charges for 148 days and did not see his attorney for four months. The court declared the period between arraignment and trial was a critical stage at which the absence of counsel "may be more damaging than denial of counsel during the trial itself." (*Id.* at 224).

**Why *Strickland* and the Prejudice Requirement Are Inapplicable.** It is important to point out that the focus of the approach suggested here is on nonrepresentation due to the constructive absence of counsel, rather than ineffective representation. As the *Hurrell* court recognized, the "question presented by such claims . . . is whether the State has met its obligation to provide counsel, not whether under all the circumstances counsel's performance was inadequate or prejudicial." (*Id.* at 225). Such a lawsuit therefore does not raise the "contextually sensitive claims that are typically involved when ineffectiveness is alleged" because case-specific decisions made by individual attorneys are not at issue. Thus *Strickland* is not applicable.

The Supreme Court held in *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), that the right to counsel attaches when an arrestee is brought before a judicial officer who informs the arrestee of the charge and places restrictions upon the individual's liberty by setting bail. This is typically called an arraignment. Where an excessive caseload prevents counsel from being able to meet and confer with a client, undertake necessary legal research, and conduct an appropriate factual investigation within a reasonable time after arraignment, there has been a failure to provide core assistance at a critical stage. As the Supreme Court stated in *United States v. Cronin*: "If no actual 'Assistance' 'for' the accused's 'defense' is provided, then the constitutional guarantee has been violated. To hold otherwise could convert the appointment of counsel into a sham. . . . Assistance begins with the appointment of counsel, it does not end there." (*United States v. Cronin*, 466 U.S. 648, 654 (1984).)

The Supreme Court has recognized a completed violation of the right to counsel without any showing of prejudice in a number of different contexts. *Gideon* itself did not require a showing of prejudice where counsel is not provided at trial. (See also *Hamilton v. Alabama*, 368 U.S. 52 (1961) (counsel not provided at arraignment), *White v. Maryland*, 373 U.S. 59 (1963) (guilty plea), *Herring v. New York*, 322 U.S. 853 (1975) (counsel prohibited from making closing argument); *Geders v. United*

States, 425 U.S. 80 (1976) (preventing counsel from consulting with defendant during an overnight recess that occurred between his direct testimony and cross-examination); *Holloway v. Arkansas*, 435 U.S. 475 (1978); and *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (representation by counsel with conflicting interests).) None of these cases required an actual showing of prejudice to establish a Sixth Amendment violation.

Finally, the Supreme Court has recognized a Sixth Amendment violation of the right to counsel without any showing of prejudice when defendants have been erroneously denied the right to retain private counsel of their choice. In *United States v. Gonzales-Lopez*, 548 U.S. 140, 150 (2006), the court refused to engage in “a

under section 5 of the Fourteenth Amendment, Congress also has the power to enforce the Sixth Amendment by creating a federal cause of action for equitable and declaratory relief. The Justice for All Reauthorization Act of 2011, S. 250, 112 Cong. (2011), sponsored by Senators Leahy and Franken, contains a provision that authorizes the attorney general of the United States to file a civil action to obtain equitable and declaratory relief to eliminate any “pattern and practice . . . by government officials . . . with responsibility for the administration of programs or services which provide appointed counsel to indigent defendants, that deprives persons of their rights to assistance of counsel protected under the Sixth Amendment and Fourteenth

## **Gideon itself did not require a showing of prejudice where counsel is not provided at trial.**

speculative inquiry into what might have occurred in an alternate universe,” holding that “We have little trouble concluding that erroneous deprivation of the right to counsel of choice, ‘with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as ‘structural error.’” (*Id.* at 150).

The search for prejudice when an indigent defendant is deprived of the assistance of counsel during the investigative stage is likewise “a speculative inquiry” because it is impossible to know, often years later, what witnesses or evidence might have been uncovered had a prompt investigation been conducted. It would indeed turn *Gideon* on its head to hold that rich defendants are not required to show prejudice when deprived of counsel of their choice, but poor defendants must show prejudice when the government has defaulted in its obligation to provide “core” assistance of counsel at a critical stage of the proceedings against them.

