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**CIVIL RIGHTS IN CRISIS:
THE RACIAL IMPACT OF THE DENIAL
OF THE SIXTH AMENDMENT RIGHT TO COUNSEL**

Richard Klein*

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INTRODUCTION

Whereas in 2013 there had been widespread celebration of the fiftieth anniversary of the landmark Supreme Court decision in *Gideon v. Wainwright*,¹ much has been written in subsequent years about the unhappy state of the quality of counsel provided to indigents.² But it is not just defense counsel who fail to comply with all that we hope and expect would be done by those who are part of our criminal courts; prosecutorial misconduct, if not actually increasing, is becoming more visible.³ The judiciary chooses to focus on the rapid processing of cases, often ignoring the rights of those being prosecuted – rights the judges have sworn to protect.

But we must ask why has this country tolerated a criminal justice system which has been so dysfunctional? Why are many of the criminal courts in our urban centers an embarrassment to any of us who would want to see the individualized care and concern that our nation prides itself in maintaining and championing? Why is funding for our criminal courts – the public defenders, prosecutors, and the judiciary – so inadequate?

This Article offers an explanation: America tolerates unjust and often unconstitutional treatment of those accused of crime because so many of those accused are minorities.

The incarceration rate in Illinois for African-Americans has been reported at more than 10 times that of Whites;⁴ African-American men between the ages of 18 and 65, who accounted for just

¹ 372 U.S. 335 (1963). Then-Attorney General, Robert F. Kennedy, commented a few months after the decision, that it “changed the whole course of American legal history.” Eric H. Holder, *Gideon – A Watershed Moment*, 2012 THE CHAMPION 56.

² See, e.g., *infra* notes 113–121.

³ See, e.g., the comment by the Chief Judge of the U.S. Court of Appeals for the Ninth Circuit that, “there is an epidemic of Brady violations abroad in the land.” *United States v. Olsen*, 737 F.3d 625, 625 (9th Cir. 2013) (Kozinski, C.J., dissenting).

⁴ PAUL STREET, *THE VICIOUS CIRCLE: RACE, PRISONS, JOBS, AND COMMUNITY IN CHICAGO, ILLINOIS AND THE NATION* 11 (2002).

4% of the total population in the state, comprised 57% of those incarcerated.⁵

In Maryland, African-American men are incarcerated at 6.37 times the rate that White men are.⁶

In New Jersey as of 2013, African-Americans represented 15% of the population,⁷ but 61% of the state's inmates.⁸

In Texas, African-Americans have been incarcerated at 5 times the rate of Whites.⁹

In South Carolina, African-Americans are 28% of the population,¹⁰ yet comprise 64% of the incarcerated.¹¹

In Tennessee, African-Americans are 17% of the population¹² yet make up 44%¹³ of all inmates.

⁵ *Id.* at 11–12. Fully 80% of the adult African-American males in the workforce in Chicago have been convicted of a felony. *Id.* at 17.

⁶ Zerline Hughes, *National and State Experts to Highlight Causes, Remedies for Racial Disparities in Maryland's Criminal Justice System*, 1 JUSTICE POLICY INSTITUTE (June 4, 2012) <http://www.justicepolicy.org/news/3948> (citing Maryland Division Correction Annual Report, FY 2010).

⁷ U.S. CENSUS BUREAU, *State and County Quick Facts: New Jersey*, U.S. CENSUS BUREAU (2013), available at <http://quickfacts.census.gov/qfd/states/34000.html>.

⁸ Gary M. Lanigan, Commissioner, *Offenders Characteristics Report*, Offender Statistics-State of New Jersey (2013), available at <http://www.state.nj.us/corrections/pdf/offenderstatistics/2013/By%20EthnicityRace%202013.pdf>.

⁹ JUSTICE POLICY INSTITUTE, *RACE AND IMPRISONMENT IN TEXAS: THE DISPARATE INCARCERATION OF LATINOS AND AFRICAN AMERICANS IN THE LONE STAR STATE*, (Justice Policy Institute 2005) available at http://www.justicepolicy.org/images/upload/05-02_rep_txraceimprisonment_ac-rd.pdf (Citing HUMAN RIGHTS WATCH, *RACE AND INCARCERATION IN THE UNITED STATES* (Human Rights Watch, 2002)).

¹⁰ U.S. CENSUS BUREAU, *State & County Quick Facts: South Carolina*, U.S. CENSUS BUREAU (2013), available at <http://quickfacts.census.gov/qfd/states/45000.html>.

¹¹ PROFILE OF INMATES IN INST. COUNT, S. C. DEP'T OF CORR. 2 (June 30, 2013), available at <http://www.doc.sc.gov/research/InmatePopulationStas/ASOFInstitutionalCountProfileFY13.pdf>.

¹² U.S. CENSUS BUREAU, *State & County Quick Facts: Tennessee*, U.S. CENSUS BUREAU (2013) available at <http://quickfacts.census.gov/qfd/states/47000.html>.

And even in two of the states that rank among the lowest in terms of proportion of African-Americans, Rhode Island and Minnesota, they are overrepresented in prisons. In Rhode Island, only 7% of the population is African-American,¹⁴ yet 29% of the inmates are,¹⁵ and in Minnesota, where African-Americans are just 5.5% of the population,¹⁶ they are 35% of those who are incarcerated.¹⁷

We seem to care less when the constitutional rights of these indigent defendants are ignored because they are predominantly minorities. We seem to care less when prosecutors fail to comply with the mandates of *Brady v. Maryland*¹⁸ or their obligation to effect justice.¹⁹ And we seem to care less when judges treat defendants like numbers to be processed and thrown aside as quickly as possible. And we seem to not care that although African-Americans comprise 13%

¹³ DERRICK D. SCHOFIELD, TENN.: FY 2013 ANNUAL REP., DEP'T. OF CORR. 1, 6 (2013), available at <http://www.tn.gov/correction/pdf/AnnualReport2013.pdf>.

¹⁴ U.S. CENSUS BUREAU, *State & County Quick Facts: Rhode Island*, U.S. CENSUS BUREAU: STATE AND COUNTY QUICKFACTS (2013) available at <http://quickfacts.census.gov/qfd/states/44000.html>.

¹⁵ R. I. DEP'T OF CORR. PLANNING & RESEARCH UNIT, ANN. POPULATION REP. (2013), available at <http://www.doc.ri.gov/administration/planning/docs/FY13%20Annual%20Report.pdf>.

¹⁶ UNITED STATES CENSUS BUREAU, *State & County Quick Facts: Minnesota*, U.S. CENSUS BUREAU (2013), available at <http://quickfacts.census.gov/qfd/states/27000.html>.

¹⁷ MINN. DEP'T OF CORR. ADULT INMATE PROFILE 1, 2 (2014), available at <http://www.doc.state.mn.us/aboutdoc/stats/documents/MinnesotaDepartmentofCorrectionsAdultInmateProfile01-01-2014.pdf>.

¹⁸ 378 U.S. 83, 86–87 (1963). *Brady* requires prosecutors to turn over any exculpatory evidence in their possession to the defense. What is typically referred to as *Brady* material includes any physical evidence or statements of prosecution witnesses that may lead to the impeachment of that witness by defense counsel. *Id.*

¹⁹ *Id.* A prosecutor is unique in our justice system; unlike any other attorney whose loyalty is exclusively to the client they represent, the prosecutor has a dual obligation. Rule 3.8 of the ABA Model Rules of Professional Conduct is titled, *Special Responsibilities of the Prosecutor*; the first Comment is unambiguous: “A prosecutor has the responsibility as a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon specific evidence. MODEL RULES OF PROF'L CONDUCT R. 3.8 1 cmt. (2014). The earlier ABA Canons of Professional Ethics was even more direct as to the obligations of a prosecutor: “The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is *highly reprehensible*.” ABA CANONS OF PROF'L ETHICS, COMMENT 5 (1908) (emphasis added).

of the population of the country,²⁰ the proportion of African-American inmates in our state and federal prisons is almost 3 times that number.²¹

We care least of all, perhaps, in large urban areas such as Chicago/Cook County where over 80% of those incarcerated in 2012 were African-American or Hispanic²² even though only 34.1% of the area's population was non-white.²³ Or in Los Angeles, the country's most populous county, where 80% of inmates at the Los Angeles County Jail were black or Hispanic as of 2012,²⁴ or in the nation's

²⁰ U.S. CENSUS BUREAU, *State and County QuickFacts: U.S.A.*, U.S. CENSUS BUREAU (2013), available at <http://quickfacts.census.gov/qfd/states/00000.html>.

²¹ THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PEOPLE IN PRISONS 1 (January 2014), available at <http://www.sentenceingproject.org/doc/publications/publications/incfactsAboutPrisons Jul2014.pdf>.

²² *Characteristics of Inmates in the Cook County Jail*, COOK COUNTY SHERIFF'S REENTRY COUNCIL RES. BULLETIN, March 2011 at 3. 67% of jail admissions were African American, and 19% were Hispanic. *Id.* The Bulletin states that, "The typical inmate admitted to, and discharged from, the Cook County Jail is a single, African-American male from Chicago averaging 32 years old at admission." *Id.* The Chicago Cook County Public Defender Office is the country's second largest with more than 500 attorneys. GEORGE H. RYAN, REP. OF THE GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, Preamble V (April 2002).

²³ U.S. CENSUS BUREAU, *State and County Quick Facts: Cook County, Illinois*, U.S. CENSUS BUREAU 2013, available at <http://quickfacts.census.gov/qfd/states/17/17031.html>.

²⁴ JAMES AUSTIN, THE JFA INSTITUTE, EVALUATION OF THE CURRENT AND FUTURE LOS ANGELES COUNTY JAIL POPULATION 15 (April 2012). The population at the jail consists of those being held pretrial as well as those who have already been sentenced. *Id.* at 2. California prisons have long been in a state of crisis due to overcrowding; the Supreme Court in 2011 held that conditions violated the Eighth Amendment ban on cruel and unusual punishment and ordered the state to reduce its prison population by more than 30,000 inmates. *Brown v. Plata*, 131 S. Ct. 1910 (2011). Justice Kennedy wrote for the Court and described the California prison situation as such: "A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society." *Id.* The California legislature responded with the passage of Assembly Bill 109 which is designed to shift the responsibility of housing low-risk inmates from the state to the counties. AB 109 (California's Realignment Plan) is expected to lead to a 50% increase in the number of inmates in the Los Angeles County Jail. JAMES AUSTIN, THE JFA INSTITUTE, EVALUATION OF THE CURRENT AND FUTURE LOS ANGELES COUNTY JAIL POPULATION 3 (April 2012). As of January 2014, 71% of the population of LA County was White. *State and County*

capital where, as of January 2014, 91% of inmates housed by the D.C. Department of Corrections were African-American.²⁵

I. SIXTH AMENDMENT JURISPRUDENCE

A. *Expansion of the Sixth Amendment*

The right to effective counsel is the foundation of our adversarial system, and nowhere is this more paramount than in our criminal process.²⁶ If an individual accused of crime does not have a competent, well-prepared, zealous attorney by his or her side, the adversarial system cannot be relied upon and the defendant's rights will be sacrificed.

Even though the language of the Sixth Amendment would appear clear where it states that, "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense,"²⁷ a long and tedious process had occurred until it became clear that an indigent defendant who was unable to afford an attorney was entitled to have a lawyer, paid by the state, assigned to represent him.²⁸ The Supreme Court had initially interpreted the language merely to mean that if a defendant were to be able to afford and provide private counsel, then that defendant had the right to assistance of counsel in the proceedings.²⁹ As reasoned by the Court in *United States v. Van Duzee*, the decision to enact the Amendment had "not

Quick Facts, Los Angeles County California, U.S. CENSUS BUREAU 2013, available at <http://quickfacts.census.gov/qfd/states/06/06037.html>, yet only 15% of the inmates of the jail were white. JFA Institute, Evaluation, *Id.* at 15.

²⁵ DISTRICT OF COLUMBIA DEP'T OF CORR., INMATE POPULATION BY RACE (January 2014). Only 2.4% of inmates were White, *Id.*, yet 42.9% of the District's residents are White. District of Columbia, U.S. CENSUS BUREAU, *State and County QuickFacts: District of Columbia* (2013), available at <http://quickfacts.census.gov/qfd/states/34000.html>.

²⁶ *E.g.*, *Argersinger v. Hamlin*, 407 U.S. 25, 46 (1972) (The Supreme Court has noted that even the right of an accused to have a trial by jury is not as basic and fundamental to the constitutional guarantee to a fair trial as is the right to counsel).

²⁷ U.S. CONST. amend. VI.

²⁸ *Powell v. Alabama*, 32 U.S. 45, 73 (1932).

²⁹ WILLIAM M. BEANY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 21 (1955).

contemplated that this [provision of counsel] should be done at the expense of the government.”³⁰

The path toward *Gideon* was laid by the Supreme Court’s decision in *Powell v. Alabama* that appointment of counsel to represent an indigent in a capital case was required by our Constitution.³¹ *Powell* involved the convictions of nine African-American juveniles for the rape of two white women in Scottsboro, Alabama.³² Eight were tried and convicted and sentenced to death by electrocution within two weeks of the alleged crime.³³ The Court emphasized the crucial import of defense counsel to our adversarial system, observing that:

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

³⁰ 140 U.S. 169, 173 (1891). *See also* Bute v. Illinois, 333 U.S. 640, 611 n. 17 (1948) (Until 1938, the language in the Sixth Amendment was understood to mean the right of a defendant to be represented by retained counsel).

³¹ *Powell*, 32 U.S. at 68–71.

³² *Id.*

³³ *Id.* at 50. The attorneys who had represented the defendants had been selected by the trial judge and were not familiar with criminal matters, and had no time to properly prepare or investigate the charges. The state ultimately dropped charges against four of the nine, and agreed to release the two defendants who were 12 and 13 years of age when the incident occurred on the condition that “they leave the State, never to return.” DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 376–77 (1969).

how much more true is it of the ignorant and illiterate,
or those of feeble intellect.³⁴

Progress was made six years after *Powell* when the Court, in *Johnson v. Zerbst*,³⁵ extended the right to counsel to apply to all federal felony prosecutions.³⁶ However, shortly thereafter, a detour arose. The Court, in *Betts v. Brady*,³⁷ declined to extend the Sixth Amendment right to state felony prosecutions except in those instances where the denial of counsel would be “shocking to the universal sense of justice....”³⁸ But then came *Gideon v. Wainwright*,³⁹ presenting a rare occasion when the Supreme Court unequivocally reversed a prior decision of the Court,⁴⁰ and it did so unanimously.⁴¹ In its landmark

³⁴ *Powell*, 32 U.S. at 45. In November, 2013, the Alabama Board of Pardons and Paroles voted to pardon the only three of the nine who still had convictions on their records. Gabrielle Levy, *Scottsboro Boys Given Posthumous Pardon*, UNITED PRESS INTERNATIONAL, Nov. 21, 2013, www.upi.com/blog/2013/11/21/Scottsboro-boys-given-posthumous-pardon/3871385066865/print. The Governor spoke in support of the pardons: “While we could not take back what happened to the Scottsboro Boys’ 80 years ago, we found a way to move it right moving forward. The pardons granted to the Scottsboro Boys today are long overdue. I appreciate the Pardons and Parole Board for continuing our progress today and officially granting these pardons. Today, the Scottsboro Boys have finally achieved justice.” OFFICE OF THE GOVERNOR OF ALABAMA, Governor Bentley’s Statement on the Pardoning of the Scottsboro Boys, (Nov. 21, 2013), <http://governor.alabama.gov/newsroom/2013/04/governor-bentley-signs-scottsboro-boys-legislation/>.

³⁵ 304 U.S. 458, 469 (1938).

³⁶ *Id.*

³⁷ 316 U.S. 455, 468 (1942).

³⁸ *Id.*

³⁹ *Gideon*, 372 U.S. at 344.

⁴⁰ *Id.* The judge who presided over Gideon’s trial was correct as to the state of the law at that time when he responded to the request to “appoint counsel to represent me in this trial.” The Court replied: “Mr. Gideon, I am sorry, but I cannot appoint counsel to represent you in this case. Under the laws of the State of Florida, the only time the court can appoint counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint counsel to defend you in this case.” ANTHONY LEWIS, *GIDEON’S TRUMPET* 10 (Random House, Vintage Ed. 1966). The Supreme Court did note that Gideon “conducted his defense about as well as could be expected from a layman.” *Gideon*, 372 U.S. at 336.

⁴¹ *Gideon*, 372 U.S. at 336. This was especially startling given that the case which had been overruled, *Betts*, was a 6-3 decision. None of the 6 judges who formed the majority in *Betts* were still on the bench the time of *Gideon*, but two of the dissenters

holding, the Court concluded that the right of counsel established in the Sixth Amendment was applicable as to “serious charges” at the state court level by operation of the Fourteenth Amendment’s Due Process Clause.⁴² The Court declared it an “an obvious truth” that “in our adversary system of justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”⁴³

The Court extended the newly-mandated constitutional obligation of states to appoint counsel for indigent defendants by ruling in *Argersinger v. Hamlin*⁴⁴ that no individual could be incarcerated, even were the charge to have been just a misdemeanor,⁴⁵ without having been afforded the right to have had an attorney.⁴⁶ The Court explained: “We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex

– Justices Hugo Black and William Douglas – remained. A clue to what the Court would decide in *Gideon* came from a case, *Carnley v. Cochran*, which the Court decided several months prior to *Gideon* and where one of the Justices wrote that, “[t]wenty years experience in the state and federal courts with the *Betts v. Brady* rule has demonstrated its basic failure as a constitutional guide.” 369 U.S. 506, 518 (1962) (Black, J., concurring).

⁴² *Gideon*, 372 U.S. at 341. Twenty two states had joined as amici in support of Clarence Earl Gideon’s right under the Federal Constitution to counsel. See Brief for the State Government et al. as Amici Curiae, 2–3, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 62-155). As a result of the Court’s holding, Clarence Gideon was retried, this time with counsel, and found to be not guilty. But the second trial occurred only after Gideon discharged the counsel that the American Civil Liberties Union had sent to represent him. KAREN HOUPPERT, CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE’S JUSTICE 88–89 (The New York Press 2013). Gideon ended up selecting a local lawyer who had personal acquaintances with several of the jurors. *Id.* at 89.

⁴³ *Gideon*, 372 U.S. at 344.

⁴⁴ 407 U.S. 25, 40 (1972).

⁴⁵ *Id.* The Court made it clear 7 years after *Argersinger* that an individual’s constitutional right to counsel only applied in cases where actual loss of liberty had occurred. *Scott v. Illinois*, 440 U.S. 367, 373–74 (1969). Prior to *Scott*, there had been some confusion as to whether the right to counsel applied to charges where a sentence of imprisonment was authorized but not actually imposed. Justice Brennan dissented in *Scott*; he thought that states were to be required to provide counsel in a broader category of offenses, a much needed and long overdue reexamination of criminal statutes might result in a reclassification of minor offenses. *Id.* at 388.

