1994

Dziubak v. Mott and the Need to Better Balance the Interests of the Indigent Accused and Public Defenders

Jeffrey H. Rutherford

Comment

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> The Minnesota State Public Defender Program is fast approaching a crisis. Immediate relief is necessary in each district of the state.[1]
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> Twenty-five years after *Gideon*, adequate legal representation for poor defendants has not been obtained. . . . For many of the nation's poor, therefore, the stark reality is that the legal system functions "as if *Gideon* had never been decided."[2]

On June 2, 1987, a Minnesota district court sentenced Richard P. Dziubak to eighty-one months in state prison after he pleaded guilty to second-degree manslaughter.[3] Fifteen months

1. THE SPANGENBERG GROUP, WEIGHTED CASELOAD STUDY FOR THE STATE OF MINNESOTA BOARD OF PUBLIC DEFENSE—DRAFT REPORT 37 (1991) [hereinafter SPANGENBERG REPORT] (on file with the *Minnesota Law Review*). According to one commentator, "[v]irtually no assigned counsel program in the country is adequately funded. In fact the funding situation nationally is frequently and accurately characterized as a crisis." Nancy Gist, *Assigned Counsel: Is the Representation Effective?*, CRIM. JUST., Summer 1989, at 16, 18. Another writer noted that "[t]he phrase 'assembly-line justice' has been used over the years to describe the operations of urban public defender offices." Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled To Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 390 n.175 (1993).

On April 2, 1992, William R. Kennedy, Chief Public Defender of Hennepin County, filed a lawsuit charging that the state and county unconstitutionally failed to provide the public defender with adequate funding. Kennedy v. Carlson, No. 92-6860 (D. Minn. filed Apr. 2, 1992); *County P. D. in Minnesota Sues to Force Increase in Funding*, 6 BNA CRIMINAL PRACTICE MANUAL 204 (1992). The case against the state is currently pending in district court.

2. Michael B. Mushlin, *Forward*, Gideon v. Wainwright *Revisited: What Does the Right to Counsel Guarantee Today?*, 10 PACE L. REV. 327, 331 (1990).

3. On February 27, 1987, the Ramsey County Attorney charged Dziubak with second degree murder and first degree manslaughter in the death of his mother, May Speiser. Petitioner's Brief at 2, Dziubak v. Mott, 503 N.W.2d 771 (Minn. 1993) (No. C7-91-2517). On February 25, 1987, Dziubak claimed he found Speiser dead in her bedroom. *Id.* at 1. During the autopsy, the medical examiner discovered a note, allegedly written by Speiser, indicating that Dziubak had killed her by throwing her down the basement stairs. *Id.* The medical examiner declared the death a homicide. *Id.* He determined the primary

later, the district court vacated Dziubak's guilty plea, relying on newly-discovered exculpatory evidence.[4] The prosecution then charged and tried Dziubak for murder, but the jury acquitted him.[5]

On June 19, 1991, Dziubak sued J. Thomas Mott and James T. Hankes, the two Ramsey County Assistant Public Defenders[6] who represented him on the murder and manslaughter charges, alleging ten counts of legal malpractice.[7] Mott and Hankes asserted that public defenders possess absolute immunity from legal malpractice liability.[8] The trial court rejected Mott's and Hankes's immunity defense,[9] and the Minnesota Court of Ap-

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cause of death to be blunt head trauma, consistent with falling down the basement stairs. *Id.* After the trial, however, the lawyers discovered that the toxicology report showed fatal levels of anti-depressants, indicative of suicide. *Id.* at 3.

Dziubak's trial was originally scheduled to begin April 27, 1987. *Id.* at 2. That day, J. Thomas Mott and James T. Hankes discussed possible plea negotiations with Dziubak. *Id.* The next day, Dziubak pleaded guilty to one count of second degree manslaughter. *Id.* He would later claim that his public defenders coerced his admission. *Id.* at 3.

After the plea hearing, the trial judge departed downward from the 95-month presumptive sentence, giving Dziubak 81 months in Stillwater prison. *Id.* at 2.

4. On September 14, 1988, Dziubak retained a private lawyer to petition the District Court to vacate his guilty plea. *Id.* at 2. Initially, Dziubak argued that the guilty plea was defective because it lacked a factual basis and because Hankes and Mott had provided ineffective assistance of counsel. *Id.* at 2-3. Later, Dziubak withdrew his ineffective counsel claim and sought to vacate his guilty plea based on newly discovered exculpatory evidence regarding the high levels of anti-depressants recorded in the toxicology report. *Id.* at 3. The court vacated the guilty plea because of the new evidence and did not rule on the ineffective assistance claim. *Id.*

5. *Id.* at 3.

6. The Ramsey County District Court appointed the Ramsey County Public Defender's Office to represent Dziubak. *Id.* at 2. Subsequently, the public defender's office assigned Hankes and Mott as co-counsel. *Id.*

7. *See* Petitioner's Brief at 3-4, Dziubak v. Mott, 503 N.W.2d 771 (Minn. 1993) (No. C7-91-2517). Dziubak alleged that Hankes and Mott had failed to investigate his case adequately, neglected to test vital pieces of evidence, inadequately prepared an expert for trial, failed to develop fully the expert's information, failed to allow the expert sufficient time to prepare the medical defense, failed to secure character witnesses against decedent Speiser, failed to disclose the expert's original opinion, unreasonably coerced Dziubak, failed to ask for a continuance based upon a conversation with the expert, and failed to fully inform Dziubak of the legal implications of entering his guilty plea. *Id.*

8. *See* Dziubak v. Mott, 503 N.W.2d 771, 773 (Minn. 1993). Mott and Hankes also claimed the doctrine of collateral estoppel precluded litigation of Dziubak's claim that they had negligently failed to discover the exculpatory evidence. *Id.*

9. *Id.* The court, however, granted the defendants' collateral estoppel claim. *Id.* The district court had found Hankes and Mott were not negligent for

peals affirmed.[10] The Minnesota Supreme Court reversed the appellate court, holding that public defenders enjoy absolute immunity from legal malpractice suits.[11] The *Dziubak* court justified its holding entirely on public policy grounds.[12]

Dziubak raises the issue of the viability and propriety of extending common-law malpractice immunity to public defenders. Resolution of this issue materially affects not only public defenders, but also the large number of indigents that the state prosecutes in Minnesota courts each year.[13] Extending immunity deprives indigent defendants of an important monetary remedy for inadequate assistance of counsel, leaving them virtually no civil recourse against incompetent attorneys,[14] and contributes to the public defenders' image as second-class lawyers.

Court-appointed counsel deliver the vast majority of criminal defense services.[15] Public defenders and other court-appointed counsel litigate most of these cases in the state court system.[16] Most states, however, have not specifically addressed the issues of liability or common-law immunity as they apply to public defender negligence.[17] State courts that have considered the issue have generally done so under a statutory or functional

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failing to discover the toxicological evidence; thus, the court found that collateral estoppel prohibited relitigation of Hankes's and Mott's alleged lack of due diligence in failing to find the exculpatory evidence. Dziubak v. Mott, 486 N.W.2d 837, 842 (Minn. Ct. App. 1992), *rev'd*, 503 N.W.2d 771 (Minn. 1993).

10. *Dziubak*, 486 N.W.2d at 841. The Minnesota Supreme Court granted review solely to determine whether public defenders in Minnesota possess absolute immunity from legal malpractice actions. *Dziubak*, 503 N.W.2d at 773. The court decided *Dziubak* as a case of first impression. *Id.* at 774.

11. *Dziubak*, 503 N.W.2d at 773.

12. *Id.*

13. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1992, 426 (1993) [hereinafter SOURCEBOOK]; PROGRAM EVALUATION DIVISION, OFFICE OF THE LEGISLATIVE AUDITOR, PUBLIC DEFENDER SYSTEM 4 (1992) [hereinafter PUBLIC DEFENDER SYSTEM].

14. *See infra* Part I.D (describing the limited remedies available to indigent defendants).

15. *See* Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531, 532 n.3 (1988). Klein estimated that public defenders provide 65% of criminal defense services. *Id.* In Minnesota, the percentage is slightly lower. PUBLIC DEFENDER SYSTEM, *supra* note 13, at 4.

16. In 1991, federal district courts heard only 45,215 criminal cases. SOURCEBOOK, *supra* note 13, at 494. In contrast, State courts handed down 829,344 felony convictions in 1990. *Id.* at 527. In 1991, the police made 14,211,900 arrests. *Id.* at 422. In Minnesota alone, the police made 136,192 criminal arrests in 1991. *Id.* at 426.

17. *See, e.g.*, Sanchez v. Murphy, 385 F. Supp. 1362 (D. Nev. 1974).

analysis.[18] The *Dziubak* decision may adversely affect future consideration of immunity because it asserted, without citing empirical evidence, that absolute immunity will improve representation, promote professionalism, and ease the burden on overworked defenders.

This Comment addresses *Dziubak*'s ramifications for indigent criminal defendants and the public defenders who represent them. Part I explains the history of criminal indigent jurisprudence and the right to effective assistance of counsel, outlines the system of indigent criminal representation in Minnesota and charts the history of liability, immunity, and indemnity in relation to criminal legal malpractice. Part II describes the Minnesota Supreme Court's holding in *Dziubak*. Part III analyzes *Dziubak*'s weaknesses, in terms of public policy and case law, and elucidates its impact both on indigent defendants in Minnesota and on the court-appointed counsel obligated to represent them.

In response to *Dziubak*, this Comment proposes a two-pronged solution which advocates that the Minnesota legislature expressly extend to public defenders limited statutory liability as state employees and recommends that courts in Minnesota establish a modified evidentiary threshold for proving ineffective assistance of counsel for defendants represented by court-appointed counsel. This two-pronged solution would establish a limited, but effective, remunerative device for dissatisfied indigent defendants that balances the professional needs of lawyers, the constitutional needs of indigent defendants, and the concerns of the courts and the legislature.

I. THE RIGHT TO COUNSEL AND THE PUBLIC DEFENDER: INTERESTS IN CONFLICT?

A. The Constitutional History of Indigent Criminal Jurisprudence

In 1932, the Supreme Court established the constitutional right of certain defendants to appointed counsel.[19] In *Powell v.*

18. Spring v. Constantino, 362 A.2d 871 (Conn. 1975); Browne v. Robb, 583 A.2d 949 (Del. 1990), *cert. denied*, 499 U.S. 952 (1991); Vick v. Haller, 512 A.2d 249 (Del. Super. Ct.), *aff'd mem.*, 514 A.2d 782 (Del. 1986); Donigan v. Finn, 290 N.W.2d 80 (Mich. Ct. App. 1980); Scott v. City of Niagara Falls, 407 N.Y.S.2d 103 (Sup. Ct. 1978); Reese v. Danforth, 406 A.2d 735 (Pa. 1979).

