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### The Appropriate Legal Standard Required to Prevail in a Systemic Challenge to an Indigent Defense System

Stephen F. Hanlon  
shanlondc@gmail.com

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**THE APPROPRIATE LEGAL STANDARD REQUIRED TO PREVAIL  
IN A SYSTEMIC CHALLENGE TO AN INDIGENT DEFENSE  
SYSTEM**

STEPHEN F. HANLON\*

INTRODUCTION

The United States Supreme Court has never ruled on the appropriate legal standard for systemic challenges to state or local indigent defense systems. One federal circuit court of appeals has ruled.<sup>1</sup> Since 2010, at least four state supreme courts, one state appellate court, and one federal district court have considered this question.<sup>2</sup> The United States Department of Justice filed a Statement of Interest in the federal district court case and has filed an amicus brief in two systemic challenges to state indigent defense systems.<sup>3</sup> There are several pending systemic challenges to state indigent defense systems around

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\* General Counsel, National Association for Public Defense, [www.publicdefenders.us](http://www.publicdefenders.us), a national organization of more than 15,000 public defenders and other public defense officials. Mr. Hanlon also serves as the American Bar Association's Project Director for the public defender workload studies described herein. He is also an Adjunct Professor of Practice at Saint Louis University School of Law. The author wishes to express his gratitude for the review and editing of this article by Norman Lefstein, Professor of Law and Dean Emeritus of the Indiana University Robert H. McKinney School of Law; Margaret Winter, former Associate Director of the ACLU National Prison Project; Roger L. Goldman, Callis Family Professor of Law Emeritus, Saint Louis University School of Law; Malia Brink, Assistant Counsel for Public Defense, Standing Committee on Legal Aid and Indigent Defendants, American Bar Association; and Maureen Hanlon (no known relation to the author), a law student at Saint Louis University School of Law. The views expressed herein are those of the author himself, and all errors of judgment or otherwise are his and his alone. The author also wishes to express his gratitude to the Laura and John Arnold Foundation for its support of his work in Louisiana referred to below, which was the catalyst for this article. Again, the views expressed herein are not necessarily those of the Foundation.

1. *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988), *rev'd on other grounds*, *Luckey v. Miller*, 976 F.2d 673, 674 (11th Cir. 1992).

2. *Wilbur v. City of Mt. Vernon*, 989 F. Supp. 2d 1122, 1123–24 (W.D. Wash. 2013); *Hurrell-Harring v. State*, 930 N.E.2d 217, 219–20 (N.Y. 2010); *State v. Waters*, 370 S.W.3d 592, 597–98 (Mo. 2012) (en banc); *Pub. Def., 11th Judicial Circuit of Fla. v. State*, 115 So. 3d 261, 265 (Fla. 2013); *Kuren v. Luzerne Cty.*, 146 A.3d 715, 717–18 (Pa. 2016); *Duncan v. State*, 774 N.W.2d 89, 97 (Mich. Ct. App. 2009).

3. *See Court Filings in Support of Access to Justice*, U.S. DEPT. OF JUSTICE, [www.justice.gov/atj/court-filings-support-access-justice](http://www.justice.gov/atj/court-filings-support-access-justice) [<http://perma.cc/6UK4-UEZ6>].

the country and more are contemplated.<sup>4</sup> This article will examine the various ways in which the courts have addressed this question, particularly since 2010.

Section I of this article is a review of the major cases since 2010 that involve systemic challenges to indigent defense systems, either by classes of indigent defendants or by their attorneys, or both, seeking prospective injunctive relief pre-trial.<sup>5</sup> Section II analyzes and critiques those cases. Section III addresses class certification concerns after the Supreme Court's 2011 decision in *Wal-Mart v. Dukes*.<sup>6</sup> Section IV articulates the argument for a risk-based claim that asserts systemic Sixth Amendment violations. Section V addresses the "dismiss and release" portion of the remedy urged here. And finally, Section VI concludes with a recommendation for future Sixth Amendment systemic challenges to state and local indigent defense systems.

## I. THE MAJOR CASES

### A. *Cronic and Strickland*

*Strickland* and *Cronic* were decided on the same day—May 14, 1984. Neither *Strickland* nor *Cronic* involved pre-trial claims for prospective injunctive relief for systemic violations of the Sixth Amendment. Rather, both cases involved post-conviction attempts by individual defendants seeking to overturn their convictions based on claims of actual ineffective assistance of counsel.

#### 1. *United States v. Cronic*

A young lawyer with a real estate practice was appointed to represent a defendant charged with mail fraud in a check kiting scheme that involved over \$9,400,000 in checks moving between banks in Tampa, Florida and Norman, Oklahoma during a four-month period in 1975.<sup>7</sup> The court gave the young lawyer only twenty-five days to prepare for trial, even though it had taken the

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4. See, e.g., *Phillips v. California*, No. 15-CE-CG-02201 (Cal. Super. Ct. July 14, 2015); *Tucker v. Idaho*, No. CV-OC-2015-10240 (Idaho Dist. Ct.), *appeal docketed*, No. 43922-2016 (Idaho Jan. 25, 2016); *Joseph Allen v. John Bel Edwards*, No. C655079 (La. Dist. Ct. Feb. 6, 2017); *Church v. Missouri*, No. 17AC-CC00130 (Mo. Cir. Ct. Mar. 9, 2017).

5. Pre-trial claims are ones asserted prospectively by the class plaintiffs (indigent criminal defendants) before trial has commenced in their criminal cases. *Luckey*, 860 F.2d at 1017. This is opposed to the kind of claim asserted by an individual plaintiff in a case like *Strickland v. Washington*, which was a claim asserted by an individual defendant post-trial, in a retrospective attempt to overturn a guilty verdict. 466 U.S. 668, 675 (1984).

6. 564 U.S. 338 (2011).

7. *United States v. Cronic*, 466 U.S. 648, 649 (1983); *United States v. Cronic*, 675 F.2d 1126, 1128 (10th Cir. 1982). A specific listing of the attorney's experience in criminal law is not in the record, but this defense was "at best his second venture into that field." *Cronic*, 675 F.2d at 1128.

government over four and one-half years to investigate the case.<sup>8</sup> The Tenth Circuit Court of Appeals reversed the conviction on Sixth Amendment grounds,<sup>9</sup> but made no determination of whether counsel's actual performance had prejudiced the defense.<sup>10</sup> Instead, the Tenth Circuit found that no such showing is necessary "when circumstances hamper a given lawyer's preparation of a defendant's case."<sup>11</sup>

The Supreme Court reversed the Tenth Circuit because there had been no finding that there had been an actual breakdown of the adversarial process during the trial.<sup>12</sup> In doing so, the Supreme Court recognized that "[t]here are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."<sup>13</sup> Justice Stevens, writing for a unanimous court, also famously observed, "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."<sup>14</sup>

The Court identified two kinds of cases when no specific finding of prejudice is required.<sup>15</sup> First and most obvious is the complete denial of counsel.<sup>16</sup> Second, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then . . . the adversary process itself [is] presumptively unreliable" and no specific showing of prejudice is required.<sup>17</sup> This kind of denial of counsel has come to be known as constructive denial of counsel.<sup>18</sup> Because Cronic's case was not one where the circumstances led to this presumption, he would need to point out specific errors by trial counsel to succeed on his claim, and the Supreme Court remanded to the Tenth Circuit to examine that issue accordingly.<sup>19</sup>

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8. *Cronic*, 675 F.2d at 1129.

9. *Id.* at 1130.

10. *Id.* at 1128.

11. *Id.*

12. *Cronic*, 466 U.S. at 662.

13. *Id.* at 658.

14. *Id.* at 656.

15. *Id.* at 659.

16. *Id.*

17. *Cronic*, 466 U.S. at 659.

18. Constructive is used to define a reality, "declared such by judicial construction or interpretation." *Constructive*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/constructive> [<http://perma.cc/8NYF-AUJP>]. However, *Strickland* seems to reserve that term for claims that involve state interference with the ability of counsel to render effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684 (1984).

19. *Cronic*, 466 U.S. at 666–67. After remand, the Tenth Circuit found the defendant was denied effective assistance of counsel and a new trial was ordered. *United States v. Cronic*, 839 F.2d 1401, 1404 (10th Cir. 1988). After a new trial and appeal, Cronic's sentence was vacated after finding the evidence against him was legally insufficient to prove mail fraud. *United States v. Cronic*, 900 F.2d 1511, 1517 (10th Cir. 1990).

## 2. *Strickland v. Washington*

Charles Strickland pled guilty to three capital murder charges.<sup>20</sup> Strickland's lawyer decided not to look for or put on evidence of Strickland's character or mental state.<sup>21</sup> Instead his lawyer relied on Strickland's admission of guilt and the trial judge's remarks at the plea colloquy.<sup>22</sup> The lawyer reasoned that this strategy would prevent the state from introducing psychiatric evidence of its own.<sup>23</sup>

The trial judge sentenced Strickland to death.<sup>24</sup> Strickland sought collateral review in the state courts on the grounds that his lawyer was ineffective.<sup>25</sup> The trial court denied relief, and the Florida Supreme Court affirmed the denial of relief.<sup>26</sup> Strickland then filed a habeas petition in federal district court.<sup>27</sup>

After the federal district court denied habeas relief on an ineffective assistance of counsel claim, the Eleventh Circuit Court of Appeals vacated the sentence, sustaining the ineffective assistance of counsel claim, using a "reasonably effective assistance given the totality of the circumstances" test, and outlining standards for determining whether defense counsel fulfilled the duty to investigate and whether counsel's errors were prejudicial.<sup>28</sup> This case gave the Supreme Court the opportunity to consider the appropriate standards for adjudicating post-trial claims of actual ineffectiveness of counsel.<sup>29</sup> Justice O'Connor, writing for the majority, succinctly stated the question presented:

The petition presents a type of Sixth Amendment claim that this Court has not previously considered in any generality. The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused. . . . [T]he Court has never directly and fully addressed a claim of "actual ineffectiveness" of counsel's assistance in a case going to trial.<sup>30</sup>

As would be apparent later in the opinion, that last phrase should probably have read, "in a case *that has already gone to trial.*"

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20. *Washington v. Strickland*, 693 F.2d 1243, 1247 (11th Cir. 1982).

21. *Id.* at 1247–48.

22. *Id.* at 1247.

23. *Id.* at 1248 n.4.

24. *Id.* at 1247.

25. *Strickland*, 693 F.2d at 1247–48.

26. *Id.*

27. *Id.* at 1248–49.

28. *Id.* at 1250–63.

29. *Strickland v. Washington*, 466 U.S. 668, 684 (1984).

30. *Id.* at 683 (citing *United States v. Cronin*, 466 U.S. 648, 648 (1983)).

So, the Supreme Court recognized three distinct kinds of claims for individual post-trial claims of ineffective assistance of counsel seeking to overturn convictions<sup>31</sup>:

- Claims based on actual or constructive denial of the assistance of counsel altogether;<sup>32</sup>
- Claims based on state interference with the ability of counsel to render effective assistance to the accused;<sup>33</sup>
- Claims based on “actual ineffectiveness” of counsel.<sup>34</sup>

Turning to the third kind of claim it had identified, “actual ineffectiveness,” the Court acknowledged that it had already recognized that “the right to counsel is the right to the effective assistance of counsel.”<sup>35</sup> The Court then held that “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms[,]” citing the “[p]revailing norms of practice as reflected in . . . [the] ABA Standards for Criminal Justice . . . (‘The Defense Function’).”<sup>36</sup> The Court specifically cited the ABA Standards as guides for courts to determine what is reasonable behavior by counsel, and disclaimed any other set of detailed rules as appropriate for this task.<sup>37</sup> The Court ultimately endorsed the “reasonably effective assistance” performance standard that had been previously adopted by all federal courts of appeals.<sup>38</sup>

Turning to the question of prejudice, the Court noted that in certain Sixth Amendment contexts, namely, “[a]ctual or constructive denial of the assistance of counsel altogether[,]” prejudice is presumed.<sup>39</sup> The Court reiterated *Cronic* in holding prejudice should also be presumed in various kinds of state interference with counsel’s assistance when prejudice is so likely that “case-

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31. Each of these claims is jurisdictionally distinct. Each has separate elements; each has separate proof; each has separate remedies. Each must be separately and critically analyzed. Finally, each has radically different practical consequences in terms of structuring systemic litigation designed to provide actual systemic reform on the ground. I analyze them here because when and if the Supreme Court decides to articulate the appropriate standard for a Sixth Amendment challenge to a large indigent defense system, it will likely look to *Strickland* and its progeny for guidance.

32. *Strickland*, 466 U.S. at 692.

33. *Id.* This article will not address potential litigation based on this claim except to note there may be great potential in any state that has systematically underfunded its indigent defense system. Future examination could conceptualize a constructive interference claim; i.e., state interference by persistent failure to fund, impairing the court’s ability to function, declared as such by judicial construction or interpretation.