### **Federal Litigation to Achieve Systemic Reform**

The ability of federal courts to enforce the right to counsel via habeas corpus has been crippled by the Anti-Terrorism and Effective Death Penalty Act of 1996 that, for example, requires deference to state court rulings unless they constitute an “unreasonable” violation of “clearly established” US Supreme Court precedent. *Hurrell-Harring* was brought in state court under state law that authorized declaratory judgments. A similar authority for a federal court to provide declaratory relief to parties regarding “any controversy within its jurisdiction” is found in 28 U.S.C. 2201. Such litigation, however, is costly, time-consuming, and involves a number of complex issues. Pursuant to its authority

Amendment.” This legislation is precisely what is needed if federal enforcement of the Sixth Amendment is to become a meaningful reality. Not only have budget cuts stripped public defender offices of the resources needed to provide assistance at the critical stage of investigation, but a disturbing trend has been seen in states like California where some counties are now seeking to abolish institutional public defender offices that have developed a cadre of experienced career professional defense attorneys. To avoid the higher cost of such career professionals, who as county employees often have compensation and benefits on a par with their counterparts in the prosecutor’s office, these counties have begun to privatize indigent defense services by awarding contracts for those legal services to the lowest bidder. (See Laurence Benner, *The California Public Defender: Its Origin, Evolution and Decline*, 5 CAL. LEGAL HIST. 173 (2010).)

A case in point is Fresno County, California. In fiscal year 2006–2007 the institutional public defender had 76 staff attorneys and 19 investigators. Although it was already handling felony and misdemeanor caseloads twice the maximum allowed by national standards, by 2010 it was reported that the office had been cut to only 48 staff attorneys and nine investigators. Because of these severe budget cuts the chief defender, in compliance with ethical standards, declared the office unavailable to accept new cases and the court had to appoint private counsel to some new cases. (See Brad Brannon, *Fresno Co. Public Defender Cuts May Backfire*, FRESNO BEE, Sept. 25, 2010). Instead of restoring the public defender’s staff, the county responded by putting out an RFP soliciting bids from private contractors to do the work of the

public defender's office. (County of Fresno, Request for Proposal Number 962-4878, Oct. 20, 2010).

In theory, contract defenders can provide competent services if properly regulated by standards and accountability mechanisms to ensure adequate representation by qualified personnel. Recent research, however, indicates this has not occurred, as there is no enforcement mechanism to ensure that greed does not trump justice. One contract defender, for example, explained that he was able to handle an extremely high volume of cases (exceeding by several magnitudes the maximum allowed by national standards) because he pled 70 percent of the defendants guilty at the first court appearance after spending only about 30 seconds with the defendant to explain the prosecutor's offer. Obviously, no investigation was undertaken in these cases where the contract defender met the defendant for the first time in court. There has also been a race to the bottom as entrepreneurial lawyers engage in bidding wars to gain these government contracts. One contract defender, for example, who operated on a budget that was less than one-third that of the prosecutor's budget, was nevertheless replaced, despite support from local judges, after being undercut by a bid almost 50 percent less than his submission. (*See PRESUMPTION OF GUILT*, at 300–307 reporting examples of contract defenders that have no staff investigators or other support personnel and give inexperienced attorneys extremely heavy caseloads.)

When privatization schemes are concerned only with reducing cost and fail to provide representation at the investigation stage, it is possible—using the strategies discussed above—to establish such programs constitute a completed violation of the Sixth Amendment, allowing a successful intervention to provide a remedy. The same is equally true with respect to institutional defender offices that cannot conduct reasonable investigations due to staffing cuts.

