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The 2010 Earl F. Nelson Lecture

**Legal Representation for the Poor: Can Society
Afford This Much Injustice?**

*Stephen B. Bright**

A *New Yorker* cartoon depicts a lawyer facing his client, asking the critical question: “You’ve got a pretty good case, how much justice can you afford?” Of course, the promise is equal justice for all. But that is an aspiration, not reality. The poor person accused of a crime cannot afford any justice. So how much justice is society going to provide? Competent counsel for the accused, with the resources needed for investigation and consultation with experts, is essential for the proper working of our adversary system of justice. States can *afford* to provide high quality representation for the accused – appropriate for the high stakes involved: liberty or even life – but most states are not *willing* to provide a decent level of representation for poor people accused of a crime. The result in many places is a system that lacks legitimacy and credibility, sometimes does not provide reliable results, and, on occasion, produces great miscarriages of justice.

The criminal justice system is overwhelmed. In the 1970s, there were about 200,000 people in prisons and jails in the United States.¹ That number had held, relative to the population, pretty steady throughout our history.² Then over the next forty years there was an increase of 800 percent,³ so that today there are 2.3 million men, women, and children in our prisons and jails.⁴ The United States now has the highest incarceration rate of any country in the world.⁵

During this time, the federal government has awarded millions of dollars to state law enforcement agencies and state prosecutors. When a federal grant is made to create a drug task force or some other law enforcement agen-

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1. Steven B. Duke, *Mass Imprisonment, Crime Rates, and the Drug War: A Penological and Humanitarian Disgrace*, 9 CONN. PUB. INT. L.J. 17, 17 (2009).

2. *Id.*

3. *Id.*

4. *Rough Justice*, ECONOMIST, July 22, 2010, www.economist.com/node/16640389; THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 at 5 (2008) (reporting that, at the start of 2008, American prisons and jails held more than 2.3 million adults, while China had 1.5 million inmates and Russia had 890,000).

5. *Too Many Laws, Too Many Prisoners*, ECONOMIST, July 22, 2010, www.economist.com/node/16636027 (reporting that one in every 100 adults in America is in prison, which, as a proportion of total population, is five times more than in Britain, nine times more than in Germany, and 12 times more than in Japan).

cy, more people will be arrested. They will need lawyers when they are prosecuted in the criminal justice system.

At the same time, state legislatures throughout the country, which never funded indigent defense adequately to begin with, have not even begun to keep up with this huge, crushing number of cases that were dumped on the state courts. And the courts have often failed in their responsibility to enforce the Sixth Amendment right to counsel. When they have enforced that right, many have done so grudgingly.

The people who have made the right to counsel a reality in this country and in Missouri are public defenders and other lawyers who have taken on cases and represented the poor despite overwhelming caseloads and inadequate resources. They have worked long hours under the immense pressure of having people's liberty – and sometimes people's lives – in their hands. I have been to Missouri many times over the last 30 years and have great respect for its public defenders. They take on great challenges and do heroic work.⁶ People working in all positions in public defender offices are to be commended and thanked for the work that they do. It is sometimes a thankless job. There are many times when one cannot help but say, "Can this cup be passed?" And yet, they stay with it year after year and share their expertise with younger lawyers who come into the system, as well as with the clients that they serve.

Public defenders all over this country face excessive caseloads. I had the good fortune of serving as a public defender in an office where that was not a problem. If a lawyer had too many cases, she could decline any new cases until some of her cases were resolved. That was because in 1969, Barbara Babcock⁷ and Norman Lefstein⁸ started the Public Defender Service of

6. Monica Davey, *Budget Woes Hit Defense Lawyers for the Indigent*, N.Y. TIMES, Sept. 10, 2010 at A15 (describing public defenders in Missouri as "overworked and under-financed" and noting that Missouri's per capita spending on public defense ranks forty-ninth in the nation, with only Mississippi spending less); see, e.g., *State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870, 875-880 (Mo. 2009) (en banc) (describing those challenges such as an increase of 12,000 cases in the public defender caseloads in a six-year period during which the public defender program had no addition to its staff).

7. Judge John Crown Professor of Law, Emerita, Stanford Law School. Professor Babcock was the first director of the Public Defender Service of the District of Columbia before joining the Stanford faculty in 1972. She also served as Assistant Attorney General for the Civil Division in the U.S. Department of Justice during the Carter Administration. See Stanford Law School Directory, www.law.stanford.edu/directory/profile/5/ (last visited July 5, 2010).

8. Professor of Law and Dean Emeritus, Indiana University School of Law-Indianapolis. Professor Lefstein was director of the Public Defender Service for the District of Columbia, an Assistant United States Attorney in D.C., a staff member of the Office of the Deputy Attorney General of the U.S. Department of Justice, and a professor at University of North Carolina School of Law in Chapel Hill, as well as dean and professor at Indiana University School of Law-Indianapolis. See Indiana Law School Directory, <http://indylaw.indiana.edu/people/profile.cfm?Id=80> (last visited July 5, 2010).

the District of Columbia.⁹ It has been, and continues to be, an exemplary program that demonstrates what public defender offices should be like, with reasonable caseloads, an outstanding training program, investigative services, and resources for experts.¹⁰

Unfortunately, the kind of representation provided by the District of Columbia Public Defender Service is not provided to those accused of crimes in most state courts, where the overwhelming majority of people accused of crimes are prosecuted.¹¹ Almost all of them are poor and, therefore, are constitutionally entitled to counsel to represent them. But what kind of representation is going to be provided by the same government that is committed to convicting them and denying them their liberty and, in some cases, even their lives? Why would the government frustrate its own purpose by providing good legal representation to people it is trying to convict, imprison, and even execute? The prosecution's chances of obtaining a conviction improve if the defendant is poorly represented.

The story of the constitutional right to counsel starts with an inspiring, uplifting story, but goes downhill from there. Clarence Earl Gideon was arrested for breaking into a pool hall in Panama City, Florida.¹² He demanded a lawyer at his trial, but did not get one; he was convicted and sent to prison.¹³ He then wrote his own petition to the United States Supreme Court in pencil on prison paper that had the prison's correspondence regulations printed at the top of each page.¹⁴ His petition is only five pages,¹⁵ but it is not bad –

9. See Barbara Allen Babcock, *Lefstein to the Defense*, 36 IND. L. REV. 13 (2003).

10. See Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1285-89 (1993) (describing the Public Defender Service for the District of Columbia and how it trains and motivates its lawyers); The Public Defender Service for the District of Columbia, <http://www.pdsdc.org> (last visited July 5, 2010).

11. I will not address representation for those accused in the federal courts because the federal courts deal with a small percentage of criminal prosecutions. Most crime is prosecuted in the state courts. Also, federal public defender programs are well-funded. Most are independent community defender programs governed by a board of directors, not the judiciary. Most federal public defenders have reasonable caseloads and provide their clients with good representation. Poor people accused of crimes in the federal courts who are not represented by public defenders are assigned lawyers who are paid decent rates under the Criminal Justice Act. 18 U.S.C. §3006A (2006). Those rates in 2010 were \$125 per hour for representation in non-capital cases and \$178 per hour in capital cases, subject to certain maximums per case. See Office of Defender Services, Current Criminal Justice Rates and Case Compensation Maximums, www.fd.org/odstb_CJARates.htm (last visited July 5, 2010). As will be discussed, this is not the case in the state courts.

12. *Gideon v. Wainwright*, 372 U.S. 335, 336 (1963).

13. *Id.* at 336-37.

14. ANTHONY LEWIS, *GIDEON'S TRUMPET* 4 (1964); see also Petition for Writ of Certiorari to the Supreme Court of the State of Florida, *Gideon v. Wainwright sub nom. Gideon v. Cochran*, 372 U.S. 335 (1963) (No. 155), available at [http://www.nacdl.org/public.nsf/GideonAnniversary/pleadings/\\$FILE/Petition_for_Writ.pdf](http://www.nacdl.org/public.nsf/GideonAnniversary/pleadings/$FILE/Petition_for_Writ.pdf) (last visited July 5, 2010) [hereinafter Petition for Writ of Certiorari].

15. Petition for Writ of Certiorari, *supra* note 14.

better than the work some lawyers do these days, unfortunately. At one point, he says, "Counsel must be assigned to the accused if he is unable to employ one, and incapable adequately of making his own defense."¹⁶ He winds up his petition with a wherefore clause asking that the court provide him with lawyers.¹⁷

The Supreme Court granted certiorari.¹⁸ It appointed Abe Fortas, a prominent lawyer, then with the law firm of Arnold Fortas & Porter, to represent Gideon.¹⁹ Fortas argued the case before the Court.²⁰ At the time, a defendant had a right to counsel only in capital cases and in cases where the penalty was severe, the issues difficult, and the defendant inexperienced.²¹

Twenty-three states supported Gideon's position that a poor person accused of a crime has a right to a lawyer.²² Walter Mondale, the Attorney General of Minnesota at the time and later the Vice President of the United States, led the effort to have states file an *amicus* brief in the Supreme Court saying that, if the criminal justice system was to be fair, poor people accused of crimes must be represented by counsel.²³ Only two states, North Carolina and Alabama, supported Florida's position that poor people are not entitled to a lawyer.²⁴ The Supreme Court unanimously held the Sixth Amendment applicable to the states, finding that every person facing a felony charge is entitled to a lawyer.²⁵

Gideon went back to Panama City.²⁶ At a new trial, where he was represented by attorney Fred Turner, he was acquitted.²⁷ Anthony Lewis wrote the next day in the *New York Times*, "The difference between the two trials was that this time Mr. Gideon had a lawyer."²⁸ Lawyers make a difference.

Abe Fortas was later appointed to the Supreme Court, where he wrote one of the more important right to counsel cases, *In re Gault*, which gave children the right to counsel in delinquency cases.²⁹

In the book *Gideon's Trumpet*, Anthony Lewis wrote:

16. *Id.* at 5. (citing *Tomkins v. Missouri*, 323 U.S. 485 (1945)).

17. *Id.*

18. *Gideon*, 372 U.S. at 338.

19. *Id.*

20. LEWIS, *supra* note 14, at 169.

21. *Powell v. Alabama*, 287 U.S. 45, 59-60 (1932); *Betts v. Brady*, 316 U.S. 455, 467-72 (1942).

22. LEWIS, *supra* note 14, at 147-52.

23. *Id.* at 145-50.

24. *Id.* at 152.

25. *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963).

26. LEWIS, *supra* note 14, at 224-25.

27. *Id.* at 228, 237.

28. Anthony Lewis, *High Court Ruling Helps Poor Man to Freedom*, N.Y. TIMES, Aug. 6, 1963, at 21.

29. *In re Gault*, 387 U.S. 1 (1967).