⁴⁶ *Argersinger*, 407 U.S. at 37.

than when a person can be sent off for six months or more.”⁴⁷ The Court made it clear that the *Argersinger* holding did not apply to charges where the loss of liberty was not involved.⁴⁸

The years following *Gideon* brought a rapid and significant expansion of the various stages of a prosecution for which there was a constitutional right to counsel. The Sixth Amendment was held to apply during all of the critical stages of criminal proceedings including the process of custodial interrogation,⁴⁹ lineup or other pretrial identification proceeding,⁵⁰ a probation revocation hearing,⁵¹ a preliminary hearing,⁵² and a parole revocation hearing.⁵³

*In re Gault*⁵⁴ extended the right to counsel to juvenile cases, and even though *Douglas v. California* guaranteed the right to counsel during the first appeal of a conviction,⁵⁵ it was not until 1985,

⁴⁷ *Id.* at 33. The Court seemed to infer that the difficulties of confronting a defendant charged with a misdemeanor may even be greater than for those charged with felonies: “The volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result.” *Id.*

⁴⁸ *Argersinger*, 407 U.S. at 37. In his concurrence, however, Justice Powell commented that the Court’s rationale for extending the right to counsel “foreshadows” the extension to all petty offenses. *Id.* at 52.

⁴⁹ *Miranda v. Arizona*, 384 U.S. 436, 498 (1966).

⁵⁰ *United States v. Wade*, 388 U.S. 218, 236–37 (1967).

⁵¹ *Mempa v. Rhay*, 389 U.S. 128, 137 (1967).

⁵² *Coleman v. Alabama*, 399 U.S. 1, 9–10 (1970).

⁵³ *Gagnon v. Scarpelli*, 411 U.S. 778, 791 (1973).

⁵⁴ 287 U.S. 1, 36–37 (1967). The Court emphasized that children in fact needed more protection than adults, and noted that “under our Constitution, the condition of being a boy does not justify a kangaroo court.” *Id.* at 28. Whereas *In re Gault* only provides the mandate of counsel where defendants face incarceration, some states go further and require an attorney to be appointed to all juveniles in youth court proceedings. *See, e.g.*, MISS. CODE ANN. §§ 43-21-201.

⁵⁵ California had a procedure where the only time an indigent would qualify for appointment of counsel on appeal would be if the appellate court were to make a determination that counsel would be of help to the defendant or to the court. *Douglas v. California*, 372 U.S. 354, 355 (1963). A defendant who was able to afford his own counsel was not, of course, required to have his case so prejudged by the court. Justice Douglas, in writing the opinion of the Supreme Court, rested the decision on the Fourteenth Amendment: “[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.” *Id.* at 357. In *Ross v.*

in *Evitts v. Lucey*, that the Court held that there was a guarantee of *effective* assistance of counsel on the same appeal.⁵⁶

In 2008, the Court, in *Rothgery v. Gillespie County*, extended the right to apply to the defendant's initial appearance before a judge.⁵⁷ In 2010, the Court, in *Padilla v. Kentucky*, held that counsel were obligated to inform their client whether a guilty plea might carry a risk of deportation.⁵⁸ And in 2012, the Court, in *Missouri v. Frye*⁵⁹ and *Lafler v. Cooper*,⁶⁰ determined that the right to the effective assistance of counsel broadly applied to the plea-bargaining process.⁶¹

B. Practical Effects of Changes to Sixth Amendment Jurisprudence

The financial burdens placed on the states as a result of both *Gideon* and *Argersinger* were very substantial and have proven to be, in many instances, insurmountable. And somewhat predictable. Supreme Court Justice Tom Clark, in a curt and to-the-point dissent in the 1973 case of *Douglas v. California* regarding the obligation to provide counsel for an indigent in the first appeal, wrote: “[w]ith this new *fetish for indigency*, the Court piles an intolerable burden on the State’s judicial machinery.”⁶²

Within a few years after *Gideon*, the President’s Commission on Law Enforcement and Administration of Justice issued a report

Moffit, however, the Court held that the state is not required to appoint counsel for an indigent who is seeking a discretionary, second-tier appellate review. 417 U.S. 600, 610 (1974).

⁵⁶ 469 U.S. 387 (1985).

⁵⁷ Compare *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 213 (2008) (extending application of the Sixth Amendment right to effective counsel to a defendant’s initial appearance before a judge) with *Hamilton v. Alabama*, 368 U.S. 52, 54–55 (1961) (requiring that counsel be appointed in cases where the defendant is being arraigned on a case for which he may receive the death penalty).

⁵⁸ 559 U.S. 356, 373–374 (2010).

⁵⁹ 132 S. Ct. 1399, 1407–1408 (2012).

⁶⁰ 132 S. Ct. 1376, 1389 (2012).

⁶¹ See *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985) (holding that the same two-prong test laid out in *Strickland*, *infra*, applied to a plea bargain scenario where the defendant claims that were it not for counsel’s errors, there was a reasonable probability that he would have gone to trial instead of pleading guilty).

⁶² *Douglas*, 372 U.S. at 359 (Clark, J., dissenting) (emphasis added).

titled *The Challenge of Crime in a Free Society*.⁶³ The Commission's conclusion was clear: "[t]he shortage of criminal lawyers, which is already severe, is likely to become more acute in the immediate future."⁶⁴ The concurring opinion of Justice Powell in *Argersinger* recognized that the Court's holding "could have a seriously adverse impact upon the day-to-day functioning of the criminal justice system."⁶⁵ Justice Rehnquist joined Powell in predicting that "backlogs," "bottle-necks," and "chaos" would result in the state courts.⁶⁶ Justice Brennan also expressed concern and called upon law students to provide assistance in administering the increased representational needs of indigents accused of crime.⁶⁷

Surely, the *Argersinger* Court could well envision the havoc that would result from the holding – five years prior to the decision, the President's Commission on Law Enforcement and Administration of Justice had described the situation that had resulted from *Gideon*:

An inevitable consequence of volume that large is the almost total preoccupation in such a court with the movement of cases. . . . Inadequate attention tends to be given to the individual defendant, whether in protecting his rights, sifting the facts at trial, deciding the social risk he presents, or determining how to deal with him after conviction. . . . Suddenly it becomes clear that for most defendants in the criminal process, there is scant concern for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way.⁶⁸

⁶³ PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1968).

⁶⁴ *Id.* at 370.

⁶⁵ *Argersinger*, 407 U.S. at 52 (Powell, J., concurring).

⁶⁶ *Id.* at 55–56. A different perspective was offered by then-Chief Justice Burger: "The holding of the Court today may well add large new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it." *Id.* at 44 (Burger, C.J., concurring.)

⁶⁷ *Id.* at 40–41 (Brennan J. concurring).

⁶⁸ PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *supra* note 63.

II. DETERMINING THE REQUIREMENTS OF “EFFECTIVE” REPRESENTATION

A. *Initial Lack of Clarity*

The question not answered by the Court in *Powell*, *Gideon*, or *Argersinger*, was what, if any, standards would be utilized to evaluate the *quality* of the counsel provided to indigents. The Circuit Courts of Appeal differed as to what, if any, proper requirements may be needed to evaluate counsel’s performance.⁶⁹ In *McMann v. Richardson*, the Supreme Court finally made it clear that defendants who are confronting felony charges are entitled to the *effective* assistance of competent counsel.⁷⁰

The determination of just what “effective” was to mean, however, was unclear and was subject to widely varying interpretations by the lower appellate courts. The Eighth Circuit, for example, observed that the standard for determining whether counsel had been ineffective in the representation of the client “is not easily reduced to any formula.”⁷¹ One widely adopted test that had been used by appellate courts to determine if a conviction needed to be overturned, was stated by the Second Circuit Court of Appeals in *United States v. Wight*.⁷² The Court concluded that the standard was

⁶⁹ The D.C. Circuit, for example, was clear that even were appointed counsel to be negligent, the defendant was not deprived of his Sixth Amendment right. *Diggs v. Welch*, 48 F.2d 667 (D.C. Cir. 1945). The Court emphasized that, “All that amendment requires is that the accused shall have the assistance of counsel.” *Id.* at 668.

⁷⁰ 397 U.S. 759, 771 (1970) (emphasis added). *McMann* involved the claim of the defendants that their guilty pleas had occurred to their counsel’s wrongfully informing them that their coerced concessions could be admitted against them at trial. The Court held that the issue was not whether the advice had been correct or incorrect, but rather “whether that advice was within the range of competence demanded of attorneys in criminal cases.” *Id.* at 771.

⁷¹ *Johnson v. United States*, 506 F.2d 640 (8th Cir. 1974) (citing *Garton v. Swenson*, 497 F.2d 1137, 1140 (8th Cir. 1974)). In language that may be so general as to not be of great help, the court added that there should be a “professional standard,” which “tests for the degree of competence prevailing among those licensed to practice before the bar.” *Johnson*, 506 F.2d at 646.

⁷² 176 F.2d 376 (2d Cir. 1987).

whether or not “the purported representation by counsel was such as to make the trial a farce and a mockery of justice.”⁷³

B. Strickland v. Washington

The 1984 Supreme Court decision in *Strickland v. Washington*, which set the standard for “effective” assistance of counsel, was one of the most significant opinions ever issued by the Court.⁷⁴ Prior to the decision, the National Legal Aid and Defender Association and the American Civil Liberties Union had submitted an amicus brief requesting that the Court establish a high standard for counsel to meet in order to be providing effective assistance.⁷⁵ Entailing stringent requirements for the representation provided by defense counsel would have caused state and local governments to provide greater funding for indigent defense.

Standards were there for the taking. The American Bar Association (“ABA”) has promulgated several volumes of its Standards for Criminal Justice, one of which was directly applicable to the issue before the Court in *Strickland*: Providing Defense Services.⁷⁶ The Standards reflect the rapid growth in the need for defense counsel for the indigent that had resulted from *Gideon* and *Argersinger*. These Standards are highly regarded and respected because they are:

The result of careful drafting and review by representatives of all segments of the criminal justice system – judges, prosecutors, defense counsel, court personnel and academics active in criminal justice teaching and research. Circulation of the standards to a wide range of outside expertise guaranteed a rich array

⁷³ *Id.* at 379. At one point, nine of eleven circuits were applying the farce and mockery of justice standard. *Trapnell v. United States*, 725 F.2d 149, 151 (2d Cir. 1983).

⁷⁴ *Strickland v. Washington*, 466 U.S. 668, 685–86 (1984).

⁷⁵ Brief of the National Legal Aid and Defender Association and the American Civil Liberties Union As Amici Curiae for Respondent, at 6–7, *Strickland v. Washington*, 466 U.S. 668 (1984) (No.82-1554).

⁷⁶ AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE (3d ed. 1992).

of comment and criticism which has greatly strengthened the final product.⁷⁷

Other professional organizations have also enacted standards relating to the performance of counsel in defense representation.⁷⁸

The Court, however, was dismissive of such standards, acknowledging the ABA Standards as “guides to determining what is reasonable,”⁷⁹ while making it clear that these were “*only* guides.”⁸⁰ The Court then proceeded to explain its conception of standards in a most disconcerting and perplexing manner: “[i]ndeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant’s cause.”⁸¹ The Court did not elaborate or clarify, perhaps because it would have been most difficult to explain. How would a standard requiring counsel to adequately communicate with a client, properly investigate the facts and the law involved in the case, or to locate and speak with relevant witnesses possibly “distract counsel” from engaging in “vigorous advocacy of the defendant’s cause?”⁸²

⁷⁷ *Id.* at ix.

⁷⁸ *See, e.g.*, NAT’L LEGAL AID AND DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (2011).

⁷⁹ *Strickland*, 466 U.S. at 688.

⁸⁰ *Id.* (emphasis added).

⁸¹ *Id.* at 689.

⁸² Justice Marshall’s dissent sharply criticized the Court’s failure to adopt particularized standards:

To tell lawyers and the lower courts that counsel for a criminal defendant must behave “reasonably” and must act like “a reasonably competent attorney...is to tell them almost nothing. In essence, the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes “professional” representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel.

Id. at 707–08 (Marshall, J., dissenting). Justice Harry Blackmun joined the majority in *Strickland* even though he had previously noted that the “state is responsible for the public defender’s office and can attempt to ensure that clients receive effective assistance of counsel, for example, by hiring qualified personnel, providing sufficient funding, and *enforcing strict standards of competence.*” *Polk County v.*

In utter disregard for the quality of representation that is provided those accused of crime, the Court held that even were the level of performance of defense counsel to be so poor and not functioning in accordance with Sixth Amendment guarantees, a resulting conviction was nevertheless not to be reversed unless it has been demonstrated that there was a “reasonable probability that, but for the counsel’s unprofessional errors, the result of the proceeding would have been different.”⁸³ Yet, even the instructions from the Court as to how the incompetency of counsel was to be assessed showed callousness to stark realities. There was to be a strong presumption that counsel’s representation was constitutionally adequate,⁸⁴ and:

Judicial scrutiny of counsel’s performance must be *highly deferential*. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. . . . [T]he defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.”⁸⁵

But even *if* the poor, minority defendant who was represented by an overburdened, underfinanced public defender’s office, were to

Dodson, 454 U.S. 312, 335 n. 5 (Blackmun, J., dissenting) (emphasis added). In *Strickland*, Brennan opined that he did not consider the concept of outlining particularized standards to be sufficiently flexible as to accommodate the wide disparity in situations that lead to ineffective assistance claims. *Strickland*, 466 U.S. at 703–04 (Brennan, J., concurring and dissenting).

⁸³ *Strickland*, 466 U.S. at 694.

⁸⁴ *Id.* at 690–91 (“[T]he [appellate] court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment”).

⁸⁵ *Id.* at 689 (citation omitted).

conquer the odds in overcoming the presumption of competency, the second prong of the *Strickland* test must also be met.⁸⁶ Somehow, it must be shown that *had* the defendant's attorney been a competent one, the conviction would not have occurred.⁸⁷ An appeals court, therefore, is required to speculate how the trial might have been conducted had the defendant been provided with a competent counsel.

Yet the very fact that the counsel may well have been ineffective could have impacted the entire proceeding in such pervasive ways that it is simply not possible to gauge the degree of prejudice. How is it possible to ascertain what the results of an effective investigation or thorough preparation of a case would have been? How can an appellate court judge know how a competent lawyer would have been able to cross-examine the key prosecution witness in ways that could well have challenged the witness' credibility? The failure to have conducted an investigation which would have uncovered crucial defense witnesses may be the precise reason that the trial transcript will not reveal any prejudice for the court to review.⁸⁸ The sins of the ineffective counsel are most typically those of omission, rather than ones of commission. Yet all these concerns fall at the altar of finality; the Court's rigid application of the outcome-determinative test "reflects the profound importance of *finality* in criminal proceedings."⁸⁹

⁸⁶ *Id.* at 687. *See also*, *United States v. Cronin*, 466 U.S. 648 (1984).

⁸⁷ *Strickland*, 466 U.S. at 694.

⁸⁸ An exception exists regarding the need to show prejudice in cases where the defendant claims that there was ineffectiveness due to counsel's conflict of interest. The Supreme Court, in *Holloway v. Arkansas*, 435 U.S. 475, 490–91, (1978), has recognized the difficulties in demonstrating prejudice in conflict cases:

[T]he evil – it bears repeating – is in what the advocate finds himself compelled to *refrain* from doing; not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client.

⁸⁹ *Strickland*, 466 U.S. at 693 (emphasis added).

The *Strickland* Court seemed determined to emphasize its message that concern with those who had received ineffective assistance was not the Court's primary focus. The Court's message was indeed a clear one: judicial review of claimed Sixth Amendment violations was to be limited, and relief should occur only in the rarest of circumstances.⁹⁰ The Court seemed to issue what could appropriately be deemed a caveat:

The availability of *intrusive post-trial inquiry* into attorney performance or of detailed guidelines for its evaluation would *encourage the proliferation of ineffectiveness challenges*. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.⁹¹

Trust, I would suggest, would best be won if the defendant could rest assured that counsel would be doing everything that should be done in providing representation. Trust does not come easy for the defendant who may meet his public defender in a jail cell with many others present⁹² and where the defendant knows that the same state that paid

⁹⁰ *Id.* at 694–695.

⁹¹ *Id.* at 690.

⁹² This initial interview that counsel has with the client is of great import. *See, e.g.*, NAT'L LEGAL AID AND DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 2.2, Initial Interview (2011) (counsel needs to be familiar with the elements of the offense, the potential punishment the defendant may be facing, the charging documents, any recommendations made by any bail agency regarding pre-trial release, and should provide the client with the crucial information concerning the case. All relevant data regarding a bail application, such as the accused's ties to the community, family relationships, job history must be ascertained. Counsel ought to also ascertain any

the salaries of the police officer who arrested him as well as the prosecutor who is pursuing the case, also pays the defender.

Trust must be earned, especially when race is a factor. A poor black defendant is not automatically going to perceive the white lawyer assigned to his case as one who will provide the highest level of representation. If the defendant gets the message that his counsel is not going to be held accountable for the quality of their assistance, then the client may well distrust their court-appointed attorney all the more. An accused who does not trust their counsel is unlikely to be completely forthcoming as to what had occurred regarding the alleged crime, and is also less likely to heed the advice of counsel.⁹³ It is typical for professionals to have specific standards they must adhere to; the attorney who is assigned to safeguard one's liberty ought not to be the exception.⁹⁴

Courts are not *highly deferential* when evaluating the work of a doctor, an architect, or an accountant; why should the work of a defense attorney be treated differently? The injury suffered by a defendant whose liberty may have been sacrificed due to an incompetent attorney suffers far more than the client of a negligent accountant or architect. This author suggests that race may well play a factor in the courts' treatment of indigents claiming ineffective assistance. It is especially ironic that attorneys who actively litigate claims that other professionals failed to act appropriately, are somehow themselves provided with a presumption of competence. As we shall see, such a presumption may not be at all warranted.

Also problematic, and deeply disturbing, is the *Strickland* Court's message to defense counsel and to appellate courts that in cases where the prosecution case is a very strong one, the quality of

possible witnesses who need to be located and if there has been any improper police investigative processes which may affect the defendant's right).

⁹³ See AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE, Standard 4-3.1 (3d ed. 1991): "Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence." See also *Morris v. Slappy*, 461 U.S. 1, 21 (1983) (Brennan, J., dissenting) (counsel can best represent a defendant if there is a relationship which is based on trust and confidence.)

⁹⁴ The American Bar Association Standards for Criminal Justice do, in fact, instruct that "defense counsel should seek to establish a relationship of trust and confidence with the accused." Standard 4-3.1(a) (3d ed. 1991).

counsel's representation need not be an issue. Courts are invited to look at the prejudice prong *first* whenever it is "easier to do so,"⁹⁵ and when the court determines that the prosecutor's case was strong, there is no need to "grade counsel's performance."⁹⁶ If a defendant is clearly guilty, then, *ipso facto*, there can be no prejudice caused by an ineffective counsel.⁹⁷

Yet it could well be that the very reason that the record shows no indication of reasonable doubt is that the counsel was ineffective, unprepared, inept, and simply unable to provide an adequate defense. Ironically, it is the defendant who is confronted by the strongest case against him who is most in need of the zealous and vigorous defender. Yet it is in those very instances where appellate courts do not even attempt to ascertain the ineffectiveness of defense counsel.

