When Excessive Public Defender Workloads Violate the Sixth Amendment Right to Counsel Without a Showing of Prejudice

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In his keynote address at the National Symposium on Indigent Defense, Attorney General Eric Holder candidly acknowledged the well-documented fact that public defender offices across the country are overloaded with too many cases.[1] About three out of every four county-funded public defender offices have attorney caseloads which exceed nationally recognized maximum caseload standards.[2] Caseloads are so excessive that in many jurisdictions, defense counsel are unable to perform core functions such as conducting an adequate factual investigation into guilt or innocence. In Florida, for example, the annual felony caseload of individual public defenders increased to 500 felonies per year while the average for misdemeanor cases rose to an astonishing 2,225.[3] In Tennessee, six attorneys handled over 10,000 misdemeanors annually, spending on average less than one hour per client.[4] The maximum annual caseload recommended by the American Bar Association and the President's National Advisory Commission on Criminal Justice Standards and Goals is only 150 felony cases or 400 misdemeanor cases per full time attorney.[5]

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[1] Attorney Gen. Eric Holder, Keynote Address to the U.S. Dep't of Justice Nat'l Symposium on Indigent Defense: Looking Back, Looking Forward, 2000-2010 (February 18, 2010), *available at*: http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html. Materials presented at the symposium are available at http://www.ojp.usdoj.gov/BJA/topics/inddef_index.html. For additional studies documenting longstanding problems in the delivery of indigent defense services, *see also* ABA CRIMINAL JUSTICE SECTION, THE STATE OF CRIMINAL JUSTICE 149-158 (2009); NAT'L RIGHT TO COUNSEL COMMITTEE, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009); Laurence A. Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263 (2009) [hereinafter Benner, *The Presumption of Guilt*]; NAT'L LEGAL AID & DEFENDER ASSOC., EVALUATION OF TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS IN MICHIGAN: A RACE TO THE BOTTOM (2008); ABA STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004); NAT'L LEGAL AID & DEFENDER ASSOC., FINAL REPORT OF THE NATIONAL ADVISORY COMMITTEE ON INDIGENT DEFENSE SERVICES (1996); Laurence A. Benner, *Tokenism and the American Indigent: Some Perspectives on Defense Services*, 12 AM. CRIM. L. REV. 667 (1975); LAURENCE A. BENNER & ELIZABETH L. NEARY, NAT'L LEGAL AID & DEFENDER ASSOC., THE OTHER FACE OF JUSTICE (1973).

[2] See DONALD J. FAROLE, JR. & LYNN LANGTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: CENSUS OF PUBLIC DEFENDER OFFICES 2007, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf, reporting that 73% of all county-based and local public defender offices exceeded maximum attorney caseload standards recommended by the ABA, NLADA, The National Study Commission on Defense Services and the President's National Advisory Commission on Criminal Justice Standards and Goals (discussed *infra*). Defender systems organized at the state level fared no better, experiencing a 20% increase in caseload from 1999 to 2007 while gaining only a 4% increase in staffing. Fifteen of twenty-two state-wide defender systems operated with attorney caseloads that exceeded national standards in 2007. *See id*.

[3] NAT'L RIGHT TO COUNSEL COMM., *supra* note 2 at 68.

[4] *Id.*

[5] *See* ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf. *See also* NAT'L ADVISORY COMM. ON CRIMINAL JUSTICE STANDARDS AND GOALS,

The traditional legal remedy for such abridgement of the Sixth Amendment right to counsel, has been an ineffective assistance of counsel claim, made after conviction under *Strickland v. Washington*.[6] A recent study of over 2,500 ineffective assistance of counsel (IAC) claims found, however, that only a tiny fraction (4%) of such claims were successful.[7] To establish a violation of the Sixth Amendment under *Strickland's* two pronged test, counsel's deficient performance must be both professionally unreasonable and prejudicial.[8] To establish prejudice a defendant must show there is a reasonable probability that the outcome would have been different. While establishing the "prejudice" prong has always been extremely difficult, the Supreme Court has recently increased the difficulty even further, declaring in *Harrington v Richter* that the "likelihood of a different result must be substantial, not just conceivable."[9] Demonstrating prejudice because of an excessive caseload is thus problematic. Even if counsel conducted little or no investigation due to an excessive caseload, for example, how does one determine, sometimes years after the event, what a prompt and thorough investigation would have uncovered? Moreover, if favorable evidence is later uncovered, it is often, as one judge candidly admitted, "impossible to know" in a post-conviction proceeding what effect the evidence would have had on the jury.[10] Attempting systemic reform through post-conviction ineffective assistance of counsel claims is thus not an effective option. Even when successful, the deterrent impact of an individual case is small and further marginalized by the fact that relief is usually granted only after years of protracted litigation.

This Issue Brief discusses a litigation strategy which avoids *Strickland's* prejudice prong by focusing on the *absence* of counsel at a critical stage of the proceedings, rather than the *ineffectiveness* of counsel's conduct. As *Gideon v. Wainwright* [11] and its progeny established, the Sixth Amendment guarantees the assistance of counsel at each critical stage of the proceedings against an accused. The strategy outlined here is premised upon the argument that the period between arraignment and trial---the investigatory stage---is a critical stage at which the accused is entitled to counsel's assistance. In sum, the argument is that because excessive caseloads make it impossible for defense counsel to conduct a reasonable investigation into factual innocence and/or mitigating circumstances relevant to punishment, this inability to provide "core" assistance of counsel renders counsel constructively absent at a critical stage of the proceedings.