It will be an enormous social task to bring to life the dream of *Gideon v. Wainwright* – the dream of a vast, diverse country in which every man charged with crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense.³⁰

Of course, *Gideon v. Wainwright* is not a dream; it is a constitutional requirement. The Court did not say it is a *good idea* to provide lawyers for people accused of crimes; it said that lawyers are *constitutionally required*. There is no constitutional requirement to pave a road to anywhere. But there is a constitutional requirement to provide lawyers to poor people accused of crimes. The Supreme Court later held that a lawyer must be provided to the accused in any case in which there could be a loss of liberty.³¹ It is not optional. It is not merely a good idea. It is absolutely required.

But *Gideon* was a judicial opinion. It was an unfunded mandate from the federal government. There was no agency to go about administering the daunting task of implementing the decision. It was going to be enormously costly if done right, and a lot of states resisted spending any money on it and did it wrong. Some states conscripted lawyers. Any member of the bar was required to represent people accused of crimes. A lawyer might specialize in tax or real estate work, but, when his or her turn came, the lawyer was assigned a case, spent as little time as possible on it, and moved on. That is still the practice in some jurisdictions even today. In the federal southern district of Georgia, every lawyer who is a member of the bar has to take criminal cases, although they are compensated for their work.³² That requirement is ridiculous and outdated. Remarkably, two Missouri prosecutors recently advocated conscripting new lawyers, requiring them to “volunteer 40 hours per year of their time to representation of indigent defendants . . . for the first five years.”³³

Robert Kennedy, who was the Attorney General of the United States at the time *Gideon* was decided, said that the poor person accused of a crime has no lobby.³⁴ And that is the great problem. When *Gideon*'s decision came

30. LEWIS, *supra* note 14, at 205.

31. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

32. S.D. Ga. R. 83.11 (providing that the roll of attorneys who are members of the Court “shall constitute the ‘panel of attorneys’ to be used in appointing counsel to represent indigent defendants”).

33. Jeffrey M. Merrell & Christopher W. Lebeck, *Consider Eliminating State Public Defenders*, SPRINGFIELD NEWS-LEADER, Aug. 15, 2010. Merrell is the prosecuting attorney and Lebeck the chief assisting prosecuting attorney for Taney County, Mo. *Id.* They supported their suggestion for five years of “volunteer” representation of poor people by new lawyers by emphasizing the value of the experience to the lawyers without addressing the quality of representation that would be received by the clients. *Id.*

34. LEWIS, *supra* note 14, at 211.

down from the Supreme Court, there was no lobby in the legislatures for the right to counsel. However, within days of the *Gideon* decision, Florida's then-governor Farris Bryant recommended to the state's legislature the creation of a public defender system in response to the opinion.³⁵ Within two months, Florida's legislature passed a law creating a public defender office in every judicial circuit in Florida, parallel to the State's Attorneys' Offices.³⁶ As a result, a public defender system has developed throughout Florida since 1963. Some of those offices are among the most outstanding public defender offices in the country.

The work of one of those offices is documented in the film *Murder on a Sunday Morning*, directed by Jean-Xavier de Lestrade. It follows two veteran public defenders in Jacksonville, Florida, as they represent a young man, Brenton Butler, who was accused of a murder.³⁷ They won an acquittal, even though an eyewitness identified Butler as the perpetrator and law enforcement officers testified that Butler confessed.³⁸ The public defenders presented Butler's testimony that the law enforcement officers beat him and evidence of the bruises on his face from the beating.³⁹ After Butler's acquittal, the public defenders even identified the person who actually committed the crime, which further confirmed that Butler's confession had been coerced.⁴⁰ If the crime had happened on the other side of the state line in Georgia, Butler would still be rotting away in some Georgia prison today.

However, if Brenton Butler was wrongfully accused of murder in Jacksonville today, he would not receive the same capable representation that resulted in his acquittal. A challenger successfully defeated the long-time public defender in Jacksonville in an election in 2008 by promising that, if elected, *he would not allow public defenders to accuse any police officer of lying*.⁴¹ Upon winning the election, he fired the two lawyers who successfully defended Butler, as well as eight other veteran lawyers in the office.⁴² As a result of this demagoguery and irresponsibility, poor, innocent people accused of a crime in Jacksonville may also spend the rest of their time rotting away in a prison.

Public defenders in other offices in Florida are not restricted in how they defend their clients, but many have such crushing workloads that they cannot meet their legal and ethical obligations to their clients. The Miami public defenders have twice sought relief for excessive caseloads. In one case, they

35. *Id.* at 202.

36. *Id.* at 203.

37. MURDER ON A SUNDAY MORNING (Centre National de la Cinématographie (CNC) 2001).

38. *Id.*

39. *Id.*

40. *Id.*

41. Ronald F. Wright, *Public Defender Elections and Popular Control over Criminal Justice*, 75 MO. L. REV. 803, 821-22 & nn.87-88 (2010).

42. *Id.* at 821-22 n.88; Paul Pinkham, *Public Defender-elect Fires 10 Seasoned Attorneys*, FLA. TIMES UNION, Nov. 29, 2008, at A-1.

sought broad relief – asking to be allowed to decline representation in third-degree felony cases until they got their caseloads under control so their lawyers could give each client the individual representation that the Sixth Amendment requires.⁴³ In the other, a single public defender sought to withdraw from a single case because his obligations to 164 clients in pending felony cases prevented him from being able to represent yet another client, one who faced a first-degree felony charge that carried a sentence of life imprisonment as a habitual offender.⁴⁴

The public defenders prevailed on both cases before trial courts that were familiar with their situations. However, they lost both cases before an intermediate appellate court.⁴⁵ It is hard to imagine that the appellate judges did not realize how discouraging their decision would be to the conscientious public defender with 164 clients, as well as to his colleagues. Surely, the judges recognized that some of the best and most diligent public defenders will have no alternative except to resign if they are forced to take on more cases than they can competently and ethically handle. Once good lawyers start leaving a public defender office because effective representation is no longer possible, it begins a downward spiral, as the office loses its most dedicated and experienced lawyers, its supervisors and mentors. The large caseloads must then be given to newly hired, inexperienced lawyers. It becomes harder to hire and keep good lawyers as the job becomes more and more impossible.

One judge on the Florida Court of Appeals, concurring in the denial of allowing the public defenders to decline third degree felonies until they had reasonable caseloads, said that the case was “nothing more than a political question masquerading as a lawsuit.”⁴⁶ The Sixth Amendment right to counsel?

This is an example of courts passing the buck to the legislature on a constitutional question where, as Attorney General Kennedy said, the poor person accused of a crime has no lobby. Justice Hugo Black observed in *Chambers v. Florida*: “[C]ourts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.”⁴⁷ People who have no political power go to the courts for

43. *State v. Pub. Defender*, Eleventh Judicial Circuit, 12 So.3d 798 (Fla. Dist. Ct. App. 2009) (per curiam), *review granted*, No. SC09-1181, 34 So.3d 2 (Fla. May 19, 2010). Public defenders in Missouri have also sought to reject new cases because of the demands of their existing ones. See Davey, *supra* note 6, at A15 (describing a trial court’s refusal to allow a public defender office to decline representation of a defendant because of existing caseloads and the Supreme Court of Missouri’s issuing of an order temporarily halting the appointment until that court decides whether the public defenders can refuse to take cases).

44. *State v. Bowens*, No. 3D09-3023. 2010 WL 2670839 at *1 (Fla. Dist. Ct. App. July 7, 2010).

45. *Pub. Defender*, 12 So.3d at 805-06; *Bowens*, 2010 WL 2670839 at *2.

46. *Pub. Defender*, 12 So.3d at 806 (Shepherd, J., concurring).

47. *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

protection of their constitutional rights, not to the legislatures. The legislatures often do not protect the constitutional rights of poor people accused of crimes. The poor, the despised must rely on the courts because courts have a responsibility to protect constitutional rights, no matter how popular or unpopular the person asserting those rights may be. While the Florida legislature created a public defender system in 1963, as previously discussed, it has failed to maintain the system. Now, as shown by Miami, the system is in crisis. This is true around the country: states do not provide enough resources, and public defenders have too many cases to provide effective representation to all their clients.

Some states, like Alabama and Texas, do not have public defender systems even today. In those states, judges just appoint whatever lawyers they want. A judge in Texas has talked about how wonderful his system is – he appoints four contract attorneys who represent the poor people accused of crimes that come before him.⁴⁸ But to whom are they loyal? To their clients, or to the judge upon whom they rely for their livelihoods?

That system of “public defenders” hired by judges to work in their courtrooms was used in Indianapolis, but is not anymore, thanks again to Norman Lefstein.⁴⁹ I once met with a lawyer there about a capital case the lawyer was handling. The lawyer was totally unprepared. When I told him he needed to get a continuance, he said that he could not move for a continuance because he would lose his job if he did. A lawyer’s duty of loyalty is to his or her client, not to the judge. But lawyers must stay on the good side of judges if they depend upon judges for their livelihoods. When lawyers are loyal to the judge instead of their clients, it skews the adversary system so that it often works to the disadvantage of the clients.

Some states, like Georgia and Montana, finally got around to creating public defender systems around 2005 – over 40 years after Florida.⁵⁰ Now, in

48. Lise Olsen, *Hundreds Kept Jailed for Months Pretrial: Lawyers for the Poor Have High Caseloads, But Little Oversight, Analysis Shows*, HOUSTON CHRON., Oct. 4, 2009 (quoting Judge Michael McSpadden as saying he saw no need for a public defender system because he could not “imagine anyone doing a better job than I am with my four contract attorneys,” and noting that McSpadden used “defense attorneys with heavy caseloads,” that his courtroom was “plagued by backlogs,” and he was “among nine of the 22 district courts with backlogs of more than a year for 100 or more felony cases”); Brian Rogers, *Doubting the Public Defender Office: Some Judges Worry About How Well Lawyers Would be Vetted*, HOUSTON CHRON., Oct. 3, 2009, at B2 (reporting that Judge McSpadden opposed a public defender office for Harris County); Bob Sablatura, *Appointment of Defenders Varies in County: Some Judges Create Own Systems; Critics Call for Independent Office*, HOUS. CHRON., Oct. 18, 1999, at A9 (reporting that Judge McSpadden had set up his contract system ten years previously).

49. See Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 IND. L. REV. 495 (1996) (describing efforts in death penalty cases which were part of larger reform efforts).

50. Georgia Indigent Defense Act of 2003, GA. CODE ANN. §§ 17-12-1 (West 2010); Montana Public Defender Act, MONT. CODE ANN. §§ 47-1-101. The Georgia program was created in 2003, funded in 2004 and started operations in 2005. See GA. CODE ANN. §§

those states, there is at least a structure – a public defender’s office in each judicial circuit. If young lawyers want to represent poor people accused of crimes, they will not just have to hope a judge will appoint them; they can get full-time jobs at the public defender offices. But other things are absolutely essential: resources, so the caseloads are reasonable; independence, so that public defenders are loyal to their clients alone; training, so that public defenders know the latest developments in the law and in scientific evidence, how to represent people in different kinds of cases, and information about mental health issues; and competent management, so public defender programs are well run and make the best use of their limited resources. The critical question is whether public defenders are simply processing people through the system or giving their clients the individual representation that justice requires. Too often, it is the first.