Why are we so willing to dismiss the import of assessing the quality of counsel provided to those who seem to have little chance of successfully confronting the state? Is not the Sixth Amendment applicable to *anyone* charged with a crime, even the clearly guilty? Has the Sixth Amendment been rewritten so as to provide the right to effective assistance only to the innocent?

III. CURRENT CRISIS IN REPRESENTATION PROVIDED INDIGENT DEFENDANTS

A. *The Impact of Strickland v. Washington*

Rather than lead to an improvement in the quality of representation provided defendants, *Strickland* accepted the *status quo* – or worse.⁹⁸ The Court informed that "the proper measure of attorney

⁹⁵ *Strickland*, 466 U.S. at 697.

⁹⁶ *Id.*

⁹⁷ The *Strickland* Court held that in order for a defendant to show a constitutional violation of their right to effective assistance of counsel, the defendant must show the court that the lawyer's representation was prejudicial, and "there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

⁹⁸ The American Bar Association published a report some years after *Strickland* that addressed the decision's apparent leniency on the quality of representation; RICHARD KLEIN & ROBERT SPANGENBERG, THE AMERICAN BAR ASS'N, THE INDIGENT

performance remains simply reasonableness under prevailing professional norms.”⁹⁹ Therefore, if the norm is that overburdened public defenders are simply unable to provide an effective and competent defense, then a claim that in any particular case the counsel was ineffective would not warrant relief. It was as though the Court failed to heed its own warning 44 years earlier that incompetent lawyering “could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution’s requirement that an accused be given the assistance of counsel.”¹⁰⁰

The Supreme Court’s coupling of the “presumption” that counsel is effective with the requirement that counsel need do no more than comply with “prevailing professional norms,” has created a situation where substandard representation is routine.¹⁰¹ Nothing more than that is expected; not by overburdened defenders of one another, nor by poor, minority defendants.¹⁰²

B. The Extent of the Crisis

The current U.S. Attorney General, Eric Holder, the head of the office responsible for prosecuting indigent defendants in the federal courts throughout the country, recently wrote that, “the full promise of the rights guaranteed under *Gideon* has yet to be fully realized...as a result, children and adults regularly enter our criminal justice system without knowledge of their rights or an understanding of the charges and potential sentences that they face.”¹⁰³

DEFENSE CRISIS 25 (1993) (“The long-term neglect and underfunding of indigent defense has created a crisis of extraordinary proportions in many states throughout the country.”).

⁹⁹ *Strickland*, 466 U.S. at 688.

¹⁰⁰ *Avery v. Alabama*, 308 U.S. 444, 446 (1940).

¹⁰¹ Justice Thurgood Marshall dissented in *Strickland* and was highly critical of the decision of the Court. *Strickland*, 466 U.S. at 713 (Marshall, J., dissenting) (“The only justification the majority itself provides for its proposed presumption is that undue receptivity to claims of ineffective assistance of counsel would encourage too many defendants to raise such claims and thereby would clog the courts with frivolous suits.”).

¹⁰² See, e.g., Jonathan Rapping, *Redefining Success as a Public Defender: A Rallying Cry for These Most Committed to Gideon’s Promise*, THE CHAMPION, June 2012, at 30, 33 (describing his experience with public defender offices in the South).

¹⁰³ Eric H. Holder, Jr., *Reflections on Gideon – A Watershed Moment*, THE CHAMPION, June 2012, at 56.

And such views know no party affiliation; Dick Thornburgh, the Republican Attorney General under both President Ronald Reagan and George Bush, recently wrote that “the hopes expressed post-*Gideon* remain largely unfulfilled.”¹⁰⁴ The Civil Rights Division of the United States Department of Justice has noted in a Statement of Interest regarding a 2013 case in a Federal District Court in Seattle that, “claims of deprivation of the right to counsel...are part of a crisis impacting public defender services nationwide.”¹⁰⁵

The organized bar, at all levels, has surely taken note for years. The first comprehensive, national analysis of criminal defense funding was conducted in 1973 by the National Legal Aid and Defender Association.¹⁰⁶ *The Other Face of Justice* minced no words:

The resources allocated to indigent defense services have been found grossly deficient in light of the needs of adequate and effective representation. Relatively few indigent defendants have the benefit of investigation and other expert assistance in their defense. Their advocates are overburdened, undertrained, and underpaid, and as recent studies have shown, the poor have as little confidence in such advocates, who are often hand-picked by the same authority which pronounces their sentence, as they do in the inherent fairness of the American criminal justice system.¹⁰⁷

Most recently, the President of the American Bar Association wrote to Attorney General Eric Holder in October, 2013, that, “[t]here can be no denying that the indigent defense system in the United States is in

¹⁰⁴ Dick Thornburgh, *Reflections on Gideon: A Vigorous and Capable Prosecution and Defense*, THE CHAMPION, June 2012, at 57.

¹⁰⁵ CIVIL RIGHTS DIV., SPECIAL LITIGATION SECTION, U.S. DEP’T OF JUSTICE, DOC. NO. 332, STATEMENT OF INTEREST OF THE UNITED STATES: WILBUR V. CITY OF MOUNT VERNON 4 (2013).

¹⁰⁶ LAURENCE A. BENNER & BETH LYNCH NEARY, NAT’L LEGAL AID AND DEFENDER ASS’N, *THE OTHER FACE OF JUSTICE* 1 (1973).

¹⁰⁷ *Id.* at 70.

crisis.”¹⁰⁸ The letter was written in response to the vote in February of 2013 by the ABA policy-making House of Delegates to “[u]rge Congress to establish an independent federally funded Center for Indigent Defense Services for the purpose of assisting state, local, tribal and territorial governments in carrying out their constitutional obligation to provide effective assistance of counsel of the defense of the indigent accused in criminal, juvenile, and civil commitment proceedings.”¹⁰⁹ The ABA President could not have been more clear: “We, as a nation of laws, have not kept the promise of *Gideon* that the right to counsel is fundamental and essential to a fair trial.”¹¹⁰

To be sure, academics have taken note of this crisis, and the literature is filled with law review articles with titles such as *Gideon’s Muted Trumpet*,¹¹¹ *Gideon’s Promise Unfulfilled*,¹¹² *Gideon at 40: Facing the Crisis, Fulfilling the Promise*,¹¹³ *The Silence of Gideon’s Trumpet*,¹¹⁴ *Keeping Gideon from Being Blown Away*,¹¹⁵ *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional*

¹⁰⁸ Letter from James Silkenat, President, American Bar Association, to Eric H. Holder, U.S. Att’y Gen. (Oct. 15, 2013) (on file with American Bar Association) available at http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013oct15_indigentdefensecommission_1.authcheckdam.pdf.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Victoria Nourse, *Gideon’s Muted Trumpet*, 58 Md. L. Rev. 1417, 1431 (1999) (noting that *Gideon* states that it is simply “obvious” that a defendant who is too poor to afford representation cannot be assured a “fair” trial).

¹¹² Note, *Gideon’s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2064 (2000) (noting the vast amount of inefficiencies that still permeate the right to effective counsel after *Gideon*).

¹¹³ Ellen S. Podgor, *Gideon at 40: Facing the Crisis, Fulfilling the Promise*, 41 AM. CRIM. L. REV. 131, 133 (2004) (noting that a survey on *Gideon* unveiled significant challenges for modern lawyers practicing indigent criminal defense).

¹¹⁴ Jordan Glaser, Note, *The Silence of Gideon’s Trumpet: The Courts Inattention to Systemic Inequities Causing Violations of Speedy Trial Rights in Vermont v. Brillion*, 129 S.Ct. 1283 (2009), 89 NEB. L. REV. 396, 414 (2010) (noting that inequities in the criminal justice system ensure that defendants who can afford counsel are almost always better off than those who cannot).

¹¹⁵ Stephen B. Bright, Stephen O. Kinnard & David A. Webster, *Keeping Gideon From Being Blown Away: Prospective Challenges to Inadequate Representation May Be Our Best Hope*, 4 CRIM. JUST. 10, 48 (1990) (noting that the “noble ideal” in *Gideon* may not be feasible because of the current number of poor defendants).

Right to Effective Assistance of Counsel,¹¹⁶ *Gideon's Unfulfilled Mandate*,¹¹⁷ *After Half A Century, Gideon's Promise Remains Elusive*,¹¹⁸ and *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*.¹¹⁹ Authors seem to attempt to best one another in their desires to emphasize how severely our criminal justice system has departed from the hopes that were raised after the Supreme Court's *Gideon* decision.

IV. TAKING NOTICE OF SUBSTANDARD PRACTICES

What does this failure of our justice system to live up to the promise of *Gideon* actually mean to the poor defendant who is provided with court-appointed counsel?

A. Recurring Problems in Florida

In May of 2013, the Florida Supreme Court, after reviewing 26 volumes of testimony, documents, statistics and expert opinions in *Public Defender, Eleventh Judicial Circuit of Florida v. State of Florida*,¹²⁰ concluded that the evidence illustrated that the attorneys in Miami-Dade County were consistently “unable to interview clients,

¹¹⁶ Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 627 (1986) (acknowledging the challenge of upholding the Sixth Amendment promise in *Gideon* in the face of underfunded agencies providing defense).

¹¹⁷ Virginia E. Sloan, Cait Clarke, & Daniel Engelberg, *Gideon's Unfulfilled Mandate, Time for a New Consensus*, 31 WTR HUM. RTS. 3, 3 (2004) (showing that, after *Gideon*, cases still exist where indigent defendants receive either ineffective or no counsel whatsoever).

¹¹⁸ Norman L. Reimer *After A Half Century, Gideon's Promise Remains Elusive*, THE CHAMPION, Feb. 2012, at 7, (“As much as *Gideon* was promising a breakthrough, it remains a promise unfulfilled.”).

¹¹⁹ Stephen B. Bright, Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2155 (2013) (claiming that the system of Sixth Amendment rights resulting from *Gideon* is lacking in “legitimacy and credibility” and “undeserving of respect”).

¹²⁰ 115 So.3d 261, 274 (Fla. 2013). The Public Defender office had filed motions to be relieved of the statutory responsibility to represent indigents in non-capital felony cases due to the excessive caseload which had resulted from insufficient funding. Section 27.51(1), Fla. Stat. (2007) requires the public defender to represent all indigents arrested or charged with crimes that could result in imprisonment. *Id.* at 265, n.2.

conduct investigations, take depositions, prepare mitigation or counsel clients about pleas offered at arraignments.”¹²¹

The Court characterized the lack of effective representation as “nonrepresentation,”¹²² which, therefore, constituted a denial of the actual assistance of counsel guaranteed by *Gideon* and the Sixth Amendment.¹²³ Not choosing to mince words, the Court found that the evidence is “a damning indictment of the poor quality of trial representation that is being afforded to indigent defendants.”¹²⁴ The Court emphasized that the poor quality of representation was not confined to isolated instances but rather revealed systemic failings.¹²⁵

The Florida Supreme Court’s decision confirmed what many observers of the state’s criminal defense services long knew. A 2011 report by the National Association of Criminal Defense Lawyers concluded that “Florida’s county courts are consistently sacrificing due process for case-processing speed. The problem is pervasive[,] but particularly evident in larger counties.”¹²⁶ Eighty-two percent of the arraignments in Florida’s courts lasted for three minutes or less.¹²⁷

In their haste to move cases to conclusion, trial judges didn’t even inform defendants of their right to an attorney 28% of the time,¹²⁸ even though the right to counsel provided in the Florida state constitution is broader than the Sixth Amendment right as interpreted by the federal courts.¹²⁹

¹²¹ *Id.* at 278.

¹²² *Id.*

¹²³ *Id.* at 274.

¹²⁴ *Id.* at 274, n.8.

¹²⁵ Bennett Brummer, who was the elected chief of the Public Defender Office in Miami-Dade County for 32 years until 2009, had filed his first motion for “relief from excessive caseloads” in 1978. KAREN HOUPPERT, CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE’S JUSTICE 91–92 (The New Press 2013).

¹²⁶ ALISA SMITH & SEAN MADDEN, THREE-MINUTE JUSTICE: HASTE & WASTE IN FLORIDA’S MISDEMEANOR COURTS 14 (2011).

¹²⁷ *Id.* at 23, tbl.12.

¹²⁸ *Id.* at 22 (noting that judges were reluctant to inform defendants of the disadvantages of proceeding without counsel or to inquire whether they could afford a lawyer).

¹²⁹ *Id.* at 7 (noting that, while the Sixth Amendment has been interpreted to only require appointed counsel in cases where the defendant loses liberty, the Florida

What is so tragically disappointing about the Florida example is the state government's response to the decades of litigation by public defender offices to obtain greater funding to represent indigent defendants. This author maintains that because such a high percentage of those accused of crime in the state are minorities, the state has consistently fought such attempts for increased funding. The constitutional rights of these Black and Hispanic defendants were apparently not of concern.

The Legislature in 2003 enacted what is not only a rather remarkable piece of legislation, but one of questionable constitutionality as well. Florida statutory law attempts to prevent state courts from granting relief to public defenders who claim that their excessive caseloads prevent their clients from being afforded their Sixth Amendment right to effective counsel: "In no case shall the court approve a withdrawal by the public defender... based solely upon inadequacy of funding or excess workload of the public defender or regional counsel."¹³⁰ The State therefore acknowledged the inadequacy of funding as well as the resulting excessive workload and simply moved to prohibit the courts from acting to rectify the situation. The state's intransigence is all too typical, and all too common to be shocking. But government's lack of concern for the constitutional rights of those accused of crime is appalling...and increasing.

B. Mississippi

Take, for example, Mississippi. A Report prepared by the NAACP Legal Defense Fund titled *Assembly Line Justice: Mississippi's Indigent Defense Crisis*, concluded that the *Gideon* guarantees to counsel are "functionally meaningless."¹³¹ The Report found that public defenders lacked sufficient funds to perform the most basic of investigations or to conduct legal research.¹³² The state's

constitution requires appointment of counsel in all cases where there is any possibility that the defendant may be incarcerated).

¹³⁰ 5 West's F.S.A. § 27.5303(1)(d) (2014).

¹³¹ NAACP LEGAL DEFENSE AND EDUCATION FUND, ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS 6 (2003).

¹³² *Id.* at 6. Similar problems occurred when the clients were juveniles. *Id.* at 12–14.

substandard representation led to lawyers who were unable to meet with their clients, properly prepare bail applications, or to file necessary motions.¹³³ The inadequate resources were in sharp contrast to the state's funding for the prosecutors' offices which included money for expert witnesses, a state-of-the-art crime lab, and all litigation and support services.¹³⁴

C. The Racial Impact in Washington State

As in many states, race is at the heart of the problems in the state of Washington. An intensive analysis by the Task Force on Race and the Criminal Justice System – which was comprised of groups as varied as the Seattle City Attorney's Office, the Washington State Bar Association, the Washington State Access to Justice Board, Washington Women Lawyers, the American Civil Liberties Union of Washington, and the Administrative Office of the Courts – led to the issuance of a report in 2011.¹³⁵ The report concluded that, “the fact of racial and ethnic disproportionality in our criminal justice system is indisputable.”¹³⁶ Of particular import are the following:

1. Of those convicted of felonies related to drug offenses, African-Americans were 62% more likely to receive a prison sentence than similarly situated Whites.¹³⁷
2. In the state's juvenile justice system, similarly situated minorities received harsher sentences than their White peers.¹³⁸

¹³³ *Id.* at 8. In many parts of the state, if counsel wished to engage an investigator or psychiatrist, the lawyer would have to pay for the assistance. *Id.* at 6. Most commonly, counsel would simply conduct no investigation when the client specifically requested one. *Id.* at 10.

¹³⁴ *Id.* at 17.

¹³⁵ Research Working Group & Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 35 SEATTLE U. L. REV. 623 (2012).

¹³⁶ *Id.* at 627.

¹³⁷ *Id.* at 628.

¹³⁸ *Id.*

3. Pretrial release decisions systematically disadvantaged minorities.¹³⁹
4. Minorities were more likely to be searched when stopped for traffic investigations.¹⁴⁰
5. Although African-Americans comprised only 3% of the general population in the State, they constituted 28% of the prison population.¹⁴¹
6. In King County (Seattle, Washington), prosecutors recommended harsher sentences for African-American defendants, and were 75% less likely to recommend alternative to incarceration sentences for African-Americans than for similarly situated Whites.¹⁴²
7. The Seattle Police Department's focus on crack cocaine arrests to the "virtual exclusion" of heroin, powder cocaine, and methamphetamine, led to gross racial disparities in drug enforcement because 73.4% of those arrested for delivering crack cocaine were African-American.¹⁴³

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 629.

¹⁴¹ *Id.* at 634 (noting that Washington had led the country in the disproportionate representation of blacks in prison during 1980).

¹⁴² *Id.* at 647 (citing ROBERT D. CRUTCHFIELD ET AL, RACIAL AND ETHNIC DISPARITIES IN THE PROSECUTION OF FELONY CASES IN KING COUNTY 4 (1995), available at

<http://www.courts.wa.gov/committee/pdf/Novemeber%201995%20Report.pdf>).

¹⁴³ *Id.* at 652 (citing Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOCIAL PROBLEMS 3 (2005)). "By contrast, only 20% of those arrested for delivering other drugs were Black." *Id.*

D. Racial Bias in Virginia's Criminal Justice System

At the end of 2013, another report was issued highlighting racial biases and inequalities in a state's criminal justice system: *Virginia's Justice System: Expensive, Ineffective and Unfair*.¹⁴⁴ This report from the Justice Policy Institute concluded, "African Americans are over-represented at each stage of the Virginia criminal justice system."¹⁴⁵ Specifically, even though only 20% of the overall population of Virginia is African-American, over 60% of state prison inmates and 47% of all those arrested are African-American.¹⁴⁶ And, as was true in the Washington report,¹⁴⁷ the Virginia Report concluded that the racial imbalance in arrests for drug offenses was a function of the priorities of the police and the justice system, and was not indicative of greater actual usage by the African-American population.¹⁴⁸ The greatest disparities occur in the juvenile justice system; 70% of juveniles who were committed to serve time in detention facilities were African-American although only 20% of the juvenile population in the state was African-American.¹⁴⁹

The poor quality of criminal defense services for indigents is, once again, thought to be a prime factor in the over-incarceration of African-Americans.¹⁵⁰ For every White person incarcerated in Virginia's state prisons, there are six African-Americans.¹⁵¹ Reports dating back to 2003 have concluded that the quality of representation provided to indigents in the state is lacking;¹⁵² defender services were

¹⁴⁴ JUSTICE POLICY INSTITUTE, VIRGINIA'S JUSTICE SYSTEM: EXPENSIVE, INEFFECTIVE AND UNFAIR (Nov. 2013), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/va_justice_system_expensive_ineffective_and_unfair_final.pdf.

¹⁴⁵ *Id.* at 1.

¹⁴⁶ *Id.* For certain crimes, the racial imbalance was even higher; for example, 76% of all robbery arrests were of African-Americans. *Id.* at 11.