19. Powell v. Alabama, 287 U.S. 45, 71 (1932). The Sixth Amendment states, "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense." U.S. Const. amend. VI. The

Alabama,[20] the Court held that "the necessity of counsel was so vital and imperative [in capital cases] that the failure . . . to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment."[21] Six years later, in *Johnson v. Zerbst*,[22] the Court extended *Powell* and held that the Sixth Amendment requires appointment of counsel in all federal-court felony cases for indigent defendants.[23] Subsequently, in *Gideon v. Wainwright*,[24] the Supreme Court held that the Sixth Amendment obligates states to provide defense counsel to indigent defendants in all felony prosecutions.[25]

Minnesota Constitution also requires that "[i]n all prosecutions the accused shall enjoy the right . . . to have the assistance of counsel in his defense." MINN. CONST. art. 1, § 6.

Many state courts have interpreted their state constitutions as providing greater protections than afforded by United States Constitution. *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (noting "[i]t is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law").

20. 287 U.S. 45 (1932).

21. *Id.* at 71. The Court declined to adopt a sweeping rule that appointed counsel is required in all capital cases. *Id.* Rather, the Court limited its holding to those defendants who are "incapable of making [their] own defense because of ignorance, feeble mindedness, illiteracy, or the like . . . ." *Id.*

22. 304 U.S. 458 (1938).

23. *Id.* at 463. The *Zerbst* Court explained its holding:

> [T]he obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious.

Id. at 462-63.

Four years later, the Supreme Court declined to incorporate against the states the Sixth Amendment right to counsel in felony cases. Betts v. Brady, 316 U.S. 455 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963). The Court held that states must provide appointed counsel only when the special circumstances of the case indicated that the assistance of counsel was needed to ensure a fair trial. *Id.* at 461.

24. 372 U.S. 335 (1963).

25. *Id.* at 343-44. In overruling *Betts*, the Court stated, "[the assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights . . . ." *Id.* at 343 (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938)) (alteration in original). The *Gideon* Court extended the Sixth Amendment guarantee of the right to counsel to the states through the Fourteenth Amendment's Due Process Clause. *Id.* at 339-41.

B. The Emergence of Minnesota's Public Defense System After *Gideon*

Before *Gideon*, volunteer legal service agencies and uncompensated attorneys generally represented the small number of indigent defendants for whom courts appointed counsel in criminal proceedings.[26] *Gideon* and its progeny,[27] however, produced a wave of state legislative activity in the 1960s and 1970s, creating public-defender offices and similar mechanisms to ensure compliance with the Constitution.[28]

Today, state law dictates indigent representation structures at the state and, generally, the local level.[29] Both state and local funds support indigent defense systems.[30] Most jurisdictions operate one of the following systems: some jurisdictions employ comprehensive, full-time public defender offices,[31] some rely on

26. *See* William M. Beaney, *The Right to Counsel*, *in* The Rights of the Accused in Law and Action 147, 149-50 (Stuart S. Nagel ed., 1972); Suzanne E. Mounts & Richard J. Wilson, *Systems for Providing Indigent Defense: An Introduction*, 14 N.Y.U. Rev. L. & Soc. Change 193, 197-98 (1986).

27. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972) (finding the right to counsel for misdemeanor prosecutions); Coleman v. Alabama, 399 U.S. 1 (1970) (establishing the right to counsel for all post-charge witness-suspect confrontations); *In re* Gault, 387 U.S. 1 (1967) (extending due process protection to juveniles in delinquency proceedings leading to possible incarceration); Miranda v. Arizona, 384 U.S. 436 (1966) (extending right of counsel to pre-charge police interrogations); Douglas v. California, 372 U.S. 353 (1963) (holding that Fourteenth Amendment's Equal Protection Clause entitles defendant to an attorney on first appeal).

28. *See generally* Norman Lefstein, Criminal Defense Services for the Poor: Methods and Programs for Providing Legal Representation and the Need for Adequate Financing (1982) (reporting on state and county indigent defense systems); Bureau of Statistics, U.S. Dep't of Justice, National Criminal Defense Systems Study 1 (1982) [hereinafter National Study] (same).

Few public defender programs existed in the United States prior to *Gideon*. Spangenberg Report, *supra* note 1, at 4. These pre-*Gideon* programs were either the product of well-meaning lawyers and activists or state constitutions and statutes creating the right to counsel. *Id.* These early programs were generally small and staffed only part-time. *Id.*

29. *See generally* Lefstein, *supra* note 28 (describing statutorily created public defense systems); National Study, *supra* note 28 (same); Mounts & Wilson, *supra* note 26 (same).

30. *See* Lefstein, *supra* note 28, at 10-24, A1-A104; National Study, *supra* note 28, at 23.

31. *See* Lefstein, *supra* note 28, at C1-C39; National Study, *supra* note 28, at 14-16; *see also* Mounts & Wilson, *supra* note 26, at 198-99 (describing the origins of public defender offices).

court-appointed counsel from the local private bar, either compensated or pro bono,[32] and some rely on a contract system.[33]

In 1965, the Minnesota legislature created a system of full-time and part-time defender offices to meet indigent criminal defense needs.[34] Since that time, the legislature has made significant structural and organizational changes.[35] In 1981, the legislature created the State Board of Public Defense and charged it with appointing a state public defender[36] and chief

32. *See* LEFSTEIN, *supra* note 28, at B1-B38; NATIONAL STUDY, *supra* note 28, at 16-19; *see also* Mounts & Wilson, *supra* note 26, at 198 (describing court appointment of private attorneys). An assigned-counsel system relies on the appointment of different lawyers from the bar at large. The indigent defendant represented by appointed or assigned counsel often encounter difficulty because the attorney generally does not receive funds for investigation; typically, assigned counsel receive a flat hourly rate. *See* 18 U.S.C. § 3006a(d) (1988). *But see* 18 U.S.C. § 3006(e)(1) (stating that "counsel may request compensation for investigative, expert, or other services necessary for an adequate defense . . .").

33. NATIONAL STUDY, *supra* note 28, at 19-21. In Washington state, for example, the government funding source contracts with individual attorneys or private law firms to provide criminal indigent legal representation. *See* Robert C. Boruchowitz, *Remarks*, *in* GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING 12 (1982); PUBLIC DEFENDER SYSTEM, *supra* note 13, at 51-52; *see also* Mounts & Wilson, *supra* note 26, at 199-200 (describing the contract system).

34. Act of May 26, 1965, ch. 869, §§ 1-20, 1965 Minn. Laws 1631-39 (codified as amended at MINN. STAT. §§ 611.14-.21, .23-.26, .27 (1992)). In 1917, the Minnesota legislature created public defender offices in counties with populations of at least 300,000. Act of April 21, 1917, ch. 496, §§ 1-7, 1917 Minn. Laws 835-36 (codified as amended at MINN. STAT. § 611.12 (1988)), *repealed by* Act of June 3, 1989, ch. 335, art. 3, § 57(2), 1989 Minn. Laws 2932.

Under Minnesota law, anyone accused of a felony, gross misdemeanor, or probation or parole violation is entitled to representation, including juveniles. MINN. STAT. § 611.14. The court appoints public defenders to represent criminal defendants who cannot afford to pay for a private attorney. *Id.* § 611.18. Judges determine if a defendant is indigent. *Id.* § 611.17. In 1990, public defender offices handled almost 75% of the felony docket and over 50% of the gross misdemeanor docket in Minnesota. PUBLIC DEFENDER SYSTEM, *supra* note 13, at 4. The percentages were higher in the districts encompassing Minneapolis and St. Paul. *Id.* Compensated court-appointed counsel or private, nonprofit public defense corporations handle the remainder of indigent representation needs in Minnesota. *Id.* at 20-27. Five such public defense corporations operate in the state. *Id.* at 21.

35. *See* MINN. STAT. §§ 611.14-.35; PUBLIC DEFENDER SYSTEM, *supra* note 13, at 11-17. Currently in Minnesota, public defense corporations and court-appointed private lawyers represent a small percentage of the indigent criminal accused. *Id.* at 20-27.

36. MINN. STAT. § 611.25; PUBLIC DEFENDER SYSTEM, *supra* note 13, at 22. The state public defender office in Minnesota handles appellate cases. *See* MINN. STAT. § 611.25(1).

public defenders in six of the ten judicial districts.[37] The legislature expanded the authority of the State Public Defender in 1987,[38] and in 1990, further incorporated all ten judicial districts into the state funding system.[39]

C. THREATENING *GIDEON'S* GUARANTEE: THE CURRENT CRISIS IN INDIGENT DEFENSE

Nationally, and in Minnesota, the move toward establishing defender services did not solve the problem of ensuring fair and adequate legal representation for indigent criminal clients.[40] Most commentators agree that the public defender offices, especially those offices located in the large urban districts, are un-

37. MINN. STAT. §§ 611.12, .215, .26; *see* PUBLIC DEFENDER SYSTEM, *supra* note 13, at 24.

38. In 1987, the legislature expanded the statutory authority for the Board of Public Defense by modifying its membership, creating an administrative office, instituting greater oversight of the State Public Defender's office, creating two new Judicial District Public Defender offices, mandating new standards regulating the offices and conduct of all public defender organizations, and establishing new reporting, budgeting, and funding processes. Act of May 26, 1987, ch. 250 §§ 1-18, 1987 Minn. Laws 889-98 (codified as amended at MINN. STAT. §§ 611.215-.27); PUBLIC DEFENDER SYSTEM, *supra* note 13, at 11-17.

39. In 1989, the legislature expanded the authority of the Board of Public Defense to include all ten judicial districts in Minnesota. Act of June 3, 1989, ch. 335, art. 1 § 262, 1989 Minn. Laws 2897 (codified as amended at MINN. STAT. § 611.215(2)); PUBLIC DEFENDER SYSTEM, *supra* note 13, at 12, 14. The legislature also appropriated $17,000,000 of state funds to provide representation for felony and gross misdemeanor cases throughout the state and for juvenile and misdemeanor cases in the second, fourth, and eighth judicial districts. SPANGENBERG REPORT, *supra* note 1, at 3. Although this sum may seem considerable, the city of Washington D.C. received approximately the same amount for its non-federal indigent criminal defense allocation in 1990, which totalled $16,542,000. DISTRICT OF COLUMBIA COURTS ANNUAL REPORT 1990, at 11 (1990). The District of Columbia has a mixed system of public defenders and court-appointed counsel. NATIONAL STUDY, *supra* note 28, at 65.

40. LEFSTEIN, *supra* note 28, at ii; SPANGENBERG REPORT, *supra* note 1, at 6. As a result of changes in the criminal law landscape over the last three decades, "public defender caseloads have grown to be overwhelming in many jurisdictions, and the ability to provide 'effective representation' has been stretched to the limit." *Id.*

Justice Marshall spoke to the dilemma of drawing a public defender in his dissent in *Strickland*:

> It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn has limited time and resources to devote to a given case.