Many courtrooms in parts of this country look like a slave ship is docked outside the courthouse. A large number of men – almost all of them people of color – are brought in, handcuffed together, wearing orange jumpsuits. Then, a lawyer comes in and talks to each one of them. Of course, the conversations are not confidential – the defendants are handcuffed to each other. The conversations are generally not very long. Usually, it goes something like “here is what the plea offer is, and this is what you will get.” The lawyer proceeds right down the row. A short time later, the judge takes the bench. Each defendant hobbles up to the podium in chains, pleads guilty, answers the judge’s questions, waives his rights, and is sentenced. That is called “meet ’em and plead ’em,” and that is all the representation and all the “justice” they get.

Although the Georgia legislature created a public defender system that began operations in 2005, it did not appropriate sufficient funding to run the system.⁵¹ And so, while the system is improved because of the structure provided by the public defender offices with full-time lawyers, there are still serious deficiencies, including instances when people accused of crimes have received no representation at all.

In 2010, the Georgia Supreme Court decided two capital cases which had ground to a halt due to lack of funding for representation of the defendants. The court held, by a vote of 4-3, that the state could proceed to seek the death penalty against Jamie Ryan Weis despite Georgia’s failure to pro-

17-12-20-37 (West 2010); *see also* THE CONSTITUTION PROJECT, NAT’L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 72-73, 150-53 (2009), *available at* www.constitutionproject.org/manage/file/139.pdf.

51. *See, e.g.*, Jay Bookman, Opinion, *Justice Delayed is Justice Denied, Even in Georgia*, ATLANTA JOURNAL-CONSTITUTION, July 2, 2010, at A16 (discussing delay in bringing cases to trial because of failure of Georgia legislature to fund properly the public defender system); E. Wycliffe Orr St., Letter to the Editor, *State’s Leaders Indifferent to Broken PD System*, FULTON COUNTY DAILY REP., July 19, 2010, at 4 (former legislator and member of the public defender council expresses dismay at legislature’s failure to properly fund the public defender system).

vide funds for his legal representation for all but six months of the three and a half years his case had been pending.⁵² After representing him for six months, the lawyers appointed to defend Weis were unable to obtain funds for investigation and experts and, eventually, their own compensation.⁵³ At a hearing in November 2007, the district attorney – without any notice to Weis or his lawyers – moved to cut costs by replacing the defense lawyers with salaried attorneys from the local public defenders office.⁵⁴ The judge granted the motion.⁵⁵

Because of the inadequate funding, Georgia public defenders carry staggering caseloads. One of the public defenders appointed to represent Weis was not certified to handle capital cases, was lead counsel in 103 felony cases, and part of a defense team in over 400 cases.⁵⁶ The other was the administrator of a four-county circuit public defender office and represented clients in 91 felony cases.⁵⁷ They filed three motions to withdraw, describing their workloads and lack of resources and stating, “[C]ounsel cannot, *under the current state of affairs, perform adequately in representing the Defendant, no matter how good our intentions or diligent our efforts.*”⁵⁸ The first motion was promptly denied,⁵⁹ but the trial judge never ruled on the second and supplemental motions.

52. *Weis v. State*, 694 S.E.2d 350, 354-58 (Ga. 2010).

53. *Id.* at 353.

54. *Id.*

55. *Id.*

56. Motion for Reconsideration at 22, *Weis v. State*, 694 S.E.2d 350 (Ga. 2010), available at <http://www.schr.org/files/post/2010.04.07%20Corrected%20Motion%20for%20Web%20Site.pdf>.

57. *Id.* at 25.

58. Supplement to Renewed Motion to Withdraw at 3, *Weis v. State*, No. 06R-097 (Pike County Super. Ct. Jan. 8, 2008) (emphasis added). Because of their workloads, the public defenders were ethically prohibited from taking on Weis’ case. See GA. RULES OF PROF’L CONDUCT R. 1.1 (2001) (prohibiting lawyers from handling a matter unless they can do so competently), available at http://gabar.org/handbook/part_iv_after_january_1_2001_georgia_rules_of_professional_conduct/rule_11_competence/. Rule 6.2 states that “[f]or good cause a lawyer may seek to avoid appointment by a tribunal to represent a person.” *Id.* at R. 6.2, available at http://gabar.org/handbook/part_iv_after_january_1_2001_georgia_rules_of_professional_conduct/rule_62_accepting_appointments/. The comment to the rule clarifies that “[g]ood cause exists if the lawyer could not handle the matter competently.” *Id.* at R. 6.2 cmt. 2 (2001), available at http://gabar.org/handbook/part_iv_after_january_1_2001_georgia_rules_of_professional_conduct/rule_62_accepting_appointments/. However, the Georgia Supreme Court majority found they had an ethical responsibility to do the best they could. *Weis*, 694 S.E.2d at 357 (citing GA. RULES OF PROF’L CONDUCT R. 1.3 for the proposition that the public defenders should have acted with “reasonable diligence” even though they never represented Weis).

59. Transcript of Hearing at 25-27, *State v. Weis*, No. 2006R-097 (Pike County Super. Ct. Dec. 7, 2007) (trial judge states to public defenders: “the two of you are going to represent him until I get told differently by somebody” and notes the objection of the public defenders).

After a mandamus action was filed against the judge, the original defense counsel were eventually reinstated, but still no funding was provided.⁶⁰ In June 2009, despite the absence of funding for defense counsel, experts, and investigation for over two years, the trial court set the trial date for only two months later.⁶¹ Five weeks later, with trial less than a month away, the director of the state indigent defense agency suddenly came up with some funding for the case, but it was less than half what his agency and the defense lawyers had agreed was necessary to prepare and present an adequate defense.⁶²

Weis moved to dismiss the indictment and for discharge and acquittal based on denial of his rights to counsel and a speedy trial.⁶³ The trial judge summarily denied the motions.⁶⁴ The Georgia Supreme Court affirmed.⁶⁵ The four justices in the majority said the delay in the case was the fault of Weis and his lawyers because they did not “cooperate” with the appointment of the public defenders, the same public defenders who protested their appointment and asserted that it was impossible for them to represent Weis.⁶⁶ In short, Weis was penalized for asserting his right to counsel and refusing to go along with lawyers who admitted they could not represent him competently.

The three justices in dissent found that Georgia denied Weis adequate representation and a speedy trial:

[I]f the State wants to seek the death penalty against an indigent defendant, it must provide adequate funds for a full and vigorous defense. The State cannot shirk this responsibility because it is experiencing budgetary constraints. It still must fulfill its constitutional obligation to bring those accused of committing crimes to trial in a speedy manner. . . .

....

60. *Weis*, 694 S.E.2d at 353-54.

61. *Id.* at 354.

62. *Id.* The Georgia Supreme Court describes the amount as “significantly reduced” from what defense counsel believed was necessary for an adequate defense. *Id.* The Court did not acknowledge that the Interim Director of the Capital Defender office and the Chief of Staff of the indigent defense program had also agreed on the amount necessary for an adequate defense, which was \$255,000. Transcript of Hearing at 103, 108-09, 140, 256 Exhibit 4, *State v. Weis*, No. 2006-R-097, (Pike County Super. Ct. Feb. 11, 2009) (e-mail from Interim Capital Defender Gerald Word to Weis’ counsel, Chief of Staff, and others confirming the \$255,000 figure as an acceptable budget for the case). The indigent defense agency came up with only \$115,000 on July 8, 2009. Brief for Appellant at *17, *Weis*, 694 S.E.2d 350 (No. S09A1051), 2009 WL 4028414, *17 (representation based on statement at *ex parte* hearing before the trial court).

63. *Weis*, 694 S.E.2d at 354.

64. *Id.*

65. *Id.* at 358.

66. *Id.* at 356.

. . . The failure to move this case forward is the direct result of the government's unwillingness to meet its constitutional obligation to provide Weis with legal counsel and the funds necessary for a full investigation. This failure cannot be justified, and it casts doubt upon the fairness and reliability of a trial"⁶⁷

The dissenters also pointed out that "the State should not be allowed to fully arm its prosecutors while it hamstringing the defense and blames defendant for any resultant delay."⁶⁸

The Georgia Supreme Court majority treated the district attorney's motion to replace Weis' defense lawyers as the equivalent of a "defendant's request to appoint the counsel of his preference."⁶⁹ But of course it was not a defendant's request to appoint counsel of his preference at the outset of a case. It was *opposing counsel's motion* to remove lawyers with whom the defendant had an ongoing attorney-client relationship.⁷⁰ The majority of jurisdictions that have considered the questions have held similarly to the California Supreme Court, which found that, "once counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained."⁷¹ Even where

67. *Id.* at 361, 362-63 (Thompson, J., dissenting).

68. *Id.* at 361.

69. *Id.* at 356 (majority opinion).

70. *See State v. Serna*, 787 P.2d 1056, 1064 (Ariz. 1990) (en banc) ("motions to disqualify an opposing party's attorney are disfavored and are viewed with suspicion[;] . . . we will not tolerate impermissible interferences with the right to the assistance of counsel, and . . . we deplore any governmental action that intrudes on the attorney-client relationship[;] [i]n cases involving disqualification of counsel, we will carefully review the record for any denial of defendant's sixth amendment rights"); *Boulas v. Superior Court*, 188 Cal. App. 3d 422, 425 (Cal. Ct. App. 1986) (requiring dismissal of charges where law enforcement personnel interfered with defendant's attorney-client relationship).