¹⁴⁷ Research Working Group & Task Force on Race and the Criminal Justice System, *supra* note 135, at 652.

¹⁴⁸ JUSTICE POLICY INSTITUTE, *supra* note 144, at 12.

¹⁴⁹ *Id.* at 8.

¹⁵⁰ *Id.* at 6.

¹⁵¹ *Id.* at 12.

¹⁵² *Id.* at 6 (citing Betsy Wells Edwards, *Virginia's Indigent Defense Delivery System Receives Poor Grades from VIDC*, 51 VIRGINIA'S LAWYERS MAGAZINE 36 (2003)).

not found to be on equal footing with the funding provided to prosecutors.¹⁵³

And, as is all too common in many states, when private counsel are appointed by the court to represent indigent defendants, there is a “cap” on the maximum amount that they can get paid in any particular case.¹⁵⁴ Pay caps act as disincentives to quality lawyering; the amount of time properly spent by counsel on the preparation or investigation of a case may well exceed the number of hours for which counsel can get reimbursed. The private, court-appointed counsel may therefore choose to devote time to clients who are not indigent and who can be billed for every hour of representation that counsel devotes to that case.

E. Insufficient Funding for Counsel in New York

But such deplorable conditions are not limited to America’s south. In *Hurrell-Harring v. New York*, indigent defendants in five counties in New York State brought a class action claiming that the system of public defense had presented an unacceptable risk that the plaintiffs were being denied their constitutional right to counsel.¹⁵⁵ The New York Court of Appeals concluded that the allegations that counsel was so inadequate at critical stages of the proceedings were sufficient to justify the inference that there was a basic denial of rights required by *Gideon*.¹⁵⁶ Furthermore, the Court found that the arraignment process was to be considered a critical stage even when there was not any guilty plea elicited.¹⁵⁷ It is not a matter of inadequate representation; rather that the “numerous allegations to the effect that counsel, although appointed, were uncommunicative, made virtually no efforts on their nominal clients’ behalf during the very critical period subsequent to arraignment, and, indeed, waived important

¹⁵³ JUSTICE POLICY INSTITUTE, *supra* note 144, at 5.

¹⁵⁴ *Id.*

¹⁵⁵ 930 N.E.2d 217 (N.Y. 2010). *Id.* at 219.

¹⁵⁶ *Id.* at 227.

¹⁵⁷ *Id.* at 223. One of the most basic rights in the Sixth Amendment’s mandate that the accused be “informed of the nature and cause of the accusation.” The arraignment is the stage where the defendant is formally informed of the charges against him; time is often required to explain and discuss the particular sections of the state’s criminal code that will form the basis of the prosecution.

rights without authorization from their clients, may be reasonably understood to allege *non-representation* rather than ineffective representation.”¹⁵⁸

In this landmark litigation, a settlement between the parties was reached in 2015 which provided for the New York State Office of Indigent Legal Services to guarantee counsel at arraignment, institute quality standards, and insure that public defenders have manageable caseloads.¹⁵⁹ The only problem was that the counties were afforded a time period of seven and a half years to comply.¹⁶⁰ Violations of the Sixth Amendment, ought not, in this author’s view, be tolerated for even one day, much less for seven and a half years.

It should be noted that in 2013, approximately half of those incarcerated in New York were African-American,¹⁶¹ despite that group’s constituting only 17.5% of the state’s population.¹⁶²

Whereas it is not uncommon for public defender offices themselves to acknowledge that inadequate funding leads to ineffective representation, it is very unusual for the funding source itself to admit that it does not provide sufficient funds. But that is just what was done in 2013 by Suffolk County, the second largest county by area in New York State, which includes the infamously wealthy Hamptons.

The Acting County Attorney, while realizing both the constitutional as well as the statutory obligation to provide counsel at the defendants’ arraignments, acknowledged that providing “counsel at first appearance has proven to be a challenge in certain courts”

¹⁵⁸ <http://quickfacts.census.gov/qfdd/states/36000.html>.

¹⁵⁹ Joel Stashenko, Judge Approves Settlement Over Indigent Criminal Defense, *New York Law Journal*, March 18, 2015.

¹⁶⁰ *Id.*

¹⁶¹ STATE OF NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, UNDER CUSTODY REPORT 5 (2013), *available at* http://www.doccs.ny.gov/Research/Reports/2013/UnderCustody_Report_2013.pdf.

¹⁶² U.S. Census Bureau, *State and County QuickFacts: New York*, U.S. CENSUS BUREAU, *available at* <http://quickfacts.census.gov/qfd/states/36000.html> (last revised Jul. 08, 2014).

within the County given the limitations in resources.¹⁶³ There is no statewide public defender office in New York, and the counties themselves are responsible for funding indigent defense. Yet the Acting County Attorney admitted that adequate funding was a “perennial problem” and that additional money was needed “to hire competent attorneys and supply them with the resources that are needed to render effective assistance of counsel.”¹⁶⁴ In a shocking admission, the County admitted that the goal of a special grant that was being sought from the state was to “realize the mandate” as envisioned by the Court in *Gideon*.¹⁶⁵

Fifty years after *Gideon*, one of the country’s largest and wealthiest counties acknowledged that it has yet to comply with the Sixth Amendment of the Constitution. And those who were the “victims” of the noncompliance were disproportionately African-American – by a factor of four.¹⁶⁶

Things are hardly better in adjoining Nassau County, also one of the wealthiest counties in the country and the second most populous in the state outside the city of New York.¹⁶⁷ In 2013, the County’s First Appearance [at Arraignment] Plan admitted that the “sheer volume of arrests” presented “severe challenges” at the time of an

¹⁶³ Letter from Paul J. Margiotta, Acting County Attorney, County of Suffolk, to Karen Jackusack, Office of Indigent Legal Services, Albany New York (Feb. 14, 2013), Request for Grant Aid by the County of Suffolk, at 2.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ In 2012, approximately 32% of those who were incarcerated in Suffolk County were African-American. NEW YORK STATE COMMISSION OF CORRECTION, ARRESTS, CONVICTIONS AND JAIL INMATES BY RACE AND ETHNICITY (2013). Yet African-Americans were only 8.2% of the County population. *U.S. Census Bureau, State and County QuickFacts: Suffolk County*, U.S. CENSUS BUREAU, available at <http://www.quickfacts.census.gov/qfd/states/36/36103.html> (last revised Jul. 08 2014).

¹⁶⁷ The population of Nassau was 1,340,000. *See U.S. Census Bureau, State and County QuickFacts: Nassau County*, U.S. CENSUS BUREAU, available at <http://www.quickfacts.census.gov/qfd/states/36/36059.html> (last revised Jul. 08 2014). Suffolk’s was 1,493,000. *See United States Census Bureau, State and County QuickFacts: Suffolk County*, U.S. CENSUS BUREAU, available at <http://www.quickfacts.census.gov/qfd/states/36/36103.html> (last revised Jul. 08 2014).

accused's first appearance in court.¹⁶⁸ The attorney-client interviews "are often brief because there are so many defendants."¹⁶⁹ In spite of the Supreme Court's mandate in *Rothgery*¹⁷⁰ that the arraignment stage requires the provision of effective counsel, the County stated that "at least half of the clients appear in Court without having previously spoken to the attorney who appears on their behalf because...it is physically impossible for the current [Legal Aid] Society staff, to interview all those requesting indigent representation."¹⁷¹

And even though the County made a request to the State for a modest increase in funding, Nassau was quite frank: "[T]he fact is that little can realistically be done to mitigate the *harried and relatively chaotic situation*" that existed in Arraignment Court.¹⁷² In an open acknowledgment that widespread constitutional violations were occurring, the County stated that "we are left to try to ensure adequate representation at first appearance *as best as practicable*."¹⁷³

But to some extent, the best was saved for last. In a theme we have seen before,¹⁷⁴ the County concluded its description of the conditions taking place in its Arraignment Courts as follows: "In summary, while indigent defense lawyers *may be physically present* in the District Court at first appearance, their ability to provide adequate representation is severely compromised."¹⁷⁵ The Constitution does not require that rights of citizens only be respected "as best as practicable." It is this author's contention that we tolerate such constitutional violations occurring because we just don't care; after all, it is only the poor who are affected, and often minority to boot.¹⁷⁶

¹⁶⁸ Nassau County First Appearance Plan, Project Summary (Feb. 2013), at 2.

¹⁶⁹ *Id.*

¹⁷⁰ *Rothgery*, 554 U.S. at 213.

¹⁷¹ Nassau County First Appearance Plan, *supra* note 168, at 2. For the last fifty years, the County has contracted with the Legal Aid Society of Nassau County and the Assigned Counsel Defender Plan to provide indigent defense services. *Id.* at 12.

¹⁷² *Id.* at 3 (emphasis added).

¹⁷³ *Id.* (emphasis added).

¹⁷⁴ *See, e.g., Hurrell-Harring*, 930 N.E.2d at 224 (explaining that counsel may well be engaging not just in ineffective representation, but perhaps in non-representation).

¹⁷⁵ NASSAU COUNTY FIRST APPEARANCE PLAN, *supra* note 168, at 4.

¹⁷⁶ In 2012, approximately 43% of those incarcerated in Nassau County were African-American. NEW YORK STATE COMMISSION OF CORRECTION, *supra* note 166. Only 12.4% of the general population was African-American. U.S. Census Bureau,

F. Mass Processing of Hispanic Defendants in Federal Court

Staggering caseloads and inadequate resources directly impact minorities in the federal courts as well. The Ninth Circuit in 2013 in *United States v. Arqueta Ramos*,¹⁷⁷ reviewed the actions by United States Magistrate Judges in Arizona who had conducted proceedings where there were pleas entered for up to 70 defendants at one time.¹⁷⁸ *Operation Streamline* is a program established by the Justice Department to require prosecution and imprisonment of all those who unlawfully cross the U.S./Mexico border; any possible use of discretion by the U.S. Attorneys' offices has been eliminated.¹⁷⁹ A Magistrate Judge in the District Court typically presides over a hearing of 50-70 defendants at one time who are charged with the misdemeanor of illegal entry; guilty pleas and sentences all occur during this one proceeding.¹⁸⁰

This *en masse* handling of defendants makes a mockery of any concept we have of individualized justice. In the instance involving Arqueta-Ramos, the judge informed the group of sixty-three defendants as follows: "I'm going to start by addressing all of you as a group, and then I will call you and your attorneys up five at a time to speak to you more individually about your case."¹⁸¹ While in the group of five, there was not any information given nor question asked of any defendant individually except whether or not he or she wished to enter a guilty plea.¹⁸²

The Ninth Circuit held that the failure of the Magistrate to ever individually ask the defendants whether they understood the charges against them or the consequences of pleading guilty, constituted a

State and County QuickFacts: Nassau County, U.S. CENSUS BUREAU, available at <http://www.quickfacts.census.gov/qfd/states/36/36059.html> (last revised Jul. 08 2014).

¹⁷⁷ 730 F.3d 1133 (9th Cir. 2013).

¹⁷⁸ *Id.* at 1135–36.

¹⁷⁹ *In re Approval of Judicial Emergency*, 639 F.3d 970, 974 (9th Cir. 2011).

¹⁸⁰ *Arqueta-Ramos*, 730 F.3d at 1135–36 (citing *United States v. Aguilar-Vera*, 698 F.3d 1196, 1198 (9th Cir. 2012)).

¹⁸¹ *Id.* at 1136.

¹⁸² *Id.* at 1137.

violation of Rule 11 of the Federal Rules of Criminal Procedure¹⁸³ and that the Government did not meet its burden of showing that such violation was harmless.¹⁸⁴ The Court emphasized that, “[w]e act within a system maintained by the rules of procedure. We cannot dispense with the rules without setting a precedent subversive of the structure.”¹⁸⁵

But the basic framework of *Operation Streamline’s* mass processing of Hispanic defendants continues unabated. In February of 2014, Magistrate Judge Bernardo Velasco boasted about his “record” time of 30 minutes to have had 25 defendants hear the charges against them, enter a plea, and receive their sentences.¹⁸⁶ The Judge assured a New York Times reporter that there was no reason why we should be concerned: “What we do is constitutional, it satisfies due process. It may not look good, but it does everything the law requires.”¹⁸⁷ Indeed, the mass processing of mostly Mexican men with “chains around their ankles and wrists jingling as they move,” does not “look good.”¹⁸⁸

G. Excessive Caseloads and the Contract System in California

In 2004, the California State Senate created the California Commission on the Fair Administration of Justice.¹⁸⁹ The first charge of the Commission was “to study and review the administration of criminal justice in California to determine the extent to which that process has failed in the past, resulting in wrongful executions or the wrongful conviction of innocent persons.”¹⁹⁰ Four years later, the

¹⁸³ *Id.* at 1139. Rule 11 requires the court to “address the defendant personally in open court.” FED.R.CRIM.P.11(b)(1). Furthermore, the Rule requires the court to inform a defendant of pre-trial and trial rights and “determine that the individual understands those rights.” *Id.*

¹⁸⁴ *Arqueta-Ramos*, 730 F.3d at 1139–40.

¹⁸⁵ *Id.* at 1139 (quoting *United States v. Roblero-Solis*, 588 F.3d 692, 693 (9th Cir. 2009)).

¹⁸⁶ Fernanda Santos, *Detainees Sentenced in Seconds in ‘Streamline’ Justice on Border*, N.Y. TIMES, Feb. 12, 2014, at A12.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ S. Res. 44, 2003-04 Reg. Sess. (Cal. 2004).

¹⁹⁰ *Id.*

Final Report of the Commission found that every public defender office in the state except one reported problems with excessive attorney workloads.¹⁹¹ And the problems were not minor – over 81% of defenders reported the difficulties were significant, very significant, or serious.¹⁹²

But California presents a concern that this article has yet to analyze. Some counties in that state utilize the contract system for determining who is to represent indigents accused of crime; the lowest bidder – the group of attorneys that claims that they can represent the greatest number of defendants for the cheapest cost – wins the contract.

The bidding procedure is the same as is commonly used for the awarding of contracts for the building of roads or sewers, or the removal of trash. In one such county, a contracted attorney reported that he pled 70% of his clients guilty at the very first court appearance after devoting all of 30 seconds to convey to each defendant the prosecutor's offer.¹⁹³ Judges not only were complicit in the assembly-line justice, but in the one instance where the contract attorney sought a continuance to prepare for trial on a felony charge because virtually no preparation or investigation had been done, the judge denied the request.¹⁹⁴

The Report recounts how one county chose to contract with a group of attorneys who had bid \$16.8 million, successfully undercutting a competing bid of \$28 million to represent the county's indigents who were accused of crime.¹⁹⁵ A journalist described the defense firm as following a "Wal-Mart Business Model,"¹⁹⁶ and the

¹⁹¹ CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, FINAL REPORT 93 (Gerald Uelmen & Chris Boscoa eds., 2008), *available at* <http://www.ccfaj.org/documents/ccfajfinalreport.pdf>.

¹⁹² *Id.* Every defender office that responded to the Commission's statewide survey reported excessive investigator caseloads. *Id.*

¹⁹³ *Id.* at 95.

¹⁹⁴ *Id.* at 94 (citing SPANGENBERG GROUP, CONTRACTING FOR INDIGENT DEFENSE SERVICE (U.S. Department of Justice Office of Justice Programs (2000)).

¹⁹⁵ *Id.* at 95.

¹⁹⁶ *Id.* (quoting Cheryl Miller, *California Defense Firm Borrows Wal-Mart Business Model*, THE RECORDER, Dec. 26, 2007).

owner of the business admitted that his company was indeed like “a grocery store.”¹⁹⁷ Eighty-five lawyers in this public defender business were able to offer counties “rock-bottom pricing” due to the utilization of “a revolving door of undertrained lawyers.”¹⁹⁸

In spite of the longstanding opposition of the ABA,¹⁹⁹ the utilization of the low-bid contract system by a state to satisfy its constitutional obligations under *Gideon* and *Argersinger* is alive and well as governments have been strapped for cash in these post-recession years. The major criticism is that since the contract typically takes the form of a lump-sum or fixed-fee arrangement, there is a disincentive for counsel to provide quality representation. It becomes financially desirable to process as many cases as possible and spend as little time as possible on any given case. Costs for expert witnesses or investigators typically come out of the pockets – and therefore profits – of the attorneys.

The Report of the California Commission recommended that the State impose minimal standards on any contracting defenders, as is done for county contracts for public works, and that all such contracts provide separate funding for investigators and expert witnesses.²⁰⁰ The ABA itself in 2002 went on record asserting that any contract for defense services should separately fund expert, investigative, and other litigation support services.²⁰¹

¹⁹⁷ Cheryl Miller, *Market Force*, THE RECORDER, Dec. 20, 2007.

¹⁹⁸ *Id.*

¹⁹⁹ The first Resolution relating to the matter of contracting out defender services was in February 1985; the ABA resolved that it “opposes the awarding of public defense contracts on the basis of cost alone, or through competitive bidding without reference to quality of representation.” AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION STANDING COMMISSION ON LEGAL AID & INDIGENT DEFENDANTS, REPORT OF THE HOUSE OF DELEGATES (1985), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/20110325_aba_110.authcheckdam.pdf. Six months later, the ABA resolved that any contract entered into needed to comply with both Chapter 5 (Providing Defense Services) of the ABA Standards of Criminal Justice as well as the NLADA’s Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services.

²⁰⁰ CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, *supra* note 191, at 96.

²⁰¹ *See* ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, ABA

H. Race, the Missouri Supreme Court, and Overburdened Public Defenders

In Missouri, the percentage of African-Americans who are arrested is more than 4 times higher than the percentage of whites in the general population.²⁰² And, as one would expect, there is a crisis relating to funding for counsel to represent the indigent poor. The statewide Public Defender Commission responded to the concern about the excessive caseloads of defenders by promulgating a Rule requiring local defender offices to set the maximum caseloads that the office is able to handle in order for the workload not to interfere with the ability to properly represent clients.²⁰³ After reaching its maximum caseloads for a three-month consecutive period, an office is then able to inform the presiding district judge that it will not, and cannot, accept additional cases.²⁰⁴

TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 3 (2002), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

²⁰² Howard Koplowitz, *Ferguson Missouri Crime Stats 2014: Blacks Arrested 4 Times As Much As Whites*, INT'L BUS. TIMES (Aug. 14, 2014, 3:39 PM), <http://www.ibtimes.com/ferguson-missouri-crime-stats-2014-blacks-arrested-4-times-much-whites-1658846>.

²⁰³ MO. CODE REGS. ANN. tit. 18, § 10-4.010(1)(A) (2014). The American Council of Chief Defenders has issued a supportive policy statement:

A chief executive of an agency providing public defense services is ethically prohibited from accepting a number of cases which exceeds the capacity of the agency's attorneys to provide competent, quality representation in every case....When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency's attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases.

American Council of Chief Defenders, *Ethics Opinion 03-01*, NAT'L LEGAL AID & DEFENDER ASSOCIATION 1 (Apr. 2013), *available at* <http://www.nlada.org/DMS/Documents/1082573112.32/ACCD%20Ethics%20opinion%20on%20Workloads.pdf>.