As discussed below, *Powell v. Alabama*,[12] *Geders v. United States*,[13] and the Supreme Court's recent decision in *Kansas v. Ventris*,[14] (which dealt with the timing of a Sixth

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COURTS 276 (1976) (creating Standard 13.12, which establishes maximum annual caseload standards for publically provided defense counsel).

[6] 466 U.S. 668 (1984).

[7] Benner, *The Presumption of Guilt*, *supra* note 1 at 324.

[8] *Strickland*, 466 U.S. at 687.

[9] Harrington v. Richter, 131 S. Ct. 770, 792 (2011). *Harrington* involved the failure to call forensic experts.

[10] Sears v. Upton, 130 S. Ct. 3259, 3264 (2010). In a *per curiam* opinion the U.S. Supreme Court held that the judge's failure to "engage with the evidence" was error. *Id*. at n.9. That does not, however, diminish the difficulty judges face in having to make the assessment of prejudice.

[11] 372 U.S. 335 (1963).

[12] 287 U.S. 45 (1932).

[13] 425 U.S. 80 (1976).

[14] 129 S. Ct. 1841 (2009).

Amendment violation) establish that a constitutional violation occurs without regard to any showing of prejudice when counsel is prevented from providing assistance during a critical stage of the proceedings.[15] There is thus a completed violation of the Sixth Amendment prior to trial. This is a "structural defect," rather than a product of erroneous decision-making by counsel in an individual case. Because core assistance by counsel has not been provided, the framework in which the trial proceeds is altered, resulting in a criminal justice system that "cannot reliably serve its function as a vehicle for the determination of guilt or innocence."[16] Therefore, *Strickland* does not apply and proof of prejudice is not required.[17] This strategy makes it possible to bring a cause of action which focuses not on the individual case, but instead on the system as a whole by showing a systemic violation of the right to counsel prior to trial. Because the Sixth Amendment violation is established at the time the inability to investigate arises, this makes class action injunctive relief an appropriate remedy prior to the trial of any individual case.[18]

I. Providing Counsel under Circumstances which Preclude the Opportunity for Investigation Violates the Sixth Amendment

It has been long established that the failure to investigate factual innocence and circumstances mitigating punishment violates the Sixth Amendment's guarantee of the right to the assistance of counsel. The Supreme Court first recognized the importance of defense counsel's duty to conduct a "prompt and thorough-going investigation" in the pathmarking right to counsel case, *Powell v. Alabama* (1932).[19] In that case, six black youths were charged with the rape of two white women, a capital offense in Alabama at that time. Although attorneys were appointed to represent the defendants, the trial commenced almost immediately without giving counsel an opportunity to conduct any meaningful investigation. The Supreme Court held that the state's duty to provide counsel in a capital case was "not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."[20] The Court emphasized that the time between arraignment and trial was "perhaps the most critical period of the proceedings" because that is when "consultation, thorough-going investigation and preparation [are] vitally important."[21] The fact

[15] "The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." United States v. Cronic, 466 U.S. 648, 659 n. 25 (1984) (citing *Geders*; Herring v. New York, 422 U.S. 853 (1975); Brooks v. Tennessee, 406 U.S. 605, 612-13 (1972); Hamilton v. Alabama, 368 U.S. 52 (1961); White v. Maryland, 373 U.S. 59, 60 (1963) (per curiam); Ferguson v. Georgia, 365 U.S. 570 (1961); *and* Williams v Kaiser, 323 U.S. 471, 475-76 (1945)).

[16] Rose v. Clark, 478 U.S. 570, 577-78 (1986).

[17] As the Supreme Court explained in Arizona v Fulminate, 499 U.S. 279 (1991), structural defects "defy analysis by harmless error standards" because they involve speculative inquires into what "might have been." *Id.* at 309. Examples of structural defects requiring no showing of prejudice include the absence of counsel, Gideon v. Wainwright, 372 U.S. 335 (1963), interference with counsel's representation at a critical stage, *Geders*, the improper disqualification of privately retained counsel, United States v. Gonzalez-Lopez, 548 U.S. 140 (2006), and representation by counsel with conflicting interests, Holloway v. Arkansas, 435 U.S. 475 (1978); Cuyler v. Sullivan, 446 U.S. 335 (1980). *See* Part VI, *infra*.

[18] *See* Hurrell-Harring v. New York, 930 N.E.2d 217 (N.Y. 2010). This case is discussed further *infra*.

[19] 287 U.S. 45, 58 (1932).

[20] *Id*. at 71.

[21] *Id*. at 57.

that counsel were unable to conduct any meaningful investigation was thus central to *Powell's* holding that the defendants' right to counsel was violated.