71. *Smith v. Superior Court*, 440 P.2d 65, 74 (Cal. 1968); *see also Morris v. Slappy*, 461 U.S. 1, 24 (1983) (Brennan, J., concurring) (quoting *Smith*, 440 P.2d at 74); *Lane v. State*, No. CR-05-1443, 2010 WL 415248, at *14 (Ala. Crim. App. Feb. 5, 2010) (finding substitution of counsel violated Sixth Amendment, quoting *Smith*); *McKinnon v. State*, 526 P.2d 18, 22 (Alaska 1974) (same); *State v. Madrid*, 468 P.2d 561, 563 (Ariz. 1970) (same); *Clements v. State*, 817 S.W.2d 194, 199 (Ark. 1991) (reversing removal of counsel in interlocutory pretrial appeal); *Harling v. United States*, 387 A.2d 1101, 1105 (D.C. 1978) (reversing conviction because of substitution of counsel over defendant's objection); *People v. Davis*, 449 N.E.2d 237, 241 (Ill. App. Ct. 1983) (finding that defense counsel was improperly removed and holding "for purposes of removal by the trial court, a court-appointed attorney may not be treated differently than privately retained counsel"); *In re Welfare of M.R.S.*, 400 N.W.2d 147, 152 (Minn. Ct. App. 1987) (finding attorney improperly removed as counsel for a juvenile in delinquency proceedings because "once an attorney is serving under a valid appointment by the court and an attorney-client relationship has been established, the court may not arbitrarily remove the attorney over the objection of both the defendant and counsel"); *State v. Huskey*, 82 S.W.3d 297, 305 (Tenn. Crim. App. 2002); *cf. Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (stating that

disqualification has been allowed, courts have held that “disqualification of defense counsel should be a measure of last resort, and ‘the government bears a heavy burden of establishing that disqualification is justified.’”⁷² A serious conflict of interest, physical incapacity, gross incompetence, or contumacious conduct are the only kinds of things that will justify removing counsel who has an ongoing attorney-client relationship.⁷³ Georgia, however, followed the Louisiana Supreme Court, which held “there is nothing in either the federal or state constitutions” which gives a defendant the right “to maintain a particular attorney-client relationship.”⁷⁴ In Louisiana, only defendants who can afford to retain counsel or have volunteer counsel have the right to maintain an attorney-client relationship.⁷⁵

The Georgia Supreme Court applied its decision in *Weis* to do even greater violence to the constitutional right to counsel in *Phan v. State*.⁷⁶ The capital case against Khanh Dinh Phan had been pending for over *five years* without trial because the Georgia public defender agency was unable to provide funds for attorneys, investigators, and expert witnesses.⁷⁷ The agency originally agreed to pay Phan’s lawyers \$125 per hour, but reduced the amount to \$95 per hour and then did not pay them at all after August 30, 2008.⁷⁸ It also refused to fund an investigation that was recognized as constitutionally required.⁷⁹ On a pretrial appeal of a speedy trial issue, the Georgia

“[e]xcept for the source of payment” the relationship between an indigent defendant and appointed counsel is “identical to that existing between any other lawyer and client”).

72. *United States v. Gearhart*, 576 F.3d 459, 464 (7th Cir. 2009) (quoting *United States v. Diozzi*, 807 F.2d 10, 12 (1st Cir. 1986)).

73. *See, e.g., Bumette v. Terrell*, 905 N.E.2d 816, 824 (Ill. 2009); *Weaver v. State*, 894 So.2d 178, 189 (Fla. 2004); *People v. Johnson*, 547 N.W.2d 65, 70 (Mich. Ct. App. 1996).

74. *State v. Reeves*, 11 So.3d 1031, 1066 (La. 2009).

75. *Id. See also United States v. Van Anh*, 523 F.3d 43, 48 n.3 (1st Cir. 2008) (stating that no continuity of counsel issue arises when an indigent defendant’s appointed counsel is replaced because this issue only arises when a defendant has been denied his “paid counsel of . . . choosing.”); *Daniels v. Lafler*, 501 F.3d 735, 739 (6th Cir. 2007) (holding that because an indigent defendant does not have the right to counsel of choice, he or she has no cognizable complaint if appointed counsel is replaced absent a showing of prejudice); *Gonzalez v. Knowles*, 515 F.3d 1006, 1012 (9th Cir. 2008) (holding that absent a showing of prejudice and because Gonzalez was appointed an attorney who was at least facially competent, no Sixth Amendment violation occurred when counsel who represented him on appeal was replaced on remand); *United States v. Parker*, 469 F.3d 57, 61 (2d Cir. 2006) (recognizing that “the criminal defendant . . . retain[s] some interest in continuous representation,” though “courts are afforded considerable latitude in their decisions to replace appointed counsel”).

76. No. S10A0374, 2010 WL 2553467 (Ga. 2010).

77. Bill Rankin, *5-Year Delay Kills Case, Suspect’s Lawyers Argue*, ATLANTA JOURNAL-CONSTITUTION, Mar. 10, 2010, at B8.

78. *Phan*, 2010 WL 2553467, at *4 n.1 (Thompson, J., dissenting).

79. *Id.* at *4.

Supreme Court, in another 4-3 decision, remanded the case to the trial court to *consider appointing other counsel*.⁸⁰

The majority went beyond its decision in *Weis*, in which it approved a judge's replacement of defense counsel, and placed *an affirmative duty* on trial courts to interrupt and disregard ongoing attorney-client relationships instead of enforcing the Sixth Amendment right to counsel. On remand, the trial court in *Phan* – although it has already found that there is no funding available for defense representation from any source⁸¹ – is to shop for lawyers who will work for little or nothing yet somehow represent Phan in accordance with recognized performance standards, even without resources for necessary expert and investigative assistance.⁸²

The majority in *Phan* said this might be accomplished by the most superficial kind of investigation – “such as phone or internet interviews of witnesses” – for the guilt-innocence and penalty phases of the trial.⁸³ However, a thorough investigation requires following leads, surveying the physical environment in which the client developed,⁸⁴ talking to people who may not be available by telephone or internet,⁸⁵ conducting repeated in-person interviews,⁸⁶ assessing the impact that witnesses will have on the jury, and preparing the witnesses for direct examination and cross examination.

80. *Id.* at *1.

81. *Id.*

82. See, e.g., Welsh S. White, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES (2006) (describing the demands upon defense lawyers in capital cases); American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, reprinted in 31 HOFSTRA L. REV. 913 (2003) (setting out detailed guidelines which constitute the standard of care required for the proper defense of capital cases).

83. *Phan*, 2010 WL 2553468, at *2.

84. See Gregory J. Kuykendall et al., *Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client*, 36 HOFSTRA L. REV. 989, 1009-11 (2008) (describing the need to survey the physical environment where the client has lived, particularly in the case of those who have lived in foreign countries).

85. In *Phan*, the witnesses with regard to both guilt-innocence and mitigation are in Vietnam. The survivor of the murders with which Phan is charged fled to Vietnam and all of Phan's family lives there. *Phan*, 2010 WL 2553467 at *1.

86. See *Porter v. McCollum*, 130 S. Ct. 447, 453 (2009) (finding counsel ineffective for “not even” taking the first step of “interviewing witnesses” or requesting records); William M. Bowen, Jr., *A Former Alabama Appellate Judge's Perspective on the Mitigation Function in Capital Cases*, 36 HOFSTRA L. REV. 805, 814 (2008) (describing the importance of “in-person, face-to-face, one-on-one interviews with . . . the client's family, and other witnesses who are familiar with the client's life, history, or family history” and the need for “multiple interviews” with some witnesses “to establish trust, elicit sensitive information”); American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 10.7 – Investigation & Commentary to Guideline 10.7, reprinted in 31 HOFSTRA L. REV. 913, 1015-26 (2003) (discussing need for interviews of client and various witnesses by defense counsel, the investigator, the mitigation specialist, and other members of the defense team).

For poor people accused of crimes in Georgia – even those facing the death penalty – lawyers are now fungible and subject to replacement based on cost considerations at any time. A defense lawyer who suggests that an investigation is needed can be swapped for a lawyer who will not investigate or will conduct only a superficial investigation. The poor are left with an inferior right to lawyers who may be overwhelmed with other work, who may not be qualified to handle their cases, and who, even if they cannot effectively represent them, do not have the same ability as other lawyers to invoke their ethical obligation to decline representation. This is not “equal justice for all.” It is not justice at all.

Weis and *Phan* illustrate the importance of keeping the defense function independent from the prosecution and the judiciary. Had the district attorney and the trial court been successful in having public defenders who were representing hundreds of other clients represent *Weis* at a capital trial, *Weis* would have received token representation at a perfunctory trial at which the outcome would have been a foregone conclusion.

Weis and *Phan* are not the only people facing the death penalty who received no representation for long periods of time because the Georgia legislature did not allocate sufficient funding to provide for the timely, competent, and effective representation the Sixth Amendment requires.⁸⁷ Stacy Sims was assigned one team of lawyers, but they were allowed to withdraw a year and a half later because they had not been paid; a second set was appointed, but they too were allowed to withdraw a year and a half later because they had not been paid.⁸⁸ So, three years into the case, he had received virtually no representation. His case is still pending.

In Georgia’s Northern Judicial Circuit, a five-county circuit in the northeast part of the state, some people accused of non-capital felonies did not receive any representation from lawyers because the indigent defense agency did not renew the contracts for the lawyers who represent defendants in conflict cases.⁸⁹ Conflicts occur, for example, when three defendants are accused of the same crime. One may want to testify against the other two in

87. See Brenda Goodman, *Georgia Murder Case’s Cost Saps Public Defense System*, N.Y. TIMES, Mar. 22, 2007, at 16, available at <http://www.nytimes.com/2007/03/22/us/22atlanta.html> (reporting that “[a] high-profile multiple-murder case has drained the budget of Georgia’s public defender system and brought all but a handful of its 72 capital cases to a standstill”) (emphasis added).

88. Transcript of Proceedings, *State v. Sims*, No. 2006-CR-91 (Tift County Super. Ct. Dec. 22, 2008). Another example is *State v. Ortegon*, Forsyth Co. Super. Court (at the end of May 2009, lawyers for Ortegon had not been paid since October 2007 for their work on the case which involved a murder that occurred on March 19, 2006). Julie Arrington, *Funds Avert Fears of ‘Constitutional Crisis’*, FORSYTH COUNTY NEWS, May 31, 2009, at 3A, available at www.forsythnews.com/news/archive/2631. At the time of this Article’s publication, the case is still pending trial.

89. Bill Rankin, *Judge Testifies in Class-Action Suit from Unrepresented Indigent Defendants*, ATLANTA JOURNAL-CONSTITUTION, Mar. 3, 2010, <http://www.ajc.com/news/georgia-politics-elections/judge-testifies-in-class-345189.html>.

order to get a good plea bargain or even have the charges dismissed. The public defender can only represent one defendant because of the conflicting interests, so there must be other lawyers to represent the other two defendants.

Until July 2008, the indigent defense agency had contracted with lawyers to provide that representation. One contract provided for a lawyer to handle 175 cases in a year for \$50,000, which comes out to \$285 per case.⁹⁰ National standards set 150 felonies as the maximum caseload for a *full time public defender*.⁹¹ But the contract lawyer who handled 175 cases was allowed to maintain a private practice. The old adage, “you get what you pay for,” is true here. Defendants represented by contract lawyers received only token representation.

But things got worse. The state agency reduced the budget for conflict cases in July 2008 from nearly \$130,000 to approximately \$37,000.⁹² As a result, the contracts with the lawyers who represented defendants in conflict cases were not renewed.⁹³ The judges there did not believe they should appoint the lawyers if they were not getting paid. So they went for almost an entire year *without providing lawyers to people – many of them accused of felonies*.⁹⁴

Judges called upon defendants to enter pleas without lawyers. The United States Supreme Court held in 1963 in *White v. Maryland* that a person accused of a felony was entitled to consult with counsel before being required to enter a plea.⁹⁵ But of course the three Georgia Superior Court judges, the district attorney, and assistant district attorneys in the circuit, all of whom had taken an oath to uphold the Constitution of the United States, were conducting court in violation of an even more fundamental constitutional protection: *Gideon v. Wainwright*, which guarantees the “guiding hand of counsel” to an accused in a felony case “*at every step in the proceedings against him*.”⁹⁶ This continued from September 2008 until the following April – as if this circuit was back in the 1950s before *Gideon* was decided – without the judges, the state indigent defense agency, the prosecutors, the local bar, or the Georgia Bar Association doing anything about it.