34. *Id.* at 693.

35. *Id.* at 686 (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

36. *Id.* at 688 (citing ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980)).

37. *Strickland*, 466 U.S. at 688–89.

38. *Id.* at 683.

39. *Id.* at 692.

by-case inquiry into prejudice is not worth the cost.”<sup>40</sup> The Court then held that a showing of prejudice is required in claims like the one in *Strickland* where an individual makes a post-conviction claim that his conviction should be overturned because of his lawyer’s actual ineffectiveness.<sup>41</sup>

*B. Lower Court Cases Following Strickland and Cronic*

1. *Luckey v. Harris*

As noted above, no Supreme Court case has ever addressed the standard to prevail in a class action brought pre-trial by a class of indigent accused persons and attorneys representing them, seeking prospective Sixth Amendment injunctive relief for actual ineffectiveness. The only federal court of appeals case that has done so is *Luckey v. Harris*.<sup>42</sup> This case was appealed to the Eleventh Circuit from an order granting a motion to dismiss under Rule 12(b)(6).<sup>43</sup>

*Luckey* was a 42 U.S.C. § 1983 class action brought against state officials on behalf of a bilateral class consisting of all indigent persons then charged or who would in the future be charged with criminal offenses in Georgia and all attorneys who then represented or who would in the future represent indigent defendants.<sup>44</sup> The *Luckey* plaintiffs sought “an across-the-board ruling that the Georgia criminal defense scheme systematically denies or *will deny in the future* effective assistance of counsel to the indigent accused.”<sup>45</sup>

The Eleventh Circuit rejected the actual ineffectiveness standard from *Strickland*, holding the two-pronged performance and prejudice standard was “inappropriate” for a civil suit seeking prospective relief.<sup>46</sup> Discussing the needs of a civil suit, the court went on to hold:

The sixth amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the ‘ineffectiveness’ standard may nonetheless violate a defendant’s rights under the sixth amendment. In the post-trial context, such errors may be deemed harmless because they did not affect the outcome of the trial. Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief—whether the defendant is

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40. *Id.* The Court specifically cites to examples in *Cronic* of state interference in individual post-conviction cases seeking to overturn convictions. *Id.* (citing *United States v. Cronin*, 466 U.S. 648, 658 (1983)).

41. *Id.* at 693.

42. *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), *rev’d on other grounds*, *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992).

43. *Id.* at 1013.

44. *Id.*

45. *Id.* at 1016 (emphasis in original).

46. *Id.* at 1017.

entitled to have his or her conviction overturned—rather than to the question of whether such a right exists and can be protected prospectively.<sup>47</sup>

The court held the “powerful considerations” justifying the *Strickland* prejudice prong in a post-conviction actual ineffectiveness case do not apply in prospective relief cases.<sup>48</sup> Deferential scrutiny of counsel’s performance is appropriate in such a case based on concerns for finality, concern that extensive post-trial burdens would discourage counsel from accepting cases, and concern for the independence of counsel.<sup>49</sup>

The Eleventh Circuit distinguished the relief sought in a case seeking injunctive relief from those previously brought in post-trial claims seeking to overturn a conviction:

Prospective relief is designed to avoid future harm. Therefore, it can protect constitutional rights, even if the violation of these rights would not affect the outcome of the trial. . . .

In a suit for prospective relief *the plaintiff’s burden is to show “the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.”* . . . This is the standard to which appellants, as a class, should have been held.<sup>50</sup>

The Eleventh Circuit then described the kinds of claims that the class had alleged in their complaint, including systemic delays in the appointment of counsel that denied them their Sixth Amendment right to counsel at critical stages in the criminal process, pressure by the courts to hurry their case to trial or enter a guilty plea, and denial of investigative and expert resources “*necessary to defend them effectively.*”<sup>51</sup> The court thus reversed the motion to dismiss and concluded that these allegations were sufficient to state a viable claim of a denial of Sixth Amendment rights.<sup>52</sup>

The Eleventh Circuit’s adoption of *O’Shea v. Littleton*’s “likelihood of substantial and immediate irreparable injury” test is what I call a risk-based test throughout the rest of this article.<sup>53</sup> This is to distinguish this test from the performance-based test that *Luckey* and, as we shall see, *Hurrell-Harring* rejected.

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47. *Luckey*, 860 F.2d at 1017.

48. *Id.*

49. *Id.*

50. *Id.* at 1017–18 (quoting *O’Shea v. Littleton*, 414 U.S. 488, 502 (1974) (emphasis added)).

51. *Id.* at 1018 (emphasis added).

52. *Luckey*, 860 F.2d at 1018.

53. *Id.* at 1017–18.



## 2. *Hurrell-Harring v. State*

Like *Luckey*, *Hurrell-Harring v. State* dealt with a putative class action by individual criminal defendants seeking prospective injunctive relief for systemic Sixth Amendment violations in five counties in upstate New York.<sup>54</sup> The case came before the New York Court of Appeals after the state appealed the denial of its motion to dismiss.<sup>55</sup> Plaintiffs in this case were indigent defendants with ongoing criminal prosecutions represented by defense systems in five counties in upstate New York.<sup>56</sup>

The plaintiffs' claim, as interpreted by the intermediate appellate court ruling under review, was that the state's public defense system was "systematically deficient and presents a grave and unacceptable risk that indigent criminal defendants are being or will be denied their constitutional right to meaningful and effective assistance of counsel."<sup>57</sup> So stated, the claim appeared to adopt *Luckey*'s admonition that in a suit for prospective injunctive relief, the plaintiffs' burden is to show the likelihood of substantial and immediate irreparable injury.<sup>58</sup>

But the New York Court of Appeals ignored *Luckey* and ignored the risk-based nature of the plaintiffs' claim. Rather, it accepted the defendants' argument that the plaintiffs' claim was simply a performance-based two-pronged *Strickland* claim asserting both failure of performance and prejudice.<sup>59</sup> Such a claim, the court believed, was "necessarily rooted in the particular circumstances of an individual case [and] cannot serve as a predicate for systemic relief."<sup>60</sup> Having so characterized the plaintiffs' claim, the court majority wasted little time deciding that there were inherent problems in such a systemic challenge.<sup>61</sup>

Then, as the dissent accurately noted, the court read a constructive denial of counsel claim into the complaint, focusing on some of the factual allegations about individual plaintiffs in the complaint who either had no counsel at all (what the court majority called "nonrepresentation") or had counsel who, although nominally appointed, were unavailable to their clients (what I call "nominal" representation).<sup>62</sup>

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54. *Hurrell-Harring v. State*, 930 N.E.2d 217, 219 (N.Y. 2010).

55. *Id.*

56. *Id.* The counties at issue were Washington, Onondaga, Ontario, Schuyler, and Suffolk counties. *Id.*

57. *Hurrell-Harring v. State*, 883 N.Y.S.2d 349, 350 (N.Y. Sup. Ct. 2009).

58. *See Luckey*, 860 F.2d at 1017–18.

59. *Hurrell-Harring*, 930 N.E.2d at 221.

60. *Id.* at 220.

61. *Id.* at 221.

62. *Id.* at 222. The dissent takes issue with the majority's insertion of a constructive denial claim, arguing, "Plaintiffs' mere lumping together of 20 generic ineffective assistance of counsel

The *Hurrell-Harring* court was quite clear about what issues were before the court, finding that “[t]he questions properly raised in this Sixth Amendment-grounded action, we think, go not to whether ineffectiveness has assumed systemic dimensions, but rather to *whether the State has met its foundational obligation under Gideon to provide legal representation.*”<sup>63</sup> The majority then found that the claims in this case were in the latter category.<sup>64</sup> The court could not have been clearer on this point: “[T]he complaint states a claim for constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of *Gideon.*”<sup>65</sup> And again: “These allegations state a claim, not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon.*”<sup>66</sup>

### 3. *Duncan v. State*

In *Duncan v. State*, a putative class of indigent criminal defendants subject to felony convictions in three Michigan counties brought this case in state court under 42 U.S.C § 1983, asserting that the indigent defense systems in those counties were constitutionally deficient due to inadequate funding and lack of fiscal and administrative oversight.<sup>67</sup> The trial court granted class certification and denied the state’s motion for summary disposition of the claim, and the state appealed.<sup>68</sup> The Michigan appeals court held that based on the pleadings before it the plaintiffs stated viable claims for relief and upheld the trial court’s class certification ruling.<sup>69</sup>

Further, the court held that in this class action challenge to the constitutionality of these three indigent defense systems the plaintiffs’ burden was two-fold.<sup>70</sup> First, plaintiffs must show that “counsel’s representation falls below an objective standard of reasonableness with respect to a critical stage in the proceedings.”<sup>71</sup> Second, plaintiffs must show that instances of deficient performance and denial of counsel are widespread and systemic and that they

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claims into one civil pleading does not ipso facto transform it into one alleging a systemic denial of the right to counsel.” *Id.* at 230 (Pigott, J., dissenting).

63. *Id.* at 221–22 (emphasis added).

64. *Hurrell-Harring*, 930 N.E.2d at 224.

65. *Id.* at 225.

66. *Id.* at 224.

67. 774 N.W.2d 89, 97, 100 (Mich. Ct. App. 2009).

68. *Id.* at 97.

69. *Id.* at 145.

70. *Id.* at 123–24.

71. *Id.* at 123. The court further noted, “[S]imply being deprived of the constitutional right to effective representation at a critical stage in the proceedings, in and of itself, gives rise to harm.” *Id.* at 127.

are caused by weaknesses and problems in the three indigent defense systems involved in the case.<sup>72</sup>

The court left it to the trial court to determine “the parameters of what constitutes ‘widespread,’ ‘systemic,’ or ‘pervasive’ constitutional violations or harm.”<sup>73</sup> The court further held the trial court on remand would need to consider the degree of harm shown, “giving more weight to instances of deficient performance that resulted in unreliable verdicts and instances where the right to counsel was denied, with less weight being given where there is mere deficient performance.”<sup>74</sup> The court further noted that the plaintiffs “will no doubt have a heavy burden to prove and establish their case” at trial.<sup>75</sup>

The court relied on *Luckey* for the proposition that the two-pronged *Strickland* standard is inappropriate for a civil suit seeking prospective relief but did not formulate its test as a risk-based test.<sup>76</sup> The court upheld the trial court’s ruling on class certification, noting that “[b]ecause there is limited case law in Michigan addressing class certifications, this Court may refer to federal cases construing the federal rules on class certification.”<sup>77</sup>

#### 4. *Public Defender, Eleventh Judicial Circuit of Florida v. State*

In this Florida case, a public defender filed a motion to be relieved of appointments to represent indigent defendants in noncapital felony cases, claiming excessive caseloads caused by underfunding created a widespread problem as to effective representation.<sup>78</sup> The trial court granted relief, but the intermediate appellate court reversed.<sup>79</sup> The Florida Supreme Court sided with the trial court and held that given the massive evidentiary showing made by the public defender, relief from excessive caseloads was appropriate, and remanded the case to the trial court to determine if current circumstances warranted relief (after five years of litigation).<sup>80</sup> No relief was subsequently sought.<sup>81</sup>

The court used a risk-based standard contained in the Rules Regulating the Florida Bar to decide the case.<sup>82</sup> A Florida statute provided that when a public defender’s basis for withdrawal is a conflict of interest (due to excessive caseloads or otherwise), the court could only permit withdrawal if it found that

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72. *Duncan*, 774 N.W.2d at 124.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 128–29.

77. *Duncan*, 774 N.W.2d at 138.

78. Pub. Def., 11th Judicial Circuit of Fla. v. State, 115 So. 3d 261, 265 (Fla. 2013).

79. *Id.*

80. *Id.* at 283.