A. National Standards

It was against this constitutional backdrop that the ABA promulgated its Standards for Criminal Justice which marked out the duties of defense counsel. Standard 4-4.1 provides:

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction . . . . The duty to investigate exists regardless of the accused's admissions or statements to defense counsel . . . .[22]

The Supreme Court has relied upon this and other ABA Criminal Justice Standards as evidence of the norms of professional conduct when finding that counsel's failure to conduct a proper investigation violated the right to effective assistance of counsel. Noteworthy examples include *Wiggins v. Smith* (2003),[23] *Rompilla v. Beard* (2005),[24] and more recently, *Porter v. McCollum* (2009)[25] and *Padilla v. Kentucky* (2010).[26]

ABA Criminal Justice Standards also provide that:

> Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations. [27]

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[22] ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION AND PROSECUTION FUNCTION 126, Defense Function Standards 4-1.3(e) (3d ed. 1993) [hereinafter ABA STANDARDS, DEFENSE AND PROSECUTION], *available at* http://www.abanet.org/crimjust/ standards/prosecutionfunction.pdf; ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 11.4.1(C) (1989); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES 68-69, Standard 5-5.3 (3d ed. 1992), *available at* http://www.abanet.org/crimjust/standards/ providingdefense.pdf.

[23] 539 U.S. 510 (2003) (holding that counsel's failure to investigate defendant's family and social history which would have uncovered mitigating evidence relevant to penalty phase of a prosecution for capital murder violated the Sixth Amendment).

[24] 545 U.S. 374 (2005) (holding that counsel's failure to review a readily available court file which would have led to mitigation evidence in a death penalty case constituted ineffective assistance).

[25] 130 S. Ct. 447 (2009) (holding that counsel's failure to investigate defendant's military records which would have disclosed defendant had received two purple hearts during the Korean War and suffered from PTSD was ineffective assistance). It should be noted that although a *per curiam* opinion in *Bobby v. Van Hook*, 130 S. Ct. 13 (2009) stated it was not appropriate to treat the more detailed 2003 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases as "inexorable commands," the trial in that case occurred eighteen years before those standards were promulgated. The Court, moreover, reaffirmed the vitality of both *Wiggins* and *Rompilla* in *Porter*.

[26] 130 S. Ct. 1473 (2010). *Padilla* held that the failure to investigate the immigration consequences of a felony guilty plea and to advise a defendant of the risk of deportation constituted ineffective assistance.

[27] ABA STANDARDS, DEFENSE AND PROSECUTION, *supra* note 22.

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals (NAC) adopted national caseload standards, which were recognized in the ABA's *Ten Principles of a Public Defense Delivery System* as a maximum that "should in no event be exceeded."[28] These national standards specify that one full-time attorney should be assigned no more than 150 non-capital felony defendants per year, or 400 non-traffic misdemeanor defendants, or 200 juvenile clients respectively. Because criminal justice systems differ significantly from state to state and even within a state, such national standards undoubtedly are too high in some jurisdictions, given local laws, court structure, logistical considerations, prosecutorial charging and plea bargaining policies, and judicial sentencing norms. Only an actual workload assessment based upon time studies can determine the maximum number of defendants an individual attorney can effectively represent in a given jurisdiction. The National Center for State Courts, for example, undertook a workload assessment for the Maryland Public Defender Office in 2005, and recommended substantially lower caseloads than those set by the national standards.[29] Nevertheless the national standards are a reliable barometer of caseload pressure.

B. A Case Study: The Crisis in California

Having established the first public defender office in Los Angeles in 1914, California has always been regarded as a leader in providing indigent defense services. A recent study for the California Commission on the Fair Administration of Justice, however, found that over half of the institutional public defender offices in that state had caseloads which exceed the national standards.[30] Those offices also reported problems in obtaining adequate investigative resources. This is significant because the maximum attorney caseload standards are predicated upon adequate investigative assistance. All (100%) of the responding California offices that employed staff investigators reported having excessive investigator workloads.[31] The recommended standard is one investigator for every three attorneys.[32] In three counties, there was only one investigator for every eight attorneys. One of these offices had handled ten death penalty cases during the year. Two rural offices had no investigator on staff and one of those reported having significant difficulty in obtaining court approval for funds to obtain investigative assistance.[33] Also revealing was the fact that all of these California defender offices reported that they had difficulty interviewing prosecution witnesses. More than one quarter (27%) classified this problem as "serious."[34]

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[28] ABA STANDING COMM'N ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002) (giving commentary on the "Fifth Principle"), *available at:* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf. These standards, approved by the American Bar Association House of Delegates in February 2002, were created to assist governmental officials and "constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney." *Id*. at Introduction.

[29] BRIAN J. OSTROM, MATTHEW KLEIMAN & CHRISTOPHER RYAN, NAT'L CENTER FOR STATE COURTS, MARYLAND ATTORNEY AND STAFF WORKLOAD ASSESSMENT 35 (2005), *available at* http://www.ncsconline.org/WC/Publications/Res_WorkLd_MDAtty&StaffWkLdAs05Pub.pdf.

[30] Benner, *The Presumption of Guilt*, *supra* note 1 at 266 n.4 & 285.

[31] *Id*. at 288.

[32] NAT'L STUDY COMM'N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS, Standard 4.1 (1976).

[33] Benner, *The Presumption of Guilt*, *supra* note 1 at 289.

[34] *Id*.

The difficulty created by the lack of adequate investigative assistance was further aggravated by several additional factors. First, virtually all of these offices had no contact with an indigent defendant until they were appointed at the arraignment, several days after arrest. This delay jeopardizes the ability to preserve evidence and makes it more difficult to locate witnesses which may be favorable to the defense. Second, there was substantial evidence that prosecutors were not complying with their statutory and constitutional obligations to provide essential information to the defense through discovery procedures. An overwhelming majority (over 90%) of both defenders and experienced private criminal defense attorneys reported that prosecutors failed to turn over evidence favorable to the defendant (*Brady* evidence) and delayed providing even routine information to which the defense is entitled in discovery. Third, and perhaps most importantly, it was documented that felony cases are routinely disposed of at a disposition conference held approximately a week after the arraignment. Where the prosecutor presents a "take it now or lose it" offer at this stage, pressure is thus placed upon the defendant to accept the plea bargain before there has been time to conduct any meaningful investigation.

