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# Constitutional Law: Making a Case for Preserving the Integrity of Minnesota's Public Defender System: *Kennedy v. Carlson*, 544 N.W.2D 1 (Minn. 1996)

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**CONSTITUTIONAL LAW: MAKING A CASE  
FOR PRESERVING THE INTEGRITY OF  
MINNESOTA'S PUBLIC DEFENDER SYSTEM:  
KENNEDY V. CARLSON, 544 N.W.2d 1(Minn. 1996).**

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## I. INTRODUCTION

*People v. Simpson*<sup>1</sup> led many citizens to believe that what they saw on television is how most criminal proceedings take place. Many viewers who watched the trial attained what they perceived as detailed insights into the mechanism known as the criminal trial. One misperception many viewers developed is that all criminal defendants benefit from similar zealous representation.<sup>2</sup> The *Simpson* case, however, was far from representative of the norm.<sup>3</sup>

The *Simpson* case revealed the contradiction between an ideal and reality.<sup>4</sup> The ideal is an adversarial system that determines truth through the advocacy of both parties. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."<sup>5</sup> The right to counsel as provided for by the Sixth Amendment to the United States Constitution is fundamental to realizing this ideal.<sup>6</sup> A criminal defendant cannot realistically hope to defend himself and his constitutional rights without the aid of an attorney.<sup>7</sup> Thus, without effective assistance of

1. *People v. Simpson*, No. BA097211 (Sup. Ct. L.A. County 1995).

2. Elizabeth Gleick, *Rich Justice, Poor Justice; Did We Need O.J. to Remind Us That Money Makes All the Difference—In the Trial and in the Verdict?*, TIME, June 19, 1995, at 40.

3. *Id.* The amount of money spent by O.J. on his defense demonstrates the uniqueness of his case. Simpson "spent \$5 million to \$6 million by the end of the trial." *Id.*; see also Barbara Babcock, *Equal Justice—and a Defendant With the Money to Exercise Every Right*, L.A. TIMES, July 10, 1994, at A26 (citing the fact that Simpson's attorneys "assembled a team of half a dozen lawyers plus forensic pathologists, criminal investigators, analysts and paralegals . . ."); Alan Abrahamson, *Simpson Legal Fees Could Run Into Millions*, L.A. TIMES, July 9, 1994, at A1 (quoting a defense attorney as stating that if prosecution will not spare any expense then neither will the defendant).

4. See Babcock, *supra* note 3, at A26.

5. Rodger Citron, Note, *(Un)Luckey v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 481 (Nov. 1991) (citing Herring v. New York, 422 U.S. 853, 862 (1975)).

6. *United States v. Cronin*, 466 U.S. 648, 653 (1984) (citing *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)).

7. *Id.* at 653. The presence of an attorney "is essential because they are the means through which the other rights of the person on trial are secured." *Id.*

counsel an ideal adversarial criminal justice system cannot exist.<sup>8</sup>

The Sixth Amendment, however, did not articulate precisely how a poor person was to exercise his or her right to an attorney when he or she could not afford one. The Supreme Court responded to this dilemma when it held, in the renowned case of *Gideon v. Wainwright*,<sup>9</sup> that the state must provide the indigent defendant with counsel to guarantee the defendant's right to due process. Since the *Gideon* ruling, the criminal justice system has repeatedly tried to figure out how to provide the assistance of counsel both effectively and economically. Despite the system's efforts to balance these competing interests, there is little doubt that for the most part, the system is failing.

In the past, Minnesota's response to *Gideon*'s mandate has been somewhat successful.<sup>10</sup> Yet, Minnesota's success quickly dissipated as the 1990s progressed.<sup>11</sup> Significant changes in the law, the complexity of charges, and the number of indigent criminal defendants have placed the current indigent defense mechanism in jeopardy.<sup>12</sup> In light of recent statutory changes, the increasing number of indigent defendants, and the impending threat of federal spending cuts,<sup>13</sup> it is

8. *Id.* at 653-54. The Court notes that "if the process loses its character as a confrontation between adversaries [in the adversarial criminal trial], the constitutional guarantee is violated." *Id.* at 656-57.

9. 372 U.S. 335 (1963).

10. See Elaine Song, *Better Than Some, Worse Than Others; The CCLU Charges in Its Recent Suit That the State's Public-Defender System Is in Crisis. Here's How Connecticut Compares With Other State Systems*, CONN. LAW. TRIB., Jan. 16, 1995, 1 (citing Wisconsin and Minnesota as examples from which Connecticut could learn how to administer a public defense system).

11. See THE SPANGENBERG GROUP, WEIGHTED CASELOAD STUDY FOR THE STATE OF MINNESOTA BOARD OF PUBLIC DEFENSE—DRAFT REPORT 18-20 (1991) [hereinafter SPANGENBERG DRAFT REPORT] (on file with author and State Board of Public Defense).

12. See *id.* at 20-21.

13. See Brad Hayward, *Controller Takes Finger Off 'Trigger'—Budget Cuts Avoided*, SACRAMENTO BEE, Oct. 17, 1995, at A3. All states are uncertain as to what impact federal cutbacks will have on state programs. For example, "California can expect to get \$510 million less in federal aid for welfare and immigration than it budgeted for . . . and its long-term financial picture will be complicated by changes in federal welfare policy and the impact of the 'three strikes and you're out' sentencing law." *Id.* (quoting Kathleen Connell, state controller).

As for Minnesota, it "stands to lose about \$265 million . . . in mid-year cuts under a bill passed by Congress, and an estimated \$171 million under the Senate plan . . ." Jean Hopfensperger, *State Groups Monitoring Changes That Could Come As Soon As Summer*, STAR TRIB. (Minneapolis), Apr. 10, 1995, at A1. The threat of federal cutbacks are also visible at the municipal level. See Ann Baker, *Cities Share Federal Budget-Cut Fears*, ST. PAUL PIONEER PRESS, Nov. 29, 1995, at B2 (noting that city officials from St. Paul, Minnesota, Toledo, Ohio and Louisville, Kentucky, all acknowledge that they "expect to feel the brunt of expected new federal spending caps in health and welfare areas that may not reflect inflationary costs and growth in populations of the poor, disabled and elderly."); see also Kevin Diaz, *Sayles Belton Outlines Cuts in Preliminary 1996 Budget*, STAR

clear that Minnesota's public defender system needed to act. So it did in the case of *Kennedy v. Carlson*.<sup>14</sup>

This Commentary asserts that the Minnesota Supreme Court abrogated the court's duty to protect the rights of the poor and to preserve the integrity of the adversarial system when it held that Minnesota constitutionally finances its public defense system. The court should have communicated to the legislature that the method currently employed is constitutionally defective. Instead, the supreme court deferred to the other government branches' assessment of what constitutes adequate financial support for the defense of the indigent. Furthermore, the court should have more thoroughly scrutinized the current state of affairs. If the court had conducted a more thorough analysis of the situation at hand, it would have seen how close the current system teeters near the brink of disintegration. This Commentary concludes that the Minnesota Supreme Court failed to recognize that it must act now to preserve the indigent defendant's right to effective representation.

Furthermore, the Minnesota Supreme Court must become much more critical when assessing whether indigent defendants receive quality representation. The supreme court must place the other branches of government on notice that it will not tolerate the abrogation of the constitutional rights of the poor. The court can communicate this message by demonstrating a willingness to overturn the conviction of an indigent defendant when the representation hints at being subpar. Thus, only additional funding and adequate judicial support can adequately transform Minnesota's public defender system into one that provides effective legal assistance to the poor criminal defendant.

Part I of this Commentary outlines the origins and the development of the indigent defendant's right to counsel. Part II describes the various types of indigent defense systems<sup>15</sup> currently used in the United States, as well as the particular program implemented in Minnesota. Part III looks at the current state of indigent defense systems, and notes that changing criminal sentencing statutes, rigorous drug enforcement efforts, and inadequate funding continually batter

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TRIB. (Minneapolis), Aug. 16, 1995, at A1 (noting uncertainties associated with federal cutbacks may result in a six million dollar budget shortfall); Sharon Schmickle, *Minnesotans See Federal Budget Cuts Hitting Home*, STAR TRIB. (Minneapolis), Mar. 31, 1995, at A1 (reporting that "[e]ven before the decisions are final, programs such as one that was to fund jobs this summer for 2,500 young people in Hennepin County and thousands elsewhere have been disrupted . . .").

14. 544 N.W.2d 1 (Minn. 1996).

15. Although there are three model indigent defense programs, this Commentary will use "public defender" when it refers to Minnesota's indigent defense system, since Minnesota currently uses a public defender model program.

and bruise a system which already operates under unrealistic government expectations. Part IV reviews the events leading to *Kennedy v. Carlson*, each parties' arguments, and both the trial court and Minnesota Supreme Court's order and reasonings.

Finally, Part V criticizes the Minnesota Supreme Court's failure to agree with the trial court's conclusions. It presents a case for how the supreme court should commence the reformation process of the current public defender system. The Minnesota Supreme Court is capable of initiating this process by taking a firm position against permitting such abuses to continue, and crafting a remedy to compel the legislature to evaluate and amend Minnesota's indigent defense system. This Commentary concludes that only a remedy which forces the other branches of government to alter the current state of indigent defense will suffice.

## II. THE RIGHT TO COUNSEL: WHERE DID IT COME FROM AND WHY IS IT HERE?

### A. *Prior to the Twentieth Century*

The right to counsel, as laid out in the Sixth Amendment to the United States Constitution, has its roots in English jurisprudence.<sup>16</sup> The right to use the services of an attorney in a criminal case first appeared in England during the twelfth century.<sup>17</sup> At that time, the English government allowed defendants to secure counsel in all civil and misdemeanor cases.<sup>18</sup> The royal government limited the role of counsel to these situations since the crown, due to its perception that it was always vulnerable to attack, sought to preserve any advantage it had over its enemies.<sup>19</sup>

After the Revolution of 1688, in which the English Government became more stable, the crown still viewed itself as relatively weak.<sup>20</sup> The crown, therefore, continued to protect itself from its enemies.<sup>21</sup> Even after the Treason Act of 1695 led to criminal procedure reforms, only defendants charged with either misdemeanors or treason

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16. ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE* 3 (1992).

17. ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791*, at 5-6 (1991). The Statute of Merton, enacted in 1236, exemplifies one of the first governmental grants of this privilege. *Id.*

18. FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION TO THE UNITED STATES 9-10* (1969).

19. *Id.* at 10.

20. GARCIA, *supra* note 16, at 3.

21. HELLER, *supra* note 18, at 10.

possessed the right to counsel.<sup>22</sup>

It is of little surprise that the early American colonists, like the English, attempted to limit the role of lawyers in society. The role of the lawyer was minimal for three reasons. First, some colonists viewed English law as oppressive and did not wish to promulgate it.<sup>23</sup> Second, the clergy and land-owning aristocracies viewed "lawyers as a threat to their respective power and status."<sup>24</sup> Finally, the English government resolved that those individuals who established the American colonies under English grants had to adopt English law.<sup>25</sup> For example, the first Virginia charter issued under James I in 1606 included a covenant which expressed that all colonists shall have the same rights in the New World as they possessed in England.<sup>26</sup> When the colonies adopted English law they also adopted English common law procedure. Thus, just as it was in England, the early colonists' "key protection from government arbitrariness and oppression was not the right to counsel but the right to trial."<sup>27</sup>

Over time, however, the colonists began to recognize the importance of the right to counsel. One reason for this change was America's use of "the inquisitorial institution of the public prosecutor."<sup>28</sup> Inevitably, as public prosecutors became more experienced with criminal procedure and the law's idiosyncrasies, it became increasingly difficult for the layperson to represent himself.<sup>29</sup> Another reason the legal profession began to flourish in the New World was that the colonies discarded English common law.<sup>30</sup> As a result, legal codes and courts

22. GARCIA, *supra* note 16, at 3. The Treason Act of 1695 also enacted many reforms of which the most important was the right to notice and compulsory process. *Id.* "And not until 1836 was the privilege of counsel extended to persons accused of felonies other than treason." HELLER, *supra* note 18, at 10.

23. William F. McDonald, *In Defense of Inequality: The Legal Profession and Criminal Defense*, in THE DEFENSE COUNSEL 20 (1983). "The hostility toward lawyers as a class generated during the Puritan Revolution in England was exaggerated in the colonies." *Id.*

24. *Id.* at 21. This seems to have been a legitimate concern of both groups. Lawyers and the aristocracy competed for power with each other for many years in Virginia. Lawyers threatened the clergy because "they were the men of learning in their communities." Thus, lawyers jeopardized their supremacy before the tribunals. *Id.* Furthermore, the religious temperament of the first colonists also limited the role of lawyers in the New World. For example, the first leaders in Massachusetts "were overly zealous in their efforts to prevent and suppress any manifestation of independence in religious or political matters." 1 ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA: THE COLONIAL EXPERIENCE 56 (1965).

25. CHROUST, *supra* note 24, at 56.

26. HELLER, *supra* note 18, at 14.

27. McDonald, *supra* note 23, at 21.

28. GARCIA, *supra* note 16, at 4.

29. GARCIA, *supra* note 16, at 4.

30. CHROUST, *supra* note 24, at 56-57.

developed that were unique to the colonies.<sup>31</sup>

These legal transformations, therefore, led laypersons to seek out those individuals who were familiar with the quickly developing law.<sup>32</sup> “Despite the strong antilawyer sentiments, provisions were made in some colonies for a right to counsel; in practice, in some places counsel were appointed in needy cases even before such appointments were required as a matter of law.”<sup>33</sup> The fact that most of the new states, after the American Revolution, enacted some sort of statutory or state constitutional provision regarding the right to counsel further evidences the new appreciation for the value of lawyers.<sup>34</sup> Thus, an attorney’s assistance became essential to counter the prosecutor’s abilities and to help America craft its own system of law.

At the time the Federal Constitution was being drafted, many states had guaranteed several criminal procedural rights in their own constitutions.<sup>35</sup> “Accordingly, it was natural that opposition to the Federal Constitution arose in part because of the procedural protections accorded the accused in state constitutions . . . were conspicuously missing from the new document.”<sup>36</sup> To encourage the adoption of the Federal Constitution, the Framers consequently added the Bill of Rights.<sup>37</sup> The Bill of Rights included the Sixth Amendment which states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and have the Assistance of Counsel for his

31. CHROUST, *supra* note 24, at 56-57.

32. CHROUST, *supra* note 24, at 56-57.

33. McDonald, *supra* note 23, at 23. “In Connecticut, for instance, there was no statutory provision for the appointment of counsel in criminal cases until 1818. Yet the custom had been since 1750 to appoint counsel if the accused requested it.” *Id.* The colonies of Delaware, Virginia, Rhode Island, Georgia, Pennsylvania, and North Carolina enacted provisions that mandated practices similar to those in Connecticut. *See id.* at 23-25.

34. McDonald, *supra* note 23, at 24. The first document protecting the right to counsel was the Massachusetts Body of Liberties, § 29. This was also the first American guaranty of the right to counsel. BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND* 199 (1977). Article 16 of the New Jersey Constitution was the first state constitutional protection enacted. *Id.* It stated “[t]hat all criminals shall be admitted to the same privilege of witnesses and counsel, as their prosecutors are or shall be entitled to . . . .” HELLER, *supra* note 18, at 22.

35. *See* HELLER, *supra* note 18, at 21-22.

36. GARCIA, *supra* note 16, at 4.

37. EUGENE W. HICKOK JR., *THE BILL OF RIGHTS* 366 (1991).



defence.<sup>38</sup>

Moreover, the right to the assistance of counsel did not mean the right to *appointed* counsel.<sup>39</sup> At the time the Sixth Amendment was enacted, the right to the assistance of counsel meant only that an accused person could retain an attorney at his or her own expense if he or she wished to do so.<sup>40</sup> The Sixth Amendment, however, says nothing about how the poor are to secure the services of an attorney.<sup>41</sup> Thus, although the development of the right to the assistance of counsel progressed tremendously during the colonial period, it did not extend to the poor in America via the Sixth Amendment until the Twentieth Century.<sup>42</sup>

### B. *The Sixth Amendment Reaches the Poor*

The Sixth Amendment lay dormant for approximately 140 years,<sup>43</sup>

38. U.S. CONST. amend. VI.

39. HICKOK JR., *supra* note 37, at 366.

40. See Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 439 (1993). The Sixth Amendment also moved America's jurisprudence from English influence by eliminating laws that forced accused individuals to represent themselves. *Id.* at 438-39.

41. HELLER, *supra* note 18, at 110. This interpretation of the Sixth Amendment is inferable from the Judiciary Act of 1789 and the Federal Crimes Act of 1790. Section 35 of the Judiciary Act of 1789 states that "in all courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct cases therein." *Id.* (citing Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 92). The Judiciary Act gave the criminal defendant the right to manage his or her defense with the assistance of counsel at his or her discretion. Furthermore, the only Congressional enactment expressly providing for counsel was the Federal Crimes Act of 1790. It provided that the federal judiciary had to appoint counsel only in capital cases. *Id.* (citing Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 112, 119 (reenacted as § 1034, Revised Statutes) and 18 U.S.C. § 503 (1940)).