81. The author confirmed this fact with Miami Public Defender Carlos Martinez.

82. *Pub. Def.*, 115 So. 3d at 279 (citing R. Regulating Fla. Bar 4-1.7(a)(2)).

the conflict was prejudicial.<sup>83</sup> The court held that under the statute, the prejudice required for withdrawal in a case involving excessive caseloads was a showing of a “substantial risk that [the] representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client,” citing the Florida Rule identical to ABA Model Rule 1.7(a)(2).<sup>84</sup> The Florida standard is very similar to the risk-based standard for systemic Sixth Amendment violations that I argue for in this article.<sup>85</sup>

The Florida Supreme Court drew on *Luckey* and carefully distinguished the performance-based claim that *Luckey* rejected and the risk-based claim for systemic Sixth Amendment violations that *Luckey* presaged.<sup>86</sup> The court also opined that the case before it had “very similar circumstances” to those presented in the *Hurrell-Harring* case<sup>87</sup> and concluded that “the circumstances presented here involve some measure of non-representation and therefore a denial of the actual assistance of counsel guaranteed by *Gideon* and the Sixth Amendment.”<sup>88</sup>

##### 5. *Wilbur v. City of Mount Vernon*

This was a class action originally brought in a state court and removed to federal court by the defendants.<sup>89</sup> The plaintiffs were indigent criminal defendants who sought prospective injunctive relief against two small municipalities in Washington state, asserting a constructive denial claim similar to the claim identified by the *Hurrell-Harring* court.<sup>90</sup> The plaintiffs argued that *Gideon*, not *Strickland*, provided the proper standard for the case.<sup>91</sup>

The case required the trial judge to analyze the workloads and performance of four lawyers in two small municipalities in the State of Washington.<sup>92</sup> The court found that that “the public defense system [had] systemic flaws;” that the defenders “represent[ed] the client in name only in these circumstances;” and that “[s]uch perfunctory ‘representation’ does not satisfy the Sixth Amendment,” citing *Hurrell-Harring*’s finding that such failures to communicate or appear at critical stages, may be reasonably interpreted as

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83. *Id.* at 275.

84. *Id.* (citing R. Regulating Fla. Bar 4-1.7(a)(2)). This is the same risk-based Rules of Professional Responsibility claim that I set out in Section IV.

85. *See infra* Section IV.

86. *Pub. Def.*, 115 So. 3d at 276–77.

87. *Id.* at 277.

88. *Id.* at 278.

89. *Wilbur v. City of Mt. Vernon*, 989 F. Supp. 2d 1122, 1123 (W.D. Wash. 2013).

90. *Id.* at 1124.

91. *Id.* at 1127.

92. *Id.* at 1124–28.

nonrepresentation rather than ineffective representation.<sup>93</sup> The court found that the plaintiffs had proven a systemic deprivation of the right to the assistance of counsel.<sup>94</sup> The court granted injunctive relief that, among other things, ordered the defendants to hire a part-time “Public Defense Supervisor” to work at least twenty hours per week to supervise and evaluate the performance of these four lawyers, to collect and analyze data regarding their performance, and to submit bi-annual reports to the parties and the court.<sup>95</sup> The *Luckey* decision is not cited in this case.

6. *State v. Waters*<sup>96</sup>

The Missouri Public Defender promulgated a rule providing for certification of unavailability once a district defender’s office exceeded the established caseload maximums. Those maximums had been established by a rule it had promulgated and a protocol it had developed and incorporated in the rule.<sup>97</sup> A district defender office with caseloads that exceeded those maximums moved in a criminal court to be relieved of further representation of clients, asserting claims under the rule, the Rules of Professional Conduct, and the Sixth Amendment.<sup>98</sup> The trial judge did not question that the district defender’s office had an excessive caseload, but the court nonetheless ordered the district defender office to continue its representation of new eligible indigent defendants.<sup>99</sup> On appeal, the Missouri Supreme Court, as requested by the Missouri Public Defender, ordered the trial court to vacate that order, finding that the trial court had exceeded its authority by appointing the public defender to represent a defendant in contravention of the Rules of Professional

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93. *Id.* at 1131–32. The facts in this case (e.g., the trial court’s observation that “representation . . . remains inadequate” and the trial court’s concern about lack of “representational relationship”) actually appear to constitute what I call “nominal representation.” *Id.* at 1128.

94. *Wilbur*, 989 F. Supp. 2d at 1133.

95. *Id.* at 1134–37.

96. The author was lead counsel for the Missouri Public Defender in *Waters*.

97. *State v. Waters*, 370 S.W.3d 592, 599 (Mo. 2012) (en banc). Public defender offices in Missouri operate under the control of the public defender commission, which is vested with corresponding powers necessary and convenient to providing representation to indigent defendants. MO. REV. STAT. § 600.015–600.101 (2016). The commission is thus authorized to “[m]ake any rules needed for the administration of the state public defender system.” MO. REV. STAT. § 600.017(10) (2016). The rule at issue provides that once a district office exceeds the maximum caseload standard for three consecutive calendar months, “the director may limit the office’s availability to accept additional cases by filing a certification of limited availability’ with the appropriate court.” *Waters*, 370 S.W.3d. at 599.

98. *Waters*, 370 S.W.3d at 597.

99. *Id.* at 601.

Conduct, the Sixth Amendment, and the Missouri Public Defender's caseload maximum rule.<sup>100</sup>

In analyzing the public defender's *Strickland* claim, the court noted the Supreme Court's admonition in *Kimmelman v. Morrison* that "the right to counsel is the right to *effective* assistance of counsel."<sup>101</sup> "Moreover," the *Waters* court noted, "this right is affirmative and prospective."<sup>102</sup>

The court saw the central issues as (1) the defendant's Sixth Amendment right to counsel at all critical stages of the proceeding, and (2) the ethical obligation of counsel not to accept work if counsel does not believe he or she can perform competently.<sup>103</sup> Relying on *Missouri v. Frye*,<sup>104</sup> the court held:

The constitutional right to effective counsel applies to all critical stages of the proceeding; it is a prospective right to have counsel's advice during the proceeding and is not merely a retrospective right to have a verdict or plea set aside if one can prove that the absence of competent counsel affected the proceeding.

Simply put, a judge may not appoint counsel when the judge is aware that, for whatever reason, counsel is unable to provide effective representation to a defendant. Effective, not just pro forma, representation is required by the Missouri and federal constitutions.<sup>105</sup>

Turning to the Rules of Professional Conduct claim, the court applied the Rule 1.7 test to determine whether excessive caseloads produce a "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client."<sup>106</sup> Relying on a similar case from California,<sup>107</sup> the court found that "a conflict of interest is inevitably created when a public defender is compelled by his or her excessive caseload to choose between the rights of the various indigent defendants he or she is representing."<sup>108</sup>

Turning finally to the Missouri Public Defender Commission's maximum caseload rule, the court held the rule valid and specifically noted that it was with the above constitutional and ethical rights and obligations in mind that the

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100. *Id.* at 607.

101. *Id.* at 606 (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986)) (emphasis in original).

102. *Id.*

103. *Waters*, 370 S.W.3d at 607.

104. 566 U.S. 133 (2012).

105. *Id.* (citations omitted).

106. *Id.* (citing Rule 4-1.7(a)(2)).

107. *In re Edward S.*, 92 Cal. Rptr. 3d 725, 746-47 (Cal. Ct. App. 2009).

108. *Waters*, 370 S.W.3d at 608. Interestingly, the court found that "while the ethical rules do not supplant 'a trial judge's obligation to protect a defendant's Sixth Amendment rights,' they do 'run parallel to' that duty." *Id.*

Commission enacted the maximum caseload rule.<sup>109</sup> The court found that no infirmity with the rule had been established under state law, and thus the trial judge exceeded his authority by appointing the public defender in violation of that rule.<sup>110</sup>

No claim of constructive denial of counsel was asserted in this case.<sup>111</sup> In the briefs and at oral argument, the Missouri Public Defender urged the court to apply the risk-based *Luckey* test of likelihood of substantial and immediate irreparable injury, but the court did not cite to or rely on *Luckey* in its opinion.<sup>112</sup>

*Waters* stands for the proposition that when a statewide public defender office can demonstrate that it has so many cases that its lawyers cannot provide competent and effective representation to all of their clients, lawyers may refuse additional appointments and judges may not appoint them to represent additional indigent defendants.<sup>113</sup> When that occurs, judges should prioritize cases on their dockets in the interest of public safety, so that the most serious cases are assigned to public defenders, and if no competent public defender can be found to represent those charged with less serious crimes, those cases should be dismissed.<sup>114</sup> Moreover, if the defendants in such cases are in custody, they should be released.<sup>115</sup>

#### 7. *Kuren v. Luzerne County*

This was a class action case filed in a state court by the Luzerne County Public Defender and his clients under 42 U.S.C. § 1983, asserting constitutional claims based on the inability to provide competent legal representation due to inadequate funding.<sup>116</sup> The trial court found that the plaintiffs had failed to state a cause of action for mandamus or a constitutional violation.<sup>117</sup> An intermediate appellate court affirmed the trial court's ruling.<sup>118</sup> The case was appealed to the Pennsylvania Supreme Court.<sup>119</sup>

The United States Department of Justice filed an amicus brief asserting that a claim for constructive denial of counsel is cognizable under the Sixth

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109. *Id.* at 612.

110. *Id.*

111. *See generally* State v. Waters, 370 S.W.3d 592 (Mo. 2012) (en banc).

112. Brief for Petitioner at 40–41, 47, State v. Waters, 370 S.W.3d 592 (Mo. 2012) (en banc) (No. SC91150), 2011 WL 5118554, at \*40–41, \*47.

113. *Waters*, 370 S.W.3d at 607.

114. *Id.* at 611.

115. *Id.* at 611–12.

116. *Kuren v. Luzerne Cty.*, 146 A.3d 715, 718, 720 (Pa. 2016).

117. *Id.* at 726.

118. *Id.*

119. *Id.* at 729.

Amendment.<sup>120</sup> Prospective injunctive relief for such a claim is viable, and the DOJ argued:

(1) when, on a system-wide basis, the traditional markers of representation—such as timely and confidential consultation with clients, appropriate investigation, and meaningful adversarial testing of the prosecution’s case—are absent or significantly compromised; and (2) when substantial structural limitations—such as a severe lack of resources, unreasonably high workloads, or critical staffing of public defender offices—cause that absence or limitation on representation.<sup>121</sup>

The DOJ argued that “when the totality of the circumstances indicate[s] . . . a system-wide problem of nonrepresentation,” i.e., the appointment of counsel is merely cosmetic and the defendant has a lawyer in name only, prospective relief must be available.<sup>122</sup>

The Pennsylvania Supreme Court relied upon and extensively analyzed *Luckey*, *Duncan*, and *Hurrell-Harring*, finding all three cases to be “persuasive, indeed, compelling.”<sup>123</sup> The court held that “there is a cognizable cause of action whereby a class of indigent defendants may seek relief for a widespread, systematic and constructive denial of counsel when alleged deficiencies in funding and resources provided by the county deny indigent defendants their constitutional right to counsel.”<sup>124</sup>

Importantly, the court adopted the *O’Shea v. Littleton* test for prospective injunctive relief that *Luckey* had adopted in 1988: “the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.”<sup>125</sup> The court also noted that under this test, a plaintiff need not prove actual injury when seeking prospective relief, but instead must only demonstrate “the likelihood” of the injury.<sup>126</sup>

Equally important, the court adopted the DOJ’s standard:

In setting forth a cause of action for prospective injunctive relief based upon the constructive denial of counsel, to prove the “likelihood of substantial and immediate irreparable injury,” the plaintiff should focus upon the following factors: “(1) when, on a system-wide basis, the traditional markers of representation—such as timely and confidential consultation with clients, appropriate investigation, and meaningful adversarial testing of the prosecution’s case—are absent or significantly compromised; and (2) when

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120. Brief for the United States as Amicus Curiae at 10, *Kuren*, 146 A.3d 715 (Nos. 57 MAP 2015, 58 MAP 2015), 2015 WL 10768531, at \*10–11.

121. *Id.* at \*11.

122. *Id.* at \*11–12.

123. *Kuren*, 146 A.3d at 742–43.

124. *Id.* at 743.

125. *Id.* at 744 (quoting *O’Shea v. Littleton*, 414 U.S. 488, 502 (1974)); see *Luckey v. Harris*, 860 F.2d 1012, 1017–18 (11th Cir. 1988).

126. *Kuren*, 146 A.3d at 744.



substantial structural limitations—such as a severe lack of resources, unreasonably high workloads, or critical understaffing of public defender offices—cause that absence or limitation on representation.”<sup>127</sup>

The court noted that this standard offered “a workable, if non-exhaustive, paradigm for weighing such claims.”<sup>128</sup> Like every court before it commenting on this remedy, the court noted that plaintiffs’ burden under this standard “is a weighty one.”<sup>129</sup>

## II. ANALYSIS AND CRITIQUE OF THE MAJOR POST-*CRONIC*/*STRICKLAND* SYSTEMIC CASES

Although the *Hurrell-Harring* plaintiffs clearly stated their claim as a systemic, risk-based claim envisioned by *Luckey*, there is no citation to *Luckey* in that case.<sup>130</sup> The failure of the *Hurrell-Harring* court to consider *Luckey*’s “likelihood of substantial and immediate irreparable injury” standard for this kind of systemic claim is fatal to its analysis for a number of reasons. Without the benefit of *Luckey*’s risk-based analysis, the *Hurrell-Harring* court accepted the defendants’ definition of plaintiffs’ claim as one that was “rooted in case law conditioning relief for constitutionally ineffective assistance upon findings that attorney performance, when viewed in its total, *case specific aspect*, has both fallen below the standard of objective reasonableness and resulted in prejudice.”<sup>131</sup>

On its face, that claim is not susceptible of systemic application or class action status, because, it is “rooted in the particular circumstances of an individual case,”<sup>132</sup> and it is “contextually sensitive.”<sup>133</sup> Given that framing of the issue before it, the court had little trouble finding that such a performance-based *Strickland* claim “cannot serve as a predicate for systemic relief” because such a “highly context sensitive inquiry into the adequacy and particular effect of counsel’s performance cannot occur until a prosecution has concluded in a conviction.”<sup>134</sup>

But the court did not want to leave the plaintiffs without a remedy for the horrific tales of lawyer ineptitude (nominal representation) they had pled in their amended class action complaint. The court noted that according to the

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127. *Id.* (quoting Brief for the United States as Amicus Curiae at 11, *Kuren*, 146 A.3d 715 (Nos. 57 MAP 2015, 58 MAP 2015), 2015 WL 10768531, at \*11).