Strickland v. Washington, 466 U.S. 668, 708 (1984) (Marshall, J., dissenting).

derfunded,[41] understaffed,[42] and carry unreasonably high caseloads.[43] Due in part to the "war on crime" and the "war on drugs,"[44] the number of people arrested and prosecuted in the criminal justice system increased exponentially during the 1980s.[45] The budgets for indigent criminal defense, however, did not grow commensurate with the rising caseloads in the public defender offices.[46] Additionally, increases in the public de-

41. LEFSTEIN, *supra* note 28, at 10-24. Minnesota appropriated only $19.8 million for public defense in Fiscal Year 1991. PUBLIC DEFENDER SYSTEM, *supra* note 13, at 1.

42. In 1990, Minnesota's ten judicial district offices employed 89 full-time and 172 part-time public defenders. SPANGENBERG REPORT, *supra* note 1, at 17. Hennepin County employed 68 of the 89 full time public defenders. *Id.* The study made the following determinations:

> Without question, the strength of the public defender system in Minnesota can be found in the staff across each judicial district. Public defenders in Minnesota, with very few exceptions, are competent, committed and first-rate advocates.
>
> They are among the most experienced criminal practitioners in the state and . . . in many instances, they were the most experienced criminal practitioners in some of the counties where they practiced. Furthermore, public defenders are respected as competent, strong advocates by both judges and prosecutors.

Id. at 19.

43. Public defender caseloads have grown exponentially in recent years due to a variety of factors, including: increasing crime rates, case filing, and court appointments, especially drug offenses; deteriorating economic conditions leading to increased claims of indigency; an increase in the types of cases and proceedings for which counsel is required; changes in prosecutorial practices, especially limits on plea bargaining in certain cases; changes in methods of case disposition or the stage at which cases are disposed; changes in the case composition for public defenders, with an increased percentage of more serious felonies; increasing use of mandatory minimum sentences and use of sentencing guidelines; increasing court efficiency; and procedural alterations, such as speedier trials or preliminary hearings for certain classes of offenses. SPANGENBERG REPORT, *supra* note 1, at 4-5.

44. *See* President's Radio Address to the Nation, 18 WEEKLY COMP. PRES. DOC. 1249, 1249-50 (Oct. 2, 1982); President's Remarks Announcing Federal Initiatives Against Drug Trafficking and Organized Crime, 18 WEEKLY COMP. PRES. DOC. 1311, 1313-14 (Oct. 14, 1982). The Reagan and Bush administrations both pursued the policies known as the "war on crime" and the "war on drugs." These policy initiatives emphasized bolstering law enforcement, prosecutorial, and sentencing powers in an effort to stem the rising wave of drug-related activity and increasingly violent crime. *See* Sheldon Krantz & Laurie Robinson, *Report to Members*, CRIM. JUST., Winter 1990, at front cover, 48; john a. powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557 (1991).

45. *See* SOURCEBOOK, *supra* note 13, at 485.

46. At the federal level, for instance, direct expenditures during the 1980s to prosecution services increased 470.4% while direct expenditures to public defense increased only 68.9%. *Id.* at 3. By 1990, expenditures to prosecution serv-

fender budget over the last twenty years did not correspond to the increase in arrests and prosecutions or compare with the increase in the growth of law enforcement and prosecution agencies.[47]

In Hennepin County, which encompasses the city of Minneapolis, for example, less than 100 full and part-time public defenders represent approximately 30,000 adult criminal and juvenile defendants each year.[48] Nearby Ramsey County suffers an even more serious caseload crisis.[49] Reflecting the national trend, an increasing percentage of the defendants in Minnesota face felony and gross misdemeanor drug charges.[50] Minnesota also spends a far greater amount of money on prosecution services than on public defense.[51]

Difficult social and political considerations complicate any critique of the delivery and adequacy of indigent criminal representation.[52] Courts have declined to recognize indigents as a

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ices at all levels greatly exceeded the funds allocated to public defense. *See id.* at 2.

47. Nationally, the amount of public defense expenditures comprised less than 3% of the total criminal justice expenditures, less than half the amount spent on prosecution. SOURCEBOOK, *supra* note 13, at 3. Minnesota spent $821,228,000 on the criminal justice system including $387,009,000 on police services and $77,941,000 on prosecution, while spending only $17,941,000 on public defense. *Id.* at 4. In addition, the state of Minnesota employs 1,499 people in its prosecution services and only 307 full-time public defense workers. *Id.* at 26.

48. In 1991, the Hennepin County Public Defender's Office employed less than 90 attorneys, but handled 27,002 new cases. HENNEPIN COUNTY PUBLIC DEFENDER OFFICE: ORGANIZATIONAL SUMMARY, B-1 (1992) [hereinafter ORGANIZATIONAL SUMMARY]; *see also* SOURCEBOOK, *supra* note 13, at 375-76 (listing crime statistics for St. Paul and Minneapolis).

Public defenders represent at least 80% of all felony criminal defendants in Minnesota's two most populated counties, Hennepin and Ramsey, which encompass Minneapolis and St. Paul, respectively. Margaret Zack, *State Court to Look at Indigent's Right to Sue Defenders*, STAR TRIB. (Mpls.), Feb. 8, 1993, at A1.

49. *See* SPANGENBERG REPORT, *supra* note 1, at 28-31.

50. *See* SOURCEBOOK, *supra* note 13, at 485. The number of defendants prosecuted in federal district courts for drug offenses more than tripled between 1980 and 1990. *Id.* In addition, by 1992, drug offenders comprised the single largest group of felony arrestees in the 75 largest counties in the country. *Id.* at 532.

51. *See supra* note 47 (describing the budgets for prosecution and public defense in Minnesota).

52. "A defender program operates in a context which is, by and large, hostile to its purpose—providing representation to people charged with committing a crime." Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 475. "The apparent contradiction between reform origins of the defender program idea and

"suspect class" deserving of heightened scrutiny under the Constitution.[53] Also, indigent defendants, who are disproportionately persons of color,[54] are generally less able to effectively use the political process.[55] Furthermore, legislators rarely give high priority to the rights of criminal suspects.[56] If the public perceives a politician as pro-defendant, he or she risks losing votes to "law-and-order" candidates on issues such as criminal rights.[57] Voters are often far more concerned with building larger prisons, establishing stiffer sentences, and increasing police forces than with ensuring the vigorous defense of criminal defendant rights and prisoner rights.[58]

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the recurrent criticism of today's defender programs is a product of the political and social environment in which such programs exist." *Id.* at 481.

53. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that school children residing in poor school district are not a suspect class because of their economic circumstances). This lack of constitutional protection for indigents is becoming even more significant because "[o]ver the past few years, for reasons not totally explainable, the percentage of defendants found to be indigent and receiving appointed counsel has grown. We were repeatedly told around the state that the indigency rate has risen to 80% and above" for all defendants. SPANGENBERG REPORT, *supra* note 1, at 21.

The *Dziubak* decision may also have constitutional implications in this regard in the future. As one commentator explained:

> However overworked the system as a whole may be, the constitutional rights of an individual charged with a crime cannot be sacrificed. The longer status quo continues, the more likely it becomes that ineffective representation will be the norm and, therefore, expected and tolerated. Excessive caseloads may explain *why* defenders cannot provide competent assistance to their clients, but this explanation must never serve to justify and perpetuate our inadequate system for the delivery of defense services.

Klein, *Competent Representation*, *supra* note 15, at 564 (emphasis in original).

54. In 1990, slightly over one million people lived in Hennepin County; racial minorities totaled 110,110 or 10.6%. ORGANIZATIONAL SUMMARY, *supra* note 48, at B-1. That year, however, racial minorities represented approximately 60% of the felony, gross misdemeanor, and misdemeanor caseload of the Hennepin County Public Defender office. *Id.*

55. *See* Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 107 (1990).

56. One commentator pointed out that "it is almost inconceivable that elected politicians would call for or provide additional funding to represent indigents accused of crime." Klein, *Eleventh Commandment*, *supra* note 1, at 432.

57. For example, Michael Dukakis suffered greatly in the presidential election of 1988 for supporting a prisoner furlough program in Massachusetts while governor, which enabled prisoner Willie Horton to commit a rape during a furlough release. *See* Ted Gest, *The Campaign Goes on Furlough*, U.S. NEWS & WORLD REP., Oct. 3, 1988, at 16.

58. *See* The Special Committee on Criminal Justice in a Free Society, *The Crisis in Our Criminal Justice System*, CRIM. JUST., Winter 1990, at 18.

D. Lawyer Accountability: Effective Assistance of Counsel, Legal Malpractice, and Immunity

Few methods exist to hold criminal defense lawyers in Minnesota accountable for inadequate representation. Dissatisfied criminal defendants in the state system may collaterally attack their conviction or seek monetary recompense for incompetent counsel. At the state level, criminal defendants can complain to the board of professional responsibility,[59] bring an ineffective-assistance-of-counsel claim for collateral relief,[60] or initiate a civil suit for legal malpractice to collect money damages.[61] At the federal level, a criminal defendant in a state system can initiate a civil-rights action to collect money damages[62] or petition for federal habeas relief.[63] Each of these remedies, however, presents obstacles for the indigent criminal defendant.[64]

1. Ineffective Assistance of Counsel in State Court

A dissatisfied client may seek non-monetary collateral relief by alleging ineffective assistance of counsel. This right is important because counsel in criminal cases risk a client's liberty.[65]

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59. *See infra* part I.D.2 (describing the ethics complaint process and problems for criminal defendants). *See generally* Minnesota Rules of Professional Conduct (1992) (providing rules for attorney behavior); Minnesota Rules on Lawyers Professional Responsibility (1992) (same). "Ethical codes governing the professional conduct of all attorneys must be the starting point of any discussion regarding public defender caseload management." Spangenberg Report, *supra* note 1, at 6.

60. *See infra* part I.D.1 (describing ineffective assistance of counsel).

61. *See infra* part I.D.4 (describing state malpractice suits). Litigants seeking to sue their lawyers for legal malpractice encounter great difficulty finding another lawyer to represent them. Lawyers have traditionally been unwilling to sue fellow members of the bar for malpractice; however, this tradition may be changing. *See, e.g.*, Kay Ostberg, Directory of Lawyers Who Sue Lawyers (1989) (providing state-by-state listings of the few lawyers who are willing to sue other lawyers).

62. *See infra* part I.D.3 (describing federal civil rights remedies under 42 U.S.C. § 1983). Civil rights suits were once the most popular form of redress for indigent clients unhappy with public defender representation. Ronald E. Mallen, *The Court-Appointed Lawyer and Legal Malpractice—Liability or Immunity*, 14 Am. Crim. L. Rev. 59, 59 (1976).

63. *See infra* part I.D.3 (describing relief under 28 U.S.C. § 2254).

64. *See generally infra* part I.D (noting pitfalls to various monetary and collateral remedies).

65. *See* Duke Nordlinger Stern & Jo Ann Felix-Retzke, A Practical Guide to Preventing Legal Malpractice § 3.07, at 40-41 (1993); Ronald E. Mallen & Jeffrey M. Smith, 2 Legal Malpractice § 21.1, at 284 (3d ed. 1989).