42. HICKOK JR., *supra* note 37, at 367.

43. Charles W. Wolfram, *Scottsboro Boys in 1991: The Promise of Adequate Criminal Representation Through the Years*, 1 CORNELL J.L. & PUB. POL'Y 61, 62 (1992). Although the Legal Aid movement began to evolve in the late 1800s, it limited the scope of its assistance to civil litigation. The first organized office, titled "public defenders," was established in Oklahoma in 1911. The Los Angeles Public Defender Office came into existence in 1912, and in 1914, became a department of the County of Los Angeles' government. As America's urban populations bloomed with the numerous waves of immigrants taking up residence in the United States, the assigned counsel systems that existed previously could not manage the rigorous new demands of a flourishing low income population. "The failure of the assigned counsel system to meet—particularly in the great urban centers—the growing needs of the indigent defendant created an environment in which new systems could evolve." SPECIAL COMMITTEE OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. AND THE NATIONAL LEGAL AID AND DEFENDER ASS'N, EQUAL JUSTICE FOR THE ACCUSED 44-46 (1959) [hereinafter EQUAL JUSTICE FOR THE ACCUSED].

until the Supreme Court recognized the right to appointed counsel in the infamous case of *Powell v. Alabama*.<sup>44</sup> The facts of this case serve as a prime example of justice at its worst. The defendants in *Powell* were seven poor, uneducated African-American males from out of state that were charged with raping two Caucasian women in the heart of Alabama during the 1920s.<sup>45</sup> Counsel did not assist any of the seven defendants during their one-day trials,<sup>46</sup> nor was there any legitimate attempt to provide them with an attorney.<sup>47</sup> Not surprisingly, the jury convicted all seven defendants and “the court imposed the death sentences . . . barely two weeks after the alleged offense.”<sup>48</sup> The Supreme Court held that the death penalty convictions violated the Due Process Clause of the Fourteenth Amendment, and asserted:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He requires the guiding hand of counsel at every step in the proceedings against him.<sup>49</sup>

Thus, the Court recognized the importance of counsel, but focused on the egregious facts involved in the case to constrain the reach of its holding.<sup>50</sup>

In *Johnson v. Zerbst*,<sup>51</sup> the Supreme Court took another step towards

By 1959, the following states provided some form of appointed counsel “for indigent defendants accused of major, non-capital, offenses.” The states that compensated counsel when assignment of an attorney was at the trial court’s discretion were Colorado, Maine, Maryland, Michigan, Texas and Vermont. The states that compensated counsel when the assignment was mandatory upon the defendant’s request were Idaho, Iowa, Minnesota, Montana, New Hampshire, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Washington, Wisconsin and Wyoming. The states that made the appointment of counsel mandatory for indigent defenders accused of major non-felony offenses were Arkansas, Arizona, California, Connecticut, Delaware, Kansas, Indiana, Massachusetts, Nebraska, Ohio, Virginia and West Virginia. *Id.* at Diagram in Appendix.

44. 287 U.S. 45, 52 (1932).

45. *Id.* at 49.

46. *Id.* at 49-50.

47. Wolfram, *supra* note 43, at 62. When the defendants first appeared for trial, some of them did have an attorney. Yet, the trial judge would not allow the attorney to assist the defendants since he was a member of the Tennessee bar. The trial judge appointed the entire bar of Scottsboro, Alabama in a half-hearted attempt to resolve the problem. “With responsibility defused, indefinite, and impersonal, the appointment of all led to the effective appearance of no one who could provide a real defense.” *Id.*

48. Wolfram, *supra* note 43, at 62.

49. *Powell*, 287 U.S. at 68-69.

50. *Id.* at 71. Some of the factors the Court focused upon were the defendants’ youth, lack of education, the intense public hostility against the defendants, the nature of the charges, and the distance between them and their families. *Id.*

51. 304 U.S. 458 (1938). The U.S. Government prosecuted the two petitioners for the possession of and the passing of counterfeit “twenty-dollar Federal Reserve notes.”

recognizing a defendant's right to the assistance of counsel. The Court held that "[t]he Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."<sup>52</sup> Thus, the Court continued the process of giving the Sixth Amendment meaning by shifting, in federal prosecutions, a defendant's right to counsel from a question of fundamental fairness to a mandatory procedure.

In *Betts v. Brady*,<sup>53</sup> however, the Court appeared hesitant to extend the right to counsel into the state courts. The Court ruled that the concept of due process as incorporated in the Fourteenth Amendment did not obligate the states to provide a criminal defendant with counsel.<sup>54</sup> The Court reasoned that the history of the right to counsel in the states demonstrates that the decision to require the appointment of counsel is in the hands of the states.<sup>55</sup> It also asserted that it could not force the states to provide counsel because, under the Due Process Clause, the Court could not define those circumstances when the right to counsel becomes necessary to ensure fundamental fairness.<sup>56</sup> Consequently, the Court preferred to continue to rely on its previously declared view that the Due Process Clause of the Fourteenth Amendment only "prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental

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*Id.* at 460.

52. *Id.* at 463. The Court also held that defendants, even those who are not indigent, must be apprised of their Sixth Amendment right to counsel in order for them to properly waive the right to the assistance of counsel. *Id.* at 468. If this does not occur, "the Sixth Amendment stands as a jurisdictional bar to a valid conviction . . ." *Id.* The Supreme Court also used this case to establish what constitutes a valid waiver of a defendant's constitutional rights. The Court held that "[t]he determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* at 464.

53. 316 U.S. 455 (1942).

54. *Id.* at 471.

55. *Id.* at 471-72. Of all the state constitutions enacted at the time of this ruling, every one, except Virginia's, contained a provision dealing with this issue. *Id.* at 467. The Court found that "[t]hose of nine States may be said to embody a guarantee textually the same as that of the Sixth Amendment." *Id.* at 467-68. On the other hand, it also found that in most states, their constitutional provisions reflect the pre-Constitutional sentiment that a defendant has the right to representation if he or she procures it. *Id.* at 468.

56. *Id.* at 473. The Court believed the Due Process Clause did not enable them to define when counsel is necessary. Justice Roberts argued that a literal reading of the Due Process Clause "would require the furnishing of counsel in civil cases involving property." The Court avoided this difficulty by relying on notions of fundamental fairness instead. *Id.*

ideas of fairness and right . . . .”<sup>57</sup>

The reasoning of *Betts*, however, came crashing down when the Court ruled in the seminal case of *Gideon v. Wainwright* that the right to counsel is a fundamental right and “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”<sup>58</sup> The Court recognized that since America’s law enforcement agencies now spend large amounts of money prosecuting criminals, the defendant’s need for an attorney must simultaneously transform from a luxury to a procedural necessity.<sup>59</sup> The Court, in summarizing why it abandoned *Betts*’ holding, succinctly reasoned:

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.<sup>60</sup>

Although *Gideon* established an indigent defendant’s right to appointed counsel, it did not define when counsel should be made available to a defendant. In the years succeeding *Gideon*, the Court set out to define these parameters.<sup>61</sup> For example, on the same day the Court decided *Gideon*, it held that a criminal defendant has the right to the assistance of counsel for his or her first appeal.<sup>62</sup> Four years later, in *In Re Gault*,<sup>63</sup> the Court held that juveniles also have the right to appointed counsel when they are subject to a loss of liberty for acts that, if committed by an adult, would constitute a crime.<sup>64</sup> Finally, the apex of the evolution of the right to counsel culminated in

57. *Id.*; see GARCIA, *supra* note 16, at 8 (noting that this standard amounted to an “insurmountable barrier” for most defendants, since they had to show that either they suffered prejudice by proceeding without counsel or that the special circumstances of the case necessitated counsel).

58. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

59. *Id.*; see GARCIA, *supra* note 16, at 9 (noting that as the government expends more resources to secure a conviction the need for a defendant to have a lawyer also escalates).

60. *Gideon*, 372 U.S. at 344.

61. See GARCIA, *supra* note 16, at 8.

62. *Douglas v. California*, 372 U.S. 353, 358 (1963). “[W]here the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.” *Id.* at 357; see GARCIA, *supra* note 16, at 8 (observing that the Court relies on the mandate of the Due Process and Equal Protection Clauses rather than the language of the Sixth Amendment).

63. 387 U.S. 1 (1967).

64. *Id.* at 36-38.

*Argersinger v. Hamlin*.<sup>65</sup> The Court articulated that “absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty misdemeanor, or felony, unless he was represented by counsel at his trial.”<sup>66</sup> Thus, *Gideon*, *Argersinger*, and *Gault* established the essential structure for appointing counsel to indigent defendants in criminal cases.<sup>67</sup>

Based upon these cases, the Court extended the right to counsel to a wide range of criminal proceedings.<sup>68</sup> It is clear, however, that *Gideon*, and the decisions made afterwards, stand for the Court’s recognition “that indigency should not constitute a barrier to the fair procedures integral to an adversary process of adjudication.”<sup>69</sup> After all of these decisions, however, a key question still remained: How are the states to provide appointed counsel to thousands of indigent criminal defendants?

### III. PROVIDING ASSISTANCE OF COUNSEL

#### A. Overview of Systems Used Nationwide

Prior to *Gideon*, indigent criminal defendants who received counsel did so due to the efforts of unpaid attorneys or charitable legal

65. 407 U.S. 25 (1972).

66. *Id.* at 37. The Court refrained from ruling that the right to counsel is dependent upon whether the trial is by jury or judge. *Id.* at 29-31. The Court rationalized its approach for its conclusion stating that “[w]e are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more.” *Id.* at 33. Justice Powell, in asserting that the majority’s rule does not go far enough, asserted that “[w]hen the deprivation of property rights and interests is of sufficient consequence, denying the assistance of counsel to indigents who are incapable of defending themselves is a denial of due process.” *Id.* at 48 (Powell, J., concurring). Powell predicted very accurately that even the majority’s rule would “have a seriously adverse impact upon the day-to-day functioning of the criminal justice system.” *Id.* at 52. The Court dismissed Powell’s view in *Scott v. Illinois*, 440 U.S. 367 (1979), when it held that the denial of counsel occurs only when a person’s conviction actually results in incarceration. *See id.* at 373-74.

67. Randolph N. Stone, *The Role of State Funded Programs in Legal Representation of Indigent Defendants in Criminal Cases*, 17 AM. J. TRIAL ADVOC. 205, 207 (1993).

68. *See, e.g.*, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation and parole revocation); *Kirby v. Illinois*, 406 U.S. 682 (1972) (post-indictment line-ups); *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearings); *Johnson v. Avery*, 393 U.S. 483 (1969) (for collateral attack in limited circumstances); *United States v. Wade*, 388 U.S. 218 (1967) (pre-indictment line-ups); *Miranda v. Arizona*, 384 U.S. 436 (1966) (right to counsel in custodial interrogations); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (arraignments).

69. GARCIA, *supra* note 16, at 11.

assistance.<sup>70</sup> In response to *Gideon's* mandate, however, state and county governments were required to implement some method of supplying the indigent with legal representation. Basically, three model systems evolved from this process.<sup>71</sup>

One method of providing the indigent criminal defendant with counsel is the contract system. In a contract system, either the state or county government "receives bids from private law firms to handle all or a portion of the county's indigent criminal cases."<sup>72</sup> The second method of providing indigent representation is the assigned counsel program.<sup>73</sup> This system typically consists of a trial court appointing a private attorney to a case and then the county or state compensates the attorney.<sup>74</sup> The third model is the public defenders office. With this

70. Jeffrey H. Rutherford, Comment, *Dziubak v. Mott and the Need to Better Balance the Interests of the Indigent Accused and Public Defenders*, 78 MINN. L. REV. 977, 982 (1994). See generally Suzanne E. Mounts & Richard J. Wilson, *Systems for Providing Indigent Defense: An Introduction*, 14 N.Y.U. REV. L. & SOC. CHANGE 193 (1986); William H. Beaney, *The Right to Counsel*, in THE RIGHTS OF THE ACCUSED IN LAW AND ACTION 147 (1972) (presenting the typical work of indigent defense lawyers).

71. See NATIONAL CENTER FOR STATE COURTS, INDIGENT DEFENDERS: GET THE JOB DONE AND DONE WELL 13 (May 1992) [hereinafter NATIONAL CENTER FOR STATE COURTS]. Although states and counties implement different defense system models, the funding methodologies for these programs are very similar. Each system relies on either state or county financing, or some combination of the two. *Id.*

72. STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES, 5-3.1 cmt. (A.B.A. 1992). "Contract systems for the delivery of defense services were a new phenomenon in the 1980s." *Id.* In 1986 contract systems accounted for 11% of county defense systems. *Id.* These systems proliferated during this time due to the Supreme Court's disdain for public defender offices representing multiple defendants. *Id.* Public defenders also became concerned with this apparent conflict of interest. Plus, contract systems seemed like a less costly alternative to public defender systems. *Id.*

The value of contract defense systems is questionable. Meredith Anne Nelson, Comment, *Quality Control for Indigent Defense Contracts*, 76 CAL. L. REV. 1147 (1988). When government administrators consider bids, they tend to rely on the cost of the contract as the sole criterion in making their decision. *Id.* at 1150. This leads attorneys to underbid and ultimately results in attorneys spending less time with clients and looking for the most cost-effective resolution of the case. *Id.* Thus, although contract systems appear to give governments a cost-effective means of providing counsel, studies show that "the contract system may provide less effective representation and fewer legal services." *Id.* at 1151.

73. Nancy Gist, *Assigned Counsel: Is the Representation Effective?*, 4 CRIM. JUST. 16 (Summer 1989).

74. *Id.* at 17. Typically the assigned counsel approach is not a program or system. "[M]ore often than not 'assigned counsel program' is simply a euphemism for an ad hoc method of providing defendants with lawyers, with judges or clerks recruiting and assigning attorneys who are present in the courtroom or who are readily available to represent indigent defendants." *Id.* Commentators repeatedly attack assigned counsel programs due to lack of funding and the lack of independent administrators. *Id.* at 18; see also Mark Ballard & Richard Connelly, *Gideon's Broken Promise; Indigent Criminal Defendants in Houston Are Far More Likely to Serve Time, and More of It, Than Those Who Can*

system, full-time salaried staff provide legal representation for the indigent criminal defendant either on the state or county level.<sup>75</sup>

### B. *Providing the Assistance of Counsel in Minnesota*

Prior to 1959, Minnesota's indigent defense program was an assigned counsel system which was only available in felony and gross misdemeanor cases.<sup>76</sup> In 1965, Minnesota adopted legislation to create full-time and part-time public defense offices in response to *Gideon*.<sup>77</sup> Although the system went unchanged for over a decade, the Minnesota Legislature revised its initial approach throughout the 1980s.

The first significant change was the creation of a State Board of Public Defense to oversee the state's public defender system.<sup>78</sup> The State Board of Public Defense assumed the duty of appointing chief public defenders to the legislatively designated districts.<sup>79</sup> The legislature further delegated to the State Board of Public Defense the responsibility of distributing state public defender funding to each judicial district,<sup>80</sup> although the counties remained the primary funding source for Minnesota's Public Defenders Offices.

The Legislature continued to alter Minnesota's public defense system through the end of the 1980s.<sup>81</sup> In 1989 the legislature began a

*Afford Private Counsel, But With Little Agreement on Why, There's No Consensus about What, If Anything, to Do*, TEXAS LAW., Aug. 28, 1995, at 1 (noting that the judges in Houston's courts tend to play favorites and many assigned counsel do not possess a lot of litigation experience). Assigned counsel systems are also subject to accusations of attorney-judge collusion. See Bruce Vincent, *The Most Generous Judge in Dallas*, TEXAS LAW., Nov. 6, 1995, at 1 (focusing on flaws in Dallas' assigned counsel system by describing how an attorney made over \$200,000 while acting as assigned counsel in one trial judge's courtroom).

75. Stone, *supra* note 67, at 209-10.

76. EQUAL JUSTICE FOR THE ACCUSED, *supra* note 43, at Appendix (citing MINN. STAT. ANN. §§ 611.07, .12, .13 (1945)). Hennepin and Ramsey Counties had public defender offices instead of an assigned counsel program. *Id.*

77. Act of May 26, 1965, ch. 869, §§ 1-20, 1965 Minn. Laws 1631 (codified as amended at MINN. STAT. §§ 611.14-35 (1994)). Minnesota Statute § 611.26 (1965) provided for the appointment and financing of public defenders in Minnesota's ten judicial districts. Each district administered its respective public defenders office and property taxes collected by county governments funded each district's office. MINN. STAT. § 611.27 (1965).

78. Act of June 1, 1981, ch. 356, § 360, 1981 Minn. Laws 1982 (codified as amended at MINN. STAT. § 611.215 (1994)). The State Board of Public Defense is a part of the judicial branch, but it is not subject to its administrative control. MINN. STAT. § 611.215, subd. 1 (1994).

79. MINN. STAT. § 611.26, subd. 2 (1994).

80. Act of May 26, 1987, ch. 250, §§ 4, 17, 1987 Minn. Laws 891, 897.

81. The basis for the continual evolution of Minnesota's public defense system was a result of the State Board of Defense and the Minnesota Legislature simultaneously realizing that a state system would result in a more efficient system. Appellants' Brief

program that shifted the financial burden of funding the state's public defender offices from the counties to the state.<sup>82</sup> Thus, the system implemented in response to *Gideon* evolved from a county-based organization into the state administered system which exists today in Minnesota.