128. *Id.*

129. *Id.* at 745.

130. *See generally* *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010).

131. *Id.* at 220 (citing *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)) (emphasis added).

132. *Id.*

133. *Id.* at 225.

134. *Id.* at 220.

complaint, ten of the twenty plaintiffs were “altogether without representation at [the] arraignments” (nonrepresentation or actual denial of counsel).<sup>135</sup> Moreover, the plaintiffs had alleged that such actual denial of counsel was “illustrative of what is a fairly common practice” that included defendants being “unrepresented in subsequent proceedings where pleas are taken and other critically important legal transactions take place.”<sup>136</sup>

In addition to those allegations of outright *nonrepresentation*, the complaint alleged that “although lawyers were eventually *nominally* appointed for plaintiffs, they were unavailable to their clients”<sup>137</sup> in that,

- “they conferred with them little, if at all”;
- they “were often completely unresponsive to their [clients’] urgent inquiries and requests from jail, sometimes for months on end”;
- they “waived important rights without consulting them”;
- they “ultimately appeared to do little more on [behalf of their clients] than act as conduits for plea offers, some of which purportedly were highly unfavorable”;
- they “missed court appearances”;
- “when they did appear they were not prepared to proceed, often because they were entirely new to the case, the matters having previously been handled by other similarly unprepared counsel”; and
- “the counsel [so] appointed . . . was seriously conflicted and . . . unqualified.”<sup>138</sup>

Given these allegations in the complaint, the court found that “[t]he questions properly raised in this Sixth Amendment-grounded action, we think, go not to whether ineffectiveness has assumed systemic dimensions, but rather to whether the State has met its foundational obligation under *Gideon* to provide legal representation.”<sup>139</sup> “These allegations,” the court found, “state a claim, not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*.”<sup>140</sup>

“The basic, unadorned question presented” by these claims, the court said, was “whether the State has met its obligation to provide counsel, not whether under all the circumstances counsel’s performance was inadequate or

135. *Hurrell-Harring*, 930 N.E.2d at 220.

136. *Id.*

137. *Id.* (emphasis added). This language is what leads me to argue the *Hurrell-Harring* term “non-representation” is equivalent to actual denial of counsel and to consider the *Hurrell-Harring* term “nominal” representation as equivalent to constructive denial of counsel.

138. *Id.* at 222.

139. *Id.* at 221–22.

140. *Hurrell-Harring*, 930 N.E.2d at 224. Just in case anyone missed that point, the court stated later that “the complaint states a claim for constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of *Gideon*.” *Id.* at 225.

prejudicial,” noting that *Strickland* had held that in the former cases prejudice was presumed.<sup>141</sup>

The court no doubt thought that once it had found a constructive denial claim in the plaintiffs’ complaint that did not require a showing of prejudice, it had solved the problem presented by the performance-based *Strickland* claim of actual ineffectiveness that it thought plaintiffs had pled in their pre-trial systemic challenge to an indigent defense system.

The indigent defense litigation that has been conducted since the *Hurrell-Harring* ruling is telling. A massive evidentiary presentation has been made in both New York and Florida courts, consisting of a plethora of anecdotes, documents, and reports, followed by expert testimony that such evidence should suffice to establish a denial of “the foundational obligation to provide counsel.”<sup>142</sup> However, neither case provides a principled analytical standard that can be met with a focused evidentiary showing, nor does the proof and the testimony in either case address a common question of law or fact, or provide common answers apt to drive the resolution of the litigation.<sup>143</sup> In *Hurrell-Harring*, after seven years of litigation, a settlement on the eve of trial was achieved for five counties, in which the State of New York for the first time acknowledged its responsibility for public defense in that state and some additional resources were obtained, among other reforms.<sup>144</sup>

A Florida Supreme Court decision interpreted a state statute and acknowledged the right of counsel with an excessive caseload to refuse additional cases based on the Rules of Professional Conduct, but not the Sixth Amendment.<sup>145</sup> A district court in Washington state found that four lawyers in two small municipalities were constructively denying counsel to their clients and ordered monitoring and reporting to ensure reform of the practices of those lawyers.<sup>146</sup> In Missouri, public defenders have established a risk-based Rules

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141. *Id.* at 225.

142. *Id.* at 222; Pub. Def., 11th Judicial Circuit of Fla. v. State, 115 So. 3d 261, 265 (Fla. 2013) (The court described the evidence: “[W]e are struck by the breadth and depth of the evidence of how the excessive caseload has impacted the Public Defender’s representation of indigent defendants.”). The author has conferred with both plaintiffs’ counsel and plaintiffs’ experts in *Hurrell-Harring* concerning the massive evidentiary presentation they were prepared to make had the case gone to trial.

143. See *infra* Sections III and IV.

144. Joel Stashenko, *Judge Approves Settlement Over Indigent Criminal Defense*, N.Y.L.J. (Mar. 18, 2015), <https://www.ils.ny.gov/files/Judge%20Approves%20Settlement%20Over%20Indigent%20Criminal%20Defense%20-%20NYLJ%20031815.pdf> [http://perma.cc/UZ3Z-TBJW].

145. Pub. Def., 115 So. 3d at 267, 279.

146. *Wilbur v. City of Mt. Vernon*, 989 F. Supp. 2d 1122, 1124, 1135–36 (W.D. Wash. 2013). I have no doubt that a trial judge could reliably and intelligently come to that conclusion with respect to the performance of four lawyers in two small towns. This is what I call “the illusion of a lawyer.” But it is not the stuff of systemic litigation that seeks to reform large

of Professional Conduct claim, but not a risk-based Sixth Amendment claim.<sup>147</sup>

*Duncan* was decided in 2009, a year before *Hurrell-Harring*, although it is not cited in *Hurrell-Harring*.<sup>148</sup> *Duncan*, presaging the argument presented below, provides an “objective standard of reasonableness with respect to a critical stage” test for a systemic challenge to a state’s indigent defense system, and additionally requires a showing of “widespread and systemic” performance deficiencies, leaving it to the trial court how to determine that.<sup>149</sup> While *Duncan* did cite *Luckey* for the proposition that the two-pronged *Strickland* test is inappropriate in a systemic case, it did not adopt *Luckey*’s risk-based test.<sup>150</sup>

The recent decision of the Pennsylvania Supreme Court in *Luzerne County*, on the other hand, expressly adopts the risk-based *Luckey* standard.<sup>151</sup> The decision also measurably improves upon *Hurrell-Harring*’s “foundational *Gideon* obligation” statement of the applicable standard for prospective injunctive relief in a systemic case, specifically noting that under the U.S. Supreme Court’s *O’Shea v. Littleton* test, adopted by *Luckey*, plaintiffs in these systemic cases need not prove actual injury.<sup>152</sup> *Luzerne County*’s adoption of *Luckey*’s risk-based test and its more specific articulation of the constructive denial test are significant steps forward for this theory of recovery.

However, even with the *Luzerne County* improvements to the constructive denial claim, we emerge from these cases with no principled analytical standard that can be met with a focused evidentiary showing using reliable data and analytics needed to certify a class and prevail on the merits in a pre-trial class action challenge to a state’s indigent defense system. In the following sections, I argue that a constructive denial claim is an insufficiently principled and an exorbitantly expensive vehicle for use in a large class action challenge to a state’s system of indigent defense. It was crafted by a court, not by experienced counsel. It is an entirely appropriate vehicle for individual claims of ineffective assistance of counsel, but it cannot serve as a viable claim for

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indigent defense systems, as has been done for decades with traditional institutional class action litigation in other similar systems.

147. *State v. Waters*, 370 S.W.3d 592, 607, 612 (Mo. 2012) (en banc).

148. *See generally* *Duncan v. State*, 774 N.W.2d 89 (Mich. Ct. App. 2009).

149. *Id.* at 123–24.

150. *Id.* at 128–29.

151. *Kuren v. Luzerne Cty.*, 146 A.3d 715, 743 (Pa. 2016).

152. *Id.* at 748. The test as adopted by *Luckey* requires plaintiffs to show “the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.” *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1980), *rev’d on other grounds*, *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992).

relief in systemic Sixth Amendment challenges to state indigent defense systems.<sup>153</sup>

### III. CLASS CERTIFICATION CONCERNS AFTER *WAL-MART V. DUKES*

*Hurrell-Harring* was an appeal from an order denying a motion to dismiss.<sup>154</sup> In this opinion the court did not consider the question of whether or not the case could be certified as a class action, but rather simply referred to the plaintiffs' allegations of "broad systemic deficiencies."<sup>155</sup> The case was subsequently brought as a class action, and in a subsequent opinion, an intermediate appellate court reversed a trial court ruling and allowed class certification in this case.<sup>156</sup> The court found the criteria in New York for class action status "must be liberally construed and 'any error, if there is to be one, should be . . . in favor of allowing the class action.'"<sup>157</sup> The court further noted that in order to prove their claim, the plaintiffs would now be "saddled with the enormous task of establishing that deprivations of counsel to indigent defendants are not simply isolated occurrences in the case of these 20 plaintiffs, but are a common or routine happenstance in the [five upstate New York] counties."<sup>158</sup>

This favorable class certification ruling was issued on January 6, 2011.<sup>159</sup> A little more than five months later, on June 20, 2011, the United States Supreme Court decided *Wal-Mart v. Dukes*.<sup>160</sup> The days of "liberal construction" of the class action rule, if they ever existed, were coming to an abrupt end. In *Wal-Mart*, the Supreme Court addressed the rigorous analysis required to meet the commands of Rule 23(a)(2) of the Federal Rules of Civil Procedure.<sup>161</sup> "The crux of this case," Justice Scalia wrote for the *Wal-Mart* majority, "is commonality—the rule requiring a plaintiff to show that 'there are questions of law or fact common to the class.'"<sup>162</sup>

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153. As a judicial construct, a constructive denial of counsel claim exists in an individual case only in relation to the actual denial of counsel, and not to any higher or different standard. In other words, a constructive denial claim exists only when counsel's performance in an individual case is so devoid of substance that it is tantamount to actual denial of counsel and therefore counsel's conduct is "declared such by judicial construction or interpretation." See *supra* note 18. This is an incredibly high bar for determining whether counsel's conduct passes constitutional muster.

154. *Hurrell-Harring v. State*, 930 N.E.2d 217, 219 (N.Y. 2010).

155. *Id.* at 225.

156. *Hurrell-Harring v. State*, 914 N.Y.S. 367, 369, 372 (N.Y. Sup. Ct. 2011).

157. *Id.* at 369 (citing *Pruitt v. Rockefeller Ctr. Props.*, 574 N.Y.S.2d 672 (N.Y. Sup. Ct. 1991)).

158. *Id.* at 372 (emphasis added).

159. *Id.* at 367.

160. 564 U.S. 338, 338 (2011).

161. *Id.* at 345.

162. *Id.* at 349 (quoting FED. R. CIV. P. 23(a)(2)).

Under *Wal-Mart*, “[c]ommonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury.’”<sup>163</sup> Their claims must depend on a “common contention” and that common contention “must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”<sup>164</sup> The Court emphasized that what matters in class certification is not just a common issue, but “the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation.”<sup>165</sup>

The issues in the kind of “systemic” constructive denial claim created by the *Hurrell-Harring* court, we are told by that court, include:

- whether counsel were communicative with their clients;
- whether any such attorney-client relationship may really be said to have existed between many (not all) of the plaintiffs and the putative attorneys;
- whether counsel made virtually no efforts on their nominal clients’ behalf; and
- whether counsel waived important rights without authorization from the clients.<sup>166</sup>

It is difficult to conceive of a claim that is more deeply “rooted in the particular circumstances of an individualized case,”<sup>167</sup> and that will inevitably involve a “highly context sensitive inquiry into the adequacy and particular effect of counsel’s performance.”<sup>168</sup> But that kind of individualized and context sensitive inquiry is simply inapposite to the post-*Wal-Mart* world, where plaintiffs seeking class certification must, as noted above, demonstrate that: (a) they have suffered the same injury; (b) their claims depend upon a common contention that is capable of classwide resolution; (c) determination of their claims’ truth or falsity will resolve an issue that is central to the validity of each one of their claims in a single stroke; and (d) their case will generate common *answers* apt to drive the resolution of the litigation.<sup>169</sup>

After *Wal-Mart*, it is extremely unlikely that the constructive denial claim described by the *Hurrell-Harring* court could survive the rigorous judicial analysis required to certify a class. The proof in such cases is a series of anecdotes (lawyers confer “little, if at all,” with their clients; are “completely

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163. *Id.* at 349–50 (quoting *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982)).