In *Strickland v. Washington*,[66] the United States Supreme Court held that the right to "reasonably effective assistance of counsel" requires that all criminal defendants have the right to challenge their conviction on grounds of incompetent legal assistance.[67] The *Strickland* Court further held that the dissatisfied defendant must prove that the representation of counsel fell below an objective standard of reasonableness[68] and that, in the absence of the lawyer's unprofessional errors, the result of the criminal proceeding would have been different.[69] The Court also directed that in these matters there is a "strong presumption" that counsel's conduct fell within the range of reasonably effective assistance.[70]

66. 466 U.S. 668 (1984). On the same day, the Court held that a defendant alleging ineffective assistance of counsel must demonstrate actual ineffectiveness to warrant Sixth Amendment protection. United States v. Cronic, 466 U.S. 648 (1984).

67. *Strickland*, 466 U.S. at 686; *Cronic*, 466 U.S. at 654-55. The Supreme Court has acknowledged that the right to counsel means the right to "effective assistance of counsel." *See, e.g.*, McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

68. *Strickland*, 466 U.S. at 687-91. "The proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances . . . [t]he defendant must show that the lawyer's representation fell below an objective standard of reasonableness." *Id.* at 669.

69. *Id.* at 691-96. "With regard to the required showing of prejudice, the proper standard requires defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 669.

A defendant's right to counsel extends only to the first appeal and does not encompass suits claiming ineffective assistance in state court. *See* Pennsylvania v. Finley, 481 U.S. 551 (1987) (denying constitutional right to counsel to mount a collateral attack on ineffectiveness of counsel). A state court may mandate that state or local authorities provide an attorney to indigents seeking to bring an ineffective assistance of counsel claim, but the U.S. Constitution does not guarantee this right.

One commentator pointed out problems with bringing an ineffective assistance of counsel claim at the post-conviction stage:

> [Post conviction relief] fails to remedy errors of omission resulting from staff and resource shortages. It may correct flagrant errors, but it cannot reach claims never brought and strategies never used. Because claims are case specific, the use of this approach precludes criminal defendants from raising structural challenges to improve indigent defense systems.

Rodger Citron, Note, *(Un)*Luckey v. Miller: *The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 486 (1991).

70. *Strickland*, 466 U.S. at 689. The Court, however, did not specifically address this presumption of effectiveness in the context of an overburdened defender office.

Most courts interpreting *Strickland* have made this a difficult standard for dissatisfied defendants to meet.[71] Indeed, the Minnesota courts have overturned only a handful of convictions on appeal in the last decade due to ineffective assistance of counsel.[72]

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71. *See, e.g.*, State v. Grover, 402 N.W.2d 163 (Minn. Ct. App. 1987) (finding counsel rendered effective assistance under *Strickland* even though counsel failed to interview several witnesses, failed to obtain statements from witnesses he did question until the day before trial, failed to discuss the case with defendant more than briefly, failed to make motions for hearings to challenge the validity of warrant and admissibility of prejudicial statement, and impliedly admitted defendant's guilt on the issue of terroristic threats). *See generally* Gregory G. Sarno, Annotation, *Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client*, 2 A.L.R. 4TH (1980 & Supp. 1993) (discussing standards for ineffective counsel cases in state courts); Gregory G. Sarno, Annotation, *Adequacy of Defense Counsel's Representation of Criminal Client Regarding Plea Bargaining*, 8 A.L.R. 4TH 660 (1980 & Supp. 1993) (discussing ineffective counsel with regards to plea bargaining); John E. Theuman, Annotation, *When is Attorney's Representation of Criminal Defendant so Deficient as to Constitute Denial of Federal Constitutional Right to Effective Assistance of Counsel—Supreme Court Cases*, 83 L.Ed.2d 1112 (1987) (discussing ineffective counsel standards for federal cases). One commentator described *Strickland*'s two-prong test as "far less a standard for effective assistance of counsel than a standard for disposing of effective assistance of counsel claims." Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 80 (1986). Most states, though, have ignored any innovative proposals for ensuring competent counsel. For a few examples of such proposals see Klein, *Competent Representation, supra* note 15, at 564-84.

The Louisiana Supreme Court, however, has broken ranks and set a modified standard for effective assistance counsel, in particular for public defenders. *See* State v. Peart, 621 So. 2d 780 (La. 1993). Responding to drastic measures that the criminal courts had adopted, the Louisiana Supreme Court ordered the trial court, when hearing cases in which defendants made ineffective assistance claims at the pre-trial stage, to hold a hearing for each defendant and to apply a rebuttable presumption that the indigent defendants are not receiving constitutionally sufficient assistance of counsel. *Id.* at 783. The *Peart* court further ordered that if the trial court, applying the rebuttable presumption and weighing all the evidence, finds that the indigent is receiving ineffective assistance, even if due to case overload, the trial court shall not permit the trial to take place. *Id.* The attorney representing Peart was, at the time, handling 70 active felony cases, and had represented 418 clients in an eight-month span during which defendant's trial was conducted. *Id.* at 784.

72. This author could locate only a few cases at the appellate stage that found ineffective assistance of counsel in the State of Minnesota in the last twenty-five years. *See, e.g.*, State v. Moore, 458 N.W.2d 90 (Minn. 1990); Gates v. State, 393 N.W.2d 417 (Minn. 1986). This is comparable to the national numbers. *See* Stephen B. Bright et. al., *Keeping* Gideon *from Being Blown Away*, CRIM. JUST., Winter 1990, at 10, 12 (emphasizing that *Strickland* and other barriers to finding ineffective assistance of counsel guarantee that conviction reversals will be too few to provoke systemic change).

As a remedy, ineffective assistance of counsel claims are usually brought by persons challenging criminal trial convictions. WAYNE R. LEFAVE & JEROLD H.

2. Board of Lawyers Professional Responsibility

In Minnesota, complaining of attorney incompetence to the state board of professional responsibility does not provide a realistic remedy to dissatisfied indigent criminal clients.[73] The Minnesota Rules on Lawyers Professional Responsibility severely limit investigations of complaints by criminal defendants.[74] This process affords indigent defendants no remedy to replace inadequate counsel before any damage is done.

3. Federal Claims: Civil Rights Actions and Habeas Petitions

Federal remedies offer dissatisfied clients little solace. Most federal courts have held state public defenders immune from civil rights suits[75] because public defenders do not act under the color of state law in discharging their duties.[76] As a result, civil rights suits do not provide a viable means by which

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ISRAEL, CRIMINAL PROCEDURE, 28-29 (1992). Because the vast majority of criminal accused agree to plea bargains and do not go to trial, *id.* § 21.1, the percentage of persons to whom this remedy is effectively available is quite small. Klein, *Competent Representation*, *supra* note 15, at 547.

73. See RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY, Rule 8(b); *see also infra* notes 185-190 and accompanying text (explaining ethical ramifications of inadequate counsel).

74. RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY, Rule 8(b).

> No investigation shall commence on a complaint by or on behalf of a party represented by court appointed counsel, insofar as the complaint against the court appointed attorney alleges incompetent representation by the attorney in the pending matter. Any such complaint shall be summarily dismissed without prejudice. The Director's dismissal shall inform the complainant that the complaint may be sent to the chief district judge or trial court judge involved in the pending matter. The judge may, at any time, refer the matter to the Director for investigation. The Director may communicate with the appropriate court regarding the complaint and its disposition.

Id.

75. 42 U.S.C. § 1983 (1988). Section 1983 suits provide several benefits: plaintiffs may file them *pro se*, indigent plaintiffs do not need to pay a filing fee, and a litigant who prevails may collect attorney's fees. Richard Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant*, 61 TEMP. L. REV. 1171, 1198 (1988). The applicable text of § 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

42 U.S.C. § 1983.

76. Polk County v. Dodson, 454 U.S. 312 (1981). The *Polk* Court held that a public defender, when engaged in the traditional defense functions as counsel

most indigent defendants can seek monetary damages for incompetent court-appointed counsel. Obtaining federal collateral relief for incompetent counsel is even more difficult. Only prisoners who have exhausted their state remedies can bring habeas petitions.[77] Worse yet, habeas petitions alleging ineffective assistance of counsel rarely succeed.[78]

4. State Tort Action for Malpractice

In most jurisdictions, criminal defendants may bring civil legal malpractice suits against attorneys.[79] Although such suits are not rare, legal malpractice is a relatively undeveloped area.[80] While suits brought by criminal defendants against their defense counsel do not comprise a large part of the legal malpractice landscape,[81] they are increasing in frequency.[82]

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for an indigent defendant, does not act under color of state law for purposes of § 1983. *Id.* at 325. The Court did not reach the immunity issue.

In contrast, the Court declined immunity for a public defender who conspired with a prosecutor to deprive indigent defendants of their constitutional rights under 42 U.S.C. § 1983. Tower v. Glover, 467 U.S. 914, 916 (1984). The Court reasoned that if private lawyers would not be immune from intentional misconduct actions, public defenders should not receive immunity either. *Id.* at 921. The Court also declined to extend immunity to public defenders because of any similarity between public defenders and prosecutors and judges. *Id.* at 922.

77. 28 U.S.C. § 2254 (1988) (dealing with applications on behalf of persons detained under state court authority).

78. *See* Kimmelman v. Morrison, 477 U.S. 365 (1986) (finding that successful habeas petitions alleging incompetent assistance of counsel must still meet the *Strickland* test).

The percentage of state prisoners granted some form of federal habeas relief is extremely low. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES REPORT NO. 7, REPORT TO THE ATTORNEY GENERAL: FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGEMENTS 32-35 (1988).

79. In a legal malpractice action, a complainant must allege and prove that an attorney's acts or omissions were illegally erroneous, that the attorney's errors were not reasonably tactical and did not comport with a reasonable standard of care, and that the negligent error or errors caused a compensable injury to the complainant. *See* 2 MALLEN & SMITH, *supra* note 65, § 27 (explicating the litigation of legal malpractice actions).

80. "[L]egal malpractice claims, particularly those based on professional negligence, did not become a subject of significance for the legal profession until the 1970s. Until then, few practitioners were concerned about claims or the cost of liability insurance." 1 MALLEN & SMITH, *supra* note 65, § 1.6, at 17. "The law of legal malpractice continues to evolve, but is doing so more on a national level rather than by jurisdiction." *Id.* at 19.

