NOTES

CIVIL CHALLENGES TO THE USE OF LOW-BID CONTRACTS FOR INDIGENT DEFENSE

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In recent years, increasing attention has been directed to the problem of adequate representation for indigent criminal defendants. While overwhelming caseloads and inadequate funding plague indigent defense systems of all types, there is a growing consensus in the legal community that low-bid contract systems—under which the state or locality's indigent defense work is assigned to the attorney willing to accept the lowest fee—pose particularly serious obstacles to effective representation. In this Note, Margaret Lemos argues that the problems typical of indigent defense programs in general—and low-bid contract systems in particular—can and should be addressed through § 1983 civil actions alleging that systemic defects in the state or locality's chosen method for providing indigent defense services constitute a violation of indigent defendants' constitutional right to effective assistance of counsel. Lemos concludes that, by addressing the causes of ineffective assistance, such an approach can achieve positive change in a way that case-by-case adjudication of postconviction claims of ineffective assistance cannot.

INTRODUCTION

Several years ago, officials in McDuffie County, Georgia, decided to cut costs on indigent defense. The county commission announced that it would accept bids from any member of the local bar willing to handle the county's indigent defense work for one year.[1] No minimum qualifications were specified in the call for bids, and the commission did not base its decision on the credentials or experience of the attorneys who submitted bids.[2] The contract was awarded to Bill Wheeler, who offered to perform all of the county's indigent defense work for $25,000.[3] Wheeler's bid was almost $20,000 lower than the

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1 See Letter from Stephen B. Bright, Director, Southern Center for Human Rights, to Joyce Blevins, Chair, McDuffie County Commission (Feb. 11, 1999) <http://209.70.38.3/public.nsf/freeform/SCHRreport> [hereinafter SCHR Letter].

2 See id. Nor did the call for bids indicate the number of cases for which the successful bidder would be responsible. See id.

3 See Stephen B. Bright, Glimpses at a Dream Yet to Be Realized, Champion, Mar. 1998, at 12, 14.

other two bids, and $21,000 less than the county had paid the previous year to court-appointed attorneys.[4]

Although he was responsible for defending every indigent charged with a crime in McDuffie County, Wheeler continued to maintain a private practice.[5] Under his contract with the county, he was free to devote as much (or as little) time as he chose to indigent defense.[6] The contract provided no funds for investigators, unless ordered by the court.[7] Wheeler either could locate and interview all witnesses and investigate cases himself, or use a portion of the contract fee to pay for support services.[8]

Most of Wheeler's indigent clients met him for the first time in court. After a brief, whispered conversation, Wheeler would recommend a guilty plea.[9] From 1993 through 1998, 262 indigent defendants represented by Wheeler pled guilty to felonies. Wheeler tried only fourteen felony cases (only two of which were before a jury) and filed no more than seven motions in those five years.[10] Indigent defendants repeatedly complained about Wheeler's poor performance, his unwillingness to discuss their cases with them, and his failure to pursue their defenses diligently.[11] According to his clients, Wheeler frequently encouraged them to plead guilty without conducting any factual or legal investigation of their cases, and without meeting with them to discuss possible defenses or to explain the charges against them.[12]

Despite the constitutional mandate of effective assistance of counsel for every indigent criminal defendant,[13] public defense systems nationwide are plagued by overwhelming caseloads and inadequate funding and support services.[14] The indigent defense crisis is

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4 See SCHR Letter, supra note 1.

5 See Bright, supra note 3, at 14.

6 See SCHR Letter, supra note 1.

7 See id.

8 See id.

9 See id.

10 See id.; cf. Larry S. Pozner, Life Liberty and Low-Bid Lawyers: The Defiling of Gideon, Champion (July 1999) <http://www.criminaljustice.org/public.nsf/ChampionArticles/99julPres?OpenDocument> (describing low-bid contract system under which contracting firm handled over 5000 cases in one year but tried only 12).