164. *Id.* at 350.

165. *Wal-Mart*, 564 U.S. at 350 (emphasis in original).

166. *Hurrell-Harring v. State*, 930 N.E.2d 217, 224 (N.Y. 2010).

167. *Id.* at 220.

168. *Id.*

169. *Wal-Mart*, 564 U.S. at 350.

unresponsive to their clients' urgent inquiries;" etc.<sup>170</sup>), together with voluminous documents and reports, caseload statistics, and perhaps the 1973 NAC Standards<sup>171</sup> and expert testimony, all of which together is claimed to constitute a massive evidentiary showing of a systemic violation of the "foundational obligation under *Gideon* to provide legal representation," whatever that may mean to any particular trial judge or reviewing court.<sup>172</sup>

The *Hurrell-Harring* court's various descriptions of the constructive denial claim ("a foundational obligation . . . to provide [counsel]"; "the basic denial of the right to counsel"; and "insufficient compliance with the constitutional mandate of *Gideon*"<sup>173</sup>) make it virtually impossible to articulate a definable common claim capable of judicial resolution on a class-wide basis. To paraphrase Justice Marshall, dissenting in *Strickland*, "[f]or the most part the [*Hurrell-Harring*] majority's efforts are unhelpful" because the constructive denial standard 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 by different courts."<sup>174</sup> Or, to paraphrase Justice Stevens in *Cronic*, the *Hurrell-Harring* court's creation of a systemic or class action constructive denial claim cannot "survive the crucible of meaningful adversarial testing"<sup>175</sup> now required by *Wal-Mart*.<sup>176</sup>

But what about *Luzerne County*'s articulation of a "totality of circumstances" standard for a systemic constructive denial case? Unfortunately, it is almost surely doomed to the same post-*Wal-Mart* fate. The court in *Luzerne County* adopted the DOJ's proposed two-pronged test to evaluate a systemic constructive denial of counsel claim:

- (1) when, on a system-wide basis, the traditional markers of representation—such as timely and confidential consultation with clients, appropriate investigation, and meaningful adversarial testing of the prosecution's case—are absent or significantly compromised; and
- (2) when substantial structural

170. *Hurrell-Harring*, 930 N.E.2d at 222.

171. *National Advisory Commission on Criminal Justice Standards and Goals: The Defense*, NAT'L LEGAL AID AND DEF. ASS'N (1973), [http://www.nlada.net/sites/default/files/nac\\_standards\\_forthedefense\\_1973.pdf](http://www.nlada.net/sites/default/files/nac_standards_forthedefense_1973.pdf) [<http://perma.cc/4LVU-7TT3>].

172. *Hurrell-Harring*, 930 N.E.2d at 222.

173. *Id.* at 222, 224–25.

174. *Strickland v. Washington*, 466 U.S. 668, 707 (1984) (Marshall, J., dissenting).

175. *United States v. Cronic*, 466 U.S. 648, 656 (1984).

176. *Wal-Mart*, a case that originated in a federal district court and involved an interpretation of Rule 23 of the Federal Rules of Civil Procedure, is binding law now in all federal courts and will undoubtedly trickle down through the state courts interpreting state class action rules similar or identical to Rule 23, as have most major Supreme Court class action cases interpreting Rule 23(b)(2) regarding injunctive and declaratory relief. *Wal-Mart*, 564 U.S. at 345. *See* *Duncan v. State*, 774 N.W.2d 89, 119 (Mich. Ct. App. 2009); *see also* *Price v. Martin*, 79 So. 3d 960, 966, 969 (La. 2011) (adoption of *Wal-Mart*'s commonality analysis by the Louisiana Supreme Court to deny class certification).

limitations—such as a severe lack of resources . . . —cause that absence or limitation on representation.<sup>177</sup>

Again, it is difficult to conceive of a test more deeply rooted in the particular circumstances of individual cases. It is extremely unlikely that such a claim could ever meet the “common contention” command of Rule 23(a)(2) in a post-*Wal-Mart* world. Plaintiffs manifestly have not suffered the same injury, their claims do not depend upon a common contention capable of class-wide resolution, the determination of their claims’ truth or falsity will not resolve an issue central to the validity of each one of their claims in a single stroke, and their case will not generate common answers apt to drive the resolution of the litigation. Unfortunately, the claim in any constructive denial case, no matter how well formulated, is essentially a “totality of the circumstances” claim, which is simply no longer the stuff of class action litigation after *Wal-Mart*.

Class certification cases decided since *Wal-Mart* make it clear that *Wal-Mart* is a watershed case in class certification law. For instance, in *M.D. ex rel Stukenberg v. Perry*, the Fifth Circuit rejected the district court’s pre-*Wal-Mart* reasoning in certifying a class of children in foster care in Texas, finding that the district court did not conduct the “rigorous analysis” required by *Wal-Mart* to certify a class under Rule 23(a)(2),<sup>178</sup> and noting that *Wal-Mart* has “further defined the contours of the ‘rigorous analysis’ required by Rules 23(a) and 23(b)(2).”<sup>179</sup>

The district court in *M.D.* relied on pre-*Wal-Mart* law that “[t]he test for commonality is not demanding.”<sup>180</sup> The Fifth Circuit rejected that notion, finding that “[a]lthough the district court’s analysis may have been a reasonable application of pre-*Wal-Mart* precedent, the *Wal-Mart* decision has heightened the standards for establishing commonality under Rule 23(a)(2), rendering the district court’s analysis insufficient.”<sup>181</sup> “After *Wal-Mart*,” the Fifth Circuit observed, “Rule 23(a)(2)’s commonality requirement demands more than the presentation of questions that are common to the class because ‘any competently crafted class complaint literally raises common questions.’”<sup>182</sup>

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177. Brief for the United States as Amicus Curiae at 11, *Kuren v. Luzerne Cty.*, 146 A.3d 715 (Pa. 2016), (No. 57 MAP 2015), 2015 WL 10768531, at \*11.

178. 675 F.3d 832, 838 (5th Cir. 2012).

179. *Id.* at 837.

180. *Id.* at 839 (alteration in original).

181. *Id.*

182. *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 840 (5th Cir. 2012) [hereinafter *M.D.*]. The order certifying the class in *Wilbur*, entered about eight months after the Supreme Court’s *Wal-Mart* decision, lists four “common questions,” and then cites *Wal-Mart*. However, there is simply no analysis of how those four “common questions” survive the rigorous analysis now required by *Wal-Mart*, other than the conclusory statement that, “The answers to most, if not all,



On remand in *M.D.*, plaintiffs filed a second motion for class certification and changed the nature of their claims substantially. In their original complaint plaintiffs asserted various “systemic failures” in the state’s system for the care of children in the care of the state.<sup>183</sup> In response to the Fifth Circuit’s denial of class certification for those claims, plaintiffs proposed several subclasses and changed their allegations, asserting that the defendants’ policies deprived them of their right to be free from an unreasonable risk of harm while in the state’s custody.<sup>184</sup> The district court granted class certification on the plaintiffs’ revised claims.<sup>185</sup>

After *Wal-Mart*, Rule 23(a)(2) requires that all of the class members’ claims depend on a common issue of law or fact whose resolution “will resolve an issue that is central to the validity of each one of the [class member’s] claims in one stroke.”<sup>186</sup> The variety of the individual indigent defendant’s complaints about their individual lawyer’s performances set out by the *Hurrell-Harring* court cannot pass this test in a post-*Wal-Mart* world. Simply characterizing the plaintiffs’ claim as one asserting “systemic deficiencies,” as the court did in *Hurrell-Harring*,<sup>187</sup> will no longer suffice to meet the “rigorous analysis” required for class certification under Rule 23(a)(2) after *Wal-Mart*.

#### IV. A RISK-BASED CLAIM FOR SYSTEMIC SIXTH AMENDMENT VIOLATIONS

My central argument in this article is that in order to prevail on a pre-trial claim asserting systemic Sixth Amendment violations and seeking systemic prospective injunctive relief, courts should require plaintiffs to prove that there is a significant likelihood (or risk) of substantial and immediate injury to the class—that is, prejudice, at both plea<sup>188</sup> and trial<sup>189</sup>—because the defendants lack the capacity to provide to the class reasonably effective assistance of counsel under prevailing professional norms at all critical stages of the

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of these questions will be capable of classwide resolution.” *Wilbur v. City of Mt. Vernon*, 298 F.R.D. 665, 667 (W.D. Wash. 2012).

183. *M.D.*, 675 F.3d at 835.

184. *Id.* This is precisely the risk-based kind of claim I argue for in Section IV below.

185. *M.D. v. Perry*, 294 F.R.D. 7, 66 (S.D. Tex. 2013). The Fifth Circuit dismissed the State’s Rule 23(f) petition to appeal the class certification order as untimely in an unpublished order. *M.D. ex rel. Stukenberg v. Perry*, 547 Fed. Appx. 543, 544 (2013). The author wishes to thank Mario H. Nguyen, Harvard Law School, J.D. Candidate 2017 for pointing out this development in *M.D.* to me after a lecture I gave to his class recently.

186. *Wal-Mart v. Dukes*, 564 U.S. 338, 350 (2011).

187. *Hurrell-Harring v. State*, 930 N.E.2d 217, 225 (N.Y. 2010).

188. “A reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.” *Missouri v. Frye*, 566 U.S. 134, 147 (2012).

189. “[A] reasonable probability that, but for counsel’s professional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 694 (1983).

proceeding.<sup>190</sup> There is no requirement to show actual prejudice.<sup>191</sup> This is what I call a risk-based claim asserting systemic Sixth Amendment violations, as opposed to the performance-based claim of actual ineffectiveness asserted by the plaintiffs in *Luckey* and appropriately rejected by that court.

Stated more succinctly, I argue that the appropriate test for a class action systemic challenge to an indigent defense system is simply this: a significant risk of prejudice due to systemic inability to perform. The *Luckey* court rejected performance-based claims of actual ineffectiveness for pre-trial class action claims seeking prospective injunctive relief and presaged the kind of risk-based pre-trial class action claim for systemic Sixth Amendment violations that I describe here.<sup>192</sup>

A risk-based claim differs significantly from a performance-based claim. The best example of a risk-based class action claim that I know of is *Gates v. Cook*.<sup>193</sup> In *Gates*, death row prisoners at Mississippi's infamous Parchman Farm (Mississippi State Penitentiary) brought a class action complaining that horrific conditions of confinement posed intolerable risks to their health, including the risk of serious heat-related injury or death during the scorching summers in the Mississippi Delta, when the Heat Index in death row cells sometimes exceeded 130° F.<sup>194</sup> The inmates claimed that those conditions violated the Eighth Amendment.<sup>195</sup>

Prison officials violate the Eighth Amendment when they show deliberate indifference to conditions posing a substantial risk of serious harm to the

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190. *Frye*, 566 U.S. at 140.

191. There is also a requirement to prove that any remedies at law are inadequate, but the courts after *Luckey* considering Sixth Amendment challenges in systemic cases have little trouble finding that individual post-trial motions to set aside individual convictions are an inadequate remedy at law for systemic deficiencies. *See, e.g., Wilbur v. City of Mt. Vernon*, 989 F. Supp. 2d 1122, 1133 (W.D. Wash. 2013).

192. *Duncan* similarly articulated such a test: i.e., plaintiffs must show that counsel's performance "falls below an objective standard of reasonableness with respect to a critical stage in the proceedings." *Duncan v. State*, 774 N.W.2d 89, 123 (Mich. Ct. App. 2009). The court added that plaintiffs must show that such performance deficiencies are "widespread and systemic." *Id.* The *Duncan* court also noted: "[S]imply being deprived of the constitutional right to effective representation at a critical stage in the proceedings, in and of itself, gives rise to harm." *Id.* at 127. It is tempting to substitute the risk of ineffectiveness at a critical stage for the risk of prejudice that I am proposing here, but there are several reasons not to do so. First, I think such a standard involves far more factual and legal complexity than prejudice. Second, the odds are against that standard's surviving a post-*Wal-Mart* class certification analysis. Third, we need not employ that standard since we can now convincingly prove the risk of prejudice with reliable data and analytics. Finally, there is good reason to believe that the courts will be much more receptive to a risk of prejudice standard.