81. Legal malpractice suits against criminal defense attorneys both nationwide and in Minnesota are still not filed in overwhelming numbers. Criminal malpractice claims accounted for three percent of the total malpractice claims recorded by 1986. 1 MALLEN & SMITH, LEGAL MALPRACTICE, *supra* note 65, § 1.7, at 22 (quoting ABA STANDING COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, PROFILE OF LEGAL MALPRACTICE, 8 (1986)). Criminal malpractice

As stated above, federal courts have held that public defenders are immune from federal civil rights actions. In *Ferri v. Ackerman*,[83] however, the Supreme Court held that the individual states should decide the issue of public defender common-law malpractice liability.[84] In so ruling, the *Ferri* Court noted in dicta that public defenders serve a role akin to privately-retained defense counsel and therefore do not need immunity.[85]

At present, only a few states specifically protect public defenders from legal malpractice liability.[86] State courts that have addressed the issue have generally declined to extend immunity to public defenders.[87] Most state courts analogize the relationship between the public defender and the client to the relationship between a privately-retained lawyer and client as the Court in *Ferri* did.[88] In *Reese v. Danforth*,[89] for example, the Penn-

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claims also account for the lowest monetary expenditure amounts for defense and claims of all areas of law. *Id.* at 23. Over 90% of the criminal malpractice defense costs were under $1000. *Id.*

Among attorneys, criminal defense attorneys face the smallest likelihood of a legal malpractice action for negligence in handling a particular matter. HILTON L. STEIN, HOW TO SUE YOUR LAWYER: THE CONSUMER GUIDE TO LEGAL MALPRACTICE 41 (1989). The author noted that the small number of suits probably results not because criminal defense lawyers commit less malpractice than civil lawyers, but because criminal defendants receive the least sympathy from juries when complaining of legal malpractice. *Id.*

82. Civil legal malpractice suits against criminal attorneys have increased in number, but appellate courts rarely affirm a judgment against an attorney. 2 MALLEN & SMITH, *supra* note 65, § 21.1, at 2845-86.

83. 444 U.S. 193 (1979). In *Ferri*, the Supreme Court addressed the issue of federal public defender immunity in state malpractice suits and unanimously held that federal law does not entitle a counsel appointed in the federal court to represent an indigent defendant to immunity when the former client sues for malpractice in state court. *Id.*

84. *Id.* at 200-01.

85. *Id.* at 204-05.

86. *See infra* notes 89-96 and accompanying text (describing different state court treatment of immunity and limited liability of public defenders).

87. *See, e.g.*, Spring v. Constantino, 363 A.2d 871 (Conn. 1975); Reese v. Danforth, 406 A.2d 735 (Pa. 1979).

88. *See, e.g.*, Sanchez v. Murphy, 385 F. Supp. 1362, 1365 (D. Nev. 1974). The *Sanchez* court explained its holding:

> The office of public defender is sui generis. Unlike other public offices, it is not established to serve the public generally. . . . Recipients of the services of a public defender's office are only those indigents in whose aid a court or magistrate appoints a public defender to render legal advice and assistance. As noted, the relationship thus created is a strictly professional one. It is a personal relationship of trust and confidence governed by the canons of professional ethics under which the attorney owes an obligation of unswerving loyalty and devotion to the interests of his client.

Id. at 1365.

sylvania Supreme Court rejected the contention that public-policy concerns for protecting public defenders outweighed concerns for an indigent client's ability to remedy insufficient representation.[90] The Connecticut Supreme Court, in *Spring v. Constantino*,[91] reached a similar result, reasoning that a lawyer's defense of an indigent accused is not a governmental act that triggers immunity.[92]

A small number of jurisdictions have granted some form of immunity to public defenders.[93] Either the state court interprets its tort claims act as covering public defenders and court-appointed counsel, as in Delaware,[94] or the state court extends only qualified immunity to public defenders and court-appointed counsel, as in New York.[95] Until recently, the Minnesota courts had not addressed the issue of public defender immunity, although it had ruled on immunity for other actors in the judicial sphere.[96]

89. 406 A.2d 735. In *Reese*, the Pennsylvania Supreme Court ruled that once a public defender is appointed, any state or public function ceases, and the public defender takes on all the obligations and protections of the private attorney-client relationship. *Id.* at 738-39.

90. *Id.* at 739-40.

91. 362 A.2d 871. In *Spring*, the indigent client sued her Connecticut public defender for negligently disclosing to the court his belief that she was insane. *Id.* at 873. In the first case in the country to address the issue of public defender immunity from state legal malpractice action, the Connecticut Supreme Court held that a public defender is not a public official and therefore, defending an indigent client is not a governmental act which triggers immunity. *Id.* at 878-79. The court reasoned that a public defender is more like a privately-retained attorney. *Id.* at 878; *see also* Donigan v. Finn, 290 N.W.2d 80, 82 (Mich. App. 1980) (holding that public defender not immune in state malpractice actions).

92. *Spring*, 362 A.2d at 871-872.

93. *See, e.g.*, Browne v. Robb, 583 A.2d 949 (Del. 1990); Vick v. Haller, 512 A.2d 249 (Del. Super. Ct. 1986); Ramirez v. Harris, 773 P.2d 343 (Nev. 1989); Scott v. City of Niagara Falls, 407 N.Y.S.2d 103 (Sup. Ct. 1978).

94. *See, e.g., Browne*, 583 A.2d at 951; *Vick*, 583 A.2d at 251-52 (holding that state tort claims act bestows qualified immunity for state employees, including court-appointed counsel and public defenders, but liability exists for duties pursued in bad faith and with gross negligence); *Ramirez*, 773 P.2d at 344-45 (finding that state statute prohibits lawsuits against "public officers" and "officers" of the state, and public defenders held to be state employees within the scope of "public officer" for discretionary acts pursuant to duty as public defender).

95. *See, e.g., Scott*, 407 N.Y.S.2d at 106 (finding public defenders not immune from negligence suits arising out of ministerial tasks or clerical duties which require no discretionary judgment).

96. Minnesota has granted immunity to a board of directors acting in quasi-judicial capacity in arbitration, Melady v. South St. Paul Live Stock Exch., 171 N.W. 806, 807 (Minn. 1919); judges, Stewart v. Cooley, 23 Minn. 347, 350 (1877); court commissioners and court-appointed examining physicians,

E. MINNESOTA'S APPROACH TO GOVERNMENTAL TORT LIABILITY

Under the Minnesota tort claims statute,[97] the state will pay compensation for injuries caused by an act or omission of an employee of the state acting within the scope of office or employment.[98] State employees shall not be liable for injuries caused by ministerial acts or omissions exercised with due care[99] or for discretionary acts or omissions.[100] The statute limits compensatory damages,[101] prohibits the payment of punitive damages,[102] and details circumstances under which liability protection is unavailable.[103] The legislature specifically categorized public defenders, whether district public defenders or state public defenders, as state employees for the purposes of tort liability under this statute.[104]

II. *DZIUBAK V. MOTT*: PROTECTING PUBLIC DEFENDERS FROM LEGAL MALPRACTICE CLAIMS

On June 2, 1987, Richard Dziubak pleaded guilty to second degree manslaughter.[105] Fifteen months later, the court vacated his guilty plea based on newly discovered exculpatory evidence.[106] Subsequently, Dziubak was tried on murder charges and acquitted.[107] After his acquittal, Dziubak sued his public defenders for ten counts of legal malpractice stemming from the proceeding that resulted in his imprisonment.[108] The public de-

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Linder v. Foster, 295 N.W. 299, 302 (Minn. 1940); and guardians ad litem, Tindell v. Rogosheske, 428 N.W.2d 386 (Minn. 1988).

97. MINN. STAT. § 3.736 (1992) (covering state employees); *see also* MINN. STAT. § 466.01-.15 (1992) (covering municipal employees).

98. MINN. STAT. § 3.736, subd. 1.

99. MINN. STAT. § 3.736, subd. 3(a). The state and its employees are not liable for "a loss caused by an act or omission of a state employee exercising due care in the execution of a valid or invalid statute or rule." *Id.*

100. MINN. STAT. § 3.736, subd. 3(b). The state and its employees are not liable for "a loss caused by the performance or failure to perform a discretionary duty, whether or not the discretion is abused." *Id.*

101. MINN. STAT. § 3.736, subd. 4.

102. MINN. STAT. § 3.736, subd. 3.

103. MINN. STAT. § 3.736, subds. 1, 3, 9.

104. MINN. STAT. § 3.732, subd. 1.

105. Petitioner's Brief at 2, Dziubak v. Mott, 503 N.W.2d 771 (Minn. 1993) (No. C7-91-2517).

106. *Id.* at 3.

107. *Id.*

108. *Id.* at 3-4.

fenders claimed absolute immunity from tort suit.[109] The trial court denied them the shield of absolute immunity.[110]

The Minnesota Court of Appeals affirmed the ruling of the trial court.[111] In denying immunity, the court reasoned that, although valid policy concerns supported legal malpractice immunity for judges and prosecutors, no such policy reasons justifies extending immunity to public defenders.[112] Judges and prosecutors owe a primary duty to the community.[113] In contrast, public defenders owe a primary duty to their clients[114] and owe a secondary duty to the community.[115] The court reasoned that a public defender's duty to society as a whole, unlike that of a prosecutors or judge, does not apply with enough force to warrant the extension of absolute immunity to court-appointed lawyers.[116] Unlike prosecutors and judges, the fear of potential malpractice action does not conflict with a public defender's primary duty to represent clients zealously.[117] The court found persuasive the fact that as state employees, public

109. *Id.* at 2.

110. *Id.* at 2-3.

111. Dziubak v. Mott, 486 N.W.2d 837, 841 (Minn. Ct. App. 1992), *rev'd*, 503 N.W.2d 771 (Minn. 1993).

112. *Id.* at 840. As the U.S. Supreme Court explained in *Ferri v. Ackerman*: "There is, however, a marked difference between the nature of counsel's responsibilities and those of other officers of the court. As public servants, the prosecutor and the judge represent the interest of society as a whole." 444 U.S. 193, 202-03 (1979) (citations omitted).

> In contrast, the primary office performed by appointed counsel parallels the office of privately retained counsel. . . . His principle responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation. The fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim does not conflict with performance of that function. If anything, it provides the same incentive for appointed and retained counsel to perform that function competently. The primary rationale for granting immunity to judges, prosecutors, and other public officers does not apply to defense counsel sued for malpractice by his own client.

Id. at 204 (citations omitted).

Judicial immunity was originally designed to protect the integrity of the judiciary. *See, e.g.*, *In re* Clerk of Lyon County Courts' Compensation, 241 N.W.2d 781, 784 (Minn. 1976); Gammel v. Ernst & Ernst, 72 N.W.2d 364, 368 (Minn. 1955).

113. *Ferri*, 444 U.S. at 202-04.

114. *Id.* at 204.

115. *Id.*

116. *Dziubak*, 486 N.W.2d at 840.