The failure to have adequate investigative assistance, coupled with systemic factors such as delayed appointment of counsel, inadequate discovery, and pressure to resolve cases early, seriously exacerbates the problem of excessive caseloads. The California experience, unfortunately, is not atypical. In fact, in many jurisdictions, the situation is graver. For county-based public defender offices, 40% do not have any staff investigators at all. With respect to those that do, moreover, only 7% have investigator-to-attorney ratios that meet the national standard.[35]

II. When does a Violation of the Sixth Amendment Right to Counsel Occur?

A. *Kansas v. Ventris*

The Supreme Court's recent decision in *Kansas v. Ventris*[36] sheds new light on the timing of a Sixth Amendment violation. *Ventris* involved a violation of the rule established in *Massiah v. United States*.[37] *Massiah* held that the government cannot use a secret undercover informant to deliberately elicit incriminating statements from an indicted defendant who is represented by counsel. The rationale for the *Massiah* rule is that the confrontation between a defendant and a government informant seeking to obtain incriminating statements is a critical stage of the prosecution against the accused. Therefore the surreptitious interrogation by the informant deprived the defendant of counsel's assistance at that critical stage. In *Ventris*, in an opinion by Justice Scalia, the Supreme Court held that the Sixth Amendment is violated at the time the statement is improperly elicited by the government informant in the absence of counsel, rather than when the statement is admitted at trial.[38] Because the right to counsel is violated at the time the uncounseled statement is induced, there is no need to show prejudice.

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[35] Farole & Langton, *supra* note 2.
[36] 129 S. Ct. 1841 (2009).
[37] 377 U.S. 201 (1964).
[38] Ventris was arrested for murder. At trial Ventris took the stand and portrayed himself as a mere bystander. In rebuttal, the prosecutor called a jailhouse informant who had been placed in Ventris' cell to obtain incriminating statements. The informant testified that Ventris had admitted shooting and robbing the deceased. On appeal it was conceded that the manner in which the jailhouse snitch had been employed violated *Massiah*. However, the Court held it was permissible to use the defendant's tainted statements for impeachment. Rejecting the defendant's

The *Ventris* holding is relevant to the excessive caseload problem because it logically follows that a violation of the Sixth Amendment likewise occurs at the time a public defender has such an excessive caseload that he or she is precluded from being able to conduct a prompt investigation. As Justice Scalia recognized in *Ventris*, the "core" of the Sixth Amendment right to counsel "has historically been and remains today, the opportunity for a defendant to consult with an attorney, and to have him investigate the case and prepare a defense for trial."[39] The window of opportunity for conducting that investigation is thus a "critical stage" of the proceedings.[40] Especially in jurisdictions where the majority of felony cases are disposed of by guilty pleas that are entered less than forty-five days after filing,[41] the inability of defense counsel to conduct a prompt investigation thus amounts to nonrepresentation at this critical investigative stage.[42]

Because excessive workloads prevent defense attorneys from fulfilling their "core" investigative function, a substantive violation of the Sixth Amendment occurs *prior to trial*.[43] Following *Ventris*, the violation occurs at the moment a public defender office accepts new indigent appointments under circumstances that preclude the ability to promptly investigate the merits of the defendant's case, both with respect to factual innocence or mitigating circumstances reducing punishment. That inability can be shown mathematically by conducting a Workload Assessment using time studies similar to those designed by the National Center for State Courts to determine when additional judges are needed.

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argument that his right to counsel was violated by the admission of the statements at trial, the Court held that the right to counsel violation occurred not at trial but "at the time of the interrogation." *Ventris*, 129 S. Ct. at 1846. Because the issue was therefore not the need to prevent a violation of the right to counsel at trial, but rather to determine only the scope of the remedy for a past violation of the right, the Court concluded that excluding the statements during the rebuttal stage was not justified because exclusion of the statements from the prosecution's case- in-chief was already a sufficient sanction to deter future violations.

[39] *Id.* at 1844-55.

[40] In Powell v. Alabama, 287 U.S. 45 (1932), the Court recognized that the period between arraignment and trial was "perhaps the most critical period" of the proceedings against an accused. *Id.* at 57. After *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court established various "touchstones" for defining what is a critical stage. As Professor LaFave has pointed out, one test is whether "a potential opportunity for benefitting the defendant as to the ultimate disposition of the charge through rights which could have been exercised by counsel" has been lost and whether that "lost opportunity" could be "regained by actions subsequently provided counsel could have taken." WAYNE LAFAVE, ET. AL., CRIMINAL PROCEDURE 599 (5th ed. 2009). When the opportunity for investigation is lost due to appointment of counsel with an excessive caseload, the opportunity to conduct a prompt investigation cannot be regained by subsequent appointment of appellate counsel who may not investigate until many months if not years after the event.

[41] *See, e.g.*, CALIFORNIA JUDICIAL COUNCIL, 2010 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 1999-2000 THROUGH 2008-2009 115-16 & 127-28 (disclosing that, during fiscal year 2008-09, disposition of 71% of all felony filings in the state of California occurs in less than ninety days, while 56% are disposed of in less than forty-five days).