11 See SCHR Letter, supra note 1.

12 See id.

13 See U.S. Const. amend VI; see also McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (stating that Sixth Amendment guarantees right to effective assistance of counsel); Glasser v. United States, 315 U.S. 60, 76 (1942) (same).

14 See, e.g., Richard Klein & Robert Spangenberg, ABA, The Indigent Defense Crisis 25 (1993) (concluding that "[t]he long-term neglect and underfunding of indigent defense has created a crisis of extraordinary proportions"); Norman Lefstein, ABA, Criminal Defense Services for the Poor 15-16 (1982) (discussing 37 studies of indigent defense systems, virtually all of which found problems related to adequacy of funding and other resources);

exacerbated by the recent proliferation of low-bid contract systems, such as that employed in McDuffie County.[15] The use of low-bid contracts to provide indigent defense services has been criticized roundly by bar association, government, and academic studies.[16] However,

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National Legal Aid & Defender Ass'n (NLADA), The Other Face of Justice 70 (1973) (describing resources allocated to indigent defense services as "grossly deficient" in light of needs of effective representation); President's Comm'n on Law Enforcement & Admin. of Justice, The Challenge of Crime in a Free Society 149-53 (1967) (noting low rates for indigent defenders and difficulties in recruiting lawyers willing and able to provide representation to indigent criminal defendants); Special Comm'n on Criminal Justice in a Free Soc'y, ABA, Criminal Justice in Crisis 37, 39-41 (1988) (discussing lack of adequate funding for indigent defense programs); David Bazelon, The Defective Assistance of Counsel, 42 U. Cin. L. Rev. 1, 2 (1973) (stating that "a great many—if not most—indigent defendants do not receive . . . effective assistance of counsel"); Andy Court, Is There a Crisis?, Am. Law., Jan./Feb. 1993, at 46, 47 (describing extensive survey of indigent defense that revealed widespread underfunding, morale problems, and frequent incompetence).

15 See ABA Standards for Criminal Justice: Providing Defense Services Standard 5-1.2 commentary at 6 (3d ed. 1990) [hereinafter ABA Standards] (noting "immense growth" of contract systems during 1970s and 1980s); National Ass'n of Criminal Defense Lawyers (NACDL), Low-Bid Criminal Defense Contracting: Justice in Retreat, Champion, Nov. 1997, at 22, 22-24 (stating that use of low-bid contract system has proliferated since 1980); Robert L. Spangenberg & Marea L. Beeman, Indigent Defense Systems in the United States, Law & Contemp. Probs., Winter 1995, at 31, 35 (finding that number of jurisdictions utilizing contract programs has increased substantially in recent years); Alissa Pollitz Worden, Privatizing Due Process: Issues in the Comparison of Assigned Counsel, Public Defender, and Contracted Indigent Defense Services, 14 Just. Sys. J. 390, 393 & n.4 (1991) (noting that contract systems represented large percentage growth in defense services from 1980 to 1990). According to a 1992 survey by the Bureau of Justice Statistics, contract systems are the predominant method of providing indigent defense services in approximately eight percent of counties nationwide. See John B. Arango, Defense Services for the Poor, Crim. Just., Spring 1996, at 53, 53.