The current system consists of the State Board of Public Defense, the Office of the State Public Defender, ten district public defender offices, and five public defense corporations.<sup>83</sup> A multitude of counties comprise eight of the judicial districts, with Hennepin and Ramsey Counties each composing their own district.<sup>84</sup> Each chief public defender must submit her annual budget to the State Board of Public Defense.<sup>85</sup> After the State Board considers each district's proposed budget,<sup>86</sup> and the legislature appropriates what it believes to be sufficient funds, the State Board distributes funds to each public defenders office.<sup>87</sup> As seen both nationally and in Minnesota,

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at 5, *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996) (No. CO-95-1282). This realization was the result of three conclusions. The first conclusion was that the counties could not cope with the skyrocketing costs of providing for their district public defenders office. Second, some counties were capable of generating more property tax revenue, and thus capable of allocating more resources than others. Lastly, "the drought of the late 1980s had a significant impact on tax revenue in rural Minnesota, making it difficult for those counties to meet the financial demands of the public defense system." *Id.*

82. Act of June 3, 1989, ch. 335, art. 1, § 7, 1989 Minn. Laws 2699-700. The transfer was to take place within one year, but the legislature extended the completion date until 1997. See MINN. STAT. § 611.27, subd. 4 (1994), amended by 1995 Minn. Laws, ch. 226, art. 6, § 14.

83. Appellants' Brief at 6, *Kennedy* (No. CO-95-1282).

84. MINN. STAT. § 2.722 (1994).

85. MINN. STAT. § 611.27, subd. 1(b) (1994). The statute also limits what the chief public defender may include in his or her budget proposal. Specifically, the statute limits the state's obligation to "those items and services in district public defender budgets which were included in the original budgets of district public defender officer as of January 1, 1990." *Id.* at subd. 5. Furthermore, "[a]ll other public defender related costs remain the responsibility of the counties unless the state specifically appropriates for these." *Id.* Since the public defenders of the Second (Ramsey) and Fourth (Hennepin) District are full-time county employees under Minnesota Statute § 611.23 (1994), Minnesota Statute § 611.26 subd. 3(a) stipulates that "compensation and economic benefit increases for chief public defenders and assistant district public defenders, who are full-time county employees, shall be paid out of the budget for that judicial district public defender's office." MINN. STAT. § 611.26, subd. 3(a) (1994).

86. MINN. STAT. § 611.27, subd. 1(c) (1994).

87. *Id.* at subd. 1(e). The State Board of Public Defense distributes the money appropriated by the legislature based upon four criteria: "the geographic distribution of public defenders, the equity compensation among the judicial districts, public defender case loads, and the results of the weighted case load study." *Id.* The statute's reference to a weighted case load study refers to the 1991 study solicited by the State and conducted by the Spangenberg Group. See generally SPANGENBERG DRAFT REPORT, *supra* note 11.



however, changing to a state-wide system serves only to cover a gaping wound with a small Band-Aid.

#### IV. THE CURRENT CRISIS IN INDIGENT DEFENSE: WHAT IS CAUSING IT AND WHAT ARE THE SYMPTOMS?

##### A. *Events Impairing the Ability of Public Defense Systems to Provide Competent Representation*

Since the 1980s, the viability of public defense systems has been under relentless attack. The forces leading this assault include a multitude of factors, such as public misperception, political puffery, and changing criminal statutes. Furthermore, this assault on the nation's indigent defense systems, and ultimately the clients they represent, has handicapped these systems to the point where representing the poor has become an exercise in futility.

The first round that breached the hull of public defense systems was the politically popular "War on Drugs."<sup>88</sup> During the Reagan and Bush administrations, law enforcement activity concentrated on illegal narcotic trafficking.<sup>89</sup> At the same time, federal and state governments dumped millions of dollars into law enforcement budgets to support this heightened enforcement activity.<sup>90</sup> Consequently, this action led to an enormous increase in the number of drug offense prosecutions.<sup>91</sup> As a result, the demand on indigent defense services

88. See J. Craig Crawford, *Nation's Drug War Flawed, Group Says American Bar Association Report Urges Emphasis on Prevention, Treatment*, ORLANDO SENTINEL, Jan. 11, 1992, at A3.

89. *Id.*

90. Timothy R. Murphy, *Indigent Defense and the U.S. War on Drugs: The Public Defender's Losing Battle*, 6 CRIM. JUST. 14 (Fall 1991). See, e.g., Christopher Johns, *'Slaughterhouse Justice': Crushing Workloads, Underfunded Public Defenders Shortchange Indigent Clients*, ARIZ. REPUBLIC, May 23, 1993, at C1; Jill Smolowe, *The Trials of the Public Defender: Overworked and Underpaid Lawyers Serve Up a Brand of Justice That Is Not Always in Their Clients' Best Interests*, TIME, Mar. 29, 1993, at 48.

91. See John A. Martin & Michelle Travis, *Defending the Indigent During a War on Crime*, 1 CORNELL J.L. PUB. POLY 69, 75 (1992). "The total number of federal drug offense prosecutions increased 153% from 1980 to 1987." *Id.* (citing 1989 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BJS DATA REPORT 1989 36-37 (1990)). Also, "[t]he number of federal drug offenders sentenced to prison for drug possession increased by 434.2%, and for those convicted of drug trafficking the number increased by 169.2%." *Id.* (citing 1989 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS 504 (1990)). *But cf.* Frank A. Aukofer, *Drug War a Big Flop, Report Says*, MILWAUKEE J. AND SENTINEL, June 18, 1993, at A1 (citing preliminary report by federal General Accounting Office which concludes that "the highly touted program of using military planes and ships to head off drug smugglers has done virtually nothing to reduce the flow of cocaine into the United States"); Jeff Gauger, *Drug Arrests Increasing, But So Are the Drugs*, OMAHA WORLD-HERALD, June 14, 1992, at 18A (noting law enforcement officials acknowledgment "that more drugs

also drastically increased.<sup>92</sup> The impact to indigent defense services proved even more severe than it did to other branches of the justice system since so many drug offenders are indigent.<sup>93</sup> Thus, the “War on Drugs” overwhelmed the meager resources of most indigent defense systems.

The second round fired into the side of this nation’s indigent defense systems is the failure of national and state governments to increase defense system funding, while simultaneously inflating the budgets of other criminal justice agencies. Indigent defense budgets consistently decrease or remain the same, and do not increase like other areas of criminal justice.<sup>94</sup> New York City’s experience serves as a valuable example of this trend.<sup>95</sup> In New York City, the significant increase in the number of narcotic related arrests led to a twenty-five percent increase in the organization’s criminal cases while at the same time New York City Legal Aid Society’s staff grew only seven percent.<sup>96</sup>

Moreover, the drastic increase in the number of juvenile offenders also burdens indigent defense programs across the country.<sup>97</sup> For example, in many metropolitan areas the average juvenile caseload ranges between eighty and ninety clients a month, which in turn leads public defenders to rapidly surpass the National Advisory Commission on Criminal Justice Standards and Goals limit of two hundred juvenile clients per attorney annually.<sup>98</sup> This trend is not going to get better

are available more cheaply now than four years ago when federal funding of anti-drug task forces began”).

92. See Murphy, *supra* note 90, at 14.

93. Murphy, *supra* note 90, at 14. Seventy to ninety percent of all defendants charged with a drug-related offense are indigent. *Id.*

94. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, JUSTICE EXPENDITURE AND EMPLOYMENT 8 (1990). In 1990 state and local governments spent approximately \$64 million dollars on this nation’s justice systems. *Id.* Police protection accounted for \$27 million. *Id.* Corrections received approximately \$23 million. *Id.* Lastly, prosecutors received approximately \$4 million, while public defense’s allocation was \$1.3 million. *Id.*; see also Johns, *supra* note 90, at C1 (noting that indigent defense budgets are typically the first cut to increase funding for law enforcement).

95. Murphy, *supra* note 90, at 16.

96. Murphy, *supra* note 90, at 16. Similarly, “[i]n Los Angeles, 75% of all criminal prosecutions are either for the sale or possession of drugs or drug-related crimes.” *Id.* “The number of defendants charged with felony drug-related crimes grew 159% in Chicago from 1984 to 1988.” *Id.*

97. Margaret Eckenbrecht, *Juvenile Rights in Peril*, A.B.A. J. 106 (March 1996).

98. *Id.* Of the metropolitan areas surveyed, zero were “within the recommended guidelines of 200 [juvenile clients] per year.” *Id.* National juvenile crime trends supports the conclusion that this situation is not going to resolve itself. “Between 1990 and 1994, the rate at which adults age 25 and older committed homicides declined 22%; yet the rate jumped 16% for youths between 14 and 17, the age group that in the early ‘90s supplanted 18- to 24- year olds as the most crime-prone.” Richard Zoglin,

in the near future. The rise in the number of juvenile arrests will continue to burden public defender systems well into the future.<sup>99</sup> In conclusion, the drastic increase in the number of drug offense and juvenile crime prosecutions and the decrease in funding for the defense of the poor negatively impacts all indigent defense services.<sup>100</sup>

Another factor that handcuffs indigent defense systems is the "Get Tough on Crime" mentality of politicians.<sup>101</sup> Politicians quickly adopt such views because they sense that the voters perceive their communities as becoming more and more violent.<sup>102</sup> Politicians,

*Now for the Bad News: A Teenage Time Bomb*, TIME, Jan. 15, 1996, at 52; see also DEP'T OF JUSTICE, NUMBER OF JUVENILE MURDERS TRIPLED OVER TEN YEARS, (1996) (available on WESTLAW at 1996 WL 98657 (D.O.J)) (reporting "that the nationwide rate at which juveniles were arrested for violent crimes increased 50 percent from 1988 to 1994").

The number of juvenile arrests in Minnesota is also quickly rising. "In 1992, juveniles accounted for 26 percent of all arrests for violent crime in Minnesota, compared with 18 percent nationally . . . [a]nd they accounted for 51 percent of property crimes in Minnesota, compared with 33 percent nationally." Mark Brunswick, '93 Violence: Juveniles, Guns - and Tragedy, STAR TRIB. (Minneapolis), Jan. 1, 1994, at B1. Furthermore, "the number of juvenile arrests for violent crime increased 63 percent from 1990 to 1994. All seven metropolitan counties, except Anoka and Ramsey, recorded even sharper jumps." Jim Adams, *Young and Violent: Juvenile Crime on the Rise*, STAR TRIB. (Minneapolis), Mar. 24, 1995, at A1.

99. See Adams, *supra* note 98, at A1; *Dark Clouds on the Crime Front; Big Trouble Might Arrive With a Big New Generation of Often Troubled Youngsters*, L.A. TIMES, Nov. 27, 1995, at B4; see also *Crime Drop: Waiting, Watching for the Next Wave*, STAR TRIB. (Minneapolis), May 7, 1996, at A1 (reporting that "though homicide among adults above age 25 dropped by 18 percent from 1990 to 1994, the rate of killing by 14- to 17-year-olds rose 22 percent during that time."); Loria Montgomery, *Crime Drops across Nation: But Fear a Rise as Teen Population Grows*, HOUSTON CHRON., May 6, 1996, at 1 (noting that "[w]ith the number of teen due to increase over the next decade, experts say, the nation soon may see an explosion of juvenile violence to rival the drug-driven carnage of the late 1980s.").

100. Murphy, *supra* note 90, at 14.

101. See Mike Carter, *Sex Crimes: Hard Time Is Costly Sex Crimes: Doing Hard Time Is Costly*, SALT LAKE TRIB., Feb. 26, 1995, at B1; Pat Flannery, *Crime Plans Play to Voters, Talking Tough Could Be Key to Re-Election*, PHOENIX GAZETTE, Oct. 26, 1993, at A1; Patricia Lopez Baden, *Both Parties Target No. 1 Issue: Crime*, STAR TRIB. (Minneapolis), Feb. 19, 1994, at B1.

102. See Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process - A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743, 770 (1995). It is possible to understand how the public becomes misinformed about crime by looking at how television portrays it. "Not only is the amount of crime on television dramas exaggerated, but also the types of crime depicted are exaggerated. Television crime is bloodier and more violent than crime is in reality." *Id.* at 769. The reality is that while in 1981 there were 35.3 violent crimes per 1000 people by 1992 the rate decreased to 32.1 crimes per 1000. NATIONAL CRIME VICTIMIZATION SURVEY REPORT, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES: 1973-1992 TRENDS 1 (1994). Yet, even in light of the current trends in crime, a recent TIME / CNN poll found "89% of those surveyed think crime

therefore, believe the public wants more done about crime.<sup>103</sup>

Elected officials react to the public's misguided perceptions in several ways. First, politicians constantly promise to provide more funds to law enforcement agencies in order to respond to the public's fear of crime.<sup>104</sup> More police officers on the street almost always makes an elected official look more commendable.

Second, prosecuting authorities also get caught up in appeasing the public. One consequence is that prosecutors become unwilling to accept plea bargains.<sup>105</sup> This forces public defenders to expend precious resources to accommodate a prosecutor's political ambitions. A second consequence is prosecutors also refuse to accept a loss because the public might believe they are incapable of handling a community's crime problem. Thus, the resources of the criminal justice system quickly drain when prosecutors repeatedly try notorious defendants because the prosecutor does not want a loss to become a political liability.<sup>106</sup>

The final reaction to the public's generally misguided perceptions

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is getting worse, and 55% worry about becoming victims themselves." Elaine Shannon, *State of the Union; Crime: Safer Streets, Yet Greater Fear*, TIME, Jan. 30, 1995, at 63.

103. See Flannery, *supra* note 101, at A1 (noting that candidates know that "politically, crime sells."); John King, *Crime Issue Tops Governor Races*, TULSA WORLD, Sept. 6, 1994, at N6 (campaigning politicians in thirty-six states promised some crime reform package).

104. See Pat Griffith, *Cities to Get Police Funds Next Month*, PITTSBURGH POST-GAZETTE, Sept. 9, 1994, at A8 (citing U.S. Attorney General Reno's plan to have 20,000 additional law enforcement officers on the street in the first sixteen months of the Clinton Crime Bill); see also Steve Berg, *The Presidential Visit*, STAR TRIB. (Minneapolis), Aug. 13, 1994, at A1 (reporting on the President's pledge to continue advocating for campaign promise of additional 100,000 police officers); Carolyn Skorneck, *Clinton Unveils a Plan For More Cops, Fewer Guns*, S.F. EXAMINER, Aug. 11, 1993, at A1 (detailing President Clinton's plan "to tighten gun controls and put tens of thousands of new police officers on the street.")

105. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 83 (1988) [hereinafter REPORT TO THE NATION]. The following jurisdictions adopted anti-plea bargaining policies: "Alaska; New Orleans, Louisiana; El Paso, Texas; Blackhawk County, Iowa; Maricopa County, Arizona; Oakland County, Michigan; and Multnomah County, Oregon." *Id.* "These prohibitions range in coverage from all felonies to only those that involve individuals charged under habitual offender laws or with high-impact crimes." *Id.*

106. See Alan Abrahamson, *To Retry, or Not to Retry, Is the Question; If a Second Menendez Jury Is Hung, Both Sides Will Have to Weigh How the Panels Split, and the Costs and Risks of Another Round*, L.A. TIMES, Jan. 27, 1994, at B1. Prosecutors estimated the cost of re-trying the Menendez brothers at approximately one million dollars. Even though the defendants seemed willing to accept a plea bargain, District Attorney Gil Garcetti appeared unprepared to compromise. This is because his election to office stemmed from his constant attack on the incumbent Ira Reiner's inability to win big cases. Thus, if he failed to attain a conviction of the Menendez brothers, he may suffer the same fate as his predecessor. *Id.*

about crime is that politicians hastily adopt statutory amendments which are intended to lead to more incarcerations and to make the penalty for committing a crime much more severe.<sup>107</sup> The rub begins, however, when politicians fail to recognize how their responses to criminal activity impact the other parts of the justice system—getting tough on crime costs money and lots of it.<sup>108</sup> Unfortunately, in a time when the public demands that the government become fiscally responsible, politicians do not view raising taxes to support their anti-crime tactics as politically feasible.<sup>109</sup> Therefore, politicians respond by reducing the budgets of programs that are not politically popular,

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107. See Mary Ann Roser, *Senate Bills Target Sex Offenders, Nonviolent Felons*, FORT WORTH STAR-TELEGRAM, Apr. 5, 1995, at 19 (observing that Senate's enactment of stricter penalties for sex offender and nonviolent felonies is in response to public demand for more severe punishment); see also Eric Bailey & Paul Jacobs, *One-Strike Measure for Sex-Offenders Praised*, HOUSTON CHRONICLE, Sept. 2, 1994, at 11 (noting that the supporters of California's new law contend that the law gives California one of the toughest penalties in the country for the crime of sexual assault); Robert Whereatt, *New Carlson Television Ad Sounds Tough on Crime, Not His Opponent*, STAR TRIB. (Minneapolis), Oct. 14, 1994, at B2 (touting newly enacted statutes creating "new laws against sexual predators, tougher penalties for guns in school and for violent crimes.").

An example of this phenomenon is the infamous "Three-Strikes" law enacted in California. See Tupper Hull, *A Father's Crusade to Lock Up Criminals*, S.F. EXAMINER, Dec. 8, 1993, at A1. Mike Reynolds' daughter was the victim of a gunshot wound to the head when she refused to turn over her purse. In response to his grief, Mr. Reynolds began his campaign for the "Three Strikes and You're Out Initiative." The proposal required "criminals convicted two or more times to serve at least 80 percent of their sentences." *Id.* California is not the only state to consider such proposals. *Id.* Actually, Washington was the first to enact such a law. See Kim Christensen, *Focus on "Three Strikes," Washington State Finds "3 Strikes" No Simple Matter*, ORANGE COUNTY REGISTER, Mar. 11, 1994, at A16. New Jersey also recently began to debate the merits of its own three-strikes laws. See P.L. Wyckoff, *Assembly Takes Swing at 3-Strikes Crime Bill*, THE STAR LEDGER (Newark), Mar. 12, 1995, at A1.