[42] *See* White v. Maryland, 373 U.S. 59 (1963). There, the defendant pled guilty at a preliminary hearing without counsel. Although the plea was non-binding and was later withdrawn when counsel was subsequently appointed, testimony revealing the defendant had pled guilty was admitted at his trial. Although the defendant made no objection to this evidence because the defense was insanity not factual innocence, the Court nevertheless reversed, ruling that the entry of the plea was a critical stage and no showing of prejudice was required. *Id*. at 60.

[43] This argument was first presented by the author in a review of Supreme Court cases at the NLADA Annual Conference in Denver. Laurence A. Benner & Marshall J. Hartman, Supreme Court Review, Nat'l Legal Aid and Defender Association Annual Conference (November 20, 2009).

B. Using Time Studies to Make Objective Workload Assessments

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

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

Analyzing time spent on particular aspects of representation for different types of cases makes it possible to classify cases based upon their complexity, thus creating a more precise tool for measuring the workload created by a given mix of cases. The Workload Assessment conducted by the University of Nebraska's Public Policy Center for the Lancaster County Public Defender, for example, identified seventeen different case types.[44]

Dividing the amount of time needed to provide representation for a given annual caseload by the number of hours available from an individual staff attorney determines the number of attorneys needed to handle that caseload. The Workload Assessment can thus be used to support a chief defender's judgment to declare a public defender office unavailable to take additional cases. Guideline 6 of the ABA's Eight Guidelines of Public Defense Related to Excessive Workloads specifically states that a public defender "is obligated to seek relief from the court" when alternative options for dealing with an excessive caseload have been exhausted or are unavailable.[45] By documenting that the office has inadequate resources to conduct the necessary client interviews and investigations, this data objectively establishes that the acceptance of additional cases will result in a substantive violation of the Sixth Amendment right to counsel's assistance.

By establishing the number and type of pending cases an individual attorney has open, it can also be shown, using data from such a Workload Assessment, that an individual staff attorney's excessive workload prevents them from having the ability to meet their constitutional obligation to investigate and prepare for trial if they accept new cases. This data can thus provide an evidence-based method for determining when an attorney has an ethical duty not to

[44] *See* ELIZABETH NEELEY, UNIV. OF NEB. PUB. POLICY CTR., LANCASTER COUNTY PUBLIC DEFENDER WORKLOAD ASSESSMENT JULY 2008, *available at:* http://ppc.unl.edu/project/LancasterCountyPublicDefenderWorkloadAssessment. For additional studies, *see* Nat'l Ctr. for State Courts, Indigent Defense Resource Guide, http://www.ncsc.org/topics/access-and-fairness/indigent-defense/resource-guide.aspx (last visited Feb. 11, 2011). *See also* Dennis R. Keefe, Weighted Caseload Studies and Time Records in Controlling Excessive Caseloads: One Public Defender Office's Experience, Presentation at Nat'l Symposium on Achieving the Promise of the Sixth Amendment: Non-Capital and Capital Defense Services, Univ. of Tenn. Coll. of Law (May 20, 2010).

[45] ABA, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS 3 (2009).

accept new assignments, by demonstrating that they would be placed in a position of having a conflict of interest between new and presently existing clients.[46]

III. Why *Strickland* and the Prejudice Requirement are Inapplicable

It is important to point out that the claim here is one of nonrepresentation, rather than ineffective representation. As the state of New York's highest court recently held in *Hurrell-Harring v. New York*, a civil action to obtain injunctive relief will lie where "systemic" deficiencies result in the denial of "core" assistance by counsel, despite the nominal appointment of counsel.[47] As the court recognized there, the "question presented by such claims … is whether the State has met its obligation to provide counsel, not whether under all the circumstances counsel's performance was inadequate or prejudicial."[48] Such a lawsuit therefore does not raise the "contextually sensitive claims that are typically involved when ineffectiveness is alleged" because case-specific decisions made by individual attorneys are not at issue.[49] Thus, *Strickland* is not applicable.

The complaint in *Hurrell-Harring* alleged that due to inadequate funding and staffing, the indigent defense system was "structurally incapable" of providing legal representation at critical stages prior to trial as required by the Constitution.[50] A multitude of systemic deficiencies were identified, including the fact that in some circumstances, misdemeanor defendants were not provided counsel at arraignment.[51] Even after counsel was appointed, however, the complaint alleged as independent claims that attorneys had no meaningful contact with their clients and investigative services essential to preparing a defense were not provided.[52] One plaintiff, for example, was held in jail awaiting disposition of misdemeanor charges for 148 days and did not see his attorney for four months.[53] The Court declared this period between arraignment and trial to be a critical stage at which the absence of counsel "may be more damaging than denial of counsel during the trial itself."[54]

The Supreme Court held in *Rothgery v. Gillespie County* [55] that the right to counsel attaches when an arrestee is brought before a judicial officer who informs him of the charge and places restrictions upon his liberty by setting bail. This is typically called an arraignment. Where an excessive caseload prevents counsel from being able to meet and confer with a client, undertake necessary legal research and conduct an appropriate factual investigation within a reasonable time after arraignment, the defendant has been deprived of core assistance at a critical stage. As the Supreme Court stated in *United States v. Cronic*: "If no actual "'Assistance' 'for' the accused's 'defense' is provided, then the constitutional guarantee has been violated. To hold