Finally, lawyers from the Southern Center for Human Rights and an Atlanta law firm brought a class action lawsuit on behalf of 300 people facing

90. Complaint, *Cantwell v. Crawford* at 15, No. 09EV275M (Ga. Super. Ct. Apr. 7, 2009), available at <http://www.schr.org/files/post/NorthernCircuitComplaint.pdf>.

91. NAT’L ADVISORY COMM’N OF CRIMINAL JUSTICE STANDARDS & GOALS, CHAPTER 13, THE DEFENSE Standard 13.12 (1973), available at http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense#thirteentwelve.

92. Bill Rankin, *Lawyerless Defendants File Lawsuit*, ATLANTA JOURNAL-CONSTITUTION, Apr. 7, 2009, at B1, available at <http://www.ajc.com/services/content/printedition/2009/04/08/defender0408.html>.

93. *Id.*

94. *Id.*

95. *White v. Maryland*, 373 U.S. 59 (1963) (per curiam).

96. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (emphasis added).

felony charges who were not represented at the time.⁹⁷ In response, the indigent defense agency signed contracts with several lawyers to represent defendants in conflict cases for a low fixed fee.⁹⁸ On July 8, 2010, two years after the lawsuit was filed, it was resolved with a consent order. The state public defender agency agreed to contract with lawyers under specific caseload limits (i.e., 125 felony defendants or 300 misdemeanor defendants).⁹⁹ In findings of fact made to supplement the consent order, the trial judge stated, “The Georgia indigent defense system is broken.”¹⁰⁰

Despite the legal and ethical prohibitions of representing defendants with conflicting interests,¹⁰¹ the director of the public defender program in Georgia has pressured the circuit public defender offices to represent codefendants. Conflicts are common in cases involving multiple defendants, because cases may be resolved with one defendant agreeing to testify against another, or defense counsel may argue for more lenient treatment for one defendant based on the relative culpability of the defendants. Constitutional and ethical rules protect the interests of the accused in cases involving multiple defendants.¹⁰² Georgia’s Rules of Professional Conduct not only prohibit lawyers from representing clients with conflicting interests, but warn that “[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.”¹⁰³

Although the overwhelming majority of criminal cases end in guilty pleas, such rules make no distinction between cases that are resolved pretrial and those that proceed to trial. Nevertheless, many circuit public defender offices in Georgia simultaneously represent defendants with conflicting interests as a cost-saving measure.¹⁰⁴ Public defender offices have been urged to

97. Complaint, *Cantwell v. Crawford*, No. 09EV275M (Ga. Super. Ct. Apr. 7, 2009), available at <http://www.schr.org/files/post/NorthernCircuitComplaint.pdf>; Rankin, *supra* note 92.

98. See Merritt Melancon, *Northern Judicial Circuit Legal Battle Not Over*, ATHENS BANNER-HERALD, Sept. 4, 2009, available at http://www.onlineathens.com/stories/090409/new_489483886.shtml.

99. Consent Order at 6-7, *Cantwell v. Crawford*, No. 09EV275M (Elbert County Super. Ct. July 8, 2010).

100. Court’s Analysis of Indigent Defense System at 8, *Cantwell v. Crawford*, No. 09EV275M (Elbert County Super. Ct. July 8, 2010); Lee Shearer, *Judge Acts to Assure Lawyers for Poor*, ATHENS BANNER-HERALD, July 9, 2010, available at www.onlineathens.com/stories/070910/new_672961573.shtml.

101. See *Holloway v. Arkansas*, 435 U.S. 475 (1978) (representation of defendants with conflicting interests by the same lawyers violated the Sixth Amendment right to counsel); *Glasser v. United States*, 315 U.S. 60 (1942) (same). GA. RULE OF PROF’L CONDUCT R. 1.7(a); see also GA. RULE OF PROF’L CONDUCT R. 1.1 (prohibiting lawyers from handling a matter unless they can do so competently).

102. See *Holloway*, 435 U.S. at 484; GA. RULE OF PROF’L CONDUCT R. 1.7(a).

103. GA. RULE OF PROF’L CONDUCT R. 1.7(a), cmt.7.

104. See Greg Land, *Bar Opinion Could Cost PD Agency: Formal Advisory Opinion States That Conflicts Exist When Public Defenders From the Same Circuit Represent Co-*

“hold” conflict cases for as long as possible before declaring a conflict in the hope that cases will be resolved with plea bargains. But a plea bargain does not mean that there is no conflict.

When it came into existence in 2005, the Georgia system had several conflict defender offices, which employed full-time lawyers, investigators, and support staff to provide representation to co-defendants with conflicting interests on a cost-effective basis. However, the legislature significantly cut the already inadequate funding for representation in conflict cases in 2008. As a result, the public defender agency had to close some of its conflict defender offices and make cutbacks to others.¹⁰⁵

The following year, a Georgia public defender resigned because she was “not providing effective representation to [her] clients . . . due to overwhelming caseloads, being required to represent clients with conflicting interests, a woefully insufficient budget for experts, lack of adequate training and supervision and an insufficient investigative staff with little to no training.”¹⁰⁶ In just 13 months, she closed approximately 900 cases and carried approximately 270 cases at any given time.¹⁰⁷ Funding for experts was limited to exceptional cases; the enormous caseloads forced the public defenders to ration out the office’s “meager resources” to just a few cases following a “ cursory review.”¹⁰⁸ Attorneys were “instructed not to withdraw from cases even where an obvious conflict existed.”¹⁰⁹ This lawyer’s resignation because of her inability to represent her clients threatens the start of the downward spiral discussed earlier. A public defender system simply cannot attract and retain conscientious, capable lawyers if it puts them in such a position. And a system with less conscientious, less capable lawyers is one destined to become a plea mill where clients are processed and not represented.

Some defendants in Georgia have had no lawyers for motions for new trials or appeals. A suit was filed at the end of 2009 on behalf of nearly 200 convicted defendants who were without counsel for the next step in the process following conviction.¹¹⁰ Some had not had a lawyer for over a year.¹¹¹ A trial court ordered that a lawyer be provided within thirty days of

defendants, FULTON COUNTY DAILY REP., Apr. 28, 2010 at 1, 8 (noting that “at least four circuits have kept some conflict cases in house”).

105. See Mike King, *Our Opinions*, ATLANTA JOURNAL-CONSTITUTION, June 13, 2008, at A12.

106. Marie-Pierre Py, Letter to the Editor, *Without Funds, PD System Will Deteriorate Further*, FULTON COUNTY DAILY REP., Mar. 19, 2009, at 5.

107. *Id.*

108. *Id.*; see also King, *supra* note 105, at A12 (suggesting that “[a]s money for the conflict cases runs out, public defenders may be forced to negotiate pleas for their clients even when it may not be in their interests”).

109. Py, *supra* note 106, at 5.

110. Order on Class Certification and Mandamus, *Flournoy v. State*, No. 2009CV178947 (Fulton County Super. Ct. Feb. 23, 2010) [hereinafter *Flournoy Order*].

111. *Id.* at 3.

when a defendant requested counsel.¹¹² The next day, someone in the legislature said that “special interest groups” and the Georgia bar wanted special treatment for criminals in Georgia.¹¹³ No one was asking for special treatment. The purpose of the lawsuit was to get lawyers for defendants so they could appeal before they served their entire sentences. That is the treatment that must be provided for meaningful appellate review.

Right before a hearing in the case, the indigent defense agency hurriedly signed contracts with ten attorneys to take on a number of cases for a fixed fee, which averaged \$1,200 to \$1,500 per case.¹¹⁴ The director of the agency estimated each appeal would require approximately 140 hours of attorney time, meaning the contract attorneys would work for \$8.57 to \$10.71 per hour.¹¹⁵ But this was an uninformed guess because, at the time the contracts were signed, neither the director of the agency nor the lawyers knew the nature or complexity of the cases to be assigned. Beyond the meager payments, the contracts provided for no more than \$150 in travel costs and \$150 for reimbursements for expert witnesses and other costs for each case.¹¹⁶ The lawyers agreed to these absurdly low limits without even knowing whether they would be handling murder or burglary cases.

Capital cases, which involve the highest stakes and the greatest demands on both lawyers and the legal system, provide many shameful examples of deficient legal representation of the accused. The capital of capital punishment has been Houston, which is in Harris County, Texas. Over 100 people sentenced to death in Harris County were executed between 1976 and mid-May 2010.¹¹⁷ Only one other state, Virginia, carried out over 100 executions during that period; it executed 106, five fewer than Harris County.¹¹⁸ Only three other states have executed over fifty people during that time: Oklahoma (92), Florida (69), and Missouri (67).¹¹⁹ The entire state of Texas has carried out over 450 executions and has almost 400 more people on its death row

112. *Id.* at 36.

113. *See, e.g.*, Bill Rankin, *Georgia's Public Defender System May Go Back Under County Control*, ATLANTA JOURNAL-CONSTITUTION, Apr. 6, 2010, <http://www.ajc.com/news/georgia-politics-elections/georgias-public-defender-system-440964.html> (quoting state legislator who said those advocating improvements in the system were “crusaders who have all the purist ideological zest of an ivory-tower professor without an understanding of practical realities required to actually manage a system with scarce resources”).

114. *Flournoy Order*, *supra* note 110, at 32-33.

115. *Id.* at 33.

116. *Id.* at 9, 33.

117. Texas Department of Criminal Justice, County of Execution for Executed Offenders, www.tdcj.state.tx.us/stat/countyexecuted.htm (last visited Aug. 30, 2010) (showing Harris County has carried out 113 executions between 1976 and May 14, 2010); *also* Texas Department of Criminal Justice, Total Number of Offenders Sentenced to Death From Each County, www.tdcj.state.tx.us/stat/countysentenced.htm (last visited Aug. 31, 2010) (showing Harris County has sentenced 280 people to death during that period).

118. Death Penalty Information Center, *Facts About the Death Penalty* at 3, May 14, 2010, available at http://www.deathpenaltyinfo.org/documents/FactShee-t_7_6_2010.pdf.

119. *Id.*

waiting to be executed.¹²⁰ So many people have been executed in Texas because, in many of the cases, there is simply no due process. A state can quickly execute people if it does not give them due process. Harris County and many other jurisdictions in Texas give defendants terrible, grossly incompetent lawyers for their trials and equally terrible lawyers for post-conviction review. The cases zip right through the system.