²⁰⁴ MO. CODE REGS. ANN. tit. 18, § 10-4.010(2)(A) (2014). The Missouri Supreme Court explained that the purpose of the Rule was to assist prosecutors and judges as well as defense counsel to fulfill their obligation to ensure that excessive caseloads

There was an overwhelming increase in cases during the six-year period of 2006-2012 in the 38th Circuit in Southwest Missouri.²⁰⁵ The state public defender office informed Presiding Judge Mark Orr that its caseload maximums had been exceeded and that it was unable to accept any new cases.²⁰⁶ Judge Orr, nevertheless, appointed a public defender to a new case after meetings with the prosecutors and public defender office failed to reach any agreement to limit caseloads.²⁰⁷ The defenders obtained a preliminary writ from the Missouri Supreme Court prohibiting the Judge from taking any action on the new case which had been assigned to the defender office.²⁰⁸ The Court also appointed a Special Master to assess the situation.²⁰⁹

The Missouri Supreme Court's final opinion in this case in 2012 is a noteworthy and highly significant one for its steadfast support of the Sixth Amendment's requirements for effective assistance.²¹⁰ The Court emphasized that it is the obligation and the professional responsibility of defense counsel, "not to accept work that counsel does not believe he or she can perform competently."²¹¹ What seems to be an obvious truth, but one which is often conveniently overlooked, was stated emphatically by the Court: "Effective, *not just pro forma*, representation is required by the Missouri and federal constitutions."²¹²

would not inhibit effective representation. *State ex rel. Mo. Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 608 (Mo. 2012).

²⁰⁵ *State ex rel. Missouri Public Defenders Commisison v. Waters [I]*, MO. L. REV. (July 31, 2012), available at <http://missourilawreview.blogspot.com/2012/07/state-ex-rel-missouri-public-defenders.html>. See also Erik Eckholm, *Public Defenders, Bolstered by a Work Analysis and Rulings, Push Back Against a Tide of Cases*, N.Y. TIMES, Feb. 18, 2014, http://www.nytimes.com/2014/02/19/us/public-defenders-turn-to-lawmakers-to-try-to-ease-caseloads.html?_r=0

²⁰⁶ *Waters*, 370 S.W.3d at 600–01.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 601.

²⁰⁹ *Id.* at 601–02.

²¹⁰ The Missouri Constitution itself provides that, "in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel." MO. CONST. art I, § 18(a).

²¹¹ *Waters*, 370 S.W.3d at 607.

²¹² *Id.* (emphasis added).

But the most significant impact of this case is the warning that the state's highest court imparted to the lower level trial courts: "Simply put, a judge may not appoint counsel when the judge is aware that, for whatever reason, counsel is unable to provide effective representation to a defendant."²¹³

V. ACTUAL HARM TO INDIGENT DEFENDANTS

A. *The Crucial Import of Case Preparation*

What are the precise ways that indigent defendants suffer when their advocates carry excessive caseloads? First and foremost, their cases are not adequately investigated and prepared. Effective advocacy requires extensive preparation – both factual and legal. The police officer's description of the crime will remain unchallenged if the lawyer has not sought out witnesses, researched the applicable law, or investigated the existence of any valid defense. Communications from one's client may be crucial in building a defense, yet the overburdened counsel simply may not have the time to travel to and visit the jail where the defendant is held. Defenders must pick and choose which few cases to devote time and resources to. In the medical world, this is referred to as triage.²¹⁴

A comprehensive case preparation entails investigating the facts relating to the criminal charge: visiting the scene of the crime, accessing and examining key pieces of evidence, and locating both the prosecution and possible defense witnesses.²¹⁵ It is frequently

²¹³ *Id.*

²¹⁴ In fact, the Florida Supreme Court characterized the Miami-Dade County Public Defender Office as engaging in triage, where the clients who face the most serious charges have priority at the expense of other clients. Pub. Defender, Eleventh Judicial Circuit v. State, 115 So. 3d 261, 274 (Fla. 2013). *See also* In re Order on Prosecution of Criminal Appeals, 561 So. 2d 1130, 1135 (Fla. 1990) ("When excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created.").

²¹⁵ *See* PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 4.1 (Nat'l Legal Aid & Defender Ass'n 1995), *available at* http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#fourone (last visited Sept. 20, 2014) (noting that counsel's investigation should occur as promptly as possible with the following as possible sources: the charging

necessary to consult with experts to receive their guidance – and maybe to prepare their testimony.²¹⁶ As the Third Circuit observed in *Moore v. United States*, adequate trial preparation may well be more critical to success than the forensic skill demonstrated in court.²¹⁷

A Commentary in the ABA Criminal Justice Standards elaborates on the extreme import of counsel's obligation:

Experienced trial counsel know that effectiveness at trial depends upon meticulous evaluation and preparation of the evidence to be presented. Where counsel's evaluation and preparation are hampered by a lack of information, the trial becomes a pursuit of truth and justice more by chance than by design. This can only lead to a diminished respect for the criminal justice system, the judiciary, and the attorneys who participate.²¹⁸

Surely, no investigation can be comprehensive without consultation with the client.²¹⁹ The Supreme Court has long held that due process requires that defendants have the opportunity to consult with their

documents, the accused, potential witnesses, the police and prosecution by way of informal as well as formal discovery, the scene of the crime, and the possible assistance of experts). *See also id.* (providing, in Guideline 4.2, that counsel's discovery should include seeking the names and addresses of all prosecution witnesses).

²¹⁶ A successful cross-examination of prosecution experts can often depend on defense counsel's consulting with his own experts. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009) (noting the import of an effective confrontation of the state's experts when defense counsel confronted those who had prepared the reports of the laboratory certificates regarding the composition and weight of the alleged cocaine).

²¹⁷ 432 F.2d 730, 735 (3d Cir. 1970).

²¹⁸ STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY § 11-1.1 cmt. 11-1.1(a) (3d ed. 1996).

²¹⁹ The investigation needs to be done before plea negotiations commence. For an elaboration of the critical import of counsel's consultation with his client, *see* Michael D. Dean & Rick McKelvey, *The Basics of Plea Negotiation: A Dual Perspective*, 28 CRIM. JUST. 52, 52–53 (2013). *See also* CRIMINAL JUSTICE STANDARDS: DEFENSE FUNCTION § 4-3.2 (“[D]efense counsel should seek to determine all relevant facts known to the accused.”).

counsel.²²⁰ But in recent years, courts have indicated that even this very basic expectation of competent lawyering has been sacrificed at the altar of processing cases.

B. The Failure of the New Jersey Supreme Court to Protect Indigents' Right to Counsel

Take, for instance, the 2013 holding of the New Jersey Supreme Court in *State v. Miller*.²²¹ In that case, the defendant was indicted on 8 counts relating to drug possession with intent to distribute.²²² The initial public defender assigned to represent the defendant was removed from the case by the Office of the Public Defender and the substitute defender had never met or had any contact with the defendant until the day of trial.²²³ Before the actual appearance in court, the lawyer conferred with his client for less than an hour in an empty stairwell between two floors in the courthouse building; counsel described that location as “the only private area” available.²²⁴

When the case was called by the judge at 10:30, counsel requested an adjournment stating that the defendant “would best prefer...an opportunity for us to sit in a more – in a calmer setting so that we can discuss and plan this particular matter.”²²⁵ Counsel made it clear to the judge that that morning was the first opportunity he had to meet with his client.²²⁶ The ABA Criminal Justice Standards are clear in requiring every jurisdiction to guarantee the right of an accused person to prompt and *effective* communication with a lawyer.²²⁷ The

²²⁰ See, e.g., *Hawk v. Olsen*, 326 U.S. 271, 278 (1945); *Tomkins v. Missouri*, 323 U.S. 485, 489 (1945) (noting it is necessary that counsel provide knowledgeable and informed advice in order to overcome the ignorance or bewilderment of the client).

²²¹ 76 A.3d 1250 (N.J. 2013).

²²² *Id.* at 1255.

²²³ *Id.* at 1255–56.

²²⁴ *Id.* at 1256. Courts have historically emphasized that conversations between counsel and his client need to be done in a private setting. See, e.g., *In re Mandell*, 69 F.2d. 830, 831 (2d Cir. 1934) (noting that the relationship between a lawyer and an accused is “highly confidential . . . in order that they might work together harmoniously”).

²²⁵ *Id.* at 1270.

²²⁶ *State v. Miller*, 18 A.3d 1054, 1067 (N.J. Super. Ct. App. Div. 2011).

²²⁷ CRIMINAL JUSTICE STANDARDS: DEFENSE FUNCTION § 4-2.1 (3d ed. 1993). See also PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION §

ABA's Ten Principles of a Public Defense Delivery System requires that "defense counsel is provided sufficient time and a confidential space within which to meet with the client."²²⁸

The judge refused to grant an adjournment, stating that "trying a drug case for a criminal defense attorney is as easy as trying an intersection accident case for a civil lawyer.... [T]he scenarios are essentially the same in every case."²²⁹ Proceedings commenced immediately with a suppression motion whereby the defendant maintained that there had not been probable cause for his arrest and that currency found on his person should therefore be suppressed.²³⁰ Even though the defendant had just met counsel that morning and there was little time to discuss any possible testimony, the defendant did take the stand.²³¹ The motion was denied and jury selection began the following morning.²³² The defendant was convicted and sentenced to a prison term of five years.²³³

Surely, we have the right to expect more from the Supreme Court of New Jersey than the justice offered to Terrence Miller.²³⁴

2.2(b)(1) (Nat'l Legal Aid & Defender Ass'n 1995) (providing that counsel should ensure that barriers to communication be overcome). Surely, meeting in a stairwell would be considered such a barrier.

²²⁸ See ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *supra* note 201, at 2. The Commentary to Principle 4 elaborates: "Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel." *Id.*

²²⁹ *Miller*, 76 A.3d at 1271.

²³⁰ *Id.* at 1256.

²³¹ *Id.* *Miller* stated that he had witnesses who would corroborate his account of what happened but "*for some reason, we weren't prepared for the day.*" *Id.* at 1272. The Supreme Court has held that defense counsel does have "a duty to discuss potential strategies with the defendant." *Florida v. Nixon*, 543 U.S. 175, 178 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

²³² *Miller*, 76 A.3d at 1257.

²³³ *Miller*, 18 A.3d at 1060. The defendant was convicted on all five counts for which he was tried. *Id.*

²³⁴ There certainly had been language from the Court that would have been cause for optimism. See, e.g., *State v. Sugar*, 417 A.2d 474, 483 (N.J. 1980) (noting that a defendant's lawyer must have "the absolute trust and confidence of his client, since an effective defense will follow only when a defendant has made full and frank

After all, how could the answer be anything other than in the affirmative to the question posed for consideration on appeal: “Did the denial of defense counsel’s adjournment request require a new trial because defendant, through no fault of his own, was assigned a new attorney who he did not meet until the scheduled trial date?”²³⁵

And yet, a “No,” was what came from the Appellate Division. Not to worry, was the Court’s message. In a blatant rationalization of what had transpired, the Court strained credibility: “The attorney that the defendant first meets the morning of a hearing or trial *may perform more effectively* in his defense than the attorney who has developed a good relationship with the defendant but is inadequately prepared, lacks experience to devise good strategy, or simply makes poor decisions.”²³⁶ Is the benchmark – the standard to be used to judge an indigent’s counsel – the inadequately prepared and inexperienced lawyer who makes poor decisions? Is it too much to hope that *Gideon* would be understood as demanding that counsel be prepared *and also* that counsel does not meet client for the first time on the day of trial?

The New Jersey Supreme Court concluded that the judge’s failure to grant the requested continuance “offended neither constitutional norms nor principles of fundamental fairness.”²³⁷

Whereas state courts are free to provide more protections to a defendant than is provided under *Strickland*,²³⁸ New Jersey has adopted the *Strickland* standard as the benchmark to measure whether the right to counsel has been violated under the New Jersey

disclosure of his knowledge of events surrounding the alleged crime”). Miller hardly had any opportunity to disclose anything to his counsel. *Miller*, 76 A.3d at 1256.

²³⁵ *Appeals Added in the New Jersey Supreme Court*, NEW JERSEY COURTS, http://www.judiciary.state.nj.us/calendars/sc_appeal.htm (last updated Sept. 12, 2014).

²³⁶ *Miller*, 18 A.3d at 1065.

²³⁷ *Miller*, 76 A.3d at 1254.

²³⁸ *See, e.g.*, *State v. Novembrino*, 519 A.2d 820, 849 (N.J. 1987) (noting that the rights afforded under the state constitution have often been interpreted to provide broader protections than those provided for under the federal constitution). *See also* *State v. Sanchez*, 609 A.2d 400, 407 (N.J. 1992) (recognizing that the right of an indigent to have appointed counsel existed in New Jersey before any other state in the country (citing *State v. Horton*, 170 A.2d 1 (N.J. 1961))).

Constitution.²³⁹ Yet even a *Strickland* analysis might well find the situation presented in *Miller* to be unacceptable. The U.S. Supreme Court had noted that, “[i]n every case the [appellate] court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.”²⁴⁰ One might well conclude that when a defense lawyer has not had time to discuss the case with their client, then the adversarial process has broken down.

The New Jersey Supreme Court did acknowledge that Miller wished to have the Public Defender who had earlier worked on his case continue the representation, yet the Court was clear in its distinction of rights afforded the indigents who get appointed counsel from those with funds to privately retain counsel.²⁴¹ The Sixth Amendment is being applied differently depending on the wealth of the defendant, surely such a two-tiered system of justice cannot be what is meant by “Equal Justice Under Law.”²⁴²

The Supreme Court, in *Powell v. Alabama*,²⁴³ recognized that for those with the requisite funds, the Sixth Amendment provides “a fair opportunity to secure counsel of [one’s] own choice.”²⁴⁴ But seventy four years later, the Court determined that the Sixth Amendment right to a counsel of one’s choosing, “does not extend to defendants who require counsel to be *appointed* for them.”²⁴⁵ It is

²³⁹ *State v. Fritz*, 519 A.2d 336, 345 (N.J. 1987). As to the requirement that prejudice must be shown, the Supreme Court of New Jersey has determined that prejudice is to be presumed in instances where the defendant has been coerced into effectively proceeding without counsel. *See State v. Hayes*, 16 A.3d 1028, 1039 (2011). *See also State v. Bellucci*, 410 A.2d 666, 672 (1980) (stating that prejudice should be presumed in instances where a requirement of prejudice would put an impossible burden on the defendant forcing the appellate court to partake in unbridled speculation (citing *Holloway v. Arkansas*, 435 U.S. 475, 491 (1978))).

²⁴⁰ *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

²⁴¹ *Miller*, 18 A.3d at 1066.

²⁴² The phrase “Equal Justice Under Law” is engraved on the front of the U.S. Supreme Court building in Washington.

²⁴³ 287 U.S. 45 (1932).

²⁴⁴ *Id.* at 53 (emphasis added).

²⁴⁵ *United States v. Gonzales-Lopez*, 548 U.S. 140, 151 (2006) (emphasis added). It is hard to reconcile such a determination by the Court with Justice Brennan’s

most difficult to maintain that our system of defense representation does not violate the call issued by Justice Hugo Black announcing the judgment of the Court in *Griffin v. Illinois*:²⁴⁶ “There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”²⁴⁷

In Terrence Miller’s case, the New Jersey Supreme Court totally dismissed the defendant’s concerns about the substitution of his counsel by the Office of the Public Defender just days before trial.²⁴⁸ The new counsel had been working on a per diem basis for the Office handling strictly juvenile cases, and had not tried a criminal case in the previous seven years.²⁴⁹ The Office itself had failed to request an adjournment for the case upon the change of counsel even though the substitute counsel acknowledged that he “was being put in a position that [he] shouldn’t be in.”²⁵⁰

The trial court’s determination that moving the calendar forward was the highest priority was not faulted by the state Supreme Court; after all, as the trial judge put it, the matter was a simple drug prosecution involving “nothing difficult or complex.”²⁵¹ On the other hand, Miller may well have found the ten-year sentence he was facing to be difficult indeed. The defendant really did seem to be considered a faceless, fungible individual taking his turn on the assembly line. And his turn didn’t even require establishing any relationship with his counsel.²⁵²

opinion that, “[n]othing about indigent defendants makes their relationships with their attorneys less important, or less deserving of protection, than those of wealthy defendants.” *Morris v. Slappy*, 461 U.S. 1, 22 (1983) (Brennan, J., concurring). If an indigent is stuck with an attorney who is not providing competent representation there will be no recourse.

²⁴⁶ 351 U.S. 12 (1956).

²⁴⁷ *Id.* at 19.

²⁴⁸ *State v. Miller*, 76 A.3d 1250, 1268 (N.J. 2013).

²⁴⁹ *Id.* at 1269 (Albin, J., dissenting).

²⁵⁰ *Id.*

²⁵¹ *Id.* at 1256. In fact, the New Jersey Supreme Court specifically noted that the complexity of a case was a factor to be used when assessing a trial court’s refusal to grant a defendant’s request for an adjournment. *State v. Hayes*, 16 A.3d 1028, 1037–38 (2011) (citing *United States v. Burton*, F. 2d 485, 490–91 (D.C. Cir. 1978)).

²⁵² *Miller*, 76 A.3d at 1268 (acknowledging that the hurried meeting that counsel had with his client in the stairwell shortly before the commencement of the suppression motion was “conducted in a less than optimal location . . .”).

One could certainly think that the Court had overlooked and ignored its earlier declaration in *Doe v. Poritz*²⁵³ that fundamental fairness “serves to protect citizens generally against unjust and arbitrary governmental action, and specifically against governmental procedures that tend to operate arbitrarily.”²⁵⁴ [It] serves, depending on the context, as an augmentation of existing constitutional protection or as an independent source of protection against state action.”²⁵⁵

However shocking to the conscience the *Miller* holding was, the New Jersey Supreme Court was accurate in its determination that there is “no federal constitutional right to a ‘meaningful relationship’ between a criminal defendant and his or her attorney.”²⁵⁶ In *Morris v. Slappy*, the defendant had sought an adjournment of his trial until his counsel recuperated from emergency surgery.²⁵⁷ The Sixth Circuit reversed the conviction that resulted after the trial court judge denied the requested continuance, but then the Supreme Court reversed again with a stunning declaration: “We reject the claim that the Sixth Amendment guarantees a ‘meaningful relationship’ between an accused and his counsel.”²⁵⁸

In some ways, one can’t help but wonder if we have gone backwards from the recognition in *Powell v. Alabama* in 1932, when the Supreme Court recognized that “a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense.”²⁵⁹ It is only through time that a relationship of trust and confidence can be established by

²⁵³ 662 A.2d 367 (N.J. 1995).

²⁵⁴ *Id.* at 421 (quoting *State v. Ramseur*, 106 N.J. 123, 377 (1987) (Handler, J., dissenting)).

²⁵⁵ *Id.* The New Jersey Supreme Court had actually used even stronger language when it declared that, “[b]ecause our concern for judicial integrity extends to even its mere appearance, we have employed the notion of fundamental fairness to strike down official action that does not itself violate due process of law.” *State v. Sugar*, 417 A.2d 474, 481 (N.J. 1980).