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[46] *See* ABA Formal Opinion 06-441, Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation (May 13, 2006).
[47] Hurrell-Harring v. New York, 930 N.E.2d 217, 224-26 (N.Y. 2010).
[48] *Id.*
[49] *Id.*
[50] Brief for Plaintiff-Appellants at 8, Hurrell-Harring v. New York, 930 N.E.2d 217 (N.Y. 2010) (No. 2010-0066).
[51] *Id.* at 4.
[52] *Id.* at 7.
[53] *Id.* at 5.
[54] *Id.* (quoting Maine v. Moulton, 474 U.S. 159, 170 (1985)).
[55] 554 U.S. 191 (2008).

otherwise could convert the appointment of counsel into a sham . . . . Assistance begins with the appointment of counsel, it does not end there."[56]

The Supreme Court has recognized a completed violation of the right to counsel without any showing of prejudice in a number of different contexts. *Gideon* itself did not require a showing of prejudice where counsel is not provided at trial. Other cases include: *Hamilton v. Alabama*[57] (counsel not provided at arraignment), *White v. Maryland*[58] (uncounseled guilty plea), *Herring v. New York*[59] (counsel prohibited from making closing argument), *Holloway v. Arkansas*,[60] and *Cuyler v. Sullivan*[61] (representation by counsel with conflicting interests). In none of these cases was an actual showing of prejudice demanded because counsel either was not present at all or was prevented from providing assistance and was therefore constructively absent.

In *Geders v. United States*,[62] the Court also did not require a showing of prejudice where the trial court prevented counsel from consulting with defendant during an overnight recess that occurred between his direct testimony and cross-examination. As the Court subsequently explained in *Perry v. Leeke*, where it distinguished *Strickland*, the actual or constructive denial of the assistance of counsel "is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective."[63]

Finally, the Supreme Court has recognized a Sixth Amendment violation of the right to counsel, without any showing of prejudice, when a defendant has been erroneously denied the right to retain private counsel of their choice. In *United States v. Gonzalez-Lopez*, the Court refused to engage in "a speculative inquiry into what might have occurred in an alternate universe,"[64] holding, "We have little trouble concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error'.'"[65]

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[56] United States v. Cronic, 466 U.S. 648, 654 (1984).
[57] 368 U.S. 52 (1961).
[58] 373 U.S. 59 (1963).
[59] 322 U.S. 853 (1975)
[60] 435 U.S. 475 (1978).
[61] 446 U.S. 335 (1980).
[62] 425 U.S. 80 (1976).
[63] Perry v. Leeke, 488 U.S. 272, 280 (1989) (citing Strickland v. Washington, 466 U.S. 668, 692 (1984)). *Perry* upheld a trial judge's order preventing a defendant from consulting with his lawyer during a brief recess immediately after defendant's direct testimony and before cross-examination. Applying the nondiscussion of testimony rule applicable to all witnesses, the Court held that "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." *Id*. at 281. The Court distinguished *Gedders* on the ground that topics discussed during an overnight recess "would encompass matters that go beyond the content of the defendant's own testimony -- matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain." *Id*. at 284.
[64] United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006).
[65] *Id.*

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

When the underfunding of indigent defense systems result in such excessive caseloads that defense counsel is unable to conduct a "prompt and thorough-going investigation,"[66] the government denies the assistance of counsel to which the defendant is entitled. County officials who cut public defender budgets thus violate the Sixth Amendment when they deprive defendants of the resources needed to provide "core" assistance of counsel—that is, a prompt and meaningful attorney-led investigation into guilt or innocence and mitigating circumstances, in compliance with national standards. The same is true for county officials who provide indigent defense services through a system of flat fee contracts awarded to the lowest bidder without making adequate provision for investigation. By viewing the period between arraignment and trial as a critical stage during which counsel-led investigation is required, the systemic failure to provide indigent defendants with counsel who have sufficient time and resources to be able to undertake that investigation gives rise to a cause of action for systemic relief.

IV. How this Strategy can be Incorporated into the Federal Government's Response to the Indigent Defense Crisis

Hurrell-Harring was brought in state court under New York's civil procedure rules permitting declaratory judgments.[67] 28 U.S.C. 2201 also contains a similar authority for a federal court to provide declaratory relief to parties regarding "any controversy within its jurisdiction."[68] Pursuant to its authority under §5 of the Fourteenth Amendment, Congress also has the power to enforce the Sixth Amendment by creating a federal cause of action for equitable and declaratory relief.[69] During the 111th Congress, Senators Leahy and Franken sponsored

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[66] Powell v. Alabama, 287 U.S. 45, 58 (1932).

[67] N.Y. C.P.L.R. § 3001 (McKinney 2010).