117. *Id.* In fact, the court of appeals noted that the possibility of legal malpractice action might provide additional incentive for public defenders to serve their clients undivided interests. *Id.* (citing *Ferri*, 444 U.S. at 204).

defenders have statutory defenses,[118] limited liability,[119] and indemnification protection.[120] According to the court, because the legislature enacted the state tort claims statute, it was the most appropriate body to decide liability for public defenders.[121]

The Supreme Court of Minnesota reversed the court of appeals and held that public defenders are immune from suit for legal malpractice.[122] The *Dziubak* court based its holding on public policy considerations.[123] The court recognized the difficult circumstances under which public defenders must operate[124] and reasoned that this difficult position necessitates immunity.[125] The *Dziubak* court emphasized that public defenders do not choose their clients and must represent all indigent criminal defendants regardless of the public defender's caseload or the degree of difficulty of the case.[126]

The *Dziubak* court also noted that public defender offices are both "grossly under-funded"[127] and understaffed,[128] and determined that court-appointed attorneys in Minnesota do an admirable job in spite of the financial constraints the current system places on them.[129] The court contended that the significant differences between public defenders and privately-retained counsel require the extension of immunity to public

118. *Id.*; *see* MINN. STAT. § 3.736, subd.3(a)-(p) (listing defenses which include protection for discretionary acts and ministerial acts performed with due care).

119. 486 N.W.2d at 840, *see* MINN. STAT. § 3.736, subd. 4.

120. 486 N.W.2d at 840-41; *see* MINN. STAT. § 3.736, subd. 9.

121. 486 N.W.2d at 840; *see also Tower*, 467 U.S. at 922-23 (stating that Congress, not the Court, should decide whether excessive litigation warrants granting state public defenders immunity from § 1983 conspiracy liability).

122. Dziubak v. Mott, 503 N.W.2d 771, 773 (Minn. 1993).

123. *Id.* The *Dziubak* court noted that "[t]ort immunity, the freedom from suit or liability, is generally based on the idea that, though a defendant might be negligent, important social values require that the defendant remain free of liability." *Id.* at 774 (citing W. PAGE KEETON ET. AL., PROSSER & KEETON ON THE LAW OF TORTS, § 131, at 1032 (5th ed. 1984)). The court did not address liability under the Minnesota state tort claims act. *See* MINN. STAT. § 3.736.

124. *Dzubiak*, 503 N.W.2d at 775-76.

125. *Id.* at 776-77.

126. *Id.* at 775. The *Dziubak* court declared that public defenders in Minnesota are obligated to represent whomever they are assigned, regardless of current caseload or the degree of difficulty the case presents. *Id.* This author, however, found no case law or statutory provisions requiring public defenders to accept cases regardless of caseload or degree of difficulty previous to the court speaking in *Dziubak*.

127. *Id.* at 775-76.

128. Increased claims of indigency and reduced state budgets limit the ability of public defenders to represent their clients. *Id.* at 776.

129. *Id.* at 777.

defenders.[130] The court reasoned that "[t]he office of the public defender does not have sufficient funds to represent each client assigned to it in the way each client might demand to be served."[131]

The court also emphasized that a public defender is appointed to protect the best interests of the indigent client and must therefore be free to exercise independent discretion without weighing every decision in terms of potential civil liability.[132] The court found immunity a more appropriate form of protection than indemnity, because indemnity would still subject the public defender to potentially expensive and time-consuming litigation.[133]

Framing its decision squarely in terms of judicial efficiency, the court asserted that public defender immunity ensures that the resources available to serve the indigent constituency will be used for the defense of the accused, rather than diminished through the defense of public defenders against civil suits for malpractice.[134] The court reasoned that immunity will conserve these resources to provide "an effective defense to the greatest number of indigent defendants"[135] and aid in the continued recruitment of qualified attorneys to serve as public defenders.[136]

Finally, when it considered the interests of the indigent defendant who believes he or she was inadequately represented, the court stressed that the indigent defendant may seek collateral remedies through the appeals process, motions for post-con-

130. *Id.* at 775. Privately retained counsel may reject a client based upon such factors as the merits of the case, the personality of the client, and the counsel's workload. *Id.*

131. *Id.* at 776. The court stated that "[the] funds available to the client usually serve to prevent the presentation of frivolous claims, tactics or defenses. There is no similar 'brake' in the public-defender-client relationship since the state, rather than the client, pays the attorney." *Id.*

132. *Id.* at 775. The court relied on an earlier decision which granted immunity to guardians ad litem for actions performed within the scope of their duty. *Id.; see also* Tindell v. Rogosheske, 428 N.W.2d 386, 387 (Minn. 1988) ("Immunity is necessary to avoid harassment from disgruntled parents who may take issue with any or all of the guardian's actions.").

133. *Dziubak*, 503 N.W.2d at 776-77. The court reasoned that "[i]mmunity exists to free government officials from the burdensome consequences of litigation." *Id.* at 776.

134. *Id.* at 776-78.

135. *Id.* at 778. *Dziubak*, however, is the only suit since the establishment of the public defender office in 1965 to survive summary judgement that this author could locate.

136. *Id.* at 777.

viction relief, and federal habeas corpus petitions.[137] The court, however, mentioned no viable avenue through which a dissatisfied indigent defendant could collect a monetary remedy.

Justice Gardebring dissented from the majority decision in *Dziubak*.[138] She argued that public defenders should not be immune from legal malpractice because immunity would result in a two-tier system of justice in which clients with enough money to retain a lawyer possess a powerful remunerative accountability measure against their lawyers, while those too poor to pay for representation do not possess such a weapon.[139] Justice Gardebring also argued that immunity does not promote sufficient public policy goals to warrant the extension of immunity to public defenders.[140] She contended further that absolute public defender immunity sanctions the chronic underfunding of the public defender system in Minnesota by easing the obligations that public defenders owe to their clients.[141]

III. *DZIUBAK'S* IMPACT ON BOTH CLIENTS AND LAWYERS NECESSITATES A SOLUTION THAT BETTER BALANCES THE INTERESTS OF INDIGENT DEFENDANTS AND PUBLIC DEFENDERS

Difficult social and political considerations complicate any critique of the delivery and adequacy of indigent criminal representation.[142] The indigent defense system, caught between constitutional standards of fair process and substantive rights and popular sentiments of law and order, must ensure that all interests are taken into consideration.

A. *DZIUBAK* FAILS TO BALANCE ADEQUATELY THE RIGHTS OF INDIGENT DEFENDANTS AND THE NEEDS OF PUBLIC DEFENDERS

The *Dziubak* court failed to balance the interests of indigent criminal defendants, the needs of public defenders, and the socio-political realities of state-sponsored indigent legal repre-

137. *Id.*; *see also supra* part I.D (discussing forms of relief available to indigent criminal defendants who are unhappy with their counsel).
138. *See Dziubak*, 503 N.W.2d at 778-79 (Gardebring, J., dissenting).
139. *Id.* at 778.
140. *Id.*
141. *Id.*
142. *See supra* notes 52-58 and accompanying text (discussing political considerations).

sentation. The court missed the opportunity to force the legislature to confront the crisis of "out of bounds" caseloads and overworked lawyers in the indigent defense system that the court has recognized exists in Minnesota.[143] As a result, the court allowed immediate political circumstances to constrain its analysis.

By declaring that public defenders are immune from malpractice, the Minnesota Supreme Court simply bandaged the problem of overburdened defenders and suspect representation of indigent accused, instead of providing a remedy. The court concentrated on relieving the public defender of responsibility for inadequate representation instead of focusing either on the crisis confronting Minnesota defender offices or on indigent clients, who, facing a loss of freedom, may seek a remunerative remedy for insufficient representation.[144]

In so doing, the *Dziubak* court failed to consider the functional analysis that other state supreme courts have applied, which have more comprehensively balanced the needs of public defenders[145] and indigent defendants.[146] For instance, in *Reese*

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143. *Dziubak*, 503 N.W.2d at 775-76.

144. The dissenting Justice in *Dziubak* did focus on this problem, however:

> [T]he real disadvantage is, of course, to the indigent defendant, whom we have said has no right to choose his lawyer, but must depend on whomever is assigned in matters that are of the most extreme gravity. If the public defender fails in the task of representation, he or she may be subject to an unfavorable performance appraisal; but the client may be unfairly convicted of a crime and sentenced to prison. The presence of remedies to overturn the conviction due to ineffectiveness of counsel cannot fully 'right the wrong' done to someone who may have spent extended periods of time incarcerated unjustly. I believe a civil remedy is needed.

Id. at 778 (Gardebring, J., dissenting) (citations omitted).

145. One commentator noted that "[i]nadequate funding has created a situation wherein overburdened defense counsel cannot possibly provide competent representation to all of the clients they are assigned to represent." Klein, *Eleventh Commandment*, *supra* note 1, at 432.

146. In her dissent, Justice Gardebring further criticized the majority opinion:

> While the majority considers it an unfair burden to subject the public defender to malpractice stemming from acts or omissions due to impossible caseloads and an under-funded office, factors out of the control of the defender, it is even more unfair that the indigent client should suffer from misrepresentation due to under-funded offices. I do not believe this court should sanction the chronic underfunding of public defense organizations by lessening the obligations which public defenders have to their indigent clients.

Dziubak, 503 N.W.2d at 778 (Gardebring, J., dissenting).

v. Danforth,[147] the Pennsylvania Supreme Court refused to place the potential liability of court-appointed counsel over the interests of the indigent client and reasoned that the same standards of professional performance applied both to public and private counsel.[148] The *Reese* court reasoned that absolute immunity would impermissibly distinguish between groups of plaintiffs based on economic status in a manner inconsistent with the ideal that the quality of defense counsel should not turn on the source of compensation.[149] Similarly, in *Spring v. Constantino*,[150] the Connecticut Supreme Court focused on the centrality of the attorney-client relationship and the deleterious impact of immunity on this relationship.[151] In refusing to extend immunity to public defenders, the *Spring* court reasoned that once a court assigns a public defender to a case, his or her relationship and obligations to the client are the same as those of a privately-retained counsel.[152]

Even when other state courts extended some form of liability protection to public defenders, they declined to do so by blanketing court-appointed counsel with absolute judicial immunity. In *Scott v. City of Niagara Falls*,[153] for example, a New York intermediate court extended only qualified immunity to court-appointed counsel, allowing indigent defendants to sue public defenders for ministerial or clerical errors.[154] Similarly, in *Browne v. Robb*,[155] the Delaware Supreme Court stated that liability protection for public defenders did not cover grossly negligent errors or acts or omissions made in bad faith.[156]

In addition, the *Dziubak* court failed to analyze liability under the Minnesota state tort claims act.[157] In so doing, it ignored that the majority of other states' courts have interpreted

147. 406 A.2d 735 (Pa. 1979); *see also supra* note 89 and accompanying text (discussing *Reese*).

148. 406 A.2d at 740.

149. *Id.*

150. 362 A.2d 871 (Conn. 1975); *see also supra* note 91 and accompanying text (discussing *Spring*).

151. 362 A.2d at 878-79.

152. *Id.* at 878.

153. 407 N.Y.S.2d 103 (Sup. Ct. 1978); *see also supra* note 95 and accompanying text (discussing *Scott*).

154. 407 N.Y.S.2d at 105.

155. 583 A.2d 949 (Del. 1990), *cert. denied*, 499 U.S. 952 (1991); *see also* note 94 and accompanying text (discussing the application of state tort claims acts to public defenders).

156. 583 A.2d at 952.