108. See, e.g., Adam Pertman, *California Debates Costs of "Three Strikes Law"*, BOSTON GLOBE, Apr. 19, 1995, at 1 (noting the California Department of Corrections will have to spend \$2 billion a year for the rest of the century to keep up with the state's growing prison population); William Claiborne, *"Three Strikes": Tough on Courts Too; California's Sentencing Law Leads to Criminal Justice Logjam*, WASH. POST, Mar. 8, 1995, at A1 (reporting that the new statute is leading to a drastic reduction in "the number of accused felons willing to offer guilty pleas."); William Claiborne, *"3 Strikes" Crime Approach Rethought; Fiscal Consequences Trouble Lawmakers*, DENVER POST, Aug. 14, 1994, at A2 (incarcerating inmates under "3 Strikes" law can cost between "\$20,000 a year per inmate to more than \$60,000, as elderly inmates serving life terms require costly medical care."); Beth J. Harpaz, *Weighing Pros and Cons of "Three Strikes, You're In"*, THE RECORD (New Jersey), Feb. 21, 1994, at A4 (noting that although the law is politically popular the cost to the court system may be too great); Greg Moran, *Three Strikes and You're Out: Felons Face a Hardened Public Attitude, Critics Fear Proposed Law Would Be Expensive Error*, SAN DIEGO UNION TRIB., Feb. 6, 1994, at A1 (arguing that California should reconsider its "Three Strikes" law due to the enormous cost of incarcerating felons convicted under the law).

109. See Johns, *supra* note 90, at C1.

such as the defense of the poor.<sup>110</sup>

This trend is especially damaging to indigent defense systems considering this country's recent recession.<sup>111</sup> The recession which occurred during the late 1980s and into the early 1990s resulted in more indigent defendants.<sup>112</sup> Moreover, recent corporate downsizing<sup>113</sup> and the creation of more technologically demanding occupations further exacerbate this trend.<sup>114</sup> In sum, political posturing only leads to the depletion of an already stretched indigent defense budget. This process of political hobbling results in impairing a system of indigent defense that already struggles to make ends meet.

### *B. How the Current State of Affairs Cripples the Defense of the Indigent*

Excessive caseloads now characterize the typical indigent defense system.<sup>115</sup> An overview of New Orleans and Florida's experiences with excessive caseloads provides valuable insight into how burgeoning caseloads currently typify indigent defense systems. In New Orleans, a public defender handled approximately seventy felony cases simultaneously.<sup>116</sup> He also represented 418 defendants over a seven-month period and had "at least one serious case set for trial for every trial date during that period."<sup>117</sup> Florida's public defenders have also

110. See RICHARD KLEIN & ROBERT SPANGENBERG, ABA SECTION OF CRIMINAL JUSTICE AD HOC COMMITTEE ON THE INDIGENT DEFENSE CRISIS, *THE INDIGENT DEFENSE CRISIS* 1 (1993).

111. See *id.*

112. BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS, U.S. DEP'T OF JUSTICE, *INDIGENT DEFENSE* 2 (Feb. 1996) (concluding that in "constant dollars, the state and local expenditures doubled for public defense from 1979 to 1990."). The fact that "[i]n 1992 about 80% of defendants charged with felonies in the Nation's 75 largest counties relied on a public defender or an assigned counsel for legal representation" further illustrates how large the indigent population has become. *Id.* at 1.

113. See Louis Uchitelle, *The Downsizing of America*, STAR TRIB. (Minneapolis), Mar. 10, 1996, at A19 (noting that approximately "43 million jobs have been erased in the United States since 1979 . . ."); see also Robert Reno, *Economic Double Whammy*, BUFFALO NEWS, Jan. 22, 1996, at 3C; Louis Uchitelle & N. R. Klienfield, *Huge White-Collar Layoffs Batter Egos, Dreams, Work Ethic*, COMMERCIAL APPEAL (Memphis), Mar. 10, 1996, at C3.

114. See, e.g., Matthew H. Bowers, *Troubled Teens: Carnegie Study Says Adolescents Are Desperately at Risk Neglected. Undereducated. Drinking. Drugs.*, VIRGINIAN PILOT (Norfolk, Va.), Oct. 13, 1995, at A1 (quoting researcher's conclusion that businesses themselves need to act to ensure qualified job applicants in the future); Elizabeth Wade Hall, *Business Push for 'Real-World' Training*, THE HERALD-SUN (Durham, N.C.), Nov. 4, 1994, at A1 (quoting school board members who observed that "[s]chool districts . . . putting technical training centers in place are very successful at helping students go into high paying, post-secondary jobs").

115. Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis Is Chronic*, 9 CRIM. JUST. 13 (Summer 1994).

116. *Id.* at 13 (citing *State v. Peart*, 621 So. 2d 780 (La. 1993)).

117. *Id.* (citing *State v. Peart*, 621 So. 2d 780, 784 (La. 1993)).

shared similar experiences.<sup>118</sup> Excessive caseloads strained the system in the Tenth District of Florida so much that the public defenders had to elect which cases to appeal first based on the severity of the punishment.<sup>119</sup> This created an immense backlog which affected both the appellate and trial courts.<sup>120</sup> Although these are vivid illustrations of how excessive caseloads have paralyzed indigent defense systems, excessive caseloads also have a more subtle, but contemptuous impact on the indigent defendant's right to the effective assistance of counsel.

The first implication of excessive caseloads is that the indigent defendant believes he or she does not receive adequate representation.<sup>121</sup> Indigent defendants typically believe that their public defender is just another instrument of the state.<sup>122</sup> "To compound matters, the indigent defendant himself does not specifically choose the public defender assigned to his case."<sup>123</sup> When an excessive caseload strains a particular defense system, the indigent defendant consequently feels even more alienated.<sup>124</sup> From the perspective of the indigent defendant, "the publicly-funded defender is merely a cog in the very 'court' bureaucracy that is 'processing' and convicting him."<sup>125</sup> A convicted felon's renowned statement that he did not have an attorney, he had a public defender, attains a degree of validity under these conditions.<sup>126</sup> Moreover, this perception intensifies a

118. *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1131 (Fla. 1990).

119. *Id.* at 1132. "For example, in the third district, approximately 15% of indigent appellants serve their sentences before briefs are filed or their cases are disposed of by the court." *Id.* at 1132 n.3.

120. *Id.* at 1131-32.

121. David A. Sadoff, Note, *The Public Defender As Private Offender: A Retreat From Evolving Malpractice Liability Standards for Public Defenders*, 32 AM. CRIM. L. REV. 883, 891 (1995).

122. Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 663 (1986).

123. Sadoff, *supra* note 121, at 891 (citing *Morris v. Slappy*, 461 U.S. 1, 11-14 (1983)).

124. Sadoff, *supra* note 121, at 891.

125. See Steve Brandt, *Public Defenders Fight for the Poor and for Respect*, STAR TRIB. (Minneapolis), Dec. 14, 1992, at B1. It is easy to see how indigent defendants get the impression that their attorney is merely processing them. A Hennepin County Public Defender noted that although she spends only three minutes of a morning before a judge, those three minutes take away most of her morning, since she must "consult with her clients, deal with a prosecutor and wait for cases to be called." *Id.*

126. Sadoff, *supra* note 121, at 892 (citing Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 83-89 (1993)); see also Klein, *supra* note 122, at 661-62 (citing Jonathan D. Casper, *Did You*

convicted defendant's feelings of betrayal and anger towards the judicial system.<sup>127</sup> Thus, excessive caseloads clearly aggravate the already strained relationship between the defendant and a public defender.

The second implication of excessive caseloads is that it becomes impossible for an attorney to adequately consult with his or her client.<sup>128</sup> The Supreme Court articulated that "[i]t is the duty of an attorney to advise the client promptly whenever he has any information . . . the client should receive."<sup>129</sup> Furthermore, ABA Model Standard 4-3.8 mandates that "[d]efense counsel should keep the client informed of the developments in the case and the progress of preparing the defense . . . ."<sup>130</sup> Only with adequate client consultation may a defense attorney feel satisfied that her client understands the implications of the charges against him and the options available to the client. When excessive caseloads bombard the representatives of the indigent, however, defense attorneys barely have enough time to introduce themselves.<sup>131</sup> Surely public defenders cannot provide the communications their ethical duty requires them to provide.

The third consequence of allowing indigent representatives to work under excessive caseloads is insufficient case preparation.<sup>132</sup> An attorney has an ethical duty to investigate a client's claims thoroughly so he or she may give sound legal advice.<sup>133</sup> Attorneys in many cases,

*Have a Lawyer When You Went to Court? No, I Had a Public Defender*, 1 YALE L. REV. L. & SOC. ACTION 4 (1971)).

127. Klein, *supra* note 122, at 663-67.

128. Klein, *supra* note 122, at 667.

129. *Baker v. Humphrey*, 101 U.S. 494, 500 (1879).

130. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-3.8(b) (A.B.A. Model Standard 1993) [hereinafter STANDARDS FOR CRIMINAL JUSTICE]; see also MODEL RULE OF PROFESSIONAL RESPONSIBILITY 1.4(a) (1983). "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." *Id.*

131. Sadoff, *supra* note 121, at 892. As if excessive caseloads are not enough trouble, public defenders also have to try to communicate with clients when they are either in jail awaiting trial or located far away from the public defenders office. *Id.* A 1987 survey of inmates in local jails demonstrates how the public defender-client relationship becomes strained. Whereas 69% of all inmates who had counsel saw their attorney within one week of being admitted, only 43% of all inmates represented by assigned counsel saw their attorney in the same time period. BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS, U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE 4 (1996).

132. Klein, *supra* note 122, at 663.

133. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 130, at 4-4.1(a). This standard requires that "[d]efense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty . . ." *Id.* This standard further mandates that "[t]he duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty." *Id.*



however, cannot conduct any worthwhile investigation due to the combination of inadequate funding and excessive caseloads.<sup>134</sup> Indigent defense programs, unlike the state which has the support of both local and federal law enforcement agencies, typically have a limited number of investigators for too many clients.<sup>135</sup> Consequently, it is not hard to perceive the correlation between the state and defense attorney's investigation and the current level of plea bargaining. When the state is able to expend great amounts of money to develop a case,<sup>136</sup> and the burdens facing public defenders preclude them from doing so,<sup>137</sup> it is obvious why so many defendants opt for "the deal."<sup>138</sup> Thus, the current state of indigent defense makes it virtually impossible to conduct an investigation to ensure that not only do indigent defendants receive their day in court, but that it actually means something.

Minnesota's public defender system is also at the mercy of the consequences of excessive caseloads. A study conducted for the State Board of Public Defense<sup>139</sup> concluded that "public defenders in Minnesota, with few exceptions, are working substantially above capacity with insufficient time to devote to their cases and their clients. Workload is too high in every district given the current level of staff

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134. Patrick Noaker, *It Doesn't Come With the Territory: Public Defenders Must Decline to Violate Legal and Ethical Standards in the Face of Rising Caseloads*, 10 CRIM. JUST. 14 (Summer 1995). An example of the lack of attorney investigation exists in Minnesota. According to the Spangenberg Group's report, law clerks assume too much of the public defender's investigatory work. SPANGENBERG DRAFT REPORT, *supra* note 11, at 29-30. The report took special offense of the fact that law clerks are often responsible for "investigating serious felony cases." *Id.* at 30.

135. NATIONAL CENTER FOR STATE COURTS, *supra* note 71, at 94. In a comparison of prosecutor and public defender offices in Denver, Seattle, and Montrey, CA, researchers found that each office had comparable numbers of felony attorneys. *Id.* at 95. "Public defender offices, however, tend to have slightly lower levels of administrative and clerical support. This pattern suggests that public defender offices are allocating their budgets to achieve parity at the attorney level [both in numbers and compensation]." *Id.*

136. REPORT TO THE NATION, *supra* note 105, at 123. It is not easy to document the cost of an average police investigation. *Id.* at 125. This is because police officers often pay informants for information and undercover officers spend large amounts of money to intercept drug trafficking. *Id.* In contrast, the average cost per indigent case in 1982 was \$196. *Id.* at 123.

137. See Smolowe, *supra* note 90, at 48 (observing that the New Orleans Public Defenders Office "has no money to hire experts or track down witnesses; its law library consists of a set of lawbooks spirited away from a dead judge's chambers.").

138. REPORT TO THE NATION, *supra* note 105, at 83. "Most cases brought by a prosecutor result in a plea of guilty." *Id.* In Minneapolis, 66% of the number of cases filed (2364) resulted in guilty pleas. *Id.* In Los Angeles the percentage of guilty pleas reaches as high as 82% of the cases filed. *Id.*

139. See SPANGENBERG DRAFT REPORT, *supra* note 11, at 3-4.

(full-time and/or part-time). And things are getting worse in this regard."<sup>140</sup> The growing number of defendants electing pro se representation rather than relying on the assistance of counsel demonstrates how excessive caseloads have impaired Minnesota's public defender system.<sup>141</sup> Thus, it is clear that, both nationally and in Minnesota, excessive caseloads are impairing, or at least certainly soon will impair, the ability of public defenders to render effective assistance of counsel.<sup>142</sup>

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140. SPANGENBERG DRAFT REPORT, *supra* note 11, 20.

141. See Paul McEnroe, *Going It Alone: Pro Se Litigation*, BENCH & BAR OF MINN., Feb. 1996, at 17; Margaret Zack, *Two Recent Cases Show That When People Act as Their Own Attorneys in Criminal Cases, It May Mean Disaster for Them*, STAR TRIB. (Minneapolis), Mar. 8, 1996, at B3.

142. The Spangenberg Group, in noting how excessive caseloads impact Minnesota's public defense system, made the following observations:

1. Many public defender attorneys, both full-time and part-time, are now faced with a serious case overload problem.

2. The Minnesota District Public Defender Program is just beginning to feel a turnover problem and unless there is early caseload relief, the problem will only get worse.

3. In most district offices, the supervision available is not sufficient since most supervisors are required to handle a full or excessive caseload.

4. As the caseload rises, public defenders find that they are spending less time with their clients which makes the attorney-client relationship more difficult. As a result, in many cases defendants are more reluctant to engage in plea bargaining that will frequently result to their benefit.

5. The pressure of caseload has in many instances resulted in fewer and fewer cases going to trial as public defenders seek ways to dispose of cases without the extended time necessary for trial.

6. In fact, some public defenders reported to us that they felt that they were being punished by the system for going to trial since during the trial period they would not be able to work on other cases.

....

8. Again, as the caseload has risen, many public defenders reported to us that they are now cutting corners, which they did not do in the past. This may be reflected in scheduling fewer investigations, doing less legal research, filing fewer motions, spending less time with clients and trying fewer cases. While these public defenders believe that they are currently maintaining the constitutional requirements of effective assistance of counsel, they may not be able to maintain this standard in the future without caseload relief.

9. Many public defender attorneys told us that the caseload has now reached such proportions that not only are they spending less time with their clients, but they are beginning to make subjective judgments about which cases and which clients they will spend substantial time with. Some of these judgments are made based upon the seriousness of the case and what is at stake for the client. This process is typical for most public defender programs.

### C. Lack of Judicial Support for Effective Assistance of Counsel

Indigent defense systems are also in their current debilitated state because courts are unwilling to demand that the representation provided to the indigent defendant retain a high degree of quality. The courts consistently fail to protect the indigent defendant by refusing to scrutinize a lawyer's conduct. The courts instead have erected road blocks to ensure that they only have to give a cursory review of a lawyer's actions. Courts, therefore, guarantee that an indigent client has an attorney by his or her side, but fail to ensure that the attorney does something when he or she is there.

Prior to the *Gideon* decision, courts ruled that an attorney's assistance was ineffective only if the defendant could substantiate that the representation was a "farce and mockery" of justice.<sup>143</sup> These ineffective counsel cases focused on "whether the trial itself was a fair one under the Fourteenth Amendment, rather than on the question of whether the attorney's conduct conformed to minimal standards of competence."<sup>144</sup>

After the Supreme Court handed down its opinion in *Gideon*, however, the nation's courts struggled with the issue of what constituted "effective" assistance of counsel.<sup>145</sup> The courts started to resolve this dilemma by abandoning the "farce and mockery" standard.<sup>146</sup>

On the other hand, some public defenders are making choices on how they spend their time based upon the aggressiveness of the client, the particular facts of the case, whether or not there is a confession and whether or not the case can be easily disposed of. Within our experience, these judgments are clear signs of overload.

10. Finally, because of lack of available time, public defenders throughout the state are finding it increasingly more difficult to spend the time required for trial preparation in those cases that are tried. The preparation may well happen at a late date, one to two weeks before trial. This problem exists also in preparing for sentencing in many cases. There simply is not enough time to properly prepare each client's case for sentencing, particularly in the area of alternative sentencing.

SPANGENBERG DRAFT REPORT, *supra* note 11, at 22-23.

143. GARCIA, *supra* note 16, at 32 n.296 (citing *Diggs v. Welch*, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945)).

144. Laurence A. Steckman & Peter Daily, *Attorney Inaction as Trial Strategy: A Study of the Effects of Judicial Use of Non-Action Neutral Language on the Analysis and Adjudication of Claims of Ineffective Assistance of Counsel Under the Sixth Amendment*, 6 J. SUFFOLK ACAD. L. 89, 94 (1989).