²⁵⁶ *Miller*, 76 A.3d. at 1264.

²⁵⁷ *Morris v. Slappy*, 461 U.S. 1, 5–7 (1983).

²⁵⁸ *Id.* at 13–14.

²⁵⁹ *Powell*, 287 U.S. at 59.

counsel with their client; fundamental fairness and due process require nothing less.

VI. RACE, INEFFECTIVE ASSISTANCE, AND THE DEATH PENALTY

A. Overview

Nowhere is the racial imbalance in our justice system more closely connected with inadequate representation of counsel than with this country's use of the death penalty. It is indisputable that the impact of the penalty has been far greater for African-American than for Whites. When the Supreme Court halted executions in this country with its decision in *Furman v. Georgia*, a primary focus was the violation of equal protection which had resulted from the imposition of the death penalty. In Justice Marshall's concurring opinion, he noted the statistic that in the years from 1930-1972, 1,751 Whites had been executed compared to 2,066 African Americans.²⁶⁰ Marshall concluded that "[i]t is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution of Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination."²⁶¹

But after *Furman's* finding that the Georgia death penalty statute had been imposed in an arbitrary manner in violation of the Eighth Amendment, states rushed to enact new statutes. Just four years after *Furman*, the Court found that a newly revised statute dealt with the concerns that had been expressed and would, therefore, be constitutional. The Georgia statute approved in *Gregg v. Georgia* listed ten aggravating factors which were to be used and weighed by

²⁶⁰ *Furman v. Georgia*, 408 U.S. 238, 364 (1972) (Marshall, J., concurring).

²⁶¹ *Id.* at 364. Justice Stewart determined, after a discussion of the arbitrariness of the imposition of the death penalty, that "if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race." *Id.* at 310. Justice Douglas found death penalty statutes to be "pregnant with discrimination" and therefore in violation of the equal protection guarantee that is implicit in the Eighth Amendment ban on cruel and unusual punishment. *Id.* at 257.

jurors to enable more reasoned determinations as to who would receive the sentence of death.²⁶²

Ten states had enacted statutes making the death penalty mandatory for certain offenses in order to eliminate any arbitrariness, but the Supreme Court in *Woodson v. North Carolina* found such statutes to be unconstitutional.²⁶³ Two years later, the Court in *Lockett v. Ohio* required that death penalty statutes allow for the consideration of mitigating factors that related either to the defendant or to the crime which was committed.²⁶⁴ The Court emphasized the historical import of the concept of individualized sentencing²⁶⁵ which, by its very nature, was violated by a mandatory sentence of death such as that which existed in Ohio for the crime of aggravated murder.

In its continued specification as to what was required for a death sentence to be constitutional after *Furman*, the Court found that a death sentence for an individual who did not possess the intention to kill was in violation of the Eighth Amendment protection against cruel and unusual punishment;²⁶⁶ the execution of someone who was insane and not cognizant of the reasons why he would be executed, was prohibited;²⁶⁷ the death sentence for a person who was mentally retarded would be cruel and unusual punishment;²⁶⁸ counsel was

²⁶² 428 U.S. 153, 164–65 (1976). The Georgia statute required that the jurors find the presence of at least one of the ten aggravating factors enumerated in the statute before death could be imposed. Aggravating circumstances included a prior capital felony conviction, a contract murder-for-hire, committing the murder concurrently with another specified felony, or the commission of the murder in an “outrageously or wantonly vile, horrible, or inhuman” manner. *Id.* at 201.

²⁶³ 428 U.S. 280, 313 (1976) (Rehnquist, J., dissenting). The North Carolina statute had made the death penalty mandatory for the crime of first degree murder; the Court held that the mandate was in violation of the requirement of the Eighth and Fourteenth Amendments that punishments adhere to “evolving standards of decency” and be “exercised within the limits of civilized standards.” *Id.* at 301.

²⁶⁴ 438 U.S. 586, 604 (1978).

²⁶⁵ *Id.* at 602–03. The Court was clear that the emphasis on individualized sentences does not arise from any constitutional requirement, but rather on public policy, which has been enacted, into statutes. *Id.* at 604–05.

²⁶⁶ *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

²⁶⁷ *Ford v. Wainwright*, 477 U.S. 399, 417–18 (1986).

²⁶⁸ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). *Atkins* reversed the prior holding in *Penry v. Lynaugh*, which found that it was not in violation of the Constitution to

required by the Sixth Amendment to conduct an investigation of possible mitigating factors;²⁶⁹ the Constitution prohibited anyone who was less than 18 years old at the time of the murder, to be sentenced to death;²⁷⁰ the three-drug protocol used in lethal injections was not cruel and unusual punishment²⁷¹; and, it constituted cruel and unusual punishment to impose a death sentence for the crime of rape of an adult,²⁷² or of a child.²⁷³

B. Failure of the Supreme Court to Respond to Racial Disparities

But it was *McCleskey v. Kemp* that brought the issue of race directly to the Court's front door.²⁷⁴ A jury of eleven Whites and one African-American sentenced Warren McCleskey to death for the murder of a White man.²⁷⁵ In one of the most bitterly received Supreme Court holdings,²⁷⁶ the Court concluded that even though the

execute a retarded person. 492 U.S. 302, 340 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

²⁶⁹ *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

²⁷⁰ *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005); *Roper* reversed the prior holding in *Sanford v. Kentucky* permitting the execution of 16 and 17 year olds. 492 U.S. 361, 380 (1989), *abrogated by* *Roper v. Simmons*, 543 U.S. 551 (2005).

²⁷¹ *Baze v. Rees*, 553 U.S. 35, 63 (2008).

²⁷² *Coker v. Georgia*, 433 U.S. 584, 600 (1977).

²⁷³ Louisiana had maintained that although the *Coker* Court had concluded that it constituted an excessive punishment to sentence someone to death for the rape of an adult, the harm caused by the rape of a child was far greater and warranted a sentence of death. *Kennedy v. Louisiana*, 554 U.S. 407, 418–19, 446 (2008).

²⁷⁴ 481 U.S. 279, 282–83 (1987).

²⁷⁵ *McCleskey*, 580 F. Supp. at 346 & 377 n. 15 (N.D. Ga. 1984).

²⁷⁶ See Cassandra Stubbs, *The Dred Scott of Our Time*, ACLU (Apr. 16, 2012, 11:09 AM), <https://www.aclu.org/blog/capital-punishment/dred-scott-our-time> (“*McCleskey* has been roundly condemned as a low point in the quest for equality.”). See also Eva Patterson & Christina Swarms, *25 Years Later, McCleskey Decision still Fosters Racism by Ignoring It*, AM. CONST. SOC’Y (Apr. 19, 2102), <http://www.acslaw.org/acsblog/25-years-later-mccleskey-decision-still-fosters-racism-by-ignoring-it>. Scott E. Sundby, *The Loss of Constitutional Faith, McCleskey v. Kemp and the Dark Side of Procedure*, 10 OHIO ST. J. CRIM. L. 5, 5 (2012) (noting *McCleskey* is firmly entrenched in the book of Notorious Cases in which the Supreme Court failed to acknowledge the Constitution’s most basic values). *Case: Landmark: McCleskey v. Kemp*, NAACP LEGAL DEF. AND EDUC. FUND (Apr. 27, 1987), <http://www.naacpldf.org/case/mccleskey-v-kemp> (stating that *McCleskey* acts as a barrier to the elimination of racial inequalities in the criminal justice system).

statistical evidence before the Court was not disputed in its illustration of the glaring racial disparities resulting from the imposition of the death penalty,²⁷⁷ neither the Eighth nor the Fourteenth Amendments were violated by the Georgia death penalty statute.²⁷⁸

McCleskey presented the Court with an unchallenged, sophisticated multiple-regression statistical analysis of over 2,000 murder cases that had occurred in Georgia during the 1970s.²⁷⁹ The cases were divided as to the race of the defendant as well as the victim; yet, an African-American defendant who killed a White victim was more than 7 times more likely to have received the death penalty than when a White defendant had killed an African-American victim.²⁸⁰ Furthermore, African-Americans who kill Whites are sentenced to death nearly 22 times more often than when an African-American kills another African-American.²⁸¹

Georgia certainly was no stranger to racial distinctions in its criminal laws. Prior to the Civil War, the sentence for an African-American who raped a White woman would be a mandatory penalty of death, yet a White man committing the same crime would face a prison term between 2 and 20 years.²⁸² And if an African-American woman were to be raped, the sentencing court would have discretion in setting a fine and term of imprisonment.²⁸³

²⁷⁷ The Eleventh Circuit Court of Appeals had conceded that the statistical study engaged in on McCleskey's behalf demonstrated that "there is a race-of-the-victim relationship with the imposition of the death sentence discernible in enough cases to be statistically significant in the system as a whole." *McCleskey v. Kemp*, 753 F.2d 877, 897 (11th Cir. 1985). The Court further concluded that the statistics did show that systematic and substantial disparities existed in the penalties imposed upon homicide defendants in Georgia based on the race of the homicide victim. *Id.* at 895–96.

²⁷⁸ *McCleskey*, 481 U.S. at 291–92, 308.

²⁷⁹ *Id.* at 286.

²⁸⁰ *Id.* (finding that in 22% of the cases involving an African-American defendant and a White victim, the defendant received the death penalty, yet in only 3% of the cases where the defendant was White and the victim was African-American, was such a sentence imposed).

²⁸¹ *Id.* at 327 (1987) (Brennan, J., dissenting).

²⁸² *See id.* at 329–330 (Brennan, J., dissenting) (citing Ga. Penal Code (1861)).

²⁸³ *Id.* at 330.

The decision of the *McCleskey* court was 5-4.²⁸⁴ The Court emphasized that for a claim of an equal protection violation to prevail, it must be shown that there was purposeful discrimination; mere disparate impact would not be sufficient.²⁸⁵ *McCleskey* had claimed that he was denied his rights under the Equal Protection Clause because the race-of-victim discrimination increased the likelihood of his getting a sentence of death.²⁸⁶ But the Court required that *McCleskey* show that racial considerations in his specific case determined the sentence.²⁸⁷

The Court did not elaborate on just how that could be shown; surely no prosecutor will state that he sought the death penalty because he regarded – consciously or otherwise – the killing of a White by an African-American to be the type of a murder which requires the defendant be put to death.²⁸⁸ Can one possibly think that jurors would, in a post-conviction proceeding, tell a court that they only voted it impose the death sentence because *McCleskey* was an African-American man who shot a White?

The *McCleskey* Court missed a huge opportunity to issue a landmark decision requiring states to enact reforms to remedy the disproportionate impact that our criminal justice system has on African-Americans. And the Court knew it.²⁸⁹ In what Justice Brennan

²⁸⁴ *Id.* at 330.

²⁸⁵ *Id.* at 292–93 (Brennan, J., dissenting) (holding that it is immaterial whether or not the impermissible influence of race is intentional). The Eighth Amendment requires that punishment “comports with social standards of rationality and decency.” *Id.* at 345, n. 1.

²⁸⁶ *McCleskey*, 580 F. Supp. at 347 (1984).

²⁸⁷ *Id.*

²⁸⁸ Justice Powell, writing for the Court, emphasized how important it in fact was for there to be discretion in any system providing for capital punishment and that prosecutorial decision-making by necessity involved both factual and judgmental decisions, which vary from case to case. *McCleskey*, 481 U.S. at 313 n. 37.

²⁸⁹ The Court stated that the 4 dissenting Justices’ reliance on the statistical showing in this case “questions the very heart of our criminal justice system: the traditional discretion that prosecutors and juries must have.” *Id.* at 313, n. 37. The statistical evidence indicated that at every stage in the process, from the indictment of the defendant through sentencing, that the White-victim cases had a higher likelihood of remaining in the system and resulting in a sentence of death. *See id.* at 356 n.11 (Blackmun, J., dissenting).

characterized in his dissent as a “fear of too much justice,”²⁹⁰ the opinion of the Court fully acknowledged the potential impact of the statistical data compiled in this matter:

McCleskey’s claim, taken to its logical conclusion throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties.... Thus if we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender.²⁹¹

The Court was not hesitant to express its fear when it noted that, “studies already exist that allegedly demonstrate a racial disparity in the length of prison sentences.”²⁹²

The Court chose not to descend down the slippery slope toward too much justice. And our justice system, especially with regard to the death penalty, has paid the price. Warren McCleskey did as well – he was executed on September 26, 1991.²⁹³ As of January 2014, the proportion of African-Americans on Death Row was more than 3 times the overall percentage of the U.S. population that is African-American.²⁹⁴ In the years from 1976, when *Furman*²⁹⁵ reinstated the

²⁹⁰ *McCleskey*, 481 U.S. at 339 (Brennan, J., dissenting).

²⁹¹ *Id.* at 314–317 (majority opinion). The Court added that McCleskey’s claims are better dealt with by state legislatures. *Id.* at 319.

²⁹² *Id.* at 315, n. 38.

²⁹³ Peter Applebome, *Georgia Inmate is Executed After Chaotic Legal Move*, N.Y. TIMES, Sept. 26, 1991, available at <http://www.nytimes.com/1991/09/26/us/georgia-inmate-is-executed-after-chaotic-legal-move.html>.

²⁹⁴ Death Penalty Information Center, *National Statistics on the Death Penalty and Race*, DIPIC, <http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976> (last visited Sept. 12, 2014). About 41% of those on death row are African-American. *Id.* According to the U.S. Census Bureau, as of 2013, 13.2% of the

death penalty, until 2014, 266 African-Americans have been executed for the murder of a White person whereas only 20 Whites have been put to death for the killing of an African-American.²⁹⁶

C. Inadequate Funding for Counsel in Capital Cases

Meanwhile, the funding for the competent lawyering that is especially required in capital cases has been inadequate. The American Bar Association Death Penalty Due Process Review Project issued a Report in 2013 on the State of the Modern Death Penalty in America.²⁹⁷ This Report found death penalty processes across the various states to be:

[U]ndermined most significantly by ineffective assistance of counsel. In the majority of states assessed, unqualified and under-compensated lawyers without resources needed to adequately and effectively defend a capital case, are often appointed to represent people facing the death penalty...a number of irreparable consequences flow from states' assignment of ill-equipped, poorly trained, and poorly compensated counsel to death penalty cases.²⁹⁸

population was African-American. The U.S. Census Bureau, *USA Quickfacts*, US CENSUS BUREAU (July 8, 2014, 6:37 PM), <http://quickfacts.census.gov/qfd/states/00000.html>.

²⁹⁵ 408 U.S. 238 (1972).

²⁹⁶ Death Penalty Information Center, *supra* note 294, at 1.

²⁹⁷ American Bar Association Death Penalty Due Process Review Project, *The State of the Modern Death Penalty in America: Key Findings of State Death Penalty Assessments 2006-2013*, ABA, available at

http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/aba_state_of_modern_death_penalty_web_file.authcheckdam.pdf (last visited Sept. 18, 2014). The Due Process Review Project was instituted in 2001 to implement a process of assessing the fairness of the death penalty proceedings at the state level. *Id.* Each assessment report devotes a chapter to the following areas: (1) an overview of the particular state's death penalty procedures; (2) the investigations and interrogations conducted by law enforcement; (3) collecting and preserving of evidence; (4) crime laboratories and medical examiner offices; (5) prosecution; (6) defense services; (7) appeal process; (8) state habeas corpus proceedings; (9) clemency; (10) jury instructions; (11) judicial independence and vigilance; (12) treatment of minorities; and, (13) mental retardation. *Id.* at 4.

²⁹⁸ *Id.* at 5.

The concerns of the ABA regarding fairness and effective counsel for racial minorities in death penalty cases have been longstanding. In 1979, the ABA adopted a policy calling for increased competency for counsel in capital matters;²⁹⁹ in 1983, the ABA passed a resolution calling for the end of the death penalty for juveniles;³⁰⁰ In 1988, a year after *McCleskey*,³⁰¹ the ABA called for the elimination of racial discrimination in capital sentencing;³⁰² the ABA in 1989 supported prohibition of the execution of the mentally retarded,³⁰³ 13 years before the Supreme Court did so in *Atkins v. Virginia*,³⁰⁴ and, the Association confronted the problem directly by the issuance in 2003 of the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*.³⁰⁵

Perhaps the strongest statement of the ABA regarding the intersection of race and ineffective assistance of counsel in death penalty cases is the policy adopted by the House of Delegates calling for a moratorium on executions.³⁰⁶ The Report accompanying the adopted Resolution explained that “fundamental due process is now systematically lacking in capital cases” and that the administration of the death penalty is “seriously flawed.”³⁰⁷ Appointed counsel in capital

²⁹⁹ *Id.* at 1.

³⁰⁰ *Id.*

³⁰¹ 481 U.S. 279 (1987).

³⁰² American Bar Association Death Penalty Due Process Review Project, *supra* note 297.

³⁰³ *Id.*

³⁰⁴ 536 U.S. 304 (2002).

³⁰⁵ American Bar Association, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L.REV. 913 (2003). The black-letter text of the guidelines has been approved by the ABA as official policy; the accompanying commentary is designed to serve as useful explanations of the guidelines while not representing the formal position of the ABA. *Id.* at 916.

³⁰⁶ AMERICAN BAR ASSOCIATION SECTION OF INDIVIDUAL RIGHT AND RESPONSIBILITIES SECTION OF LITIGATION, REPORT TO THE HOUSE OF DELEGATES, RECOMMENDATION (Feb. 1997), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/20110325_aba_107.authcheckdam.pdf. *See also*, *ABA Calls For Moratorium on Executions Until Death Penalty Fairness Assured*, PBS ONLINE, <http://www.pbs.org/wgbh/pages/frontline/angel/procon/aba.html> (last visited Sept. 12, 2014).

³⁰⁷ *Id.*

cases were found to be “grossly unqualified and undercompensated lawyers who have nothing like the support necessary to mount an adequate defense.”³⁰⁸

It is this commentator’s contention that we never would have tolerated the continuing violation of the constitutional rights of those on trial for their life, were those on trial not poor and African-American. On some level, it simply matters not, as the Report concludes, that “the results of poor lawyering are often literally fatal for capital defendants.”³⁰⁹

Opposition to the implementation of the death penalty due to concerns about the quality of lawyering and the disproportionate impact on minorities came not only from the organized bar, but from on high – all the way to the Supreme Court. Justice Blackmun had been in the majority when the Court declared in *Gregg* that the death penalty statute was constitutional,³¹⁰ but eighteen years later, when dissenting from the Court’s refusal to grant review in a Texas death penalty case, he wrote:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored – indeed, I have struggled – along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor....Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.³¹¹

For twenty years Justice Blackmun sat on the Court reviewing cases where individuals had been sentenced to die. It is hard to dispute that

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ 428 U.S. 153 (1976).