### Federal Legislation to Provide State Finance Assistance

The same approach can also be used to justify federal assistance to state and local indigent defense systems. In addition to providing a means of enforcing the right to counsel through litigation, there ought to be a means to reimburse state and local governments for bringing their indigent defense systems into constitutional compliance. The argument for federal assistance is compelling because it is the federal Constitution that requires the assistance of counsel. For over 30 years there have been demands for such federal assistance in the form of a national center for defense services. In 1977, the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, together with the National Legal Aid & Defender Association (NLADA) and the Nation-

al Clients Council, prepared a "Discussion Proposal" for such a center. (*The Center for Defense Services: A Draft Discussion Proposal for the Establishment of a Non-profit Corporation to Strengthen Indigent Defense Services*, October, 1977). The basic concept underlying this proposal was an independent, federally funded granting entity constructed upon the following four principles:

- (1) federal funding for the improvement of defense services must be structured so as to provide continuity and stability over a significant number of years;
- (2) financial support should be instituted through a grant in aid program;
- (3) the funding program should contain incentives for local communities to maintain and augment their current efforts; and
- (4) the entity administering the program must be independent of any of the three branches of the federal government.

Based upon these principles, federal assistance grants could be awarded by the national center to establish an independent center for indigent defense improvement in each state requesting such assistance. Recognizing that a one-size-fits-all approach to standards is unworkable, given the complex variables that impact defense representation, the state center's first task would be to conduct an audit of the indigent defense delivery systems of each county in the state. Using the methodology outlined above for conducting workload assessments, the audit would determine the need for additional attorneys, investigators, and other support personnel. Under this proposed system, each county would have its own unique workload standards.

After determining appropriate staffing levels, the state center would then certify that a county is in constitutional compliance when those staffing levels are met. This idea, which was first proposed by Marshall J. Hartman, former national director of Defender Services for NLADA, is similar to the system for accreditation used in other sectors of the criminal justice system, notably police departments and correctional institutions. Upon certification, the county would be reimbursed by a federal assistance grant equaling the amount required to bring the county's indigent defense system into compliance with its own locally established standards. A condition of continued reimbursement would be a requirement that the state center receive from each county basic statistical data sufficient to permit the center to monitor the health of the indigent defense delivery system. In the event excessive caseloads reappear and are not corrected within a reasonable period, the state center would have the power to revoke the county's certification and stop reimbursement. The negative publicity from decertification, the legal impact this would

have on ineffective assistance of counsel claims arising from that county (as well as providing a basis for a lawsuit to order compliance), and the financial impact of withdrawal of federal reimbursement, would provide strong incentives for voluntary compliance with the maximum workload levels established by the state center.

Because obtaining additional funding for indigent defense will be difficult given current economic realities, a special effort should also be made to achieve cost savings by rethinking how we spend our criminal justice dollars. The California Commission on the Fair Administration of Justice, for example, concluded that the state could save \$126.2 million if the death penalty was abolished in favor of life without parole. (See California Commission on the Fair Administration of Justice, *Final Report*, 156 (2007).) Reclassifying some nonviolent misdemeanor offenses as infractions, scaling back mandatory minimum sentences instead of constructing new and costly prisons, and reforming the bail system so that the percentage paid by defendants to a private bail bondsman goes instead to the government, are just a few of the alternatives that could be considered.

## Conclusion

We often lose sight of the fact that the average Ameri-

can, if accused of a serious crime, does not have the financial resources to obtain legal representation and the investigative and other supporting services necessary for an adequate defense. Sadly *Gideon's* promise of equal justice for all regardless of wealth remains unfulfilled after almost half a century. When the underfunding of indigent defense systems result in excessive caseloads so severe that counsel is unable to provide assistance in conducting a "prompt and thorough-going investigation" the government denies the assistance of counsel to which all defendants are entitled. County officials who cut public defender budgets thus violate the Sixth Amendment when they deprive defendants of the resources needed to provide "core" assistance of counsel necessary to provide competent representation. The same is true for county officials who enter into low-bid contracts to provide indigent defense services without adequate supervision, training, and provision for investigation and other support services. By recognizing that the period from arraignment to trial is a critical stage at which an indigent accused must be provided with meaningful assistance, we take an important first step in stopping the downward spiral into injustice and begin to restore confidence in the fairness of our criminal justice system. ■