157. MINN. STAT. § 3.736; *see also supra* part I.E (describing state employee liability under Minnesota state tort claims act).

liability under their state tort claims acts.[158] Thus, the *Dziubak* decision provides no guidance on matters of government employee liability that might affect other public defender personnel, such as law clerks and secretaries, legal aid lawyers, privately-contracted public defense attorneys, and public defender investigators.

As a result, the *Dziubak* court has created a two-tier criminal justice system[159] that abrogates the spirit of *Gideon*.[160] People who have the money to retain their own attorney, whether in a criminal or civil action, may sue the attorney for negligence. In contrast, the *Dziubak* decision denies *only poor people* the ability to hold their criminal defense lawyers monetarily accountable for unsatisfactory representation.[161] Moreover, the decision failed to articulate any suggestions for improving either the work conditions of public defenders or the quality of representation available to indigent clients.[162]

The *Dziubak* court also reasoned that liability would impede the exercise of a public defender's judgment in representing his or her clients and ultimately hurt the people the attorney is trying to help.[163] The court's assertion, however, has not proven

158. *See supra* part I.D.4 (describing other states' treatment of public defender liability).

159. *Dziubak*, 503 N.W.2d at 778 (Gardebring, J., dissenting).

160. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

161. One commentator explained the situation indigent defendants face:

> Poor clients become doubly disadvantaged: they may neither choose their lawyer nor recover damages if the appointed attorney is negligent. Far from improving the quality of indigent representation, immunity for appointed counsel will reduce the quality of representation available to the poor. Paid less than private attorneys and insulated from malpractice liability, court-appointed counsel will almost certainly render less effective representation.

David H. Potel, Comment, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542, 560.

162. *See* Goodpaster, *supra* note 71, at 64-67 (noting the need to consider systemic problems for ineffective assistance of counsel evaluations under *Strickland*); *see also* State v. Smith, 681 P.2d 1374, 1378-84 (Ariz. 1984) (advocating wholesale revamping of indigent defense system because of threat of ineffective assistance due to high caseloads).

163. *Dziubak*, 503 N.W.2d at 777 (quoting Brown v. Joseph, 463 F.2d 1046, 1048-49 (3d Cir. 1972)). A criminal defendant could bring suit against a public defender in three possible situations. The lawyer's negligence or inadequate representation may cause the erroneous conviction of an innocent person. The lawyer's failure to adequately conduct the case could cause the wrongful conviction of a guilty person. Lastly, a guilty person who is rightly convicted might nonetheless bring a suit against an attorney who had acted reasonably when conducting the case. Because the court in *Dziubak* was only considering the issue of immunity without the negligence claims, it concentrated on the third scenario, to the virtual exclusion of either of the first two scenarios.

true in Minnesota during the thirty years public defenders operated without the shield of immunity.[164] In Hennepin County, for example, few unsatisfied clients have brought legal malpractice suits against public defenders.[165] Furthermore, courts have summarily dismissed the few cases that unsatisfied clients did bring.[166]

The *Dziubak* court further insisted that immunity promotes professionalism.[167] Commentators and public defenders have roundly and justifiably criticized this argument.[168] Both groups contend that the threat of malpractice liability keeps public defenders sharp.[169] Furthermore, the court ignored the possibility that public defenders need no external impetus to perform professionally, that they might do so out of personal integrity or concern for the client community they serve. Immunity implicitly sends the message that public defenders are not meeting these minimum standards and therefore need protection. If public defenders are rendering effective assistance of counsel and abiding by rules of professional responsibility,[170] however,

164. *See supra* note 142 (noting the lack of suits against public defenders).

165. The few legal malpractice suits brought prior to *Dziubak* against Hennepin County public defenders consumed very few hours of court time and the courts regularly dismissed these suits. Interview with William R. Kennedy, Chief Public Defender of Hennepin County, in Minneapolis, MN (November 17, 1993).

166. *Id.*

167. *Dziubak*, 503 N.W.2d at 776-77; *see* Mallen, *supra* note 62, at 68-70.

168. As one commentator explained:

> The problem of professional discretion is faced by all attorneys, however, not merely by appointed counsel. Retained and court-appointed attorneys perform identical duties. Each requires freedom to exercise professional discretion, and appointed counsel merit no special treatment.

Potel, *supra* note 161, at 558.

169. *See* Mallen, *supra* note 62, at 68-70.

170. Dicta in *Dziubak*, however, regarding the obligations of public defenders suggests that public defenders will encounter greater difficulty in complying with these rules. The *Dziubak* court supported its holding by stating that public defenders have an obligation to accept all cases to which they are appointed, regardless of the attorney's caseload or degree of difficulty the case presents. *See supra* note 126 and accompanying text. The court implied that, unlike privately-retained counsel, nothing prevents public defenders who might press frivolous claims in criminal court at the whim of their indigent clients in order to avoid malpractice suits. *Id.* at 775-76. The *Dziubak* court did not cite any cases to support its point that public defenders bring frivolous claims at the behest of their clients, unlike privately-retained lawyers.

This dicta appears to be the first time the court has expressly obligated public defenders to take all cases. Such an obligation creates compliance problems with the Minnesota Rules of Professional Conduct. For example, a chief public defender of a "grossly under-funded" office must now require attor-

they do not need absolute protection from malpractice liability. Immunity conveys to the indigent client the message that his or her lawyer is incompetent and therefore requires absolute liability protection.

Dziubak erroneously implies that courts would too easily find attorneys in underfunded and understaffed public defender offices civilly liable unless absolute immunity protected the attorneys.[171] The *Dziubak* court's holding ignored the great difficulty a dissatisfied client already faces when bringing a malpractice suit against public defender.[172] Malpractice suits, although burdensome, provide a check on the indigent criminal representation system. These suits evaluate the lawyer's performance and assess the quality and sufficiency of the advocate's services. Furthermore, the *Dziubak* decision ignores the practical constraints that Minnesota law imposes on legal malpractice actions. Traditionally, courts have awarded only low sums for

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neys in his or her office to take all cases, regardless of attorney caseload and the case's degree of difficulty, even though in so doing they may violate ethical and professional obligations. The rules of professional conduct require that the lawyer devote a certain amount of time and energy to the investigation and preparation of each client. *See* MINNESOTA RULES OF PROFESSIONAL CONDUCT R. 1.1-.3. Considering 3,700 cases each year in Hennepin County are serious felonies, it is difficult to believe that each client receives the attention due them under the Rules. *See* MINNESOTA RULES OF PROFESSIONAL CONDUCT R. 1.16 commentary ("A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion."). Bringing a frivolous claim directly violates a lawyer's ethical and professional responsibility. *See* MINNESOTA RULES OF PROFESSIONAL CONDUCT R. 3.1.

This situation raises the question of whether the public defender offices in Ramsey and Hennepin County, and other offices with similar caseloads, should be exempt from the professional and ethical standards binding the other lawyers in the state. Conceivably, especially in large urban districts, if public defenders cannot refuse a large number of cases, "out of bounds" caseloads will result in some unethically ineffective assistance.

171. *Dziubak*, 503 N.W.2d at 776. Exposing public defenders to malpractice suits in state tort actions will not necessarily cause an explosion in the civil legal malpractice docket. None of the parties in *Dziubak* provided any empirical data to support the conclusion that the risk of malpractice litigation deters members of the private bar from accepting the representation of indigent defendants or adversely affects the quality of representation. *Dziubak*, 503 N.W.2d at 778 (Gardebring, J., dissenting); *see* Ferri v. Ackerman, 444 U.S. 193, 200 n.17 (1979).

172. The *Dziubak* court admitted as much when it stated:

> It is doubtful that an indigent client could prevail against a public defender in a negligence suit for failing to pursue a particular strategy, and if a negligence claim involves a dispute over a choice of strategies, it should fail, since honest errors may be made which do not raise to the level of malpractice.

Dziubak, 503 N.W.2d at 776.

criminal legal malpractice actions.[173] Additionally, the Minnesota state tort claims act limits the awards for tort actions against state employees.[174]

The *Dziubak* court further asserted that civil liability would impede the recruitment and retention of able and qualified public defenders.[175] Although courts have found this reasoning persuasive in the past when addressing public defender liabilities,[176] it fails to prove that this fear is legitimate in the current competitive legal market in Minnesota and the nation.[177] As a result, the court has also misperceived the motivations of those attorneys joining the ranks of public defender offices in Minnesota. Attorney pay probably acts as the greatest deterrent to recruiting qualified lawyers to work as public defenders, not the threat of malpractice liability.

B. Two-Pronged Solution: A Modifed Threshold for Proving Ineffective Assistance of Counsel and Limited Statutory Liability

The Sixth Amendment requires the effective assistance of counsel.[178] *Strickland v. Washington*[179] established a minimum standard by which state courts are to determine whether assistance of counsel is ineffective under the federal constitution. In *Ferri v. Ackerman*,[180] the Supreme Court further held that the decision to extend immunity to state defenders for malpractice is

173. *See supra* note 81 (citing relatively minimal damage awards for malpractice actions against criminal defense counsel). The *Dziubak* court did not find this point persuasive. 503 N.W.2d at 776.

174. *See* Minn. Stat. § 3.736, subds. 3, 4; *see supra* Part I.E.

175. *Dziubak*, 503 N.W.2d at 776.

176. *See, e.g.*, Robinson v. Bergstrom, 579 F.2d 401, 409 (7th Cir. 1978), *overruled by* Polk County v. Dobson, 454 U.S. 312, 321 (1981); Miller v. Barilla, 549 F.2d 648, 649 (9th Cir. 1977) (stating "two major considerations—encouragement of free exercise of discretion and recruitment of persons for public defender positions" support the need for immunity), *overruled by* Glover v. Tower, 700 F.2d 556, 558 (9th Cir. 1983); Minns v. Paul, 542 F.2d 899, 901 (4th Cir. 1976) (stating "the need to recruit and hold able lawyers to represent indigents" supports a rule of absolute immunity).

177. According to Justice Gardebring, "immunity is not necessary to preserve the ability to recruit and maintain dedicated professionals willing to serve as public defenders. There is no shortage of private attorneys willing to do criminal defense work without immunity." *Dziubak*, 503 N.W.2d at 778.

178. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); see also supra note 19 (quoting the Sixth Amendment).

179. 466 U.S. 668 (1984).

180. 444 U.S. 193 (1979).

an issue of state concern.[181] Thus, a state court's decision to protect public defenders from malpractice liability should not hinder the state from comporting with its constitutional obligations to provide adequate representation to indigent defendants. As a result, determining the propriety of public defender immunity from legal malpractice demands evaluating the adequacy of the indigent criminal defense system.

A two-pronged solution, including a threshold for proving ineffective assistance adapted to the public defense context and limited statutory liability, ensures more effective assistance of counsel than the decision in *Dziubak*. Furthermore, this solution would allow public defenders the independence necessary to zealously represent their clients and enable the legislature to bestow rights on accused or imprisoned indigent defendants in the current political climate.