145. GARCIA, *supra* note 16, at 32; see *Avery v. Alabama*, 308 U.S. 444 (1940); see also Justice Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 28 n.76 (1973) (providing a list of the cases that adopted the "[farce and] mockery" test).

146. GARCIA, *supra* note 16, at 32.

This process, which began in the federal appellate courts,<sup>147</sup> culminated in the case of *Strickland v. Washington*.<sup>148</sup>

In *Strickland*, the petitioner called upon the Court to formulate a standard under which counsel's assistance is no longer effective.<sup>149</sup> The Court responded to the petitioners request by adopting the federal appellate courts' standards.<sup>150</sup> The Court held that:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.<sup>151</sup>

At first glance, the Court's adoption of this "reasonable attorney" approach appeared promising for indigent defendants whose public defenders were unable to devote sufficient time and resources to their cases. The Court nonetheless proved that appearances are sometimes deceiving.<sup>152</sup> In an attempt to deter a flood of ineffective assistance claims,<sup>153</sup> the Court limited the breadth of its decision by requiring the petitioner to overcome what it characterized as a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."<sup>154</sup>

Furthermore, the second prong of the *Strickland* test does not look at the quality of the representation.<sup>155</sup> On the contrary, it places an

147. Steckman & Daily, *supra* note 144, at 94. The Fifth Circuit, in *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961), promulgated a reasonable lawyer test. *Id.* This standard stipulated that an attorney's assistance is effective if an attorney conducts herself like other reasonable attorneys in all stages of a proceeding. *Id.* at 599. In *United States v. Decoster*, 487 F.2d 1197 (D.C. Cir. 1976) the D.C. Court of Appeals, in an attempt to define standards to apply in the reasonable attorney test, adopted the American Bar Association's Project on Criminal Justice Standards for the Defense Function. *Id.* at 304-05. For a thorough review of the development of the various tests that the federal circuits employed, see generally Richard P. Rhodes Jr., Note, *Strickland v. Washington: Safeguard of the Capital Defendant's Right to Effective Assistance of Counsel?*, 12 B.C. THIRD WORLD L.J. 121, 124-35 (1992).

148. 466 U.S. 668 (1984).

149. *Strickland*, 466 U.S. at 684.

150. *Id.*; see Rhodes Jr., *supra* note 147, at 141.

151. *Strickland*, 466 U.S. at 687.

152. Rhodes Jr., *supra* note 147, at 137-38.

153. *Strickland*, 466 U.S. at 690. The Court purposefully avoided precisely defining what the duties of a reasonable attorney are for this reason. According to the Court, "[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges." *Id.*

154. *Id.* at 689 (citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

155. Klein, *supra* note 122, at 644.

insurmountable burden on the defendant to show that the representation was so shoddy that prejudice resulted.<sup>156</sup> "By requiring a demonstration of prejudice, the Court took the position that a defendant could be jailed even when all parties agreed that his counsel substantially failed to represent him."<sup>157</sup> Consequently this changes the impetus of the federal appellate holdings from assuring quality representation of criminal defendants to a mere question of whether the process is working in the opinion of the reviewing court.<sup>158</sup> Thus, under the *Strickland* doctrine, indigents have a virtually impassable road to travel in order to garner relief from the ineffective assistance of counsel they received.<sup>159</sup>

Unfortunately, the *Strickland* doctrine only assists state and local governments in perpetuating a substandard level of indigent representation.<sup>160</sup> By formulating a standard that allows defendants to remain incarcerated in light of drastic attorney errors, the judicial system implies that the right to counsel in reality has no meaning.<sup>161</sup> Since

156. *Klein*, *supra* note 122, at 644. Accordingly, this rule actually creates a paradox that an ineffectively represented defendant cannot escape. "When there have been the most egregious failings by counsel is exactly when the record may indeed be barren of any indication of reasonable doubt. Yet, it is those very situations where courts now need not even proceed to attempt to discover the failings of counsel." *Id.* at 645.

157. *Steckman & Daily*, *supra* note 144, at 101.

158. *Strickland*, 466 U.S. at 689. The Court avoided using the Sixth Amendment as a standard for determining the quality of the representation. The Court reasoned that "[t]he purpose [of the Sixth Amendment] is simply to ensure that criminal defendants receive a fair trial." *Id.*

159. The Supreme Court released a companion case, *United States v. Cronin*, 466 U.S. 648 (1984), the same day as *Strickland*. In *Cronin*, the Supreme Court considered whether, on the whole, an attorney rendered ineffective assistance of counsel when the attorney only had 25 days to prepare a defense to a case that took the government more than a few years to develop. *Id.* at 649-50. The Supreme Court, reversing the court of appeals' finding of ineffective assistance of counsel, held that reversal is only appropriate when the adversarial process "loses its character as a confrontation between adversaries." *Id.* at 656-57. The Court went further, making relief more difficult to attain, by reasoning that only upon a showing of specific errors by the attorney will the Court consider the claim. *Id.* at 658. Thus, "[f]raming the analysis in this manner suggests only that a certain *type* of proceeding is required, and does not address the effect of imbalances that exist within such a proceeding." William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 123 (1995).

160. *See Geimer*, *supra* note 159, at 93.

161. *See Martin C. Calhoun*, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. J.L., 413, 429-30 (1988). The Supreme Court adopted a standard which implies that since the defendant is guilty anyway, only the most extreme cases of attorney ineffectiveness warrant reversal. *Id.* Yet, "[t]he principle of 'innocent until *proven* guilty' upon which our entire criminal justice system is based, requires that no defendant be declared 'guilty' unless the government, opposed by constitutionally adequate defense counsel, proves guilt beyond

the courts are unwilling to guarantee indigent criminal defendants quality representation, there is no incentive for state or municipal governments to do so either.<sup>162</sup> Therefore, the courts currently serve only to reinforce the current conditions which are impairing all indigent defense systems.

In light of the aforementioned, it is clear that Minnesota's public defender system is at a crossroads. If Minnesota's public defenders do not receive adequate support soon, the tumultuous environment in which they now practice will compel them to provide grossly inadequate representation. It is the Minnesota Legislature's continued refusal to acknowledge this reality which led to *Kennedy v. Carlson*.<sup>163</sup>

## V. KENNEDY V. CARLSON

### A. Factual Background

William Kennedy, the Chief Public Defender for the Fourth Judicial District, commenced an action against Governor Arne Carlson, Treasurer Michael A. McGrath, Commissioner of Finance John Gunyou, the State Board of Public Defense, and the Hennepin County Commissioners.<sup>164</sup> Kennedy filed suit after he sought additional funding from the Board of Public Defense and Hennepin County and did not receive any relief.<sup>165</sup> The purpose of the litigation was to attain a declaratory judgment finding Minnesota Statutes section 611.27<sup>166</sup> systematically unconstitutional because it violates the constitutional rights of indigent criminal defendants to the effective assistance

a reasonable doubt." *Id.* Justice O'Connor acknowledges that "[t]he right to counsel plays a crucial role in the adversarial system . . . since access to counsel's skill and knowledge is necessary to accord defendants the 'amply opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (citing *Adams v. United States ex. rel. McCann*, 317 U.S. 269, 275-76 (1942)). Justice Marshall, in his articulate dissent, soundly reasons that "[e]very defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer." *Id.* at 711.

162. See Smolowe, *supra* note 90, at 48 (noting that defending the poor "is a cause without a constituency").

163. 544 N.W.2d 1 (Minn. 1996).

164. *Id.* at 3.

165. Respondent's Brief at 6, *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996) (No. C0-95-1282).

166. MINN. STAT. § 611.27 (1994). The parties and trial court focused on the language found in Minnesota Statute § 611.27, subd. 7 (1994), which states:

[T]he state's obligation for the costs of the public defender services is limited to the appropriations made to the board of public defense. Services and expenses in cases where adequate representation cannot be provided by the district public defender shall be the responsibility of the state board of public defense.

*Id.*

of counsel by not providing sufficient funds for the operation of the Fourth District Public Defenders Office.<sup>167</sup>

### B. *The State of Minnesota's Response*

Minnesota asserted that the statute in question is not unconstitutional since there is no evidence that the Fourth District public defenders are providing inadequate representation.<sup>168</sup> In support of its position, Minnesota first noted that a trial court has yet to find that an attorney from the Fourth District Public Defenders Office has "provided ineffective assistance of counsel to a client"<sup>169</sup> or that an appellate court has had to reverse a conviction due to the performance of a public defender.<sup>170</sup> Moreover, Minnesota observed that there has been no violation of the Rules of Professional Conduct found,<sup>171</sup> and a public defender has yet to be civilly liable.<sup>172</sup> The State supported its argument in a third way contending that the Fourth District public defenders effectively raise issues<sup>173</sup> and process their cases faster than the state average.<sup>174</sup> Lastly, the State cited the Fourth District trial judges who claim that the Fourth District Public Defenders Office does a tremendous job.<sup>175</sup> Thus, according to Minnesota, the statutory provision is not unconstitutional because the Fourth District Public Defenders Office only alleges that the current funding apparatus "potentially" violates the rights of the clients they represent.<sup>176</sup>

Minnesota's second argument in favor of maintaining the status quo is that a comparison of the Fourth District Public Defenders Office to other states' public defender systems demonstrates it is not operating unconstitutionally.<sup>177</sup> The State asserted that other state courts find their public defense systems are acting unconstitutionally only when there are "serious and extensive incidents of actual ineffective assistance of counsel . . . ."<sup>178</sup> The State concluded, therefore, that

167. *Kennedy v. Carlson*, No. MC92006860 at 2 (D. Minn. Apr. 24, 1995) (order granting plaintiff's motion for summary judgment).

168. Appellants' Brief at 16, *Kennedy* (No. C0-95-1282).

169. *Id.* at 24.

170. *Id.*

171. *Id.* at 25.

172. *Id.* at 28.

173. *Id.* at 25.

174. *Id.*

175. *Id.* at 25-26.

176. *Id.* at 26.

177. *Id.*

178. *Id.* The State relied on several cases to prove its argument. *Id.* at 26-28; see *State v. Peart*, 621 So. 2d 780, 784 (La. 1993) (concluding system is unconstitutional in light of evidence that a public defender had a serious case scheduled for trial every day for seven months, clients stay in jail for 30 to 70 days before even meeting their

since there is no evidence of such deficiencies in Minnesota, the Fourth District Public Defenders Office is not unconstitutionally providing legal assistance.<sup>179</sup>

Minnesota's final argument was that the statute in question is constitutionally valid since there are other resources available to Minnesota's public defenders.<sup>180</sup> It contended that the Fourth District Public Defenders Office should first look to Hennepin County, which generates a majority of the Fourth District's indigent defense needs, for additional funding.<sup>181</sup> Additionally, Minnesota asserted that there is a statutory safety valve that prevents the Fourth District public defenders from violating their constitutional and ethical duties.<sup>182</sup> Minnesota also proposed that the Fourth District Public Defenders Office should revise its screening process<sup>183</sup> and reconsider the types of cases it will take.<sup>184</sup> Thus, the State concluded that

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attorney, and there is a lack of sufficient services); *In re* Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130, 1131-33 (Fla. 1990) (finding of unconstitutionality based on 1700 pending appeals and appellate waiting period of over two years); *State v. Smith*, 681 P.2d 1374, 1380-81 (Ariz. 1984) (finding bid system unconstitutional based on finding of a part-time public defender who had 25 trials in one month); *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 66 (Mo. 1981), *cert. denied*, 454 U.S. 1142 (1982) (basing its finding of unconstitutionality on the number of appeals arguing deprivation of reasonable defense due to lack of funds).

179. Appellants' Brief at 28, *Kennedy* (No. C0-95-1282).

180. *Id.* at 30.

181. *Id.* at 31. The State asserted that the Hennepin County Public Defenders Office's claim was not ripe. It relied on the fact that Hennepin County "funded a substantial portion of Plaintiff's operating expenses even since the State took over funding of the district public defender offices." *Id.* Hennepin County, in order for the Hennepin County Public Defenders Office to drop the County from the suit, agreed to provide additional funding. *Id.*

182. *Id.* at 30-31. The State referred to Minnesota Statute § 611.27, subd. 11 (1994), which states that "[i]f the court finds that the provision of adequate legal representation . . . is beyond the ability of the district public defender to provide, the court shall order counsel to be appointed, with compensation and expenses to be paid under the provisions of this subdivision and subdivision 7." *Id.* It is the State's position that "[t]he cost of such services are to be paid by the Commissioner of Finance from the county criminal justice aid retained by the Commissioner of Revenue for this purpose under Minn. Stat. § 477A.0121, subd. 4." *Id.* at 30.

183. *Id.* at 32. The State vigorously asserted that the Hennepin County Public Defenders Office needs to implement more stringent screening standards to ensure that those clients who receive representation actually are indigent. *Id.*

184. *Id.* The State proposed three reforms that could alleviate the Public Defender's financial woes. The State first recommended that the Hennepin County Public Defenders Office cease handling matters outside of its normal caseload. This includes "appeals and various civil matters such as forfeitures, implied consent and tax liens." *Id.* at 31. The State's second recommendation is that Hennepin County Public Defenders Office hire more investigators and less attorneys to lower operating expenses. *Id.* at 31-32. An alternative approach is for the Hennepin County Public Defenders Office to "set



the Fourth District Public Defenders Office cannot assert it is currently operating in violation of the Constitution until the Fourth District Public Defenders Office shows it sought to supplement its funding or that it cannot revise its current procedures.

### C. *The Fourth District Public Defenders' Perspective*

William Kennedy maintained that every day actual injuries to the rights of indigent criminal defendants occur. Kennedy first cited the fact that his office's caseload exceeds the caseload standards recently adopted by the State Board of Defense.<sup>185</sup> Kennedy argued that his office's excessive caseloads, when combined with the seriousness of crimes committed today and their associated consequences, place an indigent criminal defendant's rights in peril.<sup>186</sup> Thus, according to Kennedy, without more funding, it is not possible to guarantee an indigent criminal defendant his or her fundamental rights.

Next, Kennedy argued that a showing of civil liability or a reversal of a conviction is not necessary to substantiate that an actual injury occurred.<sup>187</sup> Kennedy contended that his attorneys have a legal obligation to accept every client given to them.<sup>188</sup> He points out that a lack of any public defender's civil liability is due to the inability of an indigent criminal defendant to hold a public defender liable for malpractice under state law, and not due to the excellent performance

up programs with private law firms whereby the firms' attorneys would handle certain cases . . . in exchange for obtaining courtroom expertise." *Id.* at 32.

185. Respondent's Brief at 5, *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996) (No. CO-95-1282). The Board of Public Defense adopted a modified version of the standards promulgated by the Spangenberg Group. *Id.* The Spangenberg Group's caseload standards are:

The caseload of a public defender attorney should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.

SPANGENBERG DRAFT REPORT, *supra* note 11, at 10 (quoting NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE ON COURTS 186 (1973)). The American Bar Association also adopted these standards. See STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES, 72 (A.B.A. Model Standards 1993). Kennedy contended that his office, in *Dziubak v. Mott*, 503 N.W.2d 771, 775 (Minn. 1993), substantiated "that according to the Board's standards ordered by the legislature, the attorneys [in his office] have caseloads that are 50 to 100 percent higher than recommended." Respondent's Brief at 9, *Kennedy* (No. CO-95-1282).

186. Respondent's Brief at 6, *Kennedy* (No. CO-95-1282). Kennedy cited, as illustrations, that a murder conviction can result in a 30-year prison sentence and that the number of defendants charged with gross misdemeanors is on the rise. *Id.*

187. *Id.* at 10.

188. *Id.* (citing *Dziubak v. Mott*, 503 N.W.2d 771, 775 (Minn. 1993)).

of his office.<sup>189</sup> Furthermore, the relief sought in this case is not retrospective like an appeal from a criminal conviction.<sup>190</sup> Instead, Kennedy sought relief to eliminate the egregious ethical violations that occur prior to conviction.<sup>191</sup> The lack of reversals is consequently not indicative of the Fourth District Public Defenders Office's current capabilities. Kennedy, therefore, asserted that the combination of compelled ethical violations and the law's mandate that public defenders cannot refuse to represent indigent defendants places his office in a precarious position, which only more funding can alleviate.<sup>192</sup>

Kennedy's third argument was that the relatively consistent level of funding provided to his office serves only to exacerbate this problem. Between 1991 and 1994, the Fourth District public defenders' allocations increased on average only 1.7% annually.<sup>193</sup> Furthermore, Hennepin County is not a viable source of funding because it already contributes over three million dollars a year.<sup>194</sup> Since no other county contributes funds like Hennepin County, and because there is no statutory duty for them to do so, Kennedy concluded that relying upon Hennepin County's generosity is not a workable funding alternative.<sup>195</sup> Thus, the only option that will resolve the Fourth District Public Defenders Office's dilemma is to find section 611.27 unconstitutional.

Finally, Kennedy asserted that the State's purported statutory safety valve is not sufficient, since all the public defenders offices in the state share this reserve and there just is not enough for everyone.<sup>196</sup>

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189. *Id.* (citing *Dziubak v. Mott*, 503 N.W.2d 771, 775 (Minn. 1993)).