There have been three cases in Houston alone where the defense lawyers slept while supposedly defending clients at capital murder trials. In one of those cases, the defendant, Carl Johnson, was executed.¹²¹ The second case, in which George McFarland was sentenced to death, has twice been upheld by the Texas Court of Criminal Appeals even though McFarland's lead counsel slept during trial.¹²² The third, Calvin Burdine, was given a new trial only after the Fifth Circuit Court of Appeals struggled mightily with the case.¹²³ First, a panel denied relief,¹²⁴ but then the court considered the case en banc. At the en banc argument, life-tenured federal judges asked questions such as whether the lawyer slept through any important parts of the trial.¹²⁵ Of course, there was no way to know because the lawyer, who should have been making the record, was asleep.

Another question that was indicative of the low standard of representation that courts accept even in capital cases was: what was the difference between Burdine's case and cases where lawyers were found effective even though they were under the influence of alcohol or drugs and/or suffering from Alzheimer's?¹²⁶ The answer to that question, we learned from the decision, is that a lawyer who is impaired by drugs, alcohol, or Alzheimer's is at least conscious. A lawyer who is asleep is unconscious and, therefore, absent from the trial.

It would have been embarrassing for the legal profession if a class of eighth graders had come to court that day and watched the argument. What

120. *Id.* at 2-3.

121. See David R. Dow, *The State, The Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691, 694-95 (1996) (describing attorney Joe Frank Cannon, whose "ineptitude . . . jumps off the printed page," who slept while representing Carl Johnson).

122. *Ex Parte McFarland*, 163 S.W.3d 743, 752-759 (Tex. Crim. App. 2005) (en banc) (upholding conviction in post-conviction proceedings and rejecting challenge based on counsel's sleeping); *McFarland v. State*, 928 S.W.2d 482, 499-507 (Tex. Crim. App. 1996) (en banc) (upholding conviction and sentence despite counsel's sleeping); *id.* at 527 (Baird, J., dissenting) (arguing "[a] sleeping counsel is unprepared to present evidence, to cross-examine witnesses, and to present any coordinated effort to evaluate evidence and present a defense").

123. *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc).

124. See *Burdine v. Johnson*, 231 F.3d 950, 959 (5th Cir. 2000), *vacated and rev'd en banc*, 262 F.3d 336 (5th Cir. 2001). The panel decided, by a 2-1 vote, to uphold Burdine's conviction and sentence. *Id.*

125. *Burdine*, 262 F.3d at 349 n.10.

126. See Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 460-63 (1996).

does it say about the legal profession that all of these lawyers and judges were arguing about whether a man was denied a fair trial and his right to counsel when his only lawyer slept during a sixteen-hour death penalty trial? Are there cases involving surgeons who sleep through surgery? Bus drivers who sleep while driving? Do lawyers argue about whether people in other professions were sleeping on the job and still competent? Usually, one caught sleeping on the job is fired.

The Fifth Circuit judges took these questions seriously. Judge Rhesa Barksdale complained in a bitter dissent for five members of the court: “[T]he rule imposes a new obligation on the States in our circuit, by requiring trial judges and prosecutors to closely and unceasingly monitor defense counsel throughout trial to ensure defense counsel is awake.”¹²⁷ That dissent shows how little regard some judges have for the Sixth Amendment right to counsel.

Of course, most lawyers do not sleep during trial. But all too often, there are long delays before those accused of crimes are provided lawyers, and the lawyers appointed have excessive caseloads, do not have the investigative and expert assistance essential to defend a case, or lack the skill, knowledge, and inclination to provide competent representation.¹²⁸

The consequences of inadequate representation are enormous. An innocent man, Todd Willingham, was executed in Texas on February 14, 2004.¹²⁹ He was sentenced to death because the lawyers who represented him knew nothing about representing a defendant in an arson case. Another man, Ernest Ray Willis, also was sentenced to death in an almost identical arson case.¹³⁰ But Willis was fortunate – a law firm from New York represented him in post-conviction proceedings. The firm devoted more than a dozen years to the case and spent millions of dollars on fire consultants, private investigators, and forensic experts to analyze the evidence in his case and point out that the expert testimony at his trial was based on theories and assumptions that had been completely discredited.¹³¹ For example, an “expert” witness at Willingham’s trial told the jury that intricate patterns of cracks on glass – “crazed glass” – recovered from the scene was proof that an accelerant had been used to start the fire.¹³² However, studies have found that crazed glass results from cold water hitting hot glass, such as when a fire department

127. *Burdine*, 262 F.3d. at 363 (Barksdale, J., dissenting).

128. See, e.g., THE CONSTITUTION PROJECT, NAT’L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), available at www.constitutionproject.org/manage/file/136.pdf; AM. BAR ASS’N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>.

129. David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER, Sept. 7, 2009 at 42, available at http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann.

130. *Id.* at 56.

131. *Id.*

132. *Id.* at 58.

sprays streams of water on a fire, trying to put it out.¹³³ There were similar explanations for other testimony given in both the Willis and Willingham cases.¹³⁴

When the law firm took its evidence to the prosecutor in Willis' case, the prosecutor consulted his own expert and concluded that there had not been arson.¹³⁵ Willis was released.¹³⁶ One of the same experts who examined the evidence in Willis' case examined the evidence in Willingham's case and reached the same conclusion – that there had been no arson.¹³⁷ Willingham did not kill his two one-year-old twin girls and his two-year-old girl when he had no motive to do so. But Willingham's case had already been through the courts. The clemency process is meaningless in Texas.¹³⁸ Willingham was executed.¹³⁹ A switch of the lawyers in the two cases would have changed the outcomes. If the New York law firm had taken Willingham's case, he would be alive today, and Willis would be dead.

National Public Radio profiled a lawyer in Detroit, Bob Slameka, who has been reprimanded by the bar sixteen times in his forty years of practice, yet keeps getting appointed to defend indigent clients.¹⁴⁰ Like other court-appointed lawyers there, he does not interview his clients at the jail because lawyers are paid only \$50 for a single visit, and he does not accept his clients' phone calls.¹⁴¹ Slameka never met one of his clients, Eddie Joe Lloyd, and never accepted Lloyd's phone calls during the two years he represented him.¹⁴² When Lloyd complained to the bar association, Slameka wrote, "This is a sick individual who raped, kidnapped and strangled a young woman on her way to school. His claim of my wrongdoing is frivolous, just as is his existence. Both should be terminated."¹⁴³ This is a lawyer talking about *his*

133. *Id.* at 58-59.

134. *Id.* at 59-62.

135. *Id.* at 62.

136. *Id.*

137. *Id.*

138. *Id.* The power to grant clemency in Texas is possessed by the Board of Pardons and Paroles, an 18-member body whose members are appointed by the governor for six-year terms. See Jim Yardley, *Bush and the Death Penalty; Texas' Busy Death Chamber Helps Define Bush's Tenure*, N. Y. TIMES, Jan. 7, 2000, at A1; Alan Berlow, *The Texas Clemency Memos*, ATLANTIC MONTHLY, July-Aug., 2003. "[T]he governor can grant clemency only if the board recommends it." Yardley, *supra* at A1. The board does not hold hearings or meet to discuss applications. *Id.* Instead, members review cases separately and transmit their votes from across the state. *Id.* The board operates without guidelines and gives no explanation for its denial of clemency in virtually every capital case.

139. Grann, *supra* note 129, at 63.

140. *Not Enough Money or Time to Defend Detroit's Poor* (National Public Radio broadcast Aug. 17, 2009), transcript available at <http://www.npr.org/templates/transcript/transcript.php?storyId=111811319>.

141. *Id.*

142. *Id.*

143. *Id.*

own client. After seventeen years in prison, Lloyd was freed when DNA evidence showed that he was innocent of the crime.¹⁴⁴ He died just two years later.¹⁴⁵

Some people believe that DNA evidence is going to keep innocent people from being convicted, but evidence that can be subjected to DNA testing is available in only ten percent of cases.¹⁴⁶ In the other ninety percent, there is no biological evidence to be tested. In those cases, society must depend upon a properly working adversary system to bring out all the facts and enable courts to determine the truth.

There are other consequences of inadequate representation. For example, Jacqueline Winbrone was arrested in New York in 2007, and bail was set at \$10,000.¹⁴⁷ No lawyer represented her at the bail hearing, and Winbrone, who was the sole caretaker of her husband, could not reach her court-appointed lawyer to seek a bail reduction in order to care for her husband, who needed transportation to dialysis treatment several times per week.¹⁴⁸ Days later, her husband died.¹⁴⁹ Ms. Winbrone was also unsuccessful in trying to reach the lawyer to obtain a bail reduction or even a temporary release from jail to attend his funeral. Eventually, she contacted a prisoners' rights organization that secured her release on her own recognizance.¹⁵⁰ Ultimately, the charge against Winbrone – possession of a firearm found in the family car – was dismissed.¹⁵¹

As Ms. Winbrone's experience illustrates, the process of arrest and pre-trial incarceration may be a severe punishment, regardless of guilt or innocence. A person who stays in jail for two weeks after being arrested may lose his or her job and home as a result. People may go from being right on the margins of making it in society to being homeless. Some – struggling to overcome enormous challenges, such as mental illness or limitations; addiction; lack of family, friends, or any other support system; or extreme poverty – may never be able to get their lives back on track. These, too, are examples of the impact that inadequate representation may have on individuals, families, and communities. There is no such thing as a small case in the criminal justice system.

144. *Id.*

145. Innocence Project, Profile of Eddie Joe Lloyd, <http://www.innocenceproject.org/Content/201.php> (last visited Aug. 30, 2010).

146. *Reauthorization of the Innocence Protection Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 245-46 (2009) (testimony of Peter M. Marone, Virginia Department of Forensic Science, Richmond, Va.).

147. *Hurrell-Harring v. State*, 883 N.Y.S.2d 349, 360 n.3 (N.Y. App. Div. 2009) (Peters, J., dissenting), *aff'd as modified*, 930 N.E.2d 217 (N.Y. 2010).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

Yet the critical role that defense counsel can play in assuring prompt release for people like Ms. Winbrone is usually not part of the assessment of whether a lawyer is effective in representing a client. Instead, the standard of “ineffective assistance of counsel” adopted by the Supreme Court in 1984 looks back at whether “counsel’s performance was deficient” and, if so, whether “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”¹⁵² This standard fails to take into account some of counsel’s more critical responsibilities, such as meeting with the client within hours of being assigned the case; promptly obtaining pretrial release; counseling the client about the case and the options ahead; building an attorney-client relationship of trust; negotiating with the prosecutor regarding discovery, resolution of the case, and other matters; developing a client-specific sentencing plan; and scores of other tasks that have nothing to do with a fair trial but everything to do with a favorable outcome for the client. For defense lawyers to be competent and effective in these essential areas, there must be public defender programs to provide training, supervision, and adherence to standards.