1. Modifying the Threshold for Proving Ineffective Assistance of Counsel

The Minnesota Supreme Court should contextualize *Strickland* by modifying the evidentiary threshold for proving ineffective assistance of counsel claims against public defenders. Presently, Minnesota courts employ the two-prong *Strickland* test at the same minimal level which the Supreme Court established.[182] The court should adapt *Strickland*'s subjective "ineffectiveness" prong to the public defender context by removing *Strickland*'s "presumption of effectiveness" from cases involving public defenders and court-appointed counsel in Minnesota serving in districts in which an attorney's caseload of indigent criminal defendants exceeds acceptable limits.[183] The threshold for proving ineffective assistance under these circumstances should

181. *Id.* at 198; *see also supra* notes 83-85 and accompanying text (discussing *Ferri*'s holding).

182. To gain a new trial on grounds of ineffective assistance of counsel, a defendant must demonstrate that the conduct or errors of counsel were unreasonable and that those errors constitutionally prejudiced her, a standard predicated on a stringent reading of *Strickland*. *See* State v. Gassler, 505 N.W.2d 62, 70 (Minn. 1993); Dunn v. State, 499 N.W.2d 37, 38 (Minn. 1993); State v. Eling, 355 N.W.2d 286, 293 (Minn. 1984); *see also* State v. Rainer, 502 N.W.2d 784, 788 (Minn. 1993) (stating that appellate courts will not review defense counsel trial tactics).

183. Goodpaster, *supra* note 71, at 72-78 (criticizing *Strickland*'s presumption of effectiveness).

reflect the current crisis in Minnesota's indigent defense delivery system.[184]

Although *Strickland* established a minimum threshold to assess ineffective assistance of counsel challenges in criminal cases,[185] it allows courts to modify either part of the two-prong test. Indeed, the Louisiana Supreme Court, in *State v. Peart*,[186] contextualized *Strickland* in just such a manner.[187] The court determined that the public-defense counsel system in New Orleans criminal court was so overburdened with cases that it created a presumption of ineffective assistance of counsel anytime a public defender was appointed.[188] The court reasoned that it was important to address ineffectiveness claims at as early a stage in the proceedings as possible[189] and that the eventual verdict of the case did not matter.[190] The court clarified that it defined "reasonably effective assistance of counsel" to mean that the lawyer not only possesses adequate skill and knowledge, but also that he or she has the time and resources to apply his or her skill and knowledge to the task of defending each of his or her individual clients.[191]

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184. *See supra* Part I.C (discussing the crisis in the Minnesota indigent defense delivery system).

185. *See supra* Part I.D.1 (discussing *Strickland* and ineffective assistance of counsel). One commentator suggested *Strickland* was "obviously intended to establish a *general* standard" for ineffective assistance of counsel claims. Goodpaster, *supra* note 71, at 61 (emphasis added). Modifying the *Strickland* standard in Minnesota would ameliorate the problem of unequal representation for indigent defendants, a problem which Justice Marshall accurately predicted in his *Strickland* dissent. *See supra* note 40 (discussing Marshall's dissent in *Strickland*). Justice Marshall stated that his "objection to the performance standard adopted by the [*Strickland*] Court is that it is so malleable that in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied." 466 U.S. at 707 (Marshall, J., dissenting).

186. 621 So. 2d 780 (La. 1993).

187. *Id.* at 788.

188. *Id.* (establishing rebuttable presumption of ineffective counsel for public defenders appointed in New Orleans criminal court); *see infra* note 71 and accompanying text (discussing the *Peart* decision).

189. 621 So.2d at 787. While the *Peart* court adhered to the *Strickland* admonition that ineffectiveness claims be handled on a case-by-case basis, it counseled that the analysis must make a broader inquiry into the system of defense delivery affecting the performance of the public defender or court-appointed counsel. *Id.* at 788.

190. *Id.* at 787.

191. *Id.* at 789. The *Peart* court indicated that if the legislature did not respond to the crisis in indigent defense in New Orleans, the court would adopt more intrusive measures to ensure compliance with the constitutional guarantee of effective assistance of counsel. *Id.* at 791.

Importantly, the Minnesota Supreme Court has indicated that, under the Minnesota Constitution, it may look favorably on interpreting a constitutional right[192] as providing greater protection than that granted by federal courts under the federal constitution.[193] Contextualizing the threshold for sustaining ineffective assistance of counsel claims by modifying the first prong of the *Strickland* test would enable the courts to hear more meritorious cases and provide justice to indigents.[194] A higher standard would also promote attorney professionalism, minimize liability, and bring the issues of the quality of public defender representation and caseload burdens into the Minnesota courts.

2. Limited Statutory Liability

Modifying the threshold for proving ineffective assistance of counsel in Minnesota provides indigent criminal defendants with an efficacious collateral attack against incompetent defense lawyers. It does not, however, obviate the state's obligation to provide dissatisfied criminal indigent defendants with a meaningful avenue of monetary redress for incompetent counsel. Therefore, the Minnesota legislature should expressly extend limited statutory liability to public defenders as state employees.[195]

Although the *Dziubak* court did not violate any separation of powers tenets by bestowing absolute immunity upon public defenders,[196] it neglected even to consider the saliency of the state employee tort claims statute to the issue of public defender liability. It thus failed to recognize the broad protection already in place for public defenders as state employees. As a result, it erroneously deprived indigent litigants of an existing remedial

192. *See supra* note 19 (quoting the Sixth Amendment of the Minnesota Constitution).

193. The Minnesota Supreme Court has stated that "[i]t is altogether fitting that our constitution be interpreted by this state's highest court to offer *greater* safeguards of fundamental rights for Minnesota citizens than the protection offered citizens of the United States under the federal Constitution." Friedman v. Commissioner of Pub. Safety, 473 N.W.2d 828, 836 (Minn. 1991) (emphasis added); *see also supra* note 19 (noting that state courts may broadly interpret the rights which their state constitutions provide).

194. Allowing for ineffective assistance hearings earlier in the criminal process would also achieve this goal.

195. In the alternative, the Minnesota Supreme Court could assess public defender liability under MINN. STAT. § 3.736 if a plaintiff initiated a suit squarely predicated on the state tort claims act.

196. *See* MINN. STAT. § 3.736 ("[N]othing in this section waives the defense of judicial or legislative immunity.").

mechanism under which the courts might examine specific acts of public defenders.

Assessing public defender liability under the state tort claims act better considers both the interests of lawyers and clients. Adhering to the liability parameters of the tort claims statute limits the scope of *Dziubak* without entirely destroying it. Determining liability is a task well-suited to the legislature because of its ability to hold hearings, gather empirical data, and decide the issue in an open and public forum.[197] A system of limited liability for public defenders under the tort claims statute preserves the core of *Dziubak* while allowing indigent defendants to sue for gross negligence, ministerial errors, or negligent acts made in bad faith.[198]

A proceeding under the Minnesota state tort claims act involves a case-by-case determination of the actual act, an analysis of the good faith or reasonableness employed by the attorney at suit, and acts or omissions made as a result of insufficient resources. The analysis focuses on the acts rather than the actor.[199] In this context, the threat of legal malpractice suits can promote professionalism and create a record for evaluating the performance of the indigent defense delivery system.

Furthermore, limited statutory liability will not open a floodgate of successful malpractice actions. Indigent defendants who bring legal malpractice suits have difficulty prevailing because of the lack of resources available to the indigent, the incarcerated position of many potential litigants, and the reality that members of the bar are still reluctant to participate in actions

197. *See* Ferri v. Ackerman, 444 U.S. 193, 202-03 (1979). As one commentator noted:

> Finally, even if the proponents of immunity are correct, the question is better suited to legislative rather than judicial determination. A state legislature may decide that public policy demands such immunity for appointed counsel, and confer it by statute. In the absence of legislative action, however, the judiciary should not extend immunity to court-appointed attorneys.

Potel, *supra* note 161, at 560.

198. In Delaware, for example, the state's highest court allowed liability for public defenders acting in bad faith or with gross negligence in carrying out their duties as advocates. *See* Browne v. Robb, 583 A.2d 949 (Del. 1990), *cert. denied*, 499 U.S. 952 (1991).

199. In this respect, limited statutory liability functions similarly to qualified immunity. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800 (1982); Erickson v. County of Clay, 451 N.W.2d 666 (Minn. Ct. App. 1990) (holding prosecutorial immunity depends on the functional nature of activities rather than on the status of the prosecutor); Anderson v. City of Hopkins, 400 N.W.2d 350 (Minn. Ct. App. 1987) (applying *Harlow* objective test to actor's conduct to determine immunity).

against colleagues alleging lawyer misconduct.[200] Limiting the scope of "immunity" serves the interests of indigent clients while maintaining some protection for the public defenders who represent them.[201]

CONCLUSION

The Minnesota Supreme Court's controversial holding in *Dziubak* reopens a debate, largely dormant in both the courts and the academic community, over the viability and propriety of immunity for public defenders from legal malpractice action. Indigent criminal defendants in Minnesota have few means at their disposal to effectively address, either by collateral attack on their conviction or by seeking money damages, incompetent counsel. Combining a modified threshold on ineffective assistance of counsel claims with limited statutory liability provides greater constitutional protection for indigent clients, establishes a limited, but efficacious remunerative measure for dissatisfied defendants, and effectively strikes a balance between the professional needs of the lawyers, the constitutional needs of the indigents, and the budgetary constraints of the courts and the state.

This solution might make the job of being a public defender more difficult. The solution, however, allows an indigent defendant to bring into court more often the issue of caseload level and effective assistance as a defense and ensures an analysis of the particular circumstances of public defender practice. The solution would require courts to focus on the actual crisis in the

200. *See, e.g.*, Mallen, *supra* note 62, at 68-69.

201. Public defenders are, ironically, not likely to be the most vociferous proponents of immunity. One commentator explained why public defenders might oppose absolute immunity:

> Although immunity does appeal to a lawyer faced with the reality of a substantial claim for damages, philosophically the defense is repugnant to most court-appointed lawyers. Public defenders and court-appointed lawyers do not believe that the source of either their compensation [or] their clientele affects the quality and extent of their services or ethical responsibilities. Since the most serious danger involved in a malpractice claim is financial, as long as that exposure can be protected by insurance or indemnity, immunity is not only unnecessary but also undesired.

Id. at 70.

One can find support for this belief in Minnesota, where both the State Public Defender, John Stuart, and the Fourth Judicial District Chief Public Defender, William Kennedy, opposed immunity. *See* Zack, *supra* note 48. According to Kennedy, "*Dziubak* is the worst Minnesota decision I have read in my thirty-two years as a lawyer." Interview with William R. Kennedy, *supra* note 165. The Chief Public Defender of Ramsey County and the defendant in *Dziubak*, J. Thomas Hankes, does not appear, however, to oppose immunity.

delivery system and rule on whether the representation the system provides for indigents meets the guarantee indigents are afforded under the Constitution.