³¹¹ *Callins v. Collins*, 114 S. Ct. 1141, 1130 (1994).

when he speaks on this matter, he knows what he is talking about.³¹² He addressed the issue of race head on in *Callins v. Collins*:

The arbitrariness inherent in the sentencer's discretion to afford mercy is exacerbated by the problem of race. Even under the most sophisticated death penalty statute, race continues to play a major role in determining who shall live and who shall die. Perhaps it should not be surprising that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death, even within the narrower pool of death-eligible defendants selected according to objective standards.³¹³

And Justice Blackmun was not alone. Justice Sandra Day O'Connor stated, after she had retired from 20 years of service on the Court, "I have to acknowledge that serious questions are being raised about whether the death penalty is being fairly administered in this country. Perhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used."³¹⁴

And Justice Ruth Bader Ginsburg highlighted to the Associated Press the horrid fate that awaits the poorly represented: "People who are well represented at trial do not get the death penalty.... I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-executions stay applications in which the defendant was well represented at trial."³¹⁵

³¹² Justice Blackmun had been on the United States Court of Appeal before he ever joined the Supreme Court and, as an appeals judge, he voted on numerous occasions to enforce the death penalty. *Id.* at 1130, n. 1.

³¹³ *Id.* at 1135.

³¹⁴ John Floyd & Billy Sinclair, *Ineffective Assistance of Counsel in Capital Cases*, JOHN T. FLOYD LAW FIRM BLOG (Dec. 5, 2008), available at <http://www.johntfloyd.com/blog/ineffective-assistance-of-counsel-in-capital-cases>.

³¹⁵ *Id.* For a thorough exploration, see also Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (exploring the impact of poverty on the imposition of the death penalty due to the quality of representation provided by court-appointed counsel). Stephen Bright is currently the President and Senior Counsel for the Southern Center

And Justice Powell, who wrote the decision of the court in *McCleskey*, responded to a biographer's question of him after he retired, that he would choose to change his vote in the 5-4 decision in that case.³¹⁶

D. Incompetent Counsel in Texas

The level of incompetence that can occur can be mind-boggling indeed. George McFarland was an African-American man on trial for his life in Houston, Texas. The Court reporter for the Houston Chronicle described the scene as such:

Seated beside his client...defense attorney John Benn spent much of Thursday afternoon's trial in apparent deep sleep.

His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again.

Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the...arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan. When state District Judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial.

"It's boring," the 72-year old long time Houston lawyer explained....Court observers said Benn seems to have slept his way through virtually the entire trial.³¹⁷

for Human Rights; he has tirelessly dedicated his career to the struggle in the South to obtain effective, competent counsel for indigents in capital cases. *Id.*

³¹⁶ New York Times Op-Ed, *Justice Powell's New Wisdom*, NY TIMES (June 11, 1994), available at <http://www.nytimes.com/1994/06/11/opinion/justice-powell-s-new-wisdom.html>. See also JOHN JEFFRIES, *JUSTICE LEWIS F. POWELL: A BIOGRAPHY* (2001).

³¹⁷ James Kimberly, *New Testimony in Sleeping-Lawyer Case*, HOUSTON CHRONICLE, Aug. 15, 2003.

McFarland was convicted and sentenced to death in spite of juror consternation at the sleeping defense lawyer.³¹⁸

One juror submitted the following affidavit after the trial: “Benn slept during great portions of the witness testimony. It was so blatant and disgusting that it was the subject of conversation within the jury panel a couple of times.”³¹⁹

The trial judge was reported to have stated to a Houston Chronicle reporter during the course of the trial: “The Constitution says that everyone’s entitled to an attorney of their choice. But the Constitution does not say that the lawyer has to be awake.”³²⁰

There was not that much trial to be awake for; the trial began on August 10, the guilty verdict was rendered on August 12, and McFarland was sentenced to death on August 14.³²¹

One might expect, or at least hope, that there would be some remedy at the appellate level for the defendant who is sentenced to death and whose lawyer explains at the hearing on the motion for a new trial that, “I’m 72 years old. I customarily take a short nap in the afternoon.”³²² But none was forthcoming. The Court of Criminal Appeals of Texas, sitting *en banc*, while noting that, “we do not condone Benn’s behavior,”³²³ applied the two prongs of the *Strickland* test and upheld the conviction.³²⁴

³¹⁸ McFarland v. State, 928 S.W.2d 482, 482 (Tex. Ct. App. 1996) (en banc).

³¹⁹ Henry Weinstein, *A Sleeping Lawyer and a Ticket to Death Row*, LA TIMES (July 15, 2000), available at <http://articles.latimes.com/2000/jul/15/news/mn-53250>.

³²⁰ Bruce Shapiro, *Law and Order: How Awful Does a Lawyer Have to Be? Sleeping Lawyer Syndrome*, <http://userwww.sfsu.edu/kwalsh/shapiro.htm> (last visited Sept. 18, 2014).

³²¹ *Id.*

³²² *McFarland*, 928 S.W.2d at 505, n. 19.

³²³ *Id.* at 505.

³²⁴ *Id.* at 507. The Court relied on the fact that there was a second counsel representing the defendant even though that counsel clearly functioned in a secondary role and had engaged in minimal preparation and had met with the defendant only one time prior to trial. *Id.* at 527 (Baird, J., dissenting). The Court looked favorably upon co-counsel’s statement at the new trial hearing that he made the strategic decision not to awaken Benn because the jury might have sympathy for the defendant when they observed counsel sleeping. *Id.* 505, n.20. However, it was

The *McFarland* death sentence is not, in some ways, unique. Texas leads the country in executions during the period from 1976-2014, more than four times as many people were put to death than the runner-ups, Virginia and Oklahoma.³²⁵

E. A Short-lived Innovation: The Racial Justice Act of North Carolina

Even though more than 80% of the executions during that period have occurred in the South,³²⁶ one Southern state – North Carolina – had, for a while at least, gone its own way. In response, in part, to the statistics regarding the significance of race in the imposition of the death penalty as highlighted in *McCleskey*,³²⁷ social scientists from the University of North Carolina demonstrated that when the victim of a murder was White, the defendant was three and a half times more likely to receive a death sentence in North Carolina than when the victim was African-American.³²⁸ The Racial Justice Act became law in North Carolina in 2009:

An act to prohibit seeking or imposing the death penalty on the basis of race: to establish a process by

clear that Sanford Melamed, Benn's co-counsel in the case, was to play a distinctly secondary role. When the Court of Criminal Appeals of Texas considered McFarland's application it revealed the following: "The judge warned Mr. Melamed that he was to follow Mr. Benn's lead; he was not to make any decisions in the case without first seeking the approval of both Mr. Benn and applicant." *Id.* at 750. But McFarland "wanted nothing to do with Mr. Melamed and refused to sign the appointment of counsel form." *Id.* It is hard to comprehend the Appeals' Court conclusion that, nevertheless, Benn's sleeping did not show prejudice because of the presence of Melamed during the trial. *Id.* at 754–55.

³²⁵Death Penalty Information Center, *Number of Executions by State and Region Since 1976*, DIPC (Jan. 30, 2014), <http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976>. McFarland, as of March 2015, is still on death row and has not been executed. Texas Department of Criminal Justice, Offender Information Details, SID Number: 02901248, TDCJ Number: 00999046 *available at* <http://offender.tdcj.state.tx.us/OffenderSearch/offenderDetail.action?sid=02901248>.

³²⁶Death Penalty Information Center, *supra* note 325.

³²⁷*McCleskey*, 481 U.S. at 286–87.

³²⁸Kellie Slappey, *Racial Justice Act*, NORTH CAROLINA HIST. PROJECT, *available at* <http://www.northcarolinahistory.org/encyclopedia/490/entry> (last visited Oct. 24, 2014).

which relevant evidence may be used to establish that race was significant factor in seeking or imposing the death penalty within the county, the prosecutorial district, the judicial division or the state to identify types of evidence that may be considered by the court when considering whether race was a basis for seeking or imposing the death penalty including statistical evidence and to authorize the defendant to raise this claim at the pretrial conference or in post-conviction proceedings to provide that the defendant has the burden of proving that race was a significant factor in seeking or imposing the death penalty.³²⁹

If an inmate could demonstrate that his sentence was improperly influenced by racial factors, then the sentence of death would be commuted to Life Without Parole.³³⁰

And that is precisely what occurred for the first time in April 2012. A death sentence was modified after a judge determined that the defendant had “introduced a wealth of evidence showing the persistent, pervasive, and distorting role of race in jury selection throughout North Carolina.”³³¹ Later that same year, three other sentences were similarly commuted after the judge found that there was “powerful evidence of race consciousness and race-based decision-making.”³³²

But the Act was caught in a web of political infighting; a newly Republican-controlled legislature in 2011 passed a repeal of the Act

³²⁹ Racial Justice Act, ch. 15A, 2009 N.C. Sess. Laws 1213.

³³⁰ *Id.*

³³¹ Order Granting Motion for Appropriate Relief at 3, *State v. Robinson*, No. 91 CRS 23143 (N.C. Super. Ct. Apr. 20, 2012). *See also* Anne Blythe, *Retired Justices and Judges Offer Support for Racial Justice Act Cases*, NEWS & OBSERVER (Jan. 15, 2014), http://www.newsobserver.com/2014/01/15/3535952_retired-justices-and-judges-offer.html?rh=1.

³³² Campbell Robertson, *Judge in North Carolina Voids 3 Death Sentences*, N.Y. TIMES, Dec. 13, 2012, http://www.nytimes.com/2012/12/14/us/citing-race-north-carolina-judge-voids-death-sentences.html?_r=0.

which the Democratic Governor vetoed.³³³ In 2012, the legislature passed a modification of the Act which was again vetoed, but this time the veto was overridden.³³⁴ The newly-revised Act required that any statistical showing of racial bias was to be limited to the locality in which the crime occurred, and that the race of the victim was not to be taken into account.³³⁵ But the complete demise of the Act came in June 2013 when the newly elected Republican Governor repealed the legislation.³³⁶

VII. RECOURSE FOR HARMED DEFENDANTS

A. *General Immunity of Public Defenders*

At one point, it had been an open issue in this country as to whether or not individual public defenders would be liable under the Civil Rights Act for violating the constitutional rights of their clients, but the Supreme Court resolved the matter in *Polk County v. Dodson*.³³⁷ In that case, the Court determined that defenders do not act under color of state law, and that the obligations and responsibilities of defenders are the same that all private counsel owe to their clients.³³⁸ The fact that the salaries of defenders are paid by the state

³³³ *Id.* The comments of one Republican State Senator illustrate the intensity of the debate: “We have people who have been rightfully convicted of cold-blooded murder in the first degree . . . [the Racial Justice Act was] nothing but a back-door attempt to get rid of the death penalty.” Wade Rawlins, *North Carolina Lawmakers Override Race-Bias Death-Row Veto*, HUFFINGTON POST (July 2, 2012, 9:03 PM), http://www.huffingtonpost.com/2012/07/03/death-penalty-north-carolina_n_1644919.html?

³³⁴ Rawlins, *supra* note 333. Overriding the Governors’ veto required a vote of at least 60 percent of the members of the North Carolina House of Representatives. *Id.*

³³⁵ Robertson, *supra* note 332.

³³⁶ Matt Smith, ‘*Racial Justice Act*’ Repealed in North Carolina, CNN (June 21, 2013, 3:48 AM), <http://www.cnn.com/2013/06/20/justice/north-carolina-death-penalty>.

³³⁷ 454 U.S. 312 (1981).

³³⁸ *Id.* at 318. Three years after *Polk County*, the Court did carve out an exception to the immunity provided public defenders for those situations where it was alleged that the defender had been part of a conspiracy with other state officials to deprive the defendant of his constitutional rights. *Tower v. Glover*, 467 U.S. 914, 923 (1984).

does not constitute state action.³³⁹ Unfortunately, the concerns voiced below by the prescient dissenting judges in *Polk County* have, as we shall see, now materialized thirty years later:

The County's control over the size of and funding for the public defender's office, as well as over the number of potential clients, effectively dictates the size of an individual attorney's caseload and influences substantially the amount of time the attorney is able to devote to each case. The public defender's discretion in handling individual cases – and therefore [their] ability to provide effective assistance to [their] clients – is circumscribed to an extent not experienced by privately retained attorneys.³⁴⁰

B. The Extraordinary Situation in Washington State

In December 2013, a federal District Court determined that the public defense system in two Washington municipalities was so overloaded, short-staffed and inadequate that there were systematic violations of the Sixth Amendment.³⁴¹ United States District Judge Robert Lasnik concluded in *Wilbur v. City of Mount Vernon*, that the cities had made “deliberate choices regarding the funding, contracting, and monitoring of the public defense system that directly and predictably caused the deprivation” of the constitutional rights of indigent defendants.³⁴²

The Public Defenders had caseloads of over 1,000 per year,³⁴³ resulting in a “meet and plead” system where “adversarial testing of

³³⁹ The Court determined that “it is the Constitutional obligation of the State to respect the professional independence of the public defenders whom it engages.” *Polk County*, 454 U.S. at 321–22.

³⁴⁰ *Id.* at 332 (Blackmun, J., dissenting).

³⁴¹ *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1131 (W.D. Wash. 2013).

³⁴² *Id.* at 1124.

³⁴³ *Id.* This number was in sharp contrast to the June 2012 action of the Supreme Court of Washington which established 400 unweighted misdemeanor cases a year as the “maximum caseload for fully supported full-time defense attorneys for cases of average complexity and effort.” *Id.* at 1125.

the government's case was so infrequent that it was virtually a non-factor in the functioning of the Cities' criminal justice system."³⁴⁴

Mincing no words, the Court found that the "indigent defendants had virtually no relationship with their assigned counsel and could not fairly be said *to have been represented by them at all*."³⁴⁵

The *Wilbur* Court found that the cities themselves were liable under Section 1983 of the United States Code – Civil Action for Deprivation of Rights.³⁴⁶ That statute reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.³⁴⁷

The Constitutional obligation to provide effective assistance is, of course, unchallenged,³⁴⁸ and the *Wilbur* Court determined that the "perfunctory representation" which the cities provided was in violation of the Sixth Amendment.³⁴⁹ The Court concluded that the Constitutional deprivations were the "predictable result of deliberate choices" engaged in by city officials. The Court was not confident that

³⁴⁴ *Id.* at 1124.

³⁴⁵ *Id.* (emphasis added).

³⁴⁶ *Id.* at 1133.

³⁴⁷ 42 U.S.C. § 1983 (2012).

³⁴⁸ See *Gideon*, 372 U.S. at 345; and, *Argersinger*, 407 U.S. at 40.

³⁴⁹ *Wilbur*, 989 F. Supp. 2d at 1132.

the two cities would make the required changes, and therefore determined that it must exercise its equitable powers.³⁵⁰

But what was to be the remedy? In a truly extraordinary move, the U.S. Department of Justice filed a Statement of Interest³⁵¹ with the *Wilbur* Court, while, at the same time, indicating that they were taking no position on the merits of the lawsuit.³⁵² The Statement of Interest maintained that if the Court found that the plaintiffs prevailed and remedies were to be warranted, then controls should be placed on the “workload”³⁵³ of the defenders, and, that such a remedy is “well-suited to implementation by an independent monitor.”³⁵⁴ The Justice Department explained:

In the experience of the United States, appointing a monitor can provide substantial assistance to courts and parties and can reduce unnecessary delays and litigation over disputes regarding compliance. This is especially true when institutional reform can be expected to take a number of years. A monitor provides the independence and expertise necessary to conduct the objective, credible analysis upon which a court can rely to determine whether its order is being implemented, and that gives the parties and the community confidence in the reform process. A monitor will also save the Court’s time.³⁵⁵

³⁵⁰ *Id.* at 1133–34.

³⁵¹ Statement of Interest of the United States at 4, *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013) (No. 322).

³⁵² *Id.* at 1.

³⁵³ *Id.* at 2. The Statement used “workload” as inclusive not only of a numeric caseload, but also taking into account the complexity of the cases, the experience level of the defender and the overall resources available. *Id.*

³⁵⁴ *Id.* at 9. The Justice Department informed the Court that the Court did have authority to order injunctive relief as a remedy to any identified constitutional violations. *Id.* at 6.

³⁵⁵ *Id.* at 7.

VIII. DEFENSE COUNSEL AS PART OF THE PROBLEM

A. *Implicit Bias*

But the concerns about the impact that race may have on the prosecutors, judges and juries in our criminal justice system extend to choices made by defense counsel as well. If we accept the fact that most Americans on some level have perceptions that African-Americans are more prone to commit crime than Whites, and that African-Americans represent more of a threat to public safety, then there is no reason to expect that defenders themselves don't share these beliefs. If not on a conscious level, then, perhaps implicitly.

There has been increased focus in recent years on the concept of implicit bias – subtle, negative stereotypes that Whites, (and even African-Americans) have regarding African-Americans.³⁵⁶ By its very definition, one is not aware of possessing such attitudes, but it is difficult to claim that frequent media portrayals of African-Americans – especially young African-American men – as criminal, violent, drug users and sellers, do not impact us all. Societal norms increasingly condemn the *open* expression of racism, and certainly most lawyers strive to avoid being perceived as racist.

The Implicit Association Test (IAT) was developed in 1998 to explore “the unconscious roots of thinking and feeling.”³⁵⁷ The test is available in 25 languages and has been completed by over 14 million people.³⁵⁸ A thorough analysis of the research undertaken to validate

³⁵⁶ Professor Charles Lawrence does not choose to be subtle in identifying this phenomenon. See, Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, The Ego, and Equal Protection,”* 40 CONN. L. REV. 931, 936 (2008).

³⁵⁷ *Origins and Measurement With the IAT*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/demo/background/posttestinfo.html> (last visited Sept. 21, 2014). Project Implicit was formed by the designers of the IAT in order “to educate the public about implicit, social cognition.” *About Us*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/aboutus.html> (last visited Sept. 21, 2014). In addition to race, the tests can reveal attitudes regarding individuals’ gender, weight, age, sexuality or religion. *The IAT*, BLINDSPOT, <http://spottheblindspot.com/the-iat/> (last visited Sept. 21, 2014).

³⁵⁸ See PROJECT IMPLICIT, *supra* note 357.

the IAT is beyond the scope of this Article, but the test is typically taken on a computer whereby individuals engage in quick associations of positive or negative attributes with photos that are displayed of African-Americans and Whites.³⁵⁹

The IAT has consistently revealed that White Americans have strongly linked the pairing of admirable traits with Whites, and the association of negative characteristics with African-Americans.³⁶⁰ Surprisingly, it has also been found by some researchers that African-Americans as well have a “[W]hite preference,” although there are wide variations amongst African-American test takers.³⁶¹ The test designers explain this implicit, or “automatic,” accordingly:

Automatic White preference may be common among Americans because of the deep learning of negative associations to the group Black in this society. High levels of negative references to Black Americans in American culture and mass media may contribute to this learning. Such negative references may themselves be more the residue of the long history of racial discrimination in the United States than the result of deliberate efforts to discriminate in media treatments.³⁶²

B. Implicit Bias in the Criminal Justice System

It surely has been the contention of many observers of our criminal justice system that there may be implicit if not explicit racism at play when police use their discretion in determining who to arrest;

³⁵⁹ The designers of the test explain that photos are used instead of names in order to avoid any ambiguity. *Frequently Asked Questions*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/demo/background/faqs.html#faq17> (last visited Sept. 21, 2014).