The standard adopted in *Strickland* has failed to insure competent representation even in cases that go to trial. As Justice Marshall pointed out in his dissent in *Strickland*, the Court adopted a “malleable” standard – whether representation is “effective” is in the eye of the beholder.¹⁵³ Then, on top of that, Congress passed and President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996, which allows a federal court to grant habeas corpus relief only if it finds that the state court has reached a legal conclusion that was “contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States”¹⁵⁴

For example, in *Wood v. Allen*, Holly Wood, a mentally retarded man convicted of murder and sentenced to death in Alabama, was represented by attorneys who did no investigation with regard to Wood’s mental retardation.¹⁵⁵ As a result, they did not present readily available testimony by teachers who would have testified “that Wood’s IQ was probably ‘low to mid 60s,’ that Wood was ‘educable mentally retarded or trainable mentally retarded,’” “that all of the special education students, regardless of age or grade level, were placed in one room in a basement; the lighting was barely adequate; the room would flood when it rained a lot; and the students were known around school as the ‘moles’ that ‘lived in a mole hole,’” and “that Wood – even today – can read only at the third grade level and can ‘not use abstraction skills much beyond the low average range of intellect.’”¹⁵⁶ The Supreme

152. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

153. *Id.* at 707 (Marshall, J., dissenting).

154. 28 U.S.C. § 2254 (d)(1) (2006).

155. *Wood v. Allen*, 542 F.3d 1281, 1289-94 (11th Cir. 2008), *aff’d*, 130 S. Ct. 841 (2010).

156. *Id.* at 1324 (Barkett, J., dissenting).

Court affirmed a denial of habeas corpus relief by applying the provisions of the Antiterrorism and Effective Death Penalty Act to the Alabama court's finding that the lawyers made a "strategic decision" not to *even look for this evidence*, not by deciding whether Holly Wood received effective representation.¹⁵⁷ It is obvious that he did not. It is a great miscarriage of justice when a man's life story gets lost in this procedural morass that the courts and Congress created to bar vindication of constitutional rights. And it simply denies reality to pretend that his lawyers, who did nothing to prepare for the penalty phase of his trial, were somehow competent lawyers who made strategic decisions, when they were not, and that the trial was somehow fair, when it was not. It was a farce. But this pretense allowed Alabama to execute Holly Wood on September 9, 2010.¹⁵⁸

The low level of representation that the courts are tolerating is also exemplified by the case of Jeffrey Leonard, a twenty-year-old, brain-damaged, African American man who was tried and sentenced to death by a Kentucky jury that did not even know his name or anything else about him.¹⁵⁹ He was tried under the name "James Slaughter."¹⁶⁰ His lawyer conducted no investigation and never found out that his client was brain damaged.¹⁶¹ The lawyer testified that he had tried four death penalty cases, which was a lie.¹⁶² He also testified that he headed an organized crime prosecution unit in New York, which was also a lie.¹⁶³ The Sixth Circuit Court of Appeals nevertheless upheld Leonard's sentence, holding that the outcome would not have been any different even if Leonard had been competently represented.¹⁶⁴ Judge Guy Cole, in dissenting from a denial of rehearing, wrote:

We are uneasy about executing anyone sentenced to die by a jury who knows nearly nothing about that person. But we have allowed it. We are also uneasy about executing those who commit their crime at a young age. But we have allowed that as well. We are particularly troubled about executing someone who likely suffers brain damage. We rarely, if ever, allow that – especially when the jury is not afforded the opportunity to even consider that evidence. Jeffrey Leonard, known to the jury only as "James Slaughter," approaches the execution chamber with all of these characteristics. Reaching this new chapter in our death-penalty history, the majori-

157. *Wood v. Allen*, 130 S. Ct. 841, 850-51 (2010).

158. Associated Press, *Alabama Executes Inmate Who Claimed Mental Disability*, AL.COM, Sept. 9, 2010, http://eji.org/eji/files/wood_execution_article.pdf.

159. *Slaughter v. Parker*, 450 F.3d 224 (6th Cir. 2006).

160. *Id.* at 228.

161. *Id.* at 234.

162. *Id.* at 229-30 n.1; Andrew Wolfson, *Lawyer Radolovich to Give Up License*, COURIER-JOURNAL, Feb. 6, 2007, at 1A.

163. Wolfson, *supra* note 162. The lawyer was later indicted for perjury. *Id.* The charges were dismissed in exchange for him resigning from the bar. *Id.*

164. *Slaughter*, 450 F.3d at 234, 242.

ty decision cannot be reconciled with established precedent. It certainly fails the Constitution.¹⁶⁵

Judge Alvin Rubin of the Fifth Circuit, in reluctantly upholding a death sentence, once said:

The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel. . . . Consequently, accused persons who are represented by “not-legally-ineffective” lawyers may be condemned to die when the same accused, if represented by *effective* counsel, would receive at least the clemency of a life sentence.¹⁶⁶

In theory, the right to a lawyer is supposed to be enforced in post-conviction relief. But the catch-22 is that poor people are not entitled to a lawyer for post-conviction relief.¹⁶⁷ Therefore, for the vast majority of poor people convicted of crimes, post-conviction relief is a totally hollow right because they are never going to have a lawyer to file a post-conviction motion or petition. Texas provides lawyers for post-conviction review in death penalty cases who are as bad, or worse, than the lawyers that Texas provides at trial. Nine people in Texas, six of whom have been executed, have been denied post-conviction review because the lawyers assigned to them missed the statute of limitations for filing.¹⁶⁸ Three more are waiting to be executed – they are dead men walking.¹⁶⁹ They have nowhere to go; they have missed the statute of limitations.

Most remarkably, three people who were denied review due to failure to file on time *were represented by the same lawyer*, Jerome Godinich.¹⁷⁰ They were three of at least 21 clients in capital cases Godinich was appointed to represent, and among 1,638 cases involving 1,400 different defendants he was assigned from 2006 to March 2009.¹⁷¹ The Texas bar and the Texas Court of Criminal Appeals took no action to protect his clients after Godinich

165. *Slaughter v. Parker*, 467 F.3d 511, 512 (6th Cir. 2006) (Cole, J., dissenting from denial of rehearing en banc).

166. *Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

167. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (no right to counsel for poor to pursue state post-conviction remedies); *Murray v. Giarratano*, 492 U.S. 1, 12 (1989) (no right to counsel for poor, even in capital cases, to pursue state post-conviction remedies).

168. Lise Olsen, *Lawyers' Late Filings Can Be Deadly for Inmates*, HOUSTON CHRON., Mar. 22, 2009, available at <http://www.chron.com/disp/story.mpl/metropolitan/6328865.html> [hereinafter Olsen, *Late Filings*]; Lise Olsen, *Death Row Lawyers Get Paid While Messing Up*, HOUSTON CHRONICLE, Apr. 20, 2009, at A1, available at <http://www.chron.com/disp/story.mpl/metropolitan/6381687.html> [hereinafter Olsen, *Messing Up*].

169. Olsen, *Late Filings*, *supra* note 168.

170. Olsen, *Messing Up*, *supra* note 168.

171. *Id.*

missed the statute of limitations the first time, or the second, or even the third.¹⁷²

In other cases in Texas, people have been represented by grossly incompetent lawyers. For example, a lawyer assigned to represent Robert Gene Will filed the same brief for Will that he had filed a year and a half earlier for another inmate, Angel Resendiz.¹⁷³ Will was denied relief based on the brief that had nothing to do with his case.¹⁷⁴ The lawyer also had missed the statute of limitations for filing Resendiz's federal habeas corpus petition.¹⁷⁵ As a result, Resendiz was executed without any federal habeas corpus review of his case.¹⁷⁶

The brief filed on behalf of another man condemned to die in Texas, Justin Chaz Fuller, was incoherent, repetitious, and rambling. There too, the lawyer copied from an appeal filed seven years earlier for a different client, Henry Earl Dunn.¹⁷⁷ As a result, the brief filed for Fuller contained complaints about testing for blood on a gun used by Dunn's co-defendant, which had nothing to do with Fuller's case.¹⁷⁸ The lawyer also copied some of Fuller's letters into the brief so that it contained unintelligible and irrelevant statements such as, "I'm just about out of carbon paper so before I run out I want to try and list everything that was added to and took from me to convict me on the next page."¹⁷⁹ Considering only this nonsensical brief, the Texas Court of Criminal Appeals denied Fuller relief and he was executed.¹⁸⁰ There is example after example of this kind of representation.¹⁸¹ The lawyers are paid up to \$25,000 a case.¹⁸²

Courts have completely lost sight of justice in a tangle of procedural rules and administrative concerns so that now finality, not justice, is the ultimate goal of the system. Moving dockets, not competent representation, is the concern of most courts. Nevertheless, the system has its advocates, and Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit is one of them. He wrote, "I can confirm from my own experience as

172. *Id.*

173. See Chuck Lindell, *Lawyer Makes 1 Case for 2 Killers*, AUSTIN AM.-STATESMAN, Feb. 26, 2006, at A1.

174. *Id.*

175. *Id.*

176. *Id.*

177. See Maro Robbins, *Convict's Odds Today May Rest on Gibberish*, SAN ANTONIO EXPRESS-NEWS, Aug. 24, 2006, at 1A, available at http://www.mysanantonio.com/news/MYSA082406_01A_legal_gibberish_359112e_html35934.html.

178. *Id.*

179. *Id.*

180. Fuller was executed on Aug. 24, 2006. Death Penalty Information Center, Execution Database, <http://deathpenaltyinfo.org/executions> (last visited Aug. 30, 2010).

181. See Andrea Keilen & Maurie Levin, *Moving Forward: a Map for Meaningful Habeas Reform in Texas Capital Cases*, 34 AM. J. CRIM. L. 207, 218-231 (2007) (describing numerous instances of incompetent representation in post-conviction proceedings in Texas and acquiescence to it by the state judiciary).

182. *Id.* at 229, 236.

a judge that indigent defendants are generally rather poorly represented.”¹⁸³ He and I are in agreement with regard to that. Judge Posner went on to say:

But if we are to be hardheaded we must recognize that this may not be entirely a bad thing. The lawyers who represent indigent criminal defendants seem to be good enough to reduce the probability of convicting an innocent person to a very low level. If they were much better, either many guilty people would be acquitted or society would have to devote much greater resources to the prosecution of criminal cases. A bare-bones system for defense of indigent criminal defendants may be optimal.¹⁸⁴

Notice what he missed. He said that if the lawyers were any better, more *guilty people* might be acquitted. He missed the point that if the lawyers were any better, more *innocent people* would be acquitted. That apparently did not even occur to him. And, of course, this bare-bones system is only for poor people. It is not for commercial cases or cases that rearrange the assets of the upper one percent of people in society. It is only for poor people.

The question of what kind of system of justice we have for poor people accused of crimes is not about being tough on crime or soft on crime. It is about equal justice. It is about whether we have a fair and reliable system for deciding guilt or innocence. It is about whether sentences are fair and just. Nevertheless, public officials in many parts of the country have convinced themselves that they cannot afford anything but justice on the cheap. In meetings all over America about the need for indigent defense programs, one hears, “We don’t want a Cadillac, we just want a Chevy.” That seems to be the standard. One also hears legislators and others say that poor defendants are not entitled to *zealous* representation; they are only entitled to *adequate* representation. But we are talking about life and liberty, so why wouldn’t we want a Cadillac? If we can spend billions of dollars to fight wars in Iraq and Afghanistan, why can’t we just spend a fraction of that to have a decent criminal justice system that treats people fairly? There is a poverty of vision with regard to our criminal justice system. There is a very disturbing indifference to injustice.