193. *Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004). The author served as co-counsel for plaintiffs on this case.

194. *Id.* at 327.

195. *Id.*

inmate by failing to take reasonable measures to abate the risk.<sup>196</sup> In *Gates*, we amply met our burden of proving deliberate indifference by showing that the risk to health from excessive heat was so obvious that prison officials must have been actually aware of the risks, yet failed to take reasonable measures in response.<sup>197</sup>

The state argued that we had not and could not show a substantial risk of serious harm because there was no proof that any death row inmate at Parchman had ever died or suffered serious injury from excessive heat.<sup>198</sup> And indeed, the record supported that contention. But our medical expert persuasively testified that it was “very likely” that, under the conditions then existing on Death Row, an inmate would die or suffer serious injury from heat stroke or some other heat related illness due to excessive heat in the cells.<sup>199</sup>

Importantly for our purposes here, the Fifth Circuit held that an inmate need not show that death or serious illness from heat exposure has occurred in order to prevail.<sup>200</sup> “It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.”<sup>201</sup> All that the inmates need to show is that the conditions pose a substantial risk of serious harm.<sup>202</sup>

Similarly, here, in order to prevail in a class action case asserting a systemic risk-based Sixth Amendment claim and seeking prospective injunctive relief, plaintiffs need only prove that there is a likelihood (or risk) of substantial and immediate injury to the class. In this risk-based claim, that risk is prejudice due to systematic inability to provide reasonably effective assistance of counsel pursuant to prevailing professional norms to the class. There is no requirement to show actual prejudice.

But will the kind of risk-based claim that I argue for here stand up under critical analysis? We return to Missouri to begin that analysis. As noted above, in *Waters*, the Missouri Supreme Court sustained the public defender’s claim for denial of reasonably effective assistance of counsel, but did not adopt the

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196. *Id.* at 333 (citing *Farmer v. Brennan*, 511 U.S. 825, 833–34 (1994)).

197. *Id.* at 335.

198. Reply Brief of Defendants-Appellants at 16, *Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004) (No. 03-60529), 2003 WL 23783285, at \*16.

199. *Gates*, 376 F.3d at 339. The expert also testified that the inmates had complained of symptoms commonly recognized to be related to heat-related illnesses, but that these symptoms had simply gone undiagnosed. *Id.* Sound familiar?

200. *Id.*

201. *Id.* at 333 (quoting *Helling v. McKinney*, 509 U.S. 25, 32 (1993)). *Luzerne County* similarly held that under the *O’Shea v. Littleton* test adopted by *Luckey*, when seeking prospective relief, a plaintiff need not prove actual injury. *Kuren v. Luzerne Cty.*, 146 A.3d 715, 748 (Pa. 2016). See also *M.D. v. Perry*, 294 F.R.D. 7, 45 (S.D. Tex. 2013).

202. *Gates*, 376 F.3d at 339.

risk-based *Luckey* analysis that the public defender urged.<sup>203</sup> The court also sustained the public defender's risk-based Rules of Professional Conduct claim that excessive caseloads produced concurrent conflict under Rule 1.7 ("a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client").<sup>204</sup> The court also found no infirmity in the public defender's duly promulgated rule and protocol for case refusal.<sup>205</sup>

The *Waters* decision was issued on July 31, 2012.<sup>206</sup> The Missouri Public Defender immediately began to refuse additional appointments pursuant to its duly promulgated rule.<sup>207</sup> However, in October 2012, Missouri State Auditor Thomas A. Schweich, in a routine audit of the Missouri Public Defender, rejected the public defender's caseload protocol which had been upheld in *Waters* as part of a presumptively valid rule.<sup>208</sup> The Missouri State Auditor held the rule did not have sufficient support since the rule was based substantially on caseload numbers recommended by the 1973 National Advisory Commission that were not evidence based.<sup>209</sup> The Missouri Public Defender then stopped implementing its case refusal rule and protocol.<sup>210</sup> National indigent defense expert Norman Lefstein, in his *Executive Summary and Recommendations: Securing Reasonable Caseloads*, specifically recommended that henceforth public defenders "should not rely upon" the 1973 NAC Standards.<sup>211</sup>

The ABA's Standing Committee on Legal Aid and Indigent Defendants (SCLAID) then retained Rubin Brown, one of the nation's leading accounting and professional consulting firms, to perform a rigorous analysis of the workload of the Missouri Public Defender using the Delphi method that had been introduced by researchers at the Rand Corporation in 1962.<sup>212</sup> The Delphi

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203. *State v. Waters*, 370 S.W.3d 592, 609 (Mo. 2012) (en banc).

204. *Id.* at 607.

205. *Id.* at 612.

206. *Id.* at 592.

207. *Missouri State Auditor Report*, MO. PUB. DEF. SYS. 7 (2012), <http://app.auditor.mo.gov/repository/press/2012-129.pdf> [<http://perma.cc/2U7W-UTK5>].

208. *Id.* at 11.

209. *Id.* at 14.

210. STATE OF MO. PUB. DEF. COMM'N, FISCAL YEAR 2015 ANNUAL REPORT 7 (2015), <http://www.publicdefender.mo.gov/about/FY2015AnnualReport.pdf> [<http://perma.cc/222B-AXRM>].

211. Norman Lefstein, *Executive Summary and Recommendations: Securing Reasonable Caseloads*, A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS 34 (2012), [http://texaswcl.tamu.edu/reports/2011\\_LefsteinExecSummary.pdf](http://texaswcl.tamu.edu/reports/2011_LefsteinExecSummary.pdf) [<http://perma.cc/NF3Q-M6YK>].

212. RUBIN BROWN LLP, THE MISSOURI PROJECT REPORT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 5 (2014), [http://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/2014/ls\\_sclaid\\_5c\\_the\\_](http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_)

method has been peer reviewed and found to be an effective tool for producing a reliable consensus of expert opinion. As applied to the workload of a public defender, the Delphi method asks both experienced public defenders and experienced private criminal defense attorneys to provide a consensus estimate of the amount of time defense counsel should expect to spend on each designated Case Task in each of the designated Case Types in order to provide reasonably effective assistance of counsel pursuant to prevailing professional norms.<sup>213</sup>

The Missouri Project Report was published in February of 2014.<sup>214</sup> The Missouri Project Report has been described as a “watershed moment” for indigent defense.<sup>215</sup> Upon the release of the report, ABA President James Silkenat stated, “It can now be more reliably demonstrated than ever before that for decades the American legal profession has been rendering an enormous disservice to indigent clients and to the criminal justice system in a way that can no longer be tolerated.”<sup>216</sup> A similar workload study using the Delphi method was completed in Texas in 2015 and four more workload studies are being conducted in Louisiana, Tennessee, Colorado, and Rhode Island, with similar studies under consideration in other states.<sup>217</sup>

The most pertinent results of The Missouri Project Report are the vast discrepancies between the actual time worked by public defenders (determined from analyses of the timekeeping data generated by these public defenders) and the time determined by the expert Delphi panels (experienced criminal defenders, both private and public) required to provide reasonably effective assistance of counsel pursuant to prevailing professional norms.<sup>218</sup> This table

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missouri\_project\_report.authcheckdam.pdf [http://perma.cc/QSP8-5CEQ] [hereinafter *Missouri Project Report*]. The Delphi method has been peer reviewed and found to be a reliable tool for producing a reliable consensus of expert opinion. *Id.* at 17. The Missouri Public Defender used the *Missouri Project Report* to obtain its largest increase in funding in fifteen years from a two-thirds Republican Legislature, and when the Democratic Governor vetoed that bill, the Legislature overrode that veto—three times—and the Democratic Governor then impounded the funds—three times. Letter from Michael Barrett to Governor Jay Nixon (Aug. 2, 2016), [http://www.publicdefender.mo.gov/Newsfeed/Delegation\\_of\\_Representation.PDF](http://www.publicdefender.mo.gov/Newsfeed/Delegation_of_Representation.PDF) [http://perma.cc/KQY2-LTBQ].

213. *Missouri Project Report*, *supra* note 212, at 19.

214. *Id.* at 2.

215. Andrew Davies, *How Do We “Do Data” in Public Defense?*, 78 ALBANY L. REV. 1179, 1179–92 (2015).

216. National Association for Public Defense, *Letter to Chairman Grassley and Senator Leahy* (May 19, 2015), [http://www.publicdefenders.us/files/Letter\\_to\\_Chairman\\_Grassley\\_and\\_Senator\\_Leahy\\_May%2019%202015.pdf](http://www.publicdefenders.us/files/Letter_to_Chairman_Grassley_and_Senator_Leahy_May%2019%202015.pdf) [http://perma.cc/6VG4-4VYU].

217. *Id.*

218. *Missouri Project Report*, *supra* note 212, at 6.

demonstrates some of the most notable findings from the Missouri Project Report<sup>219</sup>:

CASE TYPE	ACTUAL TIME	CONSENSUS EXPERT TIME
Misdemeanor	2.3	11.7
A/B Felony	8.7	47.6
C/D Felony	4.4	25.0
Sex Felony	25.6	63.8

The results for the remaining four Case Types (all eight Case Types have fourteen Case Tasks each) are similarly stark.<sup>220</sup> The published results from the Texas study and the preliminary results from the other studies now being conducted are also similarly stark.<sup>221</sup> The consequences for both legislative advocacy for additional funding and judicial intervention in the event that funding is not forthcoming are both obvious and remarkable.

The Missouri Project Report provides the factual predicate for a risk-based claim for systemic Sixth Amendment violations. The principal question presented to the Delphi panel of experienced experts is, for each Case Task in each Case Type: how much time is reasonably required in order to provide reasonably effective assistance of counsel pursuant to prevailing professional norms?<sup>222</sup>

The expert panel of experienced criminal practitioners in the Delphi study are presented with the applicable law and standards for the study to guide their professional judgment about the amount of time that is reasonably required to provide reasonably effective assistance of counsel pursuant to prevailing professional norms, much in the way a jury is presented with instructions to guide their judgment. As noted above, *Strickland* cited the prevailing professional norms reflected in the CJS Defense Function Standards as “guides to determining what is reasonable,” specifically disclaiming any “particular set of detailed rules” as appropriate for this task and ultimately endorsing the “reasonably effective assistance” standard.<sup>223</sup> A quarter century later in *Padilla v. Kentucky* the Supreme Court reiterated that “prevailing norms of practice as reflected in American Bar Association Standards” are not only “guides to determining what is reasonable,” but also “valuable measures of the prevailing professional norms of effective representation.”<sup>224</sup>

219. *Id.* at 23–24.

220. *Id.* at 23–26.

221. Texas Indigent Defense Commission, *Guidelines for Indigent Defense Caseloads* (Jan. 2015), [http://www.tidc.texas.gov/media/31818/150122\\_weightedcl\\_final.pdf](http://www.tidc.texas.gov/media/31818/150122_weightedcl_final.pdf) [<http://perma.cc/PZ3S-KCDM>].

222. *Missouri Project Report*, *supra* note 212, at 11.

223. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

224. 559 U.S. 356, 367 (2010).

Notably, in *Missouri v. Frye*, the Supreme Court found that “ninety-four percent of state convictions are the result of guilty pleas,” citing Department of Justice Bureau of Justice Statistics.<sup>225</sup> The court quoted a *Yale Law Journal* article approvingly: “[P]lea bargaining . . . is not some adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>226</sup>

For that reason, the experts on the Delphi panel are advised by the ABA Project Leader of that Supreme Court finding along with the ABA’s Criminal Justice Section Defense Function Standard 4-6.1(b), which sets out the prevailing professional norm for defense counsel’s duty to explore disposition without trial (plea).<sup>227</sup> That standard provides that “in every criminal matter, defense counsel should consider the individual circumstances of the case and of the client, and should not recommend acceptance of a plea to a client unless and until appropriate investigation and study of the matter has been completed,” including:

- Discussion with the client;
- An analysis of relevant law;
- An analysis of the prosecutor’s evidence;
- An analysis of potential dispositions; and
- An analysis of relevant collateral consequences.<sup>228</sup>

In Louisiana, for example, such a workload study has been conducted by the ABA and Postlethwaite & Netterville (P&N), Louisiana’s largest public accounting firm.<sup>229</sup> From this study, the Louisiana Project report was co-issued by the ABA and P&N on February 17, 2017.<sup>230</sup> The conclusion of the Louisiana Project report is nothing less than stunning:

At this workload, and to be in compliance with the Delphi panel’s consensus opinions, 3,679,792 hours (approximately 1,769 public defenders are required to provide reasonably effective assistance of counsel pursuant to prevailing

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225. 132 S. Ct. 1399, 1407 (2012).

226. *Id.* (quoting Robert E. Scott & William J. Stunz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992)) (emphasis in original).