[68] 28 U.S.C.A. § 2201 (West 2010) provides:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

[69] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. 14, § 5. Gideon v. Wainwright, 372 U.S. 335 (1963), established that the Sixth Amendment is a fundamental right incorporated within the rights protected by the Due Process Clause of the Fourteenth Amendment. *See also* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (upholding law suits brought under the Civil Rights Act of 1964). Congress's intent to override sovereign immunity must be clearly expressed. Quern v. Jordan, 440 U.S. 332 (1979) (holding that Congress did not express such intent with sufficient clarity in 42 U.S.C. §1983). Official immunity is also no bar to injunctive relief. Pulliman v. Allen, 466 U.S. 522 (1984). While the abstention doctrine may pose an obstacle to such suits, *see* Younger v. Harris, 401 U.S. 37 (1971) (holding that a federal court could not interfere in a state criminal prosecution by restraining the prosecutor from proceeding), the concerns giving rise to that doctrine

Senate Bill 3842, which authorized the Attorney General of the United States to file a civil action to obtain equitable and declaratory relief to eliminate any "pattern and practice . . . by government officials . . . with responsibility for the administration of programs or services which provide appointed counsel to indigent defendants, that deprives persons of their rights to assistance of counsel protected under the Sixth Amendment and Fourteenth Amendment."[70]

The bill died in Committee at the end of the session, but has been reintroduced as S. 250 in the 112th Congress and referred to the Judiciary Committee. This type of legislation is precisely what is needed if federal enforcement of the Sixth Amendment is to become a meaningful reality. Because of the present economic downturn, budget cuts have stripped public defender offices of the resources needed to provide assistance at the critical stage of investigation. Moreover, as has been described in a previous article,[71] a disturbing trend has been seen in states like California, where counties are now seeking to abolish institutional public defender offices which have developed a cadre of experienced career professional defense attorneys. To avoid the higher cost of such career professionals, who as county employees often have compensation and benefits on a par with their counterparts in the prosecutor's office, these counties have sought to privatize indigent defense services by awarding contracts for those legal services to the lowest bidder.

A case in point is Fresno County, California. In fiscal year 2006-2007, the institutional Public Defender had seventy-six staff attorneys and nineteen investigators. Although it was already handling felony and misdemeanor caseloads twice the maximum allowed by national standards, by 2010 the office had been cut to only forty-eight staff attorneys and nine investigators. Because of these severe budget cuts, the Chief Defender, in compliance with ethical standards, declared the office unavailable to accept new cases and the court had to appoint private counsel to some new cases.[72] Instead of restoring the Public Defender's staff, the

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are muted when bringing a class action for prospective relief against a pattern and practice of unconstitutional conduct which Section 5 was clearly meant to address.

[70] The Justice for All Reauthorization Act of 2010, S. 3842, 111th Cong. (2010), contains a section proposing the "Effective Administration of Criminal Justice Act of 2010," which provided:

> (1) UNLAWFUL CONDUCT- It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by officials or employees of any governmental agency with responsibility for the administration of justice, including the administration of programs or services that provide appointed counsel to indigent defendants, that deprives persons of their rights to assistance of counsel as protected under the Sixth Amendment and Fourteenth Amendment to the Constitution of the United States.
>
> (2) CIVIL ACTION BY ATTORNEY GENERAL- Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may, in a civil action, obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

[71] *See, e.g.*, Laurence A. Benner, *The California Public Defender: Its Origins, Evolution and Decline*, 5 CAL. LEGAL HIST. 173 (2010).

[72] Brad Brannon, *Fresno Co. Public Defender Cuts May Backfire*, FRESNO BEE, Sept. 25, 2010, *available at* http://www.fresnobee.com/2010/09/24/2091363/fresno-co-public-defender-cuts.html.

County responded by putting out an RFP soliciting bids from private contractors to do the work of the public defender's office.[73]

In theory, contract defenders can provide competent services if properly regulated by standards and accountability mechanisms to ensure adequate representation by qualified personnel.[74] Recent research, however, indicates this has not occurred, as no enforcement mechanism exists to ensure that greed does not trump justice.[75] One contract defender, for example, explained that he was able to handle an extremely high volume of cases (exceeding by several magnitudes the maximum allowed by national standards) because he pled 70% of the defendants guilty at the first court appearance after spending only about thirty seconds with the defendant to explain the prosecutor's offer.[76] Obviously no investigation was undertaken in these cases where the contract defender met the defendant for the first time in court. There has also been a race to the bottom as entrepreneurial lawyers engage in bidding wars to gain these government contracts. One contract defender, for example, who operated on a budget that was less than a third of the prosecutor's budget, was nevertheless replaced, despite support from local judges, after being undercut by a bid almost 50% less than his submission.[77]

When privatization schemes that are concerned only about cost fail to provide representation at the investigation stage, the strategy discussed here for finding that this failure constitutes a completed violation of the Sixth Amendment will allow successful intervention to provide a remedy. The same is equally true with respect to institutional defender offices that have suffered staffing cuts that prevent them from conducting reasonable investigations.

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

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[73] County of Fresno, Request for Proposal Number 962-4878, October 20, 2010, *available at* www2.co.fresno.ca.us/0440/Dwnpgitms/962-4878%20Bid%20Notice.doc. The RFP was subsequently withdrawn.

[74] *See* Benner, *The Presumption of Guilt*, *supra* note 1 at 307 & 347-48 recommending: (1) that contracts based upon a flat fee per case should be prohibited because of the serious danger they present to the integrity of the criminal justice system, and (2) that contract bidders should be required to submit details concerning the number, qualifications and cost of attorneys, staff investigators and other support services they would employ, including the supervisory structure and case management information system necessary to ensure adequate supervision of individual providers and overall monitoring of the contractor's performance. *See also* NAT'L LEGAL AID & DEFENDER ASSOCIATION, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENT CONTRACTS FOR CRIMINAL DEFENSE SERVICES (1984), available at http://www.nlada.org/Defender/Defender_Standards/Negotiating_And_Awarding_ID_Contracts#threethree.