190. *Id.* at 11. Kennedy argued that the rule of *Strickland v. Washington*, 466 U.S. 668 (1984), does not apply in these circumstances. The basis of Kennedy's conclusion is that *Strickland's* rule "was intended to provide a retrospective remedy for the very few defendants who were prejudiced by the unethical conduct of their lawyers, not a prospective standard for determining whether a lawyer's ethical duties have been fulfilled." *Id.*

191. *Id.*

192. *Id.* at 10.

193. Brief of Amicus Curiae AFSCME Local 2938 at 8-9, *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996) (No. C0-95-1252). The allocations to the Hennepin County Public Defenders Office range from \$7,683,000 in 1991 to \$8,179,000 in 1994. *Id.* at 8 (citing Appellants' Brief at 13, *Kennedy* (No. C0-95-1559)). Amicus notes that "a 1.7 percent increase in years characterized by 3 percent inflation demonstrates that real dollar appropriations to the Fourth Judicial District [Hennepin County] have declined." *Id.* at 9.

194. Respondent's Brief at 14, *Kennedy* (No. C0-95-1282). "Hennepin County provides approximately 30% of the budget of the Fourth Judicial District Public Defenders Office, and 15% of the total budget statewide." *Id.* at 6.

195. *Id.* at 14.

196. *Id.* Kennedy asserted that under Minnesota Statute § 477A.0121, all public defender districts share in a reserve that consists of only \$200,000.00 *Id.*

Kennedy also argued it is the trial judge, and not his office, that determines which clients are indigent.<sup>197</sup> The Fourth District Public Defenders Office, therefore, has no control over which clients it receives.<sup>198</sup> Because of the insufficiency of the state's supplemental funding and the Fourth District Public Defenders Office's lack of discretion over which clients it accepts, Kennedy concluded that section 611.27 is unconstitutional since it leaves his office with no other alternative than to deny indigent criminal defendants due process.<sup>199</sup>

#### *D. The Trial Court's Holding and Reasoning*

In ruling upon both the State's and the Fourth District Public Defenders Office's motions for summary judgment, the trial court entered judgment in favor of the Fourth District Public Defenders Office.<sup>200</sup> The trial court further held that section 611.27, subdivision 7 "is an unconstitutional infringement upon plaintiff's [Fourth District Public Defender Office] constitutional duty to provide effective assistance of counsel to indigent clients."<sup>201</sup> The trial court held the statutory provision unconstitutional for several reasons.<sup>202</sup>

The trial court first reasoned that it does not matter who is ultimately responsible for funding indigent criminal representation.<sup>203</sup> Instead, the court articulated that it had an obligation to act "when budgetary limitations adversely affect the actual delivery of effective legal services to an accused person."<sup>204</sup> In light of this obligation, the court did not consider the lack of a showing of harm to an individual as conclusive.<sup>205</sup> The trial court also did not view this case as a traditional ineffective assistance claim.<sup>206</sup> It characterized this case as an action "seeking systemic relief from arbitrary legislative action . . . ."<sup>207</sup> The trial court, therefore, found that the Fourth District Public Defenders Office suffered the requisite injury

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197. Respondent's Brief at 14, *Kennedy* (No. C0-95-1282) (citing MINN. R. CRIM. PROC. 6).

198. *Id.* at 14-15.

199. *Id.* at 16.

200. *Kennedy v. Carlson*, No. MC-92-6860 at 2 (D. Minn. Apr. 24, 1995) (order granting plaintiff's motion for summary judgment).

201. *Id.* at 14.

202. *Id.* at 5-13.

203. *Id.* at 5.

204. *Id.*

205. *Id.* at 6.

206. *Id.* at 10.

207. *Id.* The trial court rejected the State's reliance on *Strickland v. Washington*, 466 U.S. 668 (1984). The trial court held that *Strickland's* test does not apply here since the focus of this case is on "the financial resources available to hire personnel to provide counsel in individual cases." *Id.*

upon which it could grant relief based upon its conclusion that the current capabilities of Minnesota's public defender system are in serious jeopardy.<sup>208</sup>

Next, the trial court focused upon the inflexibility of section 611.27. The trial court found that the statute was too unyielding and it could not compensate for the unpredictable nature of public defense.<sup>209</sup> It also found that the statute "fails to accommodate the increasing pressures on the public defender system resulting from new legislation and changing social conditions."<sup>210</sup> The court reasoned that in an adversarial system espousing equal justice, comparable funding is necessary to support this ideal.<sup>211</sup> Therefore, the trial court held that the statute was an attempt by the State to unconstitutionally cap the money it provides for the representation of indigent criminal defendants because of the statute's inability to deal with change.<sup>212</sup>

Lastly, the trial court held that the State's purported alternatives are not sufficient.<sup>213</sup> As for the statutory safety valve, the trial court viewed the statute as not providing sufficient relief and only serving as a temporary solution.<sup>214</sup> The court, instead, relied upon the State's continual reluctance to fund public defense systems<sup>215</sup> when it concluded that the availability of other sources did not render section 611.27, subdivision 7 constitutionally valid.<sup>216</sup> Thus, the trial court held that section 611.27, subdivision 7 forced the Fourth District Public Defenders Office to unconstitutionally render ineffective assistance of counsel.<sup>217</sup>

In sum, the trial court granted the Fourth District's motion for

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208. *Id.*

209. *Id.* at 12.

210. *Id.*

211. *Id.* The trial court also pointed out that "[t]here is no legislative funding cap on prosecutorial resources." The trial court continued by noting that the chief concern of the court is "whether defendant received the effective assistance required to assure him a fair trial and the integrity of our adversary system of justice." *Id.* (citing *Weaver v. State*, 408 N.W.2d 200, 202 (Minn. Ct. App. 1987)).

212. *Id.* at 11-12. The trial court concluded that while "[c]ounties had certainly never held out a blank check for public defense, . . . some flexibility" was inherent in the way the counties provided for public defense. *Id.*

213. *Id.* at 13-14.

214. *Id.* at 13. The trial court observed that "[s]uch services must still be paid from the legislature's appropriation and are subject to the limitation of Minn. Stat. § 611.27 Subd. 7." *Id.*

215. *Id.* at 9. The trial court noted that the allocations made to the Hennepin County Public Defenders Office "from the State Board [of Public Defense] have been considerably lower" than the amount requested. The trial court also observed that "the Hennepin County Public Defenders Office has run significant budget deficits in 1992, 1993, and 1994." *Id.*

216. *Id.* at 13.

217. *Id.* at 14.

summary judgment because it viewed section 611.27, subdivision 7 as an unconstitutional restraint on the State's obligation to provide counsel for the indigent. The court found that the statute placed the Fourth District public defenders precariously close to harming their clients' rights. So close, in fact, that the court was unwilling to uphold the statute as a constitutional enactment. Lastly, the court rejected Minnesota's alternative solutions by holding that the State's options are insufficient and just another attempt at avoiding the need to re-evaluate how Minnesota funds its public defense system. Although the trial court correctly saw the condition of Minnesota's public defense system, the Minnesota Supreme Court chose to wear blinders when it glanced at the current state of indigent representation.

### *E. The Minnesota Supreme Court's Holding and Reasoning*

The Minnesota Supreme Court, in reversing the trial court, did not give any credence to the trial court's conclusions.<sup>218</sup> The supreme court, unlike the trial court, focused upon the issue of whether the Fourth District Public Defenders Office demonstrated sufficient injury to sustain a justiciable claim.<sup>219</sup> The supreme court did not affirm the trial court's judgment because it found that the Fourth District did not show that any of its indigent clients had suffered actual injuries.<sup>220</sup>

Prior to considering the merits of *Kennedy*, the supreme court first set out to establish how it views the role of the public defender.<sup>221</sup> The supreme court asserted that "Minnesota's judiciary has long recognized the importance of criminal defense counsel, and we are concerned that adequate funds be available for public defense services to indigent juveniles and adults."<sup>222</sup> The supreme court also recognized that there are many factors, such as changing criminal statutes and the number of indigent defendants, which prevent the Fourth District from providing exemplary representation.<sup>223</sup> Thus, it appears that the court was fully aware of the environment in which indigent defense currently takes place. Also apparent is the court's willingness to affirm the trial court's holding that the judiciary cannot allow the State to abrogate its constitutional obligations.

Surprisingly, however, the supreme court decided just the opposite. The court undermined its purported support for Minnesota's public defenders by attempting to establish that the Fourth District's position

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218. See *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996).

219. *Id.* at 5-8.

220. *Id.* at 3.

221. *Id.* at 3-4.

222. *Id.*

223. *Id.*

is less than perilous.<sup>224</sup> According to the supreme court, the Fourth District public defenders are in no danger of violating an indigent defendant's constitutional rights.<sup>225</sup> The court reached this conclusion based upon three superficial rationalizations.<sup>226</sup>

First, the supreme court reasoned that the Fourth District public defenders cannot assert they are underpaid and understaffed. The court took special notice of the fact that the Fourth District has more attorneys than the rest of Minnesota's Public Defender Offices.<sup>227</sup> The supreme court also construed the fact that the Fourth District Public Defenders Office "has more investigators, law clerks and other non-attorney support staff" than the rest of Minnesota's judicial districts to mean the Fourth District Public Defenders Office is not in a position to complain about the allotments it receives.<sup>228</sup> Thus, the court reasoned that since the Fourth District has the most attorneys and support staff in the State, it is difficult to perceive why the Fourth District public defenders need any relief.

The next basis for the supreme court's reasoning was its reliance on the opinions of the Fourth District judges. The State "submitted copies of numerous letters from Fourth Judicial District Judges written in support of Kennedy's bid for reappointment"<sup>229</sup> in an attempt to substantiate that the Fourth District's judiciary does not perceive a problem. According to these judges, the public defenders in the Fourth District are providing the highest caliber of service possible.<sup>230</sup> Hence, the supreme court rationalized that since the judges who deal with the Fourth District public defenders on a regular basis do not perceive any problems, neither should the court.

The supreme court's final rationalization was the Fourth District public defenders cannot claim they are in peril, since they have incurred neither civil malpractice liability nor formal professional responsibility reprimands.<sup>231</sup> The court relied on the fact that "no Fourth District public defender has been disciplined for violations of the Rules of Professional Responsibility, nor has any court held that Kennedy's staff has provided ineffective assistance of counsel."<sup>232</sup> The court's reliance on the lack of a formal finding of professional incompetence established that the court is not likely to consider a

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224. *See id.* at 6-7.

225. *Id.*

226. *Id.* at 7.

227. *Id.* at 5.

228. *Id.*

229. *Id.* at 7 n.6.

230. *Id.*

231. *Id.* at 6-7.

232. *Id.* at 7 n.6.

Minnesota public defender's claims until a public defender receives some sort of formal disciplinary action. Thus, the supreme court reasoned that the measure of whether Minnesota's public defenders are violating their clients constitutional rights is not determined by the harm to the defendant, but the harm to the public defender.

In sum, the supreme court sealed the fate of the Fourth District's claim by holding that until there is evidence that an indigent criminal defendant suffered an actual injury, it cannot consider the claims of the Fourth District.<sup>293</sup> The court's demand for this type of proof of harm is comparable to the problematic standards found in *Strickland v. Washington*. This requirement of an actual injury to the indigent defendant serves to create a virtually insurmountable barrier for any Minnesota Public Defenders Office to overcome. The supreme court, therefore, mandated that Minnesota's indigent defense systems need to be on the verge of ruin before the court is willing to intervene.

#### VI. SENDING A MESSAGE: THE MINNESOTA SUPREME COURT SHOULD HAVE AFFIRMED THE TRIAL COURT AND FORCED THE LEGISLATURE TO UPHOLD ITS CONSTITUTIONAL OBLIGATION

The Minnesota Supreme Court should have concluded, as the trial court did, that Minnesota's indigent defense funding apparatus possesses constitutional flaws. Clearly, *as a system of indigent defense*, the Fourth District Public Defenders Office is either on the verge of or already is rendering unconstitutional ineffective assistance of counsel. The supreme court failed to protect the rights of those who cannot protect themselves when it did not accept the Fourth District's invitation to remedy the situation at hand.

It is clear that the supreme court should have concluded that the Fourth District Public Defenders Office, as section 611.27 forces it to currently operate, is providing a level of sub-standard representation which either harms or immediately threatens to harm the indigent defendant's right to effective assistance of counsel. The court erroneously concluded that since the Fourth District Public Defenders Office has the most staff, it therefore is not in a position to seek relief. The court continued down its illogical path by not recognizing the consequences of forcing the Fourth District Public Defenders Office to exceed the State Board of Defense's caseload standards. The most baffling error, however, is the court's reliance on the lack of individualized harm to the Fourth District's public defenders. Rather than focusing upon how the current environment saddles the representation of the poor, the court mistakenly looked for harms which are not perceivable in the context of this lawsuit.

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293. *Id.* at 6-7.

If the supreme court had properly analyzed the circumstances surrounding *Kennedy*, the court would have followed the example of other states and adopted their remedial measures. These remedial measures include declaratory relief, allowing public defenders to decline to represent indigent clients when their caseloads exceed the State Board of Defense's standards, and implementing a modified version of the *Strickland* test.

A. *There Is a Potential or Actual Injury Upon Which the Minnesota Supreme Court Could Grant Relief*

The Minnesota Supreme Court should not have reversed the trial court, since the Fourth District Public Defenders Office clearly is on the verge of, or already is, providing constitutionally defective representation. Furthermore, the facts of this case and the current state of Minnesota law does not support the court's reasoning.

In Minnesota, a plaintiff must establish that he or she possesses "a bona fide legal interest which has been, or with respect to the ripening seeds of a controversy is about to be, affected in a prejudicial manner."<sup>234</sup> The key to meeting this requirement is to show that there is an actual injury, or in the alternative, that the injury is imminent in nature. The "injury" contemplated in the context of *Kennedy* is the violation of the constitutional rights of the Fourth District Public Defenders Office. The Fourth District Public Defenders Office clearly met this burden in light of the findings made in this case. If the Minnesota Supreme Court had scrutinized more thoroughly the current state of indigent defense and the associated consequences, how Minnesota law makes securing the evidence the court requires virtually impossible, and the distinction between the relief sought in *Kennedy* and the relief that individual defendants typically seek, it would have seen that the current state of affairs fails to guarantee an indigent criminal defendant effective representation.

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234. *Id.* at 6 (citing *State ex rel. Smith v. Haveland*, 223 Minn. 89, 92, 25 N.W.2d 474, 477 (1946)); *see, e.g.*, *St. Paul Area Chamber of Commerce v. Martizelli*, 258 N.W.2d 585, 588 (1977); *Beatty v. Winona Hous. and Redev. Auth.*, 277 Minn. 76, 85-86, 151 N.W.2d 584, 590 (1967). The Minnesota Supreme Court is not bound to federal standing requirements even when it is considering an alleged violation of the federal constitution. *See Asarco, Inc. v. Kadish*, 490 U.S. 605, 617 (1989). The U.S. Supreme Court has recognized that "the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by [its] limitations . . . [yet] they possess the authority . . . to render binding judicial decisions that rest on their own interpretations of federal law." *Id.*



1. *The Minnesota Supreme Court Incorrectly Interpreted the Presented Facts*

The Minnesota Supreme Court misconstrued the facts in *Kennedy*. First, the court's reliance on the size of the Fourth District's staff and budget is inappropriate. The fact that the Fourth District has the largest staff and budget is only common sense. The Fourth District, which includes Minneapolis, has more major criminal complaints filed than any other district in Minnesota.<sup>235</sup> In addition, virtually all of the defendants in the Fourth District are indigent.<sup>236</sup> Thus, the court's conclusion that larger means better is not convincing.

2. *Consequences Stemming from Excessive Caseloads Constitutes a Justiciable Injury*

The second difficulty which exists with the court's position is that it characterized the State Board of Defense's caseload standards as merely "aspirational,"<sup>237</sup> therefore implying that excessive caseloads are not indicative of the requisite injury. Such reasoning ignores the consequences of excessive caseloads and disregards the reality in which indigent representation takes place today.

First, there is clear evidence that excessive caseloads are crushing the Fourth District public defenders and their ability to render effective legal assistance. One trend in support of this conclusion is "only 2.6% of all felony cases and less than 1% of all misdemeanors were tried" in

235. WAYNE KOBBERVIG, RESEARCH AND PLANNING OFFICE, STATE CT. ADMIN., MINN. SUP. CT., MINN. WEIGHTED CASELOAD STUDY 1992 Appendix C (1992). Statewide, in 1992, there were 35,180 major criminal filings. *Id.* at 34. Major criminal filings include all felonies, gross misdemeanor DWI, and other gross misdemeanors. *Id.* In the same year there were 9,506 major criminal filings in the Fourth District. *Id.* at 38. This is approximately 27% of all filings. A comparison of the crime rates found in Minnesota's population centers also shows why the Fourth District requires more money for criminal justice services than the rest of the State. The Duluth, Minnesota area had 421 violent crimes and 3,817 property crimes reported in 1994. U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS, CRIME IN THE U.S. 1994 85 (1995). The Rochester, Minnesota community reported 163 violent crimes and 3,146 property crimes in the same year. *Id.* at 99. In Minneapolis, there were 7,074 violent and 34,337 property crimes reported in 1994. *Id.* at 94. The difference between the Fourth District and Minnesota's other districts mirrors the national trend. In 1992, crime victimization in urban areas was significantly higher than it was in other areas. The Bureau of Justice Statistics reports:

People who live in rural areas—25% of the Nation's inhabitants—accounted for about 16% of the country's violent victimizations during the years 1987 through 1989. Moreover, rural rates of personal theft and household crimes, such as burglary and motor vehicle theft, were at or near the lowest level recorded since the national survey began in 1973.