³⁶⁰ See, e.g., Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RES., AND PRAC. 101, 105 (2002), available at http://advance.rackham.umich.edu/stride/Nosek_HarvestingImplicit.pdf.

³⁶¹ *Id.* at 105, n.7. Some recent research has concluded that approximately half of African-Americans show an automatic White preference, and that half demonstrate an African-American preference. PROJECT IMPLICIT, *supra* note 357.

³⁶² *Id.*

when prosecutors' choose who to prosecute as well as what level crime to charge, and, when judges decide what sentence is appropriate. But it may well be an unfortunate reality that implicit bias affects defense counsel's choices as well. The overburdened defense attorney must, of necessity, decide which cases will be prioritized to receive one's time and effort, and which cases should be quickly dealt with by a guilty plea. As with police, prosecutors, and judges, defense counsel's discretion is also likely influenced by stereotypes of young African-American men.

To be sure, the individual who chooses to become a public defender often does so with the personal conviction that the criminal justice system can be unfair and they want to put their energies into ameliorating the harm done, and, perhaps, even into reforming the process. The defender is likely to know all too well how minorities are treated unjustly – but that does not mean that implicit bias is not present, as is, occasionally, explicit bias. Counsel is obligated to focus on obtaining the best result possible for each client, and that might mean exploiting the bias of the prosecutor or judge. A personal anecdote may serve to illustrate this final point:

As a staff attorney with the Criminal Defense Division of the Legal Aid Society for ten years, the vast majority of my clients were African-American or Hispanic. On one occasion, I picked up a case of a 21 year-old White college student who had previously pled guilty to Petit Larceny, an "A" Misdemeanor in New York for which the maximum sentence was a one-year period of incarceration. The defendant had entered the plea before a different judge a month earlier, and the pre-sentence report of the Probation Department recommended the imposition of the maximum sentence due to the defendant's prior history of similar thefts. When the court clerk first called the case, and the newly assigned judge read the pre-sentence report, the judge proceeded to mark the case for a Second Call and asked me to go with him to his chambers behind the courtroom. The judge, who was Jewish, like myself, proceeded to say to me that, "this defendant is Jewish, we can't let him get sent to Rikers Island [the jail in New York City]. I'll adjourn the case and you should find him an alternative-to-incarceration program I can have him attend instead."

I often relate that incident to the students in my Criminal Law classes and inquire how I should have reacted. The judge didn't want my client to be incarcerated with "similarly situated" minorities. There was nothing *implicit* about the bias at play.

And when prosecutors offer better deals to Whites than to minorities, who knows if it is implicit or explicit bias. From my own experience, counsel's argument that the defendant is a "good kid" who just got in with the wrong crowd is much more likely to be accepted by the prosecutor and the judge when the defendant is White. And the minority male is far more commonly perceived to be the "bad apple" who needs to be taken off the streets and incarcerated.

Take the case of Brian Banks who was exonerated in 2012 in Los Angeles after serving five years in prison for rape.³⁶³ Banks was 16 when a 15-year old classmate accused him of the crime; there was no corroboration, physical or otherwise, to show that there was a rape.³⁶⁴ Banks, an African-American, was a star football player who had a verbal commitment to play on the USC football team with a full scholarship upon graduation from high school.³⁶⁵

He was facing a sentence of 41 years to life if convicted, but there was a plea offer of five years.³⁶⁶ His counsel, to whom he had repeatedly insisted that he was innocent, reportedly told him, "[y]ou're a big black teenager and they're automatically going to assume you are guilty and you'll be facing 41 years to life...this is the offer – good for now and not later."³⁶⁷

³⁶³ *Blindsided: The Exoneration of Brian Banks*, CBS NEWS (Mar. 24, 2013), <http://www.cbsnews.com/news/blindsided-the-exoneration-of-brian-banks/>.

³⁶⁴ Ashley Powers, *A 10-Year Nightmare Over Rape Conviction is Over*, LOS ANGELES TIMES (May 25, 2012), <http://articles.latimes.com/print/2012/may/25/local/la-me-rape-dismiss-20120525>. Banks claimed that the two had engaged in consensual "fooling around," but that there was no intercourse. There was no male DNA found on the girl's underwear. *Id.*

³⁶⁵ *Blindsided: The Exoneration of Brian Banks*, *supra* note 363.

³⁶⁶ Maurice Possley, *Brian Banks*, NAT'L REGISTRY OF EXONERATIONS (June 2012), <http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3901>.

³⁶⁷ Robert Littal, *H. Elizabeth Harris The Attorney Who Recommended Brian Banks' Plea Deal is a Judge Now*, BLACK SPORTS ONLINE (May 31, 2012),

And the pressure was on; the defendant wished to discuss his options with his mother, but was not afforded the opportunity. “It’s your decision, not your mom’s,” defense counsel informed him.³⁶⁸ Years later, the defendant unsuccessfully filed a state writ of habeas corpus alleging ineffective assistance of counsel.³⁶⁹ Ten years after the initial accusation had been made, the accuser was secretly taped admitting she had fabricated the rape.³⁷⁰ The District Attorney responded by informing the court that a motion to exonerate Banks should be granted: “We believe the recantations of the witness, we do not believe Mr. Banks did the crime he pled guilty to.”³⁷¹

So, the question is, in this scenario and many like it, did defense counsel just assume the defendant’s guilt in spite of the lack of evidence – was this just one more “big black guy” accused of a violent act? Or, was counsel realistically assessing the stereotyping that a jury and judge were likely to engage in and therefore assume there would be a guilty verdict? Certainly the judge who had set a bail of one million dollars on Banks would hardly have been expected to be in any manner sympathetic to the defense at trial.³⁷² Either way, for Banks the result was the same; his race seems to have been a prime factor in his serving five years in prison for a crime he did not commit.³⁷³

CONCLUSION

Civil rights are in crisis in this country. There is no right that is more basic, more crucial, more fundamental than the right of liberty. The rights to sit at a lunch counter, to ride in the front of the bus, to be educated in a quality school that is equal and not separate, mean nothing if one’s freedom is taken away. Yet the unwarranted loss of

<http://blacksportsonline.com/home/2012/05/h-elizabeth-harris-the-attorney-who-recommended-brian-banks-plea-deal-is-a-judge-now/>.

³⁶⁸ *Id.*

³⁶⁹ Possley, *supra* note 366. The petition for the writ also contended that since there was no evidence that the rape had in fact occurred, the plea should be vacated. *Id.*

³⁷⁰ Powers, *supra* note 364.

³⁷¹ *Id.*

³⁷² *Blindsided: The Exoneration of Brian Banks*, *supra* note 363.

³⁷³ Banks’ lawyer paid no price whatsoever for her role in the matter. *Id.* In fact, Banks counsel, H. Elizabeth Harris, was elected in 2012 as a Los Angeles Superior Court Commissioner by the court’s judges. Littal, *supra* note 367.

liberty is precisely what occurs all too often in this country to our minorities, and it occurs all too often because the constitutional right to the effective assistance of counsel is violated. Without effective counsel, there is no one to “police the police,” no one to challenge an unconstitutional search which may violate the Fourth Amendment, or a confession which has been coerced in violation of the Fifth Amendment, or a lineup which was unduly suggestive and violates the due process which is guaranteed by the Fourteenth Amendment, or a sentence which is grossly disproportionate to the offense in violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.

The year 1963 was graced with two monumental events: Martin Luther King delivered his “I Have a Dream Speech” at the historic March on Washington for civil rights, and the Supreme Court decided *Gideon v. Wainwright*, requiring states to provide counsel to indigent defendants.³⁷⁴ Yet, over 50 years later, both are dreams unfulfilled. The Department of Justice has estimated that one in three African-American men will go to prison at some time during their lives,³⁷⁵ and are six times more likely to be incarcerated than are white males.³⁷⁶ In two of our largest cities – Chicago and Los Angeles – over 80% of prisoners are minorities,³⁷⁷ and in the nation’s capital of Washington, D.C., 91% of the inmates in 2014 were African-American.³⁷⁸ And, as this article has repeatedly pointed out, all too often those inmates have been represented by counsel who have been besieged by caseloads which have precluded them from providing the constitutionally-mandated effective assistance.³⁷⁹

Our understanding of civil rights has certainly expanded in recent years. Whereas to be sure, the concept is most closely linked with the struggles of African-Americans in the 1950s which related to schools, housing, public accommodations, and voting, the phrase now

³⁷⁴ See *supra* note 39.

³⁷⁵ U.S. Bureau of Justice Statistics, *Prisoners in 2011*, 8 tbl. 8 (Dec. 2012).

³⁷⁶ The Sentencing Project, Report of the Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System (August, 2013) at 1.

³⁷⁷ See *supra* notes 22 and 24.

³⁷⁸ See *supra* note 25.

³⁷⁹ See, e.g., *supra* note 206.

includes issues relating to discrimination based on ethnicity, gender, and sexual orientation.

As the plight of minorities in our criminal justice system becomes a focus as it never has before,³⁸⁰ we must realize that the deprivation of liberty due to ineffective counsel may well indeed be *the* civil rights issue of our day. Historically and inexplicably, the right to counsel has not been dealt with as a “civil rights” issue. But it most surely is. Black’s Law Dictionary defines civil rights as follows: “These are the rights that are granted to every citizen of the United States by the Constitution and all of its amendments.”³⁸¹ What could be clearer? The Stanford Encyclopedia of Philosophy similarly states that civil rights are the basic legal rights a person must possess in order to have equal citizenship; they are “the rights that constitute free and equal citizenship and include personal, political and economic rights.”³⁸² What is possibly more “personal” than liberty? John Rawls, considered by many to be the most important political philosopher of the 20th Century, has emphasized that all citizens of a liberal democracy are entitled to a “fully adequate scheme of equal basic liberties.”³⁸³

Why would the labelling of the Right to Counsel as a “Civil Right,” be of such import? Perhaps it will make all of us simply care

³⁸⁰ In recent years, there have been a number of highly publicized incidents of White police officers shooting African-American men. The most recent incident was caught on camera and shows a police officer in South Carolina shooting Walter Scott, an African-American man, in the back. Walter Scott’s murder occurred at a tense time for Americans because of the images of Eric Garner being choked to death by a police officer in Staten Island, NY; the murder of unarmed teenager Trayvon Martin by George Zimmerman; and the shooting of Michael Brown in Ferguson, Missouri. Every one of those incidents was met with protests throughout the country with demands for police reform, acknowledgement of systematic problem in the criminal justice system, and accountability for the deaths of these unarmed African-American men.

³⁸¹ Black’s Law Dictionary, Standard Ninth Edition (2009). Barron’s Law Dictionary defines Civil Right as “Rights given, defined, and circumscribed by laws enacted by civilized communities . . . Also, defined as rights of a citizen or citizens, and laws relating to the private rights of individuals and to legal actions involving these.” Steven H. Gifis, Barron’s Law Dictionary (2010).

³⁸² *Id.*

³⁸³ JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 42 (2001).

more. Politicians have, to this date, not rallied round the flag in support of rights for indigent defendants. There is no constituency that politicians believe must be won over; no constituency, that is, except the Sixth Amendment. Legislatures, as we have seen in this article, simply don't fund public defenders as the Constitution requires. The Supreme Court sets a standard for assessing the constitutionally-mandated effective assistance so low as to permit incompetent counsel to represent our powerless, and too often voiceless, urban poor.

It is a matter of ongoing debate amongst some legal academics whether our Court has, historically, led the way toward civil rights enforcement, or whether the Court merely responds to changing community sentiment.³⁸⁴ One thing is for sure: our Court has indeed reversed its prior decisions due to freshly perceived "evolving standards of decency." The Court in *Atkins v. Virginia*,³⁸⁵ in 2002, reversed its holding of thirteen years earlier in *Penry v. Lynaugh*,³⁸⁶ and concluded that a new consensus had evolved which opposed execution of the mentally retarded.³⁸⁷ Similarly, the Court in 2005, in the case of *Roper v. Simmons*,³⁸⁸ concluded that it was in violation of the Eighth Amendment to impose the death penalty on an individual who was less than 18 years old at the time the crime was committed; the decision directly overturned the Court's holding in 1989 which had permitted such executions.³⁸⁹ And *Gideon* itself entailed the reversal of the Court's prior holding in *Betts v. Brady*.³⁹⁰

The time has come for the Court to reconsider and revise its holding in *Strickland*; the time has come for the Court to acknowledge that indigents' civil rights are being violated by lower courts' interpretations of the Court's decision. The time has also come for the highest state courts to find that their state constitutional guarantees of effective assistance are inadequate because of recurrent civil rights violations. The time has come for state legislatures as well as Congress

³⁸⁴ See e.g., Tomiko Brown-Nagin, *The Civil Rights Canon: Above and Below*, 123 YALE L. J. 8, 2574, 2700 (2014).

³⁸⁵ 536 U.S. 304 (2002).

³⁸⁶ 492 U.S. 302 (1989).

³⁸⁷ *Atkins*, 536 U.S. at 316.

³⁸⁸ 534 U.S. 551 (2005).

³⁸⁹ *Id.* at 572–573.

³⁹⁰ 316 U.S. 455, 468 (1942). See *supra* notes 37 – 41, and related text.

to enact sufficient funds for indigent defense. The time has come for the Civil Rights Division of the Department of Justice, which was created by the Civil Rights Act of 1957 to “uphold the civil and constitutional rights of all Americans,”³⁹¹ to actively enforce Sixth Amendment guarantees. The Division boasts that it “has grown dramatically in both size and scope, and has played a role in many of the nation’s pivotal civil rights battles.”³⁹² Well, the time has come to play a leadership role in this pivotal battle to enforce the civil right of the indigent accused of crime to effective assistance of counsel.

But it is not just government attorneys who must take the lead. The legal profession, at every level, must join in attempting to mitigate the crisis. And lawyers are obligated to do just that. The Preamble to the Model Rules of Professional Conduct begins by instructing that a lawyer is a “public citizen having special responsibility for the *quality* of justice.”³⁹³ And, the Preamble continues, “a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.”³⁹⁴ Closing our eyes to injustice, and accepting a tomorrow which is a repeat of yesterday for indigent minority defendants, is intolerable.

We all must realize our own personal interest in this battle. When vigorous advocacy by defense counsel informs police officers that they will not be able to get away with an unconstitutional search, we all benefit. Zealous advocacy is required for us to keep the police honest, or as honest as we can keep them; otherwise, there may be nothing to deter the police from entering any one of our homes with little or no probable cause. But we shouldn’t have to call on self-interest; we have a glorious history in this country of rallying on

³⁹¹ United States Department of Justice, Civil Rights Division, *About the Division*, available at <http://www.justice.gov/crt/about>.

³⁹² *Id.* Three of the most significant of the eleven sections of the Division are the Criminal, Special Litigation, and the Policy and Strategy Sections.

³⁹³ American Bar Association, Model Rules of Professional Conduct: Preamble and Scope – A Lawyer’s Responsibilities, Section 1 (emphasis added), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html.

³⁹⁴ *Id.* at Section 6.

behalf of those whose civil rights are being systematically violated. Informed Americans wouldn't choose to tolerate a criminal justice system where poor people are provided representation that we would never regard as acceptable for any member of our own family. And we would certainly *not* want the Sixth Circuit Court of Appeals to conclude as it recently did, that if counsel fell asleep during the cross-examination of the defendant who was on trial, that the conviction should stand because counsel hadn't actually slept during a "substantial portion" of the trial.³⁹⁵

Approximately 60% of the inmates in our country's prisons are minorities.³⁹⁶ A research study conducted by the Sentencing Project in 2014 concluded that "disparities in police stops, in prosecutorial charging, and in bail and sentencing decisions reveal that implicit racial bias has penetrated all corners of the criminal justice system."³⁹⁷ According to the Bureau of Justice Statistics of the Department of Justice, African-American men aged 18 and 19 were imprisoned at 9 times the rate of White men.³⁹⁸

Indigents pay an enormous price for incompetent, overloaded lawyers at the bail hearing which is so crucial to the ultimate outcome of the litigation. The defendant who is not incarcerated as the case progresses through the court is in a better bargaining posture during plea negotiations, is able to locate witnesses, assist counsel in the preparation of the case for hearings or trial, and has the capability to enter a drug rehabilitation program. Counselors from such treatment centers can present reports to the court and to prosecutors outlining the progress that the defendant has made in dealing with whatever

³⁹⁵ *Muniz v. Smith*, 647 F.3d 619 (6th Cir. 2011). *Muniz* was convicted of assault with intent to commit murder; it was claimed that while counsel had slept, the testifying defendant made statements that led to the admission of evidence against him and that the prosecutor posed questions which, had counsel been awake and objected, would not have been permitted. *Id.* at 625.

³⁹⁶ Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, *Prisoners in 2013*, Revised September 30, 2014.

³⁹⁷ The Sentencing Project, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, 2014.

³⁹⁸ Bureau of Justice Statistics, Office of Justice Programs, Department of Justice, *Prisoners in 2011*, 2012 at 8.

problem might have led to the commission of the act for which he is being prosecuted. And the problem for many indigents is far more severe than just having inadequate counsel. A 2015 Report of the Constitution Project found that in eight states, the indigent has no lawyer present *at all* for the bail hearing, and in seventeen other states, counsel appear only infrequently.³⁹⁹

Since most of those prosecuted in our states' criminal courts are not only minority, but also poor,⁴⁰⁰ approximately 82% of those who are prosecuted for felonies have had court-appointed counsel.⁴⁰¹ If we are to have the "Equal Justice Under the Law" which is engraved on the front of the Supreme Court building, if we are to have the "Liberty and Justice for All" that is recited by school children as part of the Pledge of Allegiance to the Flag, then the denial of the right to effective counsel for indigent, minority Americans must, I maintain, be reframed as a Civil Rights issue. And as such, this struggle for liberty, equality, and justice must be waged with new determination, energy, and resources in order to "right" the "wrongs" to which we have closed our eyes for far too long.

³⁹⁹ NATIONAL RIGHT TO COUNSEL COMMITTEE, CONSTITUTION PROJECT, DON'T I NEED A LAWYER? PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING, 124 (March 2015). *See also* NATIONAL INSTITUTE OF CORRECTIONS, MONEY AS A CRIMINAL JUSTICE STAKEHOLDER: THE JUDGE'S DECISION TO RELEASE OR DETAIN A DEFENDANT PRETRIAL (2014).

⁴⁰⁰ *See* CAROLIN WOLF HARLOW, U.S. DEPARTMENT OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000).

⁴⁰¹ *See* National Institute of Justice, *Indigent Defense: International Perspectives and Research Needs*, note 3 (2011). In the large state courts, 68.3 percent of defendants were represented by public defenders, and 13.7 percent had court-appointed assigned counsel. In the Federal Courts, 30.1 per cent of defendants were represented by a public defender, and 36.3 per cent had court-appointed counsel from the Criminal Justice Act panel of attorneys. These numbers date back to 1998, the last year such statistics were available. *See also* Bureau of Justice Statistics, Special Report, U.S. Department of Justice, Office of Justice Programs, *Defense Counsel in Criminal Cases* (2000) at 1.