[75] *See* Benner, *The Presumption of Guilt*, *supra* note 1 at 300-07 reporting examples of contract defenders that have no staff investigators or other support personnel and give inexperienced attorneys extremely heavy caseloads. When a lawyer is paid by the case, the contract can be profitable only if there are few trials. Not surprisingly, contract defenders were much less likely to take a case to trial than institutional public defenders. *Id*. at 316.

[76] *Id*. at 305.

[77] *Id*. at 306.

Defender Association (NLADA) and the National Clients Council, prepared a "Discussion Proposal" for such a Center.[78] The basic concept underlying the proposal was the creation of an independent federally-funded granting entity constructed upon the following four principles:

(1) federal funding for the improvement of defense services must be structured so as to provide continuity and stability over a significant number of years;
(2) financial support should be instituted through a grant in aid program;
(3) the funding program should contain incentives for local communities to maintain and augment their current efforts; and
(4) the entity administering the program must be independent of any of the three branches of the federal government.[79]

Based upon these principles federal assistance grants could fund an independent Center for Indigent Defense Improvement in each state requesting such assistance. Recognizing that a one-size-fits-all approach to standards is unworkable given the number and complexity of variables that impact defense representation, the Center's first task would be to conduct an audit of the indigent defense delivery systems of each county in the state. Using the methodology outlined above for conducting Workload Assessments, the audit would determine the need for additional attorneys, investigators, and other support personnel. Each county would then have its own individually tailored workload standards.

After determining appropriate staffing levels, the Center would then certify that a county is in constitutional compliance when those staffing levels are met.[80] Upon satisfaction of these requirements the county would then be reimbursed by federal grants equaling the amount required to bring the county's indigent defense system into compliance with its own locally established standards. A condition of continued reimbursement would be a requirement that the Center receive from each county basic statistical data sufficient to permit the Center to monitor the health of the indigent defense delivery system. In the event excessive caseloads reappeared and were not corrected within a reasonable period, the Center would have the power to revoke the county's certification and stop reimbursement. The negative publicity from de-certification, the legal impact this would have on ineffective assistance of counsel claims arising from that county (as well as providing a basis for a lawsuit to order compliance), and of course, the financial impact of withdrawal of federal reimbursement, would provide strong incentives for voluntary compliance with the maximum workload levels established by the Center.

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[78] ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, THE CENTER FOR DEFENSE SERVICES: A DRAFT DISCUSSION PROPOSAL FOR THE ESTABLISHMENT OF A NONPROFIT CORPORATION TO STRENGTHEN INDIGENT DEFENSE SERVICES (1977). Copy #37 of the Discussion Draft is on file with the author, who as National Director of Defender Services of NLADA participated in drafting the proposal. In 1979 Senator Edward Kennedy became involved in sponsoring a bill to create a center for defense services. *Defense Services Bill Still in the Works*, 65 ABA JOURNAL 1629 (1979).

[79] ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *supra* note 78 at 53-54.

[80] The author is indebted to Marshall J. Hartman, former National Director of Defender Services for NLADA who originally proposed the idea that defender offices should be accredited the same as police departments and departments of correction. In compliance with national standards, certification would also be conditioned upon the professional independence of the Public Defender being assured. *See* ABA STANDING COMM'N ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002). This could be done by creating an independent nonpartisan Board of Trustees to oversee the office.

Although obtaining funding for indigent defense will be difficult in the short term, given current economic realities, there are nevertheless many areas in which savings can be realized if we rethink how we spend our criminal justice dollars. The California Commission on the Fair Administration of Justice, for example, concluded that the state could save $126.2 million if the death penalty were to be abolished in favor of life without parole.[81] Reclassifying some non-violent misdemeanor offenses and making them infractions, scaling back mandatory minimum sentences instead of constructing new and costly prisons, and reforming the bail system so that the percentage paid by defendants to a private bail bondsman goes instead to the government, are examples of other alternatives that could also be considered.[82]

V. Conclusion

We often lose sight of the fact that the average American, if accused of a serious crime, does not have the financial resources to obtain quality legal representation and the investigative and other supporting services necessary for an adequate defense.[83] All Americans therefore have a stake in ensuring that publically provided defense services deliver representation of the highest quality because anyone's son, daughter, relative, or friend could become caught up in the web of the criminal justice system and be wrongfully accused. Sadly, *Gideon's* promise of equal justice for all, regardless of wealth, remains unfulfilled after almost half a century. By recognizing that the period from arraignment to trial is a critical stage at which an indigent accused must be provided with counsel's assistance, we take an important first step in turning back the crisis facing the delivery of indigent defense services. In taking that step, we renew our commitment to restoring confidence in the fairness of our criminal justice system.

[81] CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 156 (2007), *available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf.

[82] Illinois, for example, abolished commercial bondsmen in 1963. *See* 725 ILL. COMP. STAT. §5/110-7 (West 2011), upheld in Schilb v. Kuebel, 404 U.S. 357 (1971).

[83] More than eight out of ten criminal defendants prosecuted in California Superior Courts, for example, require appointment of counsel. Benner, *Presumption of Guilt*, *supra* note 1 at 311. A nationwide poll conducted by Bankrate.com reported that fewer than four out of ten American adults have an emergency savings fund. Laura Bruce, *Bankrate Survey: Most Americans Fail the Emergency-fund Test*, BANKRATE, June 21, 2006, http://www.bankrate.com/brm/news/sav/20060621a1.asp.