2 BUREAU OF JUSTICE STATISTICS, NATIONAL UPDATE 7 (1992).

236. SPANGENBERG DRAFT REPORT, *supra* note 11, at 34.

237. *Kennedy v. Carlson*, 544 N.W.2d 1, 5 (Minn. 1996).

1991 in the Fourth District.<sup>238</sup> This low trial rate demonstrates that public defenders are taking fewer cases to trial since they have to “dispose of cases without the extended time necessary for trial.”<sup>239</sup> The fact that Fourth District attorneys report “having over 100 open cases”<sup>240</sup> at one time further illustrates how excessive caseloads are setting the stage for a major disaster.

Second, the Fourth District public defenders’ ability to provide competent representation is highly doubtful when “[o]nly selective investigations are ordered, many fewer than should be conducted”<sup>241</sup> and attorneys are unable to keep informed about changes in the law.<sup>242</sup> It is difficult to conclude that indigent defendants in the Fourth District are receiving effective representation when attorneys have to make strategic decisions based upon: (1) the time commitment a trial will require; (2) inadequate investigations caused by a lack of time and resources; and (3) a deficient understanding of the current state of the law. Thus, the supreme court should have found the requisite injury to exist.

### 3. *Formal Sanctions Do Not Exist for Public Defenders Even When Incompetent Representation Clearly Occurs*

Another flaw in the supreme court’s reasoning is its dependence upon the lack of civil liability or ethical sanctions to support its conclusion.<sup>243</sup> First, the supreme court’s position is tenuous because of its holding in *Dzibuak v. Mott*.<sup>244</sup> In *Dzibuak*, the supreme court held that public defenders “are immune from suits alleging legal malpractice in Minnesota.”<sup>245</sup> The *Dzibuak* rule consequently makes it impossible for an indigent defendant to hold a public defender liable for his or her inadequate representation. Not only does the *Dzibuak* rule eliminate a means of redress for indigent defendants, it also prevents the Fourth District public defenders from attaining sufficient evidence to satisfy the supreme court.

An indigent defendant’s virtual inability to raise claims of professional incompetence likewise undermines the supreme court’s position. “Rule 8 (b) of the Rules on Lawyers Professional Responsibility requires the Director of the Office of Lawyers Professional Responsibili-

238. *Id.* at 4.

239. SPANGENBERG DRAFT REPORT, *supra* note 11, at 22.

240. SPANGENBERG DRAFT REPORT, *supra* note 11, at 34.

241. SPANGENBERG DRAFT REPORT, *supra* note 11, at 35.

242. SPANGENBERG DRAFT REPORT, *supra* note 11, at 36.

243. *Kennedy v. Carlson*, 544 N.W.2d 1, 6-7 (Minn. 1996).

244. 503 N.W.2d 771 (Minn. 1993).

245. *Kennedy*, 544 N.W.2d at 1 n.5 (citing *Dzibuak v. Mott*, 503 N.W.2d 771, 773. (Minn. 1993)).

ty to dismiss all complaints by criminal defendants against their court appointed counsel . . . ."<sup>246</sup> Moreover, the fact that "[d]efendants can only raise such claims before the district court involved in their case"<sup>247</sup> further inhibits indigent defendants from raising professional incompetence complaints. This creates a paradoxical situation.<sup>248</sup> The evidence the supreme court requires will remain non-existent because of Minnesota law and its rules of professional responsibility.<sup>249</sup> Thus, the supreme court's evidentiary requirement creates a hurdle the Fourth District Public Defenders Office cannot overcome.

Furthermore, the facts of *Kennedy* substantiate that the Fourth District public defenders are not meeting their ethical obligations.<sup>250</sup> The Fourth District's public defenders find themselves unable to conduct adequate investigations or to study changes in the law.<sup>251</sup> The American Bar Association, in promulgating standards for criminal defense counsel, explicitly stipulates that only "[a]fter informing himself or herself fully on the facts and the law" should counsel give advice to his or her client.<sup>252</sup> Current conditions in the Fourth District, as previously demonstrated,<sup>253</sup> prevent the public defenders from meeting their ethical obligations. The supreme court, therefore, failed to protect the rights of the poor criminal defendant by overlooking the shoddy representation the Fourth District's public defenders provide.

The supreme court's failure to perceive that the Fourth District public defenders provide incompetent representation enabled the court to make other egregious errors in judgment. One such error occurred when the supreme court concluded that it could not rule in favor of the Fourth District Public Defenders Office unless it shows an actual particularized harm to an indigent defendant.

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246. *Id.* at 6 n.5.

247. *Id.*

248. See Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 5-6 (1995) (noting that although criminal defendants have more at stake than the civil defendant, "the case law generally demonstrates so little commitment to the obligation to provide competent representation in the criminal context that it is difficult to describe legal ethics as including such an obligation.").

249. *Id.* at 6. Besides the current state of the law, the fact that "[d]iscipline for incompetence is rare and is generally reserved for the most egregious conduct—cases involving either multiple instances of incompetence or incompetence combined with other misconduct." *Id.*

250. *Kennedy*, 544 N.W.2d at 6.

251. SPANGENBERG DRAFT REPORT, *supra* note 11, at 34-36.

252. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, 4-5.1 (a) (A.B.A. Standards 1993).

253. See *supra* notes 11, 138-42 and accompanying text.

#### 4. *Actual Harm Is Not Necessary to Grant Systemic Relief*

The nature of the claims made in *Kennedy* and the relief sought by the Fourth District Public Defenders Office is such that the Minnesota Supreme Court should not have demanded an actual injury to an indigent defendant. This case is not like a traditional ineffective assistance claim<sup>254</sup> because the Fourth District Public Defenders Office is not seeking post-conviction relief.<sup>255</sup> On the contrary, *Kennedy* is an attempt to secure systemic relief to avoid providing ineffective assistance of counsel.<sup>256</sup>

Although *Kennedy* is not a traditional ineffective assistance of counsel claim, it is not a novelty either. In *Luckey v. Harris*,<sup>257</sup> the Eleventh Circuit considered the question of whether, and if so how, courts may consider systemic ineffective assistance of counsel challenges.<sup>258</sup> Plaintiffs, in the form of a class action suit representing all present and future indigent criminal defendants in Georgia, sued the State of Georgia under 42 U.S.C. section 1983.<sup>259</sup> The plaintiffs asserted that their public defenders' caseload pressures and the attorneys' inadequate resources resulted in the denial of their right to counsel.<sup>260</sup> In contemplating whether the district court properly dismissed the case, the United States Court of Appeals in the Eleventh Circuit held that the trial court erred when it applied the *Strickland* test to the plaintiffs' claims.<sup>261</sup> Instead, the court of appeals concluded that when a plaintiff sues seeking prospective relief he or she only needs to establish "the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law."<sup>262</sup> The appellate court further reasoned that using the same standards was not justifiable since the relief sought in the case was not the same as that sought in *Strickland*.<sup>263</sup>

The Minnesota Supreme Court was free to use the more appropriate *Luckey* standard to assess the Fourth District's claims, thereby allowing the court to rule against the State. The Fourth District Public Defenders Office, like the plaintiffs in *Luckey*, were seeking relief from

254. *Kennedy v. Carlson*, No. C0-95-1282, 1, 10 (D. Minn. Apr. 24, 1995) (order granting plaintiff summary judgment).

255. *Id.*; Respondent's Brief at 2, *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996) (No. C0-95-1282).

256. Respondent's Brief at 2, *Kennedy* (No. C0-95-1282).

257. 860 F.2d 1012 (11th Cir.), *cert. denied*, 495 U.S. 957 (1988).

258. *Id.*

259. *Id.* at 1013.

260. *Id.*

261. *Id.* at 1017.

262. *Id.* (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)).

263. *Id.*

the deficiencies which presently burden it, and not individual post-conviction relief for which the Supreme Court formulated *Strickland*.<sup>264</sup> Thus, it was inappropriate for the Minnesota Supreme Court to require an actual injury to a particular indigent defendant.

In sum, the Minnesota Supreme Court should have applied the more appropriate *Luckey* standard so it could have done more to preserve the indigent defendant's rights. The supreme court possesses many remedial options, such as providing declaratory relief or altering the standards under which the supreme court considers ineffective assistance of counsel claims, which it could have used to demonstrate that it will not tolerate unfettered abrogations of an indigent's right to counsel.

### B. Declaratory Judgment Is an Inadequate Remedy

The Minnesota Supreme Court could have declared that the funding apparatus currently used by the legislature is unconstitutional. The court then may have relied on the political processes to develop a new funding apparatus to alleviate the funding difficulties suffered by the state's public defenders.<sup>265</sup> "If the political branches view the court's decision as legitimate, then the declaratory judgment can be an effective tool for raising funds."<sup>266</sup> This proved true in the Kentucky case of *Bradshaw v. Ball*.<sup>267</sup>

This case was the result of Kentucky's unwillingness to compensate those attorneys ordered by the court to represent indigent defendants.<sup>268</sup> In declaring Kentucky's refusal to pay for the defense of the indigent unconstitutional, the Kentucky Court of Appeals recognized that the changing demands of representing the indigent required the State to assume the obligation of paying for the defense of the poor.<sup>269</sup> Although the court acknowledged the need to change how indigent defendants receive representation, the court refused to usurp the power of the other branches of government in order to implement its conclusion.<sup>270</sup> As the Kentucky Court of

264. Respondent's Brief at 11, *Kennedy* (No. CO-95-1282).

265. Citron, *supra* note 5, at 500.

266. Citron, *supra* note 5, at 500 (citing PETER H. SCHUCK, *SUING GOVERNMENT: CITIZENS REMEDIES FOR OFFICIAL WRONGS* 151 (1983)).

267. 487 S.W.2d 294 (Ky. 1972).

268. *Id.* at 296.

269. *Id.*

270. *Id.* at 299. The court reasoned that "[t]he proper duty of the judiciary, in the constitutionally ideal sense, is neither to enforce laws nor appropriate money. The judiciary's reason for existence is to *adjudicate*." *Id.* This position is suspect, though, when the court is acting to ensure the integrity of the judicial process. *Id.* It is role of the court to protect the rights of a criminal defendant from all government action that may violate his or her rights, including the lack of governmental action. *Id.* Because

Appeals hoped, the legislature responded by allocating moneys to fund the defense of indigent defendants.<sup>271</sup> Thus, it was possible for the Minnesota Supreme Court to rely upon the other political entities to alleviate the public defenders' funding crisis.

This approach may prove fruitless, however, considering the circumstances at hand. First of all, a declaratory judgment does not provide the legislature with "comprehensive and ongoing guidance in addressing the various deficiencies needed to bring the system into compliance with the constitution."<sup>272</sup> Also, there already have been failed attempts to cure the ills of Minnesota's public defender system. For example, the adoption of caseload standards.<sup>273</sup> Furthermore, the creation of a State Board of Public Defense to lobby on the behalf of Minnesota's public defenders has done nothing to improve the conditions in which public defenders represent the poor.<sup>274</sup> In the Fourth District Public Defenders Office's experience, in particular, the conditions have become worse.<sup>275</sup> Lastly, the supreme court must be cognizant of the fact that many state legislatures have been reluctant to provide adequate funding to defend the poor criminal defendant.<sup>276</sup> The fact that other public defense systems are currently suing for judicial relief substantiates this trend.<sup>277</sup> If the Minnesota

of this obligation, it is sometimes inappropriate for a court to hope for legislative action. *Id.*

271. Citron, *supra* note 5, at 500. For a more thorough discussion of how declaratory judgments can provide indigent defense systems with more money see generally Richard J. Wilson, *Litigative Approaches to Enforcing the Right to Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 203 (1986).

272. Citron, *supra* note 5, at 501.

273. Respondent's Brief at 6, *Kennedy* (No. C0-95-1282).

274. See Dennis Cassano, *Public Defender Sues State Over Funding*, STAR TRIB. (Minneapolis), Apr. 3, 1992, at B5.

275. Randy Furst, *Public Defender Statute Ruled Unconstitutional*, STAR TRIB. (Minneapolis), Apr. 27, 1995, at B1. "Since 1991, when the Hennepin County public defender's office came under the jurisdiction of the state board, the number of clients has climbed 24%, to 37,155, but the number of attorneys has risen only 16%, to 86." *Id.*

276. Andrew Blum, *Defense of Indigents: Crisis Spurs Lawsuits*, NAT'L L.J., May 15, 1995, at A1 (noting that the "decline, state by state, is relative.").

277. *Id.* In Indiana an attorney filed a class action suit against the state alleging ineffective assistance of counsel stemming from the lack of state financial support and Lake County's unwillingness to bear the burden alone. See Greg Kueterman, *Lake PD System Under Fire*, IND. LAW., Sept. 6, 1995, at 1; see also Andrew Blum, *Defense of Indigents: Crisis Spurs Lawsuits*, NAT'L L.J., May 15, 1995, at A1 (public defenders in Illinois brought suit after they suffered a \$1 million budget cut in 1992); "Overwhelming Caseloads and Inadequate Resources", CONN. L. TRIB., Jan. 16, 1995, at 16 (Connecticut Civil Liberties Union brought a class action alleging that Connecticut indigent defense system violates the class members "rights under the Sixth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, [sic] Article First, §§1, 8, 10, 12, and 20 of the Connecticut Constitution . . ."); Song, *supra* note 10, at 1 (noting that systems which appear to be successful in managing the current crisis are those using

Supreme Court wishes to impress upon the other branches the need to live up to their constitutional duties, the supreme court will have to do more than issue a declaratory judgment; it has to create consequences.

### C. *Compelling Change by Endorsing Consequences: The Ideal Solution*

The Minnesota Supreme Court should have fashioned a remedy to compel the other branches of the State's government to act. There are three potential options the Minnesota Supreme Court should have considered.

#### 1. *Allowing Public Defenders to Decline Representation When Faced with Excessive Caseloads*

One remedial alternative is to allow public defenders to petition the trial court when their caseloads exceed set standards. California adopted this approach in *Ligda v. Superior Court of Solano County*.<sup>278</sup> The public defender in *Ligda* filed a writ of prohibition with the Solano County Superior Court to avoid accepting a case in light of the attorney's excessive caseload. Public defenders in California, therefore, are now able to manage their caseloads because "[u]pon notification, the trial court judge may begin appointing members of the private bar until the overload situation subsides."<sup>279</sup>

Florida also implemented a similar remedy in *Escambia County v. Behr*.<sup>280</sup> In *Behr*, a public defender's caseload proved overwhelming. The public defender, in an attempt to secure relief from such pressure, petitioned the Florida Supreme Court asserting that the trial court should appoint private attorneys when the public defender surpasses his or her caseload limit.<sup>281</sup> The Florida Supreme Court held that a trial court is capable of appointing a member of the private bar at its discretion, even without a showing of a specific necessity.<sup>282</sup> Thus, as other jurisdictions have, the Minnesota Supreme Court had the option of allowing public defenders to excuse themselves from a given representation if the attorney's caseload is overwhelming.

Unfortunately, difficulties riddle this solution. For one reason, the

caseload standards to extract money from their respective legislatures); Lynne Tuohy, *CCLU Suit Lays Bare a Public Defense System in Crisis*, HARTFORD COURANT, Jan. 8, 1995, at A1 (noting that the lack of legislative attention presents indigent representatives with no other alternative than to sue the state for relief).

278. 85 Cal. Rptr. 744 (Cal. App. 1 Dist. 1970).

279. KLEIN & SPANGENBERG, *supra* note 110, at 18.

280. 384 So. 2d 147 (Fla. 1980).

281. *Id.* at 147.

282. *Id.* at 150.

Minnesota Supreme Court, in *Dzuibak v. Mott*,<sup>283</sup> mandated that public defenders cannot refuse to decline to represent indigent criminal defendants<sup>284</sup> and that Minnesota's public defenders are exempt from malpractice claims.<sup>285</sup> Allowing public defenders to decline representation, therefore, may also subject them to malpractice claims.<sup>286</sup> As a result, changing a public defender's inability to refuse to represent an indigent defendant because of overwhelming caseloads may require the supreme court to reconsider the malpractice exemption.<sup>287</sup> Thus, the supreme court would have to consider overturning a holding which is only a few years old, and this is probably an unlikely turn of events.

The Minnesota Supreme Court would also have hesitated to allow public defenders to refuse clients in light of other potential conflicts such a policy would create. One potential conflict involves the Fifth Amendment's Taking Clause.<sup>288</sup> In the last few years, other states considered whether requiring private attorneys to represent the poor abrogates the Fifth Amendment's prohibition against uncompensated taking of private property for public use. These courts have consistently concluded that the U.S. Constitution compels states to compensate appointed private attorneys.<sup>289</sup> In Minnesota, the reserve fund presently used in conflict of interest situations will not suffice to alleviate the current strain the Fourth District Public Defenders Office

283. 503 N.W.2d 771 (Minn. 1993).

284. *Id.* at 775-76.

285. *Id.* at 773.

286. See Sadoff, *supra* note 121, at 909-14 (describing the manner in which a malpractice claim is brought and what a sensible standard of review is for attorneys who represent the indigent).

287. See Rutherford, *supra* note 70, at 1000 (arguing that absolute immunity is inappropriate and unfairly denies wronged criminal defendants a legitimate means of redress).