227. ABA’s Criminal Justice Section Defense Function, Standard 4-6.1(b) (1991).

228. *Id.* This protocol, including utilization of CJS Defense Function Standard 4-6.1(b), is now being employed in ABA Delphi studies in Louisiana, Colorado, Tennessee, and Rhode Island; was employed in Missouri and Texas; and will be employed in all such future workload studies.

229. Louisiana Public Defender Board, *Memorandum to Public Defenders on Workload Study and Statewide Case Refusal Motions*, 1–2 (Mar. 18, 2016), [http://lpdb.la.gov/Serving%20The%20Public/News/txtfiles/pdf/LPDB%20Memo%20to%20Defenders\\_3\\_18\\_2016.pdf](http://lpdb.la.gov/Serving%20The%20Public/News/txtfiles/pdf/LPDB%20Memo%20to%20Defenders_3_18_2016.pdf) [<http://perma.cc/9PU2-4SJG>].

230. *See The Louisiana Project: A Study of the Louisiana Defender System and Attorney Workload Standards*, POSTLETHWAITE & NETTERVILLE and THE A.B.A. STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS (Feb. 2017), <http://www.americanbar.org/content/dam/aba/images/abanews/LouisianaProjectReportFinal.pdf> [<http://perma.cc/HRE9-Q4B3>].

professional norms in Louisiana to meet the annual public defense workloads for these Case Types. As of October 31, 2016, the Louisiana public defense system employed approximately 363 FTE public defenders. Therefore, the Delphi method's process indicates the Louisiana public defense system is currently deficient 1,406 FTE attorneys. Alternatively, based on the Delphi Method's results and analysis presented herein, the Louisiana public defense system only has the capacity to handle 21 percent of the workload in compliance with the Delphi panel's consensus opinions.<sup>231</sup>

Louisiana public defenders, armed with the results of the ABA/P&N workload study, now have compelling evidence and reliable data and analytics to establish that there is a significant likelihood (or risk) of substantial and immediate injury to their clients—that is, prejudice, at both plea and trial<sup>232</sup>—because they are systematically unable to provide reasonably effective assistance of counsel under prevailing professional norms, in that they have only 21% of the lawyers that needed to do that.<sup>233</sup> Of course, a class of the public defenders' clients will now have that same reliable data and analytics available from this public report to serve as the factual predicate for any class action claim asserting a risk-based claim for systemic Sixth Amendment violations against the Louisiana Public Defender Board, on whose behalf the study was undertaken.<sup>234</sup>

Moreover, this risk-based claim for systemic Sixth Amendment violations—significant risk of prejudice due to systemic inability to perform—supported by this reliable data and analytics, will readily withstand the “rigorous analysis” now required to meet the commonality requirement of Rule 23(a)(2) for class certification in a post-*Wal-Mart* world,<sup>235</sup> because:

- Plaintiffs have suffered the same injury: significant risk of prejudice;
- Plaintiffs' claims depend on a “common contention” that is of such a nature that it is capable of class-wide resolution: based on the results of the ABA/P&N workload study, the entire class can show they are and will be represented by public defenders who are handling almost five times more cases than they should, and who are therefore incapable of providing reasonably effective assistance of counsel pursuant to prevailing professional norms to each member of the class;<sup>236</sup> and
- This class-wide proceeding has the capacity to generate *common answers* apt to drive the resolution of the litigation: an order that is the

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231. *Id.* at 2.

232. *See supra* notes 188 and 189.

233. *The Louisiana Project, supra* note 230, at 2.

234. *Id.* at Preface.

235. *See Wal-Mart v. Dukes*, 564 U.S. 338, 250 (2011). *See also* *M.D. v. Perry*, 294 F.R.D. 7, 29 (S.D. Tex. 2013).

236. *See The Louisiana Project, supra* note 230, at 3.



functional equivalent of a permanent structural injunction directing each public defender to decline further appointments until their workload is no more than their capacity to provide reasonably effective assistance of counsel pursuant to prevailing professional norms, as determined by the ABA/P&N workload study.<sup>237</sup>

Louisiana Public Defenders will also have available reliable data and analytics to demonstrate that they cannot continue to accept the grossly unreasonable workloads that they are currently carrying because to continue to do so creates a “significant risk” that the representation of one or more of their clients will be materially limited by that lawyer’s responsibilities to another client, in violation of Rule 1.7 of the ABA and Louisiana Rules of Professional Conduct.<sup>238</sup>

There is also a compelling risk-based *Holloway v. Arkansas*<sup>239</sup> right to conflict-free counsel claim that can constitutionalize the Rule 1.7 claim. The ABA/P&N study will demonstrate that because of their excessive workloads each public defender’s representation of any one client is in fact materially limited by their representation of their other clients, and vice versa. Each of their clients is entitled to conflict-free counsel under *Holloway* and its progeny, and none of their clients have such concurrent conflict-free counsel under Rule 1.7. Thus, there is a significant risk that each public defender’s concurrent conflict will significantly affect their performance, resulting in prejudice, at both plea<sup>240</sup> and trial.<sup>241</sup>

Note that all three claims involve risk analyses: significant risk of concurrent conflict in the Rules of Professional Conduct claim; significant risk of prejudice in the conflict-free counsel claim and significant risk of prejudice and the Sixth Amendment claim. None of these three risk-based claims require proof of actual harm or injury; i.e., prejudice.

The proof in this kind of rigorously analytical and structured risk-based claim differs dramatically from the proof presented in the traditional constructive denial case. The proof in each of the three risk-based claims articulated here will focus on the ABA/P&N workload study, supported by expert testimony from both a law and standards expert (ABA) and an econometrics expert (P&N) about the validity, reliability, process and results of the study. If the court accepts the expert testimony that the workload study

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237. *Id.*

238. *See State v. Waters*, 370 S.W.3d 592, 599 (Mo. 2012) (en banc).

239. 435 U.S. 475 (1978).

240. “A reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.” *Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012).

241. Upon a showing that the concurrent conflict affected counsel’s performance, the verdict is deemed unreliable and prejudice is presumed. *Mickens v. Taylor*, 535 U.S. 162 (2002)

is valid and reliable, little else remains to be shown in order to prevail on the risk-based Rule 1.7 claim, the risk-based conflict-free counsel claim and the risk-based Sixth Amendment claim.<sup>242</sup>

That is so because it is virtually self-evident that any professional—doctor, lawyer, engineer, architect, airline pilot, etc. who is doing almost five times as much work as he or she should—is simply incapable of providing reasonably effective professional services under prevailing professional norms to each of their clients or patients or passengers, and therefore there is a significant risk of harm to every one of their clients or patients or passengers. If airline pilots did that, terrible things would happen. If obstetricians did that, terrible things would happen. When public defenders do that, terrible things happen.

In short, when public defenders have workloads that are almost five times their capacity to handle competently, there is a significant risk that: (a) the representation of every one of their clients will be materially limited by their responsibilities to every one of their other clients (systemic Rule 1.7 violation); (b) their Rule 1.7 concurrent conflict will result in prejudice in both cases that end in pleas and those that end in trials<sup>243</sup> (systemic *Holloway v. Arkansas* violation); and (c) their systemic inability to perform will result in prejudice in both cases that end in pleas and those that end in trials<sup>244</sup> (systemic Sixth Amendment violation).

These Rule 1.7, *Holloway*, and Sixth Amendment claims exist in systemic cases even though one or more such public defenders may, from time to time, by triaging their cases and pushing resources to one or more of their cases, provide reasonably effective assistance of counsel pursuant to prevailing professional norms to one or more of their clients. That is so because such triaging is unethical and unconstitutional under Rule 1.7, *Holloway*, and the Sixth Amendment. When public defenders have workloads that are almost five times their capacity to handle competently, each one of them is unavoidably acting unethically and unconstitutionally at all times and at every moment of the day because of their unethical Rule 1.7 concurrent conflicts with every one of their clients and their resulting inability to provide conflict-free and reasonably effective assistance of counsel pursuant to prevailing professional norms to each one of their clients.

The relief requested in a case refusal case (as well as a class action case asserting a risk-based claim of systemic Sixth Amendment violations) is

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242. Notably, the Fourth Circuit Court of Appeal in Louisiana has recently upheld the right and duty of a chief public defender to refuse a trial court appointment to a case because his extensive duties as head of an office facing increasing caseloads and a shrinking budget meant that such an appointment would likely run afoul of both Rule 1.7 and the Sixth Amendment. *State v. Singleton*, No. 2015-K-1099, 2016 WL 3012793, at \*17 (4th Cir. 2016).

243. *See supra* notes 240 and 241.

244. *See supra* notes 188 and 189.

simple and straightforward. The court is requested to enter an order permitting (or requiring in the class action case) each public defender involved to decline appointments in any case until, utilizing the analytics referred to above, each public defender's workload is no greater than their capacity to handle competently.<sup>245</sup> Regular reports of each public defender's workload are to be filed with the court every thirty days, and the court will review each public defender's workload to ensure that each public defender's workload is no greater than his or her capacity to handle competently before making appointments. In the event no public defender or other competent lawyer is available to represent any one or more indigent defendants on the court's docket, the case against such an indigent defendant should be dismissed, and if the defendant is in custody, he or she should be released. The court should retain jurisdiction of the case to enforce its order.

The state will then have the opportunity to choose what it wishes to do with the limited resources it is now providing for public defense. Until the state decides whether it wishes to provide more lawyers and investigators (supply-side solution) or to decriminalize current criminal code provisions that have no public safety consequences<sup>246</sup> (demand-side solution), or both, judges will necessarily have to prioritize cases on their dockets, exercising their inherent power to control their dockets, by assigning counsel to the highest priority, high risk cases, and dismissing those lower risk, lower priority cases where competent and effective counsel cannot be found.<sup>247</sup> Those defendants in custody in such cases must be released.

Our clients (public defenders in case refusal litigation, indigent defendants in class action cases) are entitled to judicial relief long before the system deteriorates all the way down to constructive denial of counsel ("nominal representation"), with lawyers who confer little, if at all, with them, and who are "often completely unresponsive to their urgent inquiries and requests from

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245. For a suggestion of such an injunction, see *State v. Waters*, 370 S.W.3d 592, 612 (Mo. 2012) (en banc).

246. Many of these criminal code provisions involve the criminalization of poverty, homelessness, mental illness, and addiction that has occurred over the course of the last thirty years. These criminal code provisions could be far more effective in deterring and modifying the behavior involved if they were made civil code violations (with no statutory collateral consequences), where social workers, not lawyers, could provide services to those charged far more effectively and efficiently. Rebecca L. Brown, *Decriminalizing Mental Illness: The Need for Treatment Over Incarceration Before Prisons Become the New Asylums for the Mentally Ill*, DIGITAL COMMONS @ URSINIS COLLEGE, July 24, 2015 at 3, 7–9, [http://digitalcommons.ursinus.edu/psych\\_sum/1?utm\\_source=digitalcommons.ursinus.edu%2Fpsych\\_sum%2F1&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](http://digitalcommons.ursinus.edu/psych_sum/1?utm_source=digitalcommons.ursinus.edu%2Fpsych_sum%2F1&utm_medium=PDF&utm_campaign=PDFCoverPages) [<http://perma.cc/Q8PG-NV5M>].

247. See, e.g., *Waters*, 370 S.W.3d at 612.

jail, sometimes for months on end,” two of the most egregious of the parade of horrors detailed by the court in *Hurrell-Harring*.<sup>248</sup>

The American Bar Association filed an amicus brief in *Luzerne County* asking the court to recognize a cause of action where public defender workloads and lack of funding prevent indigent defendants from receiving the “actual, non-trivial representation that *Gideon* demands.”<sup>249</sup> Actual, non-trivial representation is a long way from reasonably effective assistance of counsel under prevailing professional norms. While this brief may have more accurately described the constructive denial standard than anyone else, that is not the standard that anyone, particularly this class of exclusively poor, primarily black and brown people, deserves.

Let me put it another way. If “ideal” is one hundred and “reasonably effective” is sixty and “constructive denial” is ten and “actual denial” is zero, why would we ever say that our clients are not entitled to any judicial relief until and unless we can prove that the system has deteriorated all the way down to ten? Why wouldn’t we say that our clients are entitled to judicial relief once the system dips below sixty? And if we give the courts the choice, which number do you think they will pick?

#### V. DISMISS AND RELEASE: THE *BROWN V. PLATA* ANALOG

Recently in Louisiana, a trial court issued a “dismiss and release” order in a case involving denial of counsel altogether, staying its order pending appeal.<sup>250</sup> The stay order was probably a wise and prudent decision, and such a stay order would probably be a wise and prudent decision if a similar dismiss and release order were issued in the risk-based class action Sixth Amendment claim I have articulated in this article. But we should never disavow a “dismiss and release” order simply because our opponents are sure to claim that the sky will fall (“Dangerous criminals will be released onto our streets!”) if we conform our conduct to the commands of the Constitution.