16 See ABA Standards, Standard 5-1.2 commentary at 6 (stating that contract programs "have conspicuously failed to provide quality representation to the accused"); Ira Mickenberg & H. Scott Wallace, National Survey of Indigent Defense Systems Interim Report § B(1) (1997) <http://www.nlada.org/d-bjstext.htm> (noting that many defenders have expressed serious concerns regarding quality of service provided by contract systems); Paul Calvin Drecksel, The Crisis in Indigent Criminal Defense, 44 Ark. L. Rev. 363, 381-82 (1991) (noting "dangerous trend" toward use of low-bid contract systems, which are less likely to provide effective assistance); 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, 680-81 & 681 n.288 (1986) (discussing efforts of organized bar to prevent local governments from expanding low-bid contract system); NACDL, supra note 15, at 22, 24 (cataloguing flaws of low-bid contract systems); Spangenberg & Beeman, supra note 15, at 34-35, 49 (discussing dangers of low-bid contract systems); Memorandum from H. Scott Wallace, Director, Defender Legal Services, NLADA, to State Chief Justices, State and Local Bar Presidents, and Lawyer Disciplinary Agencies (Oct. 3, 1997) <http://209.70.38.3/INDIGENT/ind00008.htm> (urging institution of safeguards in low-bid contract systems to ensure efficient assistance for indigent defendants); see also Meredith Anne Nelson, Comment, Quality Control for Indigent Defense Contracts, 76 Cal. L. Rev. 1147, 1151-55 (1988) (discussing empirical studies of indigent defense contracts that found lower quality of representation under contract systems as opposed to public defender or appointed counsel programs). But see David Paul Cullen, Indigent Defense Comparison of *Ad Hoc* and Contract Defense in Five Semi-Rural Jurisdictions, 17 Okla. City U. L. Rev.

such systems continue to gain popularity as state and local governments seek to limit the cost of defending the indigent accused.[17]

Low-bid contract systems[18] share many common problems with assigned counsel systems[19] and public defender systems,[20] the two other types of indigent defense programs. As a result of the recent war on crime and a major increase in drug prosecutions, the caseloads of indigent defenders in all three categories have skyrocketed.[21] Reports from the Department of Justice indicate that over seventy percent of criminal defendants are indigent.[22] Yet year after year, state and local governments devote only scant resources to indigent defense, while spending the vast majority of their criminal justice funds on law enforcement, prosecution, and corrections.[23] Excessive

311, 374-75 (1992) (reporting results of study that compared contract attorneys to court-appointed attorneys and found no significant differences in performance).

17 See NACDL, supra note 15, at 24 (discussing appeal of low-bid contract systems as means of reducing or containing indigent defense costs); James R. Neuhard, The Right to Counsel: Shouldering the Burden, 2 T.M. Cooley J. Prac. & Clinical L. 169, 174 (1998) (same); Spangenberg & Beeman, supra note 15, at 49 (same).

18 Under the contract model, the state or county enters into contracts with a lawyer or a group of lawyers. Usually the contracting attorney agrees to accept all or a portion of the county's indigent defense work for a flat fee. See Spangenberg & Beeman, supra note 15, at 34-35. In some jurisdictions, contract attorneys are paid on a case-by-case basis. See id. Such contract systems are not the focus of this Note; any reference to "contract systems" should be understood to refer to fixed fee, low-bid systems.

19 Assigned counsel systems utilize private attorneys to represent indigent criminal defendants. Under the most common type of assigned counsel program, members of the local bar are appointed by the court to represent indigent defendants on a case-by-case basis and are paid by either a flat fee or an hourly rate. See id. at 32-34.

20 Under the public defender model, a public or private nonprofit organization staffed by full- or part-time attorneys is designated by the state or local government to provide representation to indigent defendants. See id. at 36. Because conflicts of interest inevitably arise within a public defender office, no jurisdiction can operate with a public defender system alone, but must utilize either an assigned counsel or a contract system (or a combination of the two) to supplement the public defender office. See id. at 32, 36.

21 See Richard Klein, The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel, 68 Ind. L.J. 363, 397-404 (1993) (discussing increased drug prosecutions as cause of caseload crisis in various cities); Spangenberg & Beeman, supra note 15, at 31-32 (same); David L. Wilson, Constitutional Law: Making a Case for Preserving the Integrity of Minnesota's Public Defender System, 22 Wm. Mitchell L. Rev. 1117, 1132-33 (1996) (same); Robert L. Spangenberg & Tessa J. Schwartz, The Indigent Defense Crisis Is Chronic, Crim. Just., Summer 1994, at 13, 14 (same).

22 See Steven K. Smith & Carol J. DeFrances, U.S. Dep't of Justice, Indigent Defense 1 (1996) (finding that about 75% of state prison inmates and nearly 80% of local jail inmates had court-assigned attorneys).