288. KLEIN & SPANGENBERG, *supra* note 110, at 18; U.S. CONST. amend. V. The relevant portion of the Fifth Amendment states that "nor shall private property be taken for public use, without just compensation." *Id.*

289. See, e.g., *Arnold v. Kemp*, 813 S.W.2d 770, 774 (Ark. 1992) (concluding that assigned counsel system violates Fifth Amendment due process protections "when an attorney is required to spend an unreasonable amount of time on indigent appointments so that there is a genuine and substantial interference with his or her private practice."); *State v. Lynch*, 796 P.2d 1150, 1156-57 (Okla. 1990) (finding maximum cap of \$3,200 for services rendered to be a violation of due process under the federal constitution); *State v. Ryan*, 44 N.W.2d 656, 660 (Neb. 1989) (holding that the attorney is entitled to compensation for court connected hours . . . spent researching law and investigating the prosecution's case); *State ex. rel. Stephen v. Smith*, 747 P.2d 816, 840-42 (Kan. 1987) (concluding that "the responsibility to provide the Sixth Amendment right to counsel is a public responsibility that is not to be borne entirely by the private bar.").



presently experiences.<sup>290</sup> Therefore, the most appropriate option is to craft a remedy which compels the legislature to amend the current indigent defense system rather than to continue sidestepping the fact that public defenders need more legislative support to do an adequate job.

## 2. *Compelling Relief by Implementing a Presumption of Ineffective Assistance of Counsel*

This sort of compulsive relief is also not an untested idea. One of the first challenges to the adequacy of an indigent defense system arose in the context of *State v. Smith*.<sup>291</sup> At the time of Smith's prosecution for burglary and rape, Mohave County, Arizona, used an assigned counsel system to represent its indigent criminal defendants.<sup>292</sup> In deciding which attorneys to appoint to its criminal cases, Mohave County government officials relied primarily upon one criterion: cost.<sup>293</sup> On appeal Smith argued that the system which assigned his attorney to him unconstitutionally allowed conditions to exist that led to Smith receiving ineffective legal assistance.<sup>294</sup> The court agreed, and therefore held that Mohave County's method of assigning counsel harbored too many faults to garner judicial support.<sup>295</sup> The Arizona Supreme Court found the assigned counsel system was unconstitutional since it did not properly allocate sufficient funds to provide enough time for attorneys to prepare their cases.<sup>296</sup>

The Arizona Supreme Court further held that Mohave County's system was faulty since it did not account for the fact that it is impossible to predict the complexity of a case.<sup>297</sup> Most importantly, the Arizona Supreme Court recognized the consequences of allowing an overburdened attorney to represent an indigent defendant.<sup>298</sup> The court reasoned that "[t]he insidiousness of overburdening defense

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290. See *supra* notes 193-96 (Hennepin County public defenders' attack of statutory reserve fund).

291. *State v. Smith*, 681 P.2d 1374 (Ariz. 1984). For a thorough discussion of this decision and its impact on *Strickland*'s rationale, see generally Suzanne E. Mounts, *The Right to Counsel and the Indigent Defense System*, 14 N.Y.U. REV. L. & SOC. CHANGE 221 (1986).

292. *Smith*, 681 P.2d at 1379.

293. *Id.*

294. *Id.* at 1378. The root of Smith's allegation was that his "attorney spent only two to three hours interviewing the defendant and 'possibly' six to eight hours studying the case because of the attorney's shocking, staggering and unworkable caseload." *Id.* at 1378-79.

295. *Id.* at 1381.

296. *Id.*

297. *Id.*

298. *Id.*

counsel is that it can result in concealing from the courts . . . the nature and extent of damage that is done to defendants by their attorneys' excessive caseloads."<sup>299</sup>

The Arizona Supreme Court, however, did not stop with declaring Mohave County's practices unconstitutional.<sup>300</sup> It also reinforced its disdain for Mohave County's procedures by electing to modify the way in which it reviewed ineffective assistance of counsel claims.<sup>301</sup> The court held that "there will be an inference that the procedure resulted in ineffective assistance of counsel, which inference the state will have the burden of rebutting."<sup>302</sup> Thus, the Arizona Supreme Court impressed upon the county governments in Arizona that it is unwilling to allow the counties' cost saving mentality to infringe upon a poor person's constitutional entitlements.<sup>303</sup>

The Minnesota Supreme Court could have adopted the *Smith* standard and communicated a similar message to its own legislature.<sup>304</sup> The *Smith* standard would have compelled the legislature to re-evaluate and modify Minnesota's public defender system. It is evident that the Fourth District's prosecutors are currently incapable of meeting the burden of the *Smith* standard considering the circumstances that pervade the Fourth District. The legislature, therefore, would have had to quickly respond to avoid paralyzing the State's ability to attain convictions. In sum, the Minnesota Supreme Court could have compelled the legislature to grant Minnesota's public defenders relief.

Another alternative available to the Minnesota Supreme Court was to adopt the measures formulated by the Louisiana Supreme Court in *State v. Peart*.<sup>305</sup> The city of New Orleans operated a public defender system.<sup>306</sup> During the prosecution of Peart for a host of violent crimes, the public defender representing Peart filed a "Motion for Relief to Provide Constitutionally Mandated Protection and Resourc-

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299. *Id.*

300. *Id.*

301. *Id.* at 1384.

302. *Id.*

303. *See* Citron, *supra* note 5, at 502.

304. The Minnesota Supreme Court attempts to rely on the egregious facts surrounding *Smith* to conclude that the Fourth District public defenders' claims are meritless. *Kennedy v. Carlson*, 544 N.W.2d 1, 5 (Minn. 1996). This is inappropriate, though, considering that *Smith* was a post-conviction challenge whereas *Kennedy* is a systemic challenge. Thus, the circumstances that constitute the requisite injury are different and a comparison of the two is of little value.

305. 621 So. 2d 780 (La. 1993).

306. *Id.* at 785.

es.<sup>307</sup> After a series of hearings, the trial court concluded that the public defender was unable to render effective assistance of counsel.<sup>308</sup> The trial judge reached this conclusion in light of the fact that the attorney was managing seventy felony cases and had a case set for trial every day for the first eight months of the year.<sup>309</sup> The trial judge also concluded that the public defender system itself was grossly inadequate due to the lack of investigators and the unavailability of any expert testimony.<sup>310</sup> The trial court thus ordered the legislature to grant additional funding to the public defender system so it could secure desperately needed resources.<sup>311</sup>

In ruling upon the State's appeal, the Louisiana Supreme Court reversed the trial court's order.<sup>312</sup> It instead elected to fashion its own remedy in an exercise of its "general supervisory jurisdiction over all other courts."<sup>313</sup> The court held that, since the lack of indigent defense funding eradicated the possibility of inadequate assistance by an attorney in the district in question "a rebuttable presumption arises that indigents . . . are receiving assistance of counsel not sufficiently effective to meet constitutionally required standards."<sup>314</sup> The court further held that the trial court, upon a defendant's motion, must hold a hearing to determine whether the indigent's representative is denying the defendant his right to effective counsel.<sup>315</sup> If the trial court finds a lack of effective assistance, then the trial court must attempt to fashion a remedy or prevent the prosecution from proceeding until the attorney can render effective assistance.<sup>316</sup> Certainly Minnesota's trial courts are capable of hearing similar motions and conducting any necessary hearings on the matter. Thus, the Minnesota Supreme Court should have considered implementing this remedy to alleviate the conditions existing in the Fourth District.

Just as in *State v. Smith*, however, there is a limit to the presumption of ineffective assistance of counsel.<sup>317</sup> The Louisiana Supreme Court

307. *Id.* at 784. The public defender in this case, Rick Teisser, represented Peart in defending himself against charges of armed robbery, aggravated rape, aggravated burglary, and attempted armed robbery. Teisser was one of only two attorneys assigned to represent indigent defendants. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* at 784-85.

312. *Id.* at 792; *Louisiana Supreme Court Blocks Indigent Defender Funding Order*, BATON ROUGE ADVOC., Feb. 21, 1992, at 7B.

313. *Id.* at 790 (citing LA. CONST. art. V, § 5).

314. *Id.* at 791.

315. *Id.* at 791-92.

316. *Id.* at 792.

317. *Id.* at 791.

held that this presumption shall remain in place until there are significant changes in New Orleans' public defender system.<sup>318</sup> The court went further to reinforce its position on the matter, prophesizing that:

If legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel.<sup>319</sup>

Thus, not only did the Louisiana Supreme Court provide a method of pre-trial relief, it also defined what changes were necessary so the legislature would know what aspects of its public defender system needed change. *Peart*, like *Smith*, demonstrates that the Minnesota Supreme Court is in a position to provide a remedy to force the legislature to act.

The Minnesota Supreme Court should have found the *Peart* remedy a very attractive option. While the declaratory judgment reiterates the court's position, it does little to compel the legislature to act.<sup>320</sup> Furthermore, allowing trial courts to appoint private attorneys will result in more lawsuits<sup>321</sup> and will conflict with existing precedent.<sup>322</sup> On the other hand, relief that alters how the judicial system views an indigent defense system is surely to produce the desired results.

Within this type of remedy, the court will be able to act if it concludes that the legislature did not heed its warning.<sup>323</sup> Dismissing a prosecutor's case or overturning a conviction would undoubtedly capture the legislature's attention. The court's proactive relief, therefore, would have the effect of penalizing "the state for its inadequate indigent defense institutions by making convictions more difficult to obtain until the system [is] reformed."<sup>324</sup> Surely the threat of releasing criminals will grab the media's, and ultimately the public's, attention.<sup>325</sup> Moreover, the legislature's fear of appearing to condone the release of criminals will certainly compel it to act.

318. *Id.* The court did not precisely define what it meant by "changes." Instead, it merely eluded that the attorney's workload in place at the time of the ruling would have to change. It is important to note that this rebuttable presumption only reached the district reviewed in the case, and not the entire state. *Id.*

319. *Id.*

320. Citron, *supra* note 5, at 500.

321. See KLEIN & SPANGENBERG, *supra* note 110, at 17-19.

322. See *Dzibuak v. Mott*, 503 N.W.2d 771, 775 (Minn. 1993).

323. Citron, *supra* note 5, at 502.

324. *Id.*

325. *Id.*

Hence, a remedy that incorporates a rebuttable presumption similar to those found in *Smith* and *Peart* is an attractive option, one the Minnesota Supreme Court should have implemented.

Furthermore, the ability of the court to implement a remedy to alleviate current conditions while not declaring section 611.27, subdivision 7 unconstitutional demonstrates the flexibility of the *Smith* and *Peart* rebuttable presumption option.<sup>326</sup> The court could have, as the Louisiana Supreme Court did in *Peart*, ruled that the statutory funding apparatus is constitutional but the inadequate level of funding creates intolerable conditions.<sup>327</sup> In sum, the Minnesota Supreme Court needs to formulate and order a remedy which forces the state's legislature to address its indigent defense system's deficiencies.

### 3. *Forcing the Legislature to Respond by Heightening the Level of Scrutiny Given to Claims of Ineffective Assistance of Counsel*

A third alternative available to the Minnesota Supreme Court is the option of becoming more critical of counsel's performance at the trial court level.<sup>328</sup> This can be accomplished if the court elects to implement a new standard for assessing post-conviction ineffective assistance of counsel claims. A survey of other states reveals that abandoning the *Strickland* test is a viable possibility.

The Supreme Court of Hawaii, for example, concluded in *Briones v. State*<sup>329</sup> that it is more appropriate to apply a "stricter review of counsel's performance to the appellate stage in order to more fully protect the defendants' rights . . . ."<sup>330</sup> It therefore adopted an

326. See *State v. Peart*, 621 So. 2d 780, 791 (La. 1993).

327. *Id.* It is also necessary to observe that the Minnesota Supreme Court, like the Louisiana Supreme Court did in *Peart*, could have implemented a rebuttable presumption in the Fourth District alone and not throughout the entire state. See *id.* at 792.

328. See *id.* at 791.

329. 848 P.2d 966 (Haw. 1993).

330. *Id.* at 976. The court explicitly rejected *Strickland's* test as "too burdensome for defendants to meet because it imposes a double burden upon defendants trying to show their counsel's ineffective assistance, resulting in a prejudice requirement almost impossible to surmount." *Id.* at 976 n.11 (citing *State v. Smith*, 712 P.2d 496, 500 n.7 (1986)). In reaching the same conclusion as the Hawaii Supreme Court, other commentators have argued for implementing a modified *Strickland* standard. The proposals consist of the following:

The modified *Strickland* standard initially requires a showing of a reasonable probability that the appointed counsel will commit unprofessional errors at trial. Such a showing creates a rebuttable presumption that the defendant will be prejudiced, and therefore, an inference that the defendant is not receiving effective assistance of counsel. The trial must, nevertheless, proceed in order to preserve the defendant's right to a speedy trial and foster the public's interest in the swift administration of our nation's system of criminal justice. However, all convictions should be subject to reversal unless the state can

objectively reasonable test.<sup>331</sup>

This test holds that if it is not possible to justify an act or omission, and the act or omission impacted a possibly meritorious claim, "then the knowledge held and investigation performed by counsel . . . will be evaluated as that information that, in light of the complexity of the law and the factual circumstances, an ordinarily competent criminal attorney should have had."<sup>332</sup> Thus, this standard is less restrictive than *Strickland* because it does not require a showing of actual prejudice.<sup>333</sup>

*Breese v. Commonwealth*,<sup>334</sup> provides another example of a possible test the supreme court could have used. In *Breese*, the Supreme Court of Massachusetts adopted a similar reasonable attorney standard which requires a reviewing court when assessing an ineffective assistance of counsel claim to determine "whether there has been serious incompetence, inefficiency, or inattention of counsel . . . and, if that is found, then . . . whether it has likely deprived the defendant of an otherwise available, substantial ground of defence."<sup>335</sup> The Minnesota Supreme Court, therefore, could have adopted a similar standard to provide indigent defendants more protection against errors caused by overburdened public defenders.<sup>336</sup> Moreover, the capability of implementing a more stringent review of a public defender's conduct further supports the selection of a remedy which compels the legislature to act.

In summary, the Minnesota Supreme Court expressed that it may

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demonstrate that the appointed attorney's acts or omissions were either harmless or justified. To prove that an allegedly ineffective act or omission was justified, the government must:

produce actual evidence, from the record or otherwise, that defense counsel made a reasonable tactical decision under the particular circumstances of the defendant's case and that this decision justified his failure to substantially satisfy one or more of the basic components [of effective representation].

Charles M. Kreamer, *Adjudicating the Peart Motion: A Proposed Standard to Protect the Right to Effective Assistance of Counsel Prospectively*, 39 LOY. L. REV. 635, 653-55 (1993) (quoting Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 441 (1988) (alteration in original)).

331. *Briones v. State*, 848 P.2d 966, 976 (Haw. 1993).

332. *Id.*

333. *Id.* at 977.

334. 612 N.E.2d 1170 (Mass. 1993).

335. *Id.* at 1172.

336. See Rutherford, *supra* note 70, at 977. As part of the argument to abandon absolute immunity for public defenders, Rutherford argues that the court should modify *Strickland* by eliminating the presumption of effectiveness element from the test. *Id.* at 1006-08. This is another viable alternative that the court should consider. In short, the court can remedy this problem; it just needs to be willing to do so.

make itself amenable to this standard when it stated that it "is altogether fitting that our constitution be interpreted by this state's highest court to offer greater safeguards of fundamental rights for Minnesota citizens than the protection offered citizens of the United States under the federal constitution."<sup>337</sup> If the court had chosen to order just a declaratory judgment, it would not have successfully convinced the legislature to act.<sup>338</sup> Thus, the capability to compel legislative action and the ability to enforce its warnings makes implementing a rebuttable presumption of ineffective assistance of counsel or altering the post-conviction ineffective assistance of counsel claims the superior remedies.

## VII. CONCLUSION

*Kennedy v. Carlson* provides a window for the world to view how many indigent defense systems are currently operating in the United States. The fact of the matter is that politicians, with their pro-law enforcement mentality, are crippling the poor's ability to secure adequate counsel. This trend debases the very virtues the entire judicial system represents; due process, equal treatment, and blind justice all become hollow promises for a poor person represented by today's public defender. This results because the public defender system is an institution which is neither politically popular nor always viewed as essential by the public. Unfortunately, if the court does nothing, things are only going to become worse.

*Kennedy* provided the Minnesota Supreme Court with an invitation to change this pattern of legislative insubordination. The premise is simple: public defenders cannot represent the poor effectively until the legislature provides the requisite resources. The Minnesota Supreme Court should have become the messenger and delivered to the rest of the state's government a message: the judicial system will not tolerate the transformation of a process that is supposedly adversarial in nature into a rubber stamp adjudication process. Furthermore, the Minnesota Supreme Court should have demonstrated that the rest of the government cannot ignore its message. The court could have accomplished this by implementing a remedy that will surely garner a legislative response to the current crisis. Although this solution may cause more of a burden on the State, the State created the current crisis and it, not the poor criminal defendant, should bear the burden

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337. *Friedman v. Commissioner of Pub. Safety*, 473 N.W.2d 828, 836 (Minn. 1991). The court could expand greater protection to Minnesotans under Article 1, § 6 of Minnesota's Constitution. It states that a defendant "shall enjoy the right . . . to have the assistance of counsel in his defense." MINN. CONST. art. 1, § 6.

338. See *Citron*, *supra* note 5, at 500.

**of its failings. A remedial measure with teeth would have started transforming Minnesota's public defender system from a beleaguered institution into one that guarantees effective assistance of counsel to all indigent defendants.**

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