The main reasons for the current state of affairs with regard to representation for the poor are the following: (1) the unwillingness of legislatures to appropriate the resources necessary; (2) the unwillingness of state court judges who are elected and depend upon the legislatures for their budgets to enforce the right to counsel; (3) indifference on the part of the bar to what happens to poor people in the legal system; and (4) ignorance on the part of the public because the criminal justice system is out of sight and out of mind

183. RICHARD POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 163-64 (1999).

184. *Id.* at 164.

– it is a system for the poor and has its greatest impact on racial minorities. But, increasingly, I have sadly and reluctantly come to the conclusion that there is a fifth reason – a strategic effort by prosecutors to keep the quality of representation for poor people as bad as it is.

I am very sorry to say that because I like to see the best in everyone. I would like to believe that our courts are not corrupt; just that the people who run them are indifferent. I would like to believe that judges and prosecutors act in good faith, that they are just acculturated to a system they believe they cannot change. But I have seen too much. I have seen a district attorney move to remove competent attorneys from representing a defendant in a capital case and replace them with public defenders who have so many cases they could not possibly represent the client, and I saw the judge grant the motion. I have seen judges and prosecutors go through “meet ’em and plead ’em” sessions, knowing good and well that what they were doing was not justice. Yet it is standard operating procedure in the courts where they practice. I have seen prosecutors and judges oppose funding for indigent defense and for public defenders, and they are not just fighting over the same money. They are fighting to keep the public defender programs as bad and as poor and as overworked as they are. I have seen too many prosecutors and judges say a lawyer was capable of handling a death penalty case when *everyone* knows that that prosecutor and that judge would not have that lawyer represent a member of their families in traffic court. It is a lie perpetuated to justify a system that everyone knows is broken.

We cannot be ignorant. The public may be unaware of these problems, but the legal profession cannot be. There is going to be a reckoning, and it is going to be while those of you who are law students are members of the bar. If we cannot do any better than this, we are going to have to sandblast the words “equal justice under law” off the front of the Supreme Court building. At one time, we could at least say it was an aspiration. Justice Hugo Black said for the Supreme Court in *Griffin v. Illinois*, “There can be no equal justice where the kind of trial a [person] gets depends on the amount of money he [or she] has.”¹⁸⁵ And the Court’s decision in *Griffin* and other cases brought us a little closer to equal justice.¹⁸⁶ At that time, we at least were

185. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (holding that an indigent defendant is entitled to a transcript for appeal). The Court reiterated the point in *Douglas v. California*, 372 U.S. 353, 355 (1963) (holding that an indigent defendant is entitled to a lawyer for appeal). Justice Clarence Thomas has expressed the view that these cases were wrongly decided and should be overruled. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 129 (1996) (Thomas, J., dissenting).

186. In addition to *Griffin* and *Douglas*, see *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972) (holding no imprisonment may be imposed unless the accused is represented by counsel and expressing disapproval of “assembly-line justice” system of plea bargaining); *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (holding states must provide prison inmates with access to the courts by providing law libraries or assistance from people trained in the law); *Ake v. Oklahoma*, 470 U.S. 68, 69 (1985) (holding the state must provide mental

trying to get there. If we are no longer trying to get there, but instead are in full retreat,¹⁸⁷ saying that a bare-bones system of indigent defense may be optimal, then there is no basis for a claim of equal justice under the law.

Professors and students need to go into courtrooms. I tell my students on the first day of class to go to the courthouse and see what is happening. They are shocked by the demeaning way in which people are treated, the careless attitude many lawyers have toward their clients, the arrogance and rudeness of the judges and prosecutors, the lack of advocacy for defendants, and the arbitrary way in which cases are resolved. Just as the National Capital Jury Project has done a marvelous job of educating us on jury behavior,¹⁸⁸ we need a similar effort to go into courtrooms and describe what is happening there with regard to legal representation.

I am calling upon every law student and lawyer here, regardless of how you spend your life in the law – you may become a prosecutor, you may go to a law firm, you may become a legislator or some other kind of public official, you may be a leader of your local, state, or the national bar – to take responsibility as a member of the legal profession for legal representation of the poor. You will become a trustee of justice. Besides making a living by practicing law, you will have a larger responsibility for the integrity of the justice system. The criminal justice system must have integrity, and lawyers must take responsibility for it because no one else will.

No matter what you do, talk to everyone you know – to your legislators and other public officials, to civic groups, to people concerned about public policy – about why there must be an effective indigent defense system if our system of justice is going to work. Make sure that your local bar and your state bar make this issue their top priority. The bar associations should not just be about networking, socializing, and playing golf. They should focus on important issues like the right to counsel. They should be lobbying the legislature as the primary advocates for full funding for the public defender sys-

health expert to poor defendant where mental health issues are a “significant factor” at trial).

187. See, e.g., *Ross v. Moffitt*, 417 U.S. 600, 618-19 (1974) (no right to counsel for poor to pursue discretionary appeals); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (no right to counsel for poor to pursue state post-conviction remedies); *Murray v. Giarratano*, 492 U.S. 1, 12 (1989) (no right to counsel for poor, even in capital cases, to pursue state post-conviction remedies); *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (gutting *Bounds v. Smith* decision by requiring that, to enforce right to access to the courts through libraries or legal assistance, prisoners must show “actual injury” from being denied access). In addition, the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (amending 28 U.S.C. §§ 2241-55 and adding 28 U.S.C. §§ 2261-66) (since amended by the Patriot Acts) and the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (amending various sections of 18 and 42 U.S.C.), both signed into law in April 1996, severely restricted the right of inmates to obtain federal habeas corpus review and to obtain remedies in the federal courts for unconstitutional practices and conditions in prisons and jails.

188. See University at Albany School of Criminal Justice, Capital Jury Project, <http://www.albany.edu/scj/CJPhome.htm> (last visited July 7, 2010).

tem. You can make that happen as lawyers, particularly if you are prosecutors, bar leaders, and public officials.

Most legislators – like most people in our society – do not understand the right to counsel and the importance of those accused of crimes being well represented. The representation of people accused of crimes is an issue constantly exploited by demagogues, who say that society should not waste money defending people who have done terrible things. They play on fear and ignorance. Lawyers must stand up to them. Lawyers must explain that the days of the lynch mob are behind us. Today, every person accused of a crime – no matter how heinous – is entitled to a capable lawyer with the resources needed to defend that person in the adversary system. Every American should be proud of it when it works, and everyone must understand that it will not work unless the legislatures provide the resources necessary for public defenders to do the job.

The other thing you can do – and this is a great thing about being a lawyer – is be that capable lawyer for at least some of the poor accused of crimes. You can work as public defenders, representing *your* clients with care and diligence. Just as with the Underground Railroad at the time of slavery, you may not be able to change the whole system, but you can help one person at a time. Legislatures may fail. Courts may fail. The executive branch may fail. But individual lawyers can take cases, counsel clients, investigate their cases, and tell their stories. It will make a difference. It will make the right to counsel a reality for that person and that person's family. As I said at the outset, public defenders are making the right to counsel a reality in case after case for countless people. While, as discussed, the conditions in some offices are so bad in terms of workload and lack of resources, training, supervision and support that it is impossible to practice in them, there are many more public defender offices that are doing outstanding work despite immense challenges. Those offices are looking for young, dedicated, hard-working lawyers.

Achieving equal justice and the right to counsel for every person accused of a crime will take a sustained effort over a long period of time. Those goals may not be attained in your career at the bar, or even ever attained. However, as Dr. Martin Luther King, Jr. often pointed out, we stand on the shoulders of others so that other people can stand on our shoulders. In representing people and in working to improve the representation of poor people, we stand on the shoulders of people like Thurgood Marshall, who, not long after being admitted to the Maryland bar, took a train from Baltimore to Oklahoma City and then a bus to Hugo, Oklahoma, where he represented a man in a death penalty case.¹⁸⁹ We stand on the shoulders of Clarence Darrow, who, late in his career, tried a case to an all-white, all-male jury on behalf of African-Americans who had the audacity to move into an all-white

189. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 113-19 (1998).

neighborhood in Detroit and were on trial for murder.¹⁹⁰ He stood before the jury and said that the case was about race.¹⁹¹ He asked the jurors to deal with the reality of race relations in Detroit and their own attitudes about race.¹⁹² The first trial ended in a mistrial. At the second and final trial, before another all-white, all-male jury, after again talking frankly about race, Darrow won an acquittal for Henry Sweet.¹⁹³ Those are but a few of the shoulders that you stand upon as we go forward.

No matter what has happened before, today you can look at the challenge posed by Anthony Lewis and say that *this generation of lawyers*, having seen what the mindless pursuit of wealth has done for lawyers and society, will be mindful of what Elie Wiesel said in accepting the Nobel Peace Prize: “Our lives no longer belong to us alone; they belong to all those who need us desperately.”¹⁹⁴ You can respond to Dr. King, who called upon us to be drum majors for justice.¹⁹⁵ In the midst of the indifference, hostility, and fear mongering that is going on in the country today, you can walk into the bright sunshine of hope, promise, and confidence and pursue making good on what the Constitution requires – a full measure of justice for even the poorest and most powerless person accused of any crime, no matter how petty, no matter how heinous – and, in your career as a member of the bar, settle for nothing less.

190. For a full account of the trials, see Douglas A. Linder, *The Sweet Trials: An Account*, <http://www.law.umkc.edu/faculty/projects/ftrials/sweet/sweetaccount.htm> (last visited May 17, 2010); see also KEVIN BOYLE, *ARC OF JUSTICE: A SAGA OF RACE, RIGHTS, AND MURDER IN THE JAZZ AGE* (2004).

191. Linder, *supra* note 190; BOYLE, *supra* note 190, at 292-95.

192. BOYLE, *supra* note 190, at 292-95.

193. *Id.* at 299, 336.

194. Elie Wiesel, Nobel Peace Prize Acceptance Speech (Dec. 10, 1986), *transcript available at* <http://www.pbs.org/eliewiesel/nobel/index.html>.

195. Dr. Martin Luther King, Jr., *The Drum Major Instinct*, Sermon Delivered at Ebenezer Baptist Church, Atlanta, Ga., Feb. 4, 1968, in *A KNOCK AT MIDNIGHT: INSPIRATION FROM THE GREAT SERMONS OF REVEREND MARTIN LUTHER KING, JR.* 165 (Clayborne Carson & Peter Holloran, eds., 1998), *available at* http://mlk-kpp01.stanford.edu/index.php/kingpapers/article/the_drum_major_instinct/.