23 See Bureau of Justice Statistics, U.S. Dep't of Justice, Justice Expenditure and Employment 8 (1990) (reporting that public defense represented only 2.06% of the $65 million spent by state and local governments on criminal justice); Wilson, supra note 21, at 1133 (same); see also Steven B. Bright, Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake, 1997 Ann. Surv. Am. L. 783, 816-21 (describing funding problems in various indigent defense systems nationwide).

caseloads and inadequate resources have created a situation in which defense attorneys—regardless of the system under which they work—cannot possibly provide effective assistance to all of the clients they are expected to represent.[24] Nevertheless, there is widespread agreement in the legal community that low-bid contract systems like that employed in McDuffie County[25] pose particularly serious obstacles to effective representation.[26]

In attempts to remedy the defects common to all types of indigent defense systems, litigators representing indigent defendants have employed various strategies to focus courts' attention on the causes of ineffective assistance, rather than its symptoms.[27] As a result, numerous courts have recognized that the quality of representation available to indigent criminal defendants is adversely affected by excessive caseloads, inadequate compensation, lack of supervision or training, and lack of support services.[28] These cases provide support for a new approach to the problem of ineffective assistance: section 1983 civil

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[24] See Wilson, supra note 21, at 1139-40 (noting that excessive caseloads and inadequate resources make adequate case preparation, including investigation of law and facts, witness and expert interviews, client consultation, and motion preparation, impossible); Spangenberg & Schwartz, supra note 21, at 15 (same); see also Klein, supra note 16, at 658-59 (noting that competent representation is not available to many indigent defendants because of lack of funding for indigent defense, overwhelming caseloads of defenders, lack of training for defense counsel, and lack of expert and investigative assistance); Stephen B. Bright et al., Keeping *Gideon* from Being Blown Away: Prospective Challenges to Inadequate Representation May Be Our Best Hope, Crim. Just., Winter 1990, at 10, 11-13 (same).

[25] McDuffie County's low-bid contract system and others like it suffer from some or all of the following defects: Contracts are awarded on the basis of cost alone without inquiry into attorney qualifications; attorneys are paid a flat fee regardless of the number or complexity of cases that arise; no funds are available for investigation or support services; attorneys are neither trained nor supervised; and there are no caseload limits or performance standards. See supra text accompanying notes 1-12 (describing low-bid contract system in McDuffie County); see also State v. Smith, 681 P.2d 1374, 1381 (Ariz. 1984) (describing low-bid contract system in Mohave County, Arizona); Nelson, supra note 16, at 1147-55 (discussing attributes of contract systems); Spangenberg & Beeman, supra note 15, at 34-35 (same).

[26] See supra note 16. This Note does not suggest that the use of a contract to secure indigent defense services is necessarily problematic. This Note is concerned with only a particular subset of contract systems, namely those that utilize low-bid, fixed-fee contracts.

[27] These litigative approaches can be grouped into four broad categories of cases: (1) those that challenge the rates of compensation for indigent defenders, (2) those that address the problem of excessive caseloads, (3) those that attempt to address various defects in the entire system of indigent defense in the postconviction context, and (4) those that address systemic defects prior to trial. See infra notes 134-38 and accompanying text. Rather than challenging the performance of specific attorneys (as does the "symptom-based" approach typical of postconviction claims of ineffective assistance), these "cause-based" approaches focus on the systemic conditions that lead to deficient representation.

[28] See infra notes 134-38 and accompanying text.

actions[29] alleging that systemic defects in the state's chosen method for providing indigent defense services constitute a violation of defendants' right to effective assistance of counsel. Civil claims challenging the underfunding and understaffing of public defender systems have met with moderate success.[30] However, to date, there has been no attempt to challenge the constitutionality of a low-bid contract system through civil suit.