Such an argument fell on deaf ears in the Supreme Court in *Brown v. Plata*, the California statewide class action claim based on overcrowding in the California prison system.<sup>251</sup> The case started in 1990 as a claim on behalf of

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248. 930 N.E.2d 217, 222 (N.Y. 2010).

249. Brief for American Bar Association as Amicus Curie Supporting Appellants at 2, *Kuren v. Luzerne Cty.*, 146 A.3d 715 (Pa. 2016) (No. 57 MAP 2015, No. 58 MAP 2015), 2015 WL 10818715, at \*1.

250. *State v. Bernard*, No. 528-021, at \*11 (La. Crim. Dist. Ct. Or., Sec. K, Apr. 8, 2016). The court found that the absence of a date certain as to when adequate funding would be made available by the legislature for constitutionally mandated representation of defendants who cannot afford an attorney violates the Sixth Amendment. Subject to the stay order, the prosecutions were to be halted and the defendants were to be released immediately, but the charges were not dropped. *Id.*

251. 563 U.S. 493, 501–02 (2011).

prisoners with serious mental illness who were not receiving minimally adequate mental health care.<sup>252</sup> But in 2007, a Special Master appointed to oversee the state's remedial efforts first reported to the court that mental health care in the California prisons was deteriorating due to increased overcrowding.<sup>253</sup> A remedial consent decree was entered, but when the state had not complied with the decree by 2005, the court appointed a receiver to oversee remedial efforts to reduce overcrowding.<sup>254</sup>

A three-judge court then ordered the state of California to reduce its population to 137.5% of capacity within two years.<sup>255</sup> California prisons were operating at approximately 200% at the time of the decision.<sup>256</sup> The Supreme Court affirmed the three judge court's mandated population limit and found that it was necessary to remedy the violation of the prisoner's constitutional rights to protection from harm under the Eighth Amendment, finding that overcrowding was the primary, but not the only, cause of the violations and that no other relief would remedy the violation.<sup>257</sup> Of course, the state claimed the "the sky would fall" if the order were effectuated and that public safety would be imperiled.<sup>258</sup>

That claim was squarely rejected by the Supreme Court, which found that the three judge panel had correctly considered various available methods of reducing overcrowding—good time credits and diverting low-risk offenders to community programs—that would have little or no effect on public safety.<sup>259</sup> The state was given two years to comply with the order.<sup>260</sup> Justice Kennedy, writing for the *Plata* majority, could not have been clearer about the remedy required to cure the constitutional violation: "This extensive and ongoing constitutional violation requires a remedy, and a remedy will not be achieved without a reduction in overcrowding. The relief ordered by the three-judge court is required by the Constitution . . . . The State shall implement the order without further delay."<sup>261</sup>

The systemic Rule 1.7, conflict-free counsel, and Sixth Amendment claims articulated here deserve a remedy closely analogous to the *Plata* remedy. This kind of injunctive remedy was first articulated by the Missouri Supreme Court in *Waters* where the court approved case refusal as a remedy when public defenders have so many cases that they cannot represent each of their clients

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252. *Id.* at 503, 506.

253. *Id.* at 506–07.

254. *Id.* at 507.

255. *Id.* at 509–10.

256. *Plata*, 563 U.S. at 502.

257. *Id.* at 545.

258. *Id.* at 537.

259. *Id.*

260. *Id.* at 541.

261. *Plata*, 563 U.S. at 545.

competently and effectively.<sup>262</sup> When that occurs, the court noted, trial judges should prioritize cases on their dockets in the interest of public safety, so that the most serious cases are assigned to public defenders, and if no competent public defender can be found to represent those charged with less serious crimes, those cases should be dismissed, and if the defendants in such cases are in custody, they should be released.<sup>263</sup>

The *Plata* overcrowding claim was first brought to the attention of the court in 2001.<sup>264</sup> In 2009, a three-judge court gave the State of California two years to reduce its prison population from 200% of design capacity to 137.5% of design capacity.<sup>265</sup> In the interim, the State of California “made significant progress toward reducing its prison population.”<sup>266</sup> In 2010, the Supreme Court gave the State of California two years from the date the court issued its judgment to comply with that order.<sup>267</sup> That timeline is probably a reasonable expectation for a risk-based claim that asserts a systemic Sixth Amendment violation.

#### CONCLUSION

In his new book, “Louis D. Brandeis, American Prophet,” Jeffrey Rosen traces the evolution of Justice Brandeis’ thought over several decades on the vexing issue of freedom of thought and belief and dissent in a free society.<sup>268</sup> Rosen recounts a conversation between Justice Brandeis and Justice Felix Frankfurter in 1921 in which Brandeis told Frankfurter: “I have never been quite happy about my concurrence in [the] Debs and Schenck cases. I had not then thought the issues of freedom of speech out—I thought at the subject, not through it.”<sup>269</sup>

A compelling argument can be made, it seems to me, that for the last quarter century of the twentieth century and the first sixteen years of the twenty-first century, those of us who have labored in the vineyards of systemic indigent defense reform—myself included—have thought *at* the subject of how to structure the litigation we were bringing, but we have not thought *through* it. We have litigated indigent defense cases with little more than a series of anecdotes, miscellaneous documents, reports about “systemic” deficiencies and expert testimony that had little more than the wholly unreliable 1973 NAC

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262. *State v. Waters*, 370 S.W.3d 592, 612 (Mo. 2012) (en banc).

263. *Id.* at 611–12.

264. *Plata*, 563 U.S. at 507.

265. *Id.* at 502, 510, 542.

266. *Id.* at 544.

267. *Id.* at 542.

268. See JEFFERY ROSEN, LOUIS D. BRANDEIS, AMERICAN PROPHET (Yale Univ. Press 2016).

269. *Id.* at 126 (alteration in original).

Standards for a factual predicate and no principled analytical legal standard. If we are honest with ourselves, we will acknowledge that these claims have been structured by the judiciary, and not by us.

I argue in this article that we now have three viable jurisprudential predicates: a risk-based systemic professional ethics claim, a risk-based systemic conflict-free counsel claim, and a risk-based systemic Sixth Amendment claim. Moreover, we now have a viable factual predicate—reliable data and analytics to analyze the workload of a public defender organization. We can now establish both constitutional and professional ethics systemic indigent defense claims with principled analytic standards that can be met with a focused evidentiary showing using reliable data and analytics.

We might look to the death penalty community of lawyers for guidance. This community of lawyers has produced a remarkable reduction in the number of death penalties actually meted out since the terrible loss in *Gregg v. Georgia*.<sup>270</sup> Indeed, many now believe that the end of this ignominious institution is in sight and that a turning point in those efforts occurred during the period 2000 to 2005 with the Supreme Court victories in *Rompilla v. Beard*,<sup>271</sup> *Wiggins v. Smith*,<sup>272</sup> and *Williams v. Taylor*.<sup>273</sup>

All three cases relied on the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* and the *CJS Standards for the Defense Function*.<sup>274</sup> All three cases imposed heavy financial burdens on the state to adequately fund mitigation investigation and litigation.<sup>275</sup> The result was twofold: first, it would cost the state a great deal more money to litigate death penalty cases; second, once they were adequately funded with the enormous investigation and litigation resources required for adequate mitigation in each and every one of these cases, the death penalty lawyers were successful in a much greater percentage of these cases. It turns out that if we are adequately funded, we can mitigate almost anyone. Prosecutors hate to lose cases. Cities and counties hate to spend huge sums of

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270. 428 U.S. 153, 207 (1976).

271. 545 U.S. 374, 390, 393 (2005) (holding failure to examine file on defendant's prior conviction at sentencing phase of capital trial was ineffective assistance of counsel).

272. 539 U.S. 510, 534, 537–38 (2003) (holding inadequate investigation for mitigating evidence constituted ineffective assistance of counsel).

273. 529 U.S. 362, 399 (2000) (holding failure to present mitigating evidence during sentencing constituted ineffective assistance).

274. *Rompilla*, 545 U.S. at 387, n. 7; *Wiggins*, 539 U.S. at 522; *Williams*, 529 U.S. at 396.

275. See *Rompilla*, 545 U.S. at 404 (Kennedy, J., dissenting) (arguing the majority's holding will "saddle States with . . . considerable costs").

money on risky death penalty litigation. We are killing a lot fewer people than we used to.<sup>276</sup>

The litigation strategy that I propose here is similar in many respects to that death penalty litigation strategy. It is based on the remarkable work done by Norman Lefstein<sup>277</sup> and the ABA's Standing Committee on Legal Aid and Indigent Defendants with the issuance of the *Ten Principles of a Public Defense System* in 2002 (specifically Principle 5 regarding excessive workloads),<sup>278</sup> the issuance of the ABA's Standing Committee on Ethics and Professional Responsibility's Formal Opinion that public defenders faced with excessive workloads must not accept new clients,<sup>279</sup> and issuance of the *Eight Guidelines of Public Defense Related to Excessive Workloads* in 2009 which provided a detailed action plan for declining representation in the face of excessive workloads.<sup>280</sup> The *Waters* court specifically relied on the *Eight Guidelines* in concluding that public defenders have the right (and the duty) to refuse additional appointments when faced with excessive workloads.<sup>281</sup>

By establishing the right and duty to refuse additional cases unless and until we are adequately funded to provide reasonably effective assistance of counsel under prevailing professional norms, the cost to the state of its stubbornly continuing the criminalization of poverty, the criminalization of homelessness, the criminalization of drug addiction, and the criminalization of mental illness that has occurred in the last thirty years will be dramatically increased. And like our death penalty brethren, we will undoubtedly prevail in many more of our cases once we are adequately funded. And we will start getting better deals from our prosecutor friends.

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276. Only twenty-eight executions took place in 2015, compared to eight-five in the year 2000. *Facts About the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/executions-year> [http://perma.cc/9HMQ-R5MA].

277. Dean Lefstein can truly be considered the architect of the modern indigent defense reform movement.

278. ABA Standing Committee on Legal Aid and Indigent Defendants, *Ten Principles of a Public Defense Delivery System* (Feb. 2002), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf) [http://perma.cc/F8H4-6W2A].

279. ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-441: Ethical Obligations of Lawyers Who Represent Indigent Defendants when Excessive Caseloads Interfere with Diligent and Competent Representation (May 13, 2006), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_train\\_aba\\_ethics\\_on\\_excessive\\_caseloads.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_train_aba_ethics_on_excessive_caseloads.authcheckdam.pdf) [http://perma.cc/LF7W-2LS6].

280. ABA Standing Committee on Legal Aid and Indigent Defendants, *Eight Guidelines of Public Defense Related to Excessive Workloads* (Aug. 2009), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_eight\\_guidelines\\_of\\_public\\_defense.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf) [http://perma.cc/RV64-NC39].

281. *See State v. Waters*, 370 S.W.3d 592, 608 (Mo. 2012) (en banc).



Constructive denial of counsel claims, even if successful, turn these principles on their heads. We, not the state, must spend huge sums of money and enormous amounts of time to establish our claim. Risk-based claims for systemic Sixth Amendment violations, on the other hand, when successful, *require* the state to lower caseloads,<sup>282</sup> which means states must either spend huge sums of money (supply-side solution with many more lawyers and investigators) or significantly shrink the system (demand-side solution decriminalizing the lower-risk cases in the system).

My critique of the constructive denial of counsel claim in this article should in no way be read as a criticism of the lawyers, experts, and others who have engaged in the overwhelmingly arduous and costly work required to achieve reform under that standard. Those efforts were extraordinary, laudatory, and conducted in the highest and best traditions of our profession. And in fairness to them, as I show above, they first brought a risk-based claim for systemic Sixth Amendment violations to the courts, only to have the courts misconstrue that claim as a performance-based claim and then restate that claim as a systemic claim for constructive denial.<sup>283</sup> I simply argue here that there is a better, more focused, more principled, and more powerful way forward, employing a principled analytical standard that can be met with a focused evidentiary showing using reliable data and analytics.

One final caveat. Conceivably, some courts may be tempted to view the risk-based Sixth Amendment claim that I have articulated here as the same kind of performance-based claim appropriately rejected by the *Luckey* court for a systemic pre-trial Sixth Amendment challenge to an indigent defense system. This is because I posit here that the appropriate test in such a challenge is a significant risk of prejudice due to a systemic inability to perform, and courts are accustomed to treating the prejudice standard as an essential part of a performance-based individual post-conviction claim. However, I have faith that the courts will understand that proving prejudice after conviction is fundamentally different from proving a significant risk of prejudice to a defendant pretrial. In short, I believe that the courts, and hopefully the rest of us, will no longer merely think at this subject, but will now begin thinking through it.

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282. *Id.* at 612.

283. *See Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010).