This Note argues that civil suits are a viable solution to the problems associated with low-bid contract systems. Part I sketches the development of the right to effective assistance of counsel as an essential component of a fair trial, and discusses the current standard for postconviction review of claims of ineffective assistance. This Part explains why postconviction review of alleged Sixth Amendment violations is insufficient to ensure that indigent criminal defendants receive a fair trial.

Part II proposes a new approach to remedying the problem of ineffective assistance of counsel, one that focuses on the features of indigent defense systems that cause inadequate representation. Part II.A describes the advantages of civil challenges to indigent defense systems in general—and low-bid contract systems in particular—as a means of improving the quality of representation available to indigent

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[29] In this Note, any reference to a "civil" suit should be understood to refer to a class action suit, brought under 42 U.S.C. § 1983 (Supp. IV 1998), which seeks injunctive relief to improve a particular state or local indigent defense system. Class action suits do not attempt to overturn the criminal convictions of any indigent defendants, and should not be confused with individual suits for habeas corpus relief, although such suits are technically "civil," as opposed to criminal, claims.

[30] Two such suits, which targeted public defender programs in Pennsylvania and Connecticut, resulted in favorable settlements mandating increased funding, caseload standards, and enhanced training and supervision. See ACLU Press Release, Settlement in Class-Action Lawsuit Against Pittsburgh Public Defender for Failing to Counsel the Poor (May 13, 1998) <http://www.aclu.org/news/n051398a.html>; ACLU Press Release, Settlement Reached in ACLU's Class-Action Lawsuit Alleging Inadequacy of Connecticut Public Defender System (July 7, 1999) <http://www.aclu.org/news/1999/n070799a.html>. Similar litigation was brought in Georgia, where, as a result of underfunding of the Fulton County indigent defense system, indigents were not provided with assistance of counsel prior to arraignment. Fulton County agreed to a consent order that required it to modify its system in order to provide effective and continuous legal representation to indigents from arrest through trial. See Southern Ctr. for Human Rights, Center Obtains Order Requiring Lawyers for Poor People Accused of Crimes in Atlanta (visited Oct. 24, 1999) <http://www.schr.org/news/news_fultoncounty.htm>. Other attempts to challenge the adequacy of public defender systems have garnered favorable rulings on the merits, only to be dismissed on procedural or jurisdictional grounds. See Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988), rev'd on abstention grounds sub nom. Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992); Wallace v. Kern, 392 F. Supp. 834 (E.D.N.Y.), rev'd on state action grounds, 481 F.2d 621 (2d Cir. 1973); see also Hadley v. Werner, 753 F.2d 514 (6th Cir. 1985) (relief denied on abstention grounds); Gardner v. Luckey, 500 F.2d 712 (5th Cir. 1974) (same); Noe v. County of Lake, 468 F. Supp. 50 (N.D. Ind. 1978) (same).

defendants. Part II.B explains the basic structure of a civil suit alleging deprivation of the right to counsel due to the use of low-bid contracts to secure indigent defense services. This Part demonstrates that the glaring defects in low-bid contract systems can be addressed and remedied through such an approach.

I
THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

A. Development of the Right to Counsel

The emergence of the right to counsel can be traced to *Powell v. Alabama*,[31] in which the Supreme Court held that the trial judge's failure to appoint counsel for the defendants in a highly publicized capital case until the morning of the trial violated the Due Process Clause of the Fourteenth Amendment.[32] *Powell* established that the right to counsel is a fundamental right, essential to ensure a fair trial for every criminal defendant, rich or poor.[33] In an oft-quoted passage, the Court explained the importance of the appointment of counsel in an adversary system: "Even the intelligent and educated layman . . . requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[34]

Although the holding was carefully limited to the facts of the case,[35] *Powell* stands as an important reminder that the right to counsel comprehends more than a "pro forma" appearance.[36] Emphasizing the vital importance of "consultation, thorough-going investigation and preparation" prior to trial,[37] the Court made clear that lackluster representation could not be excused by the apparent strength of the prosecution's case.[38] Thus, counsel's decision to proceed to trial without adequate preparation could not be justified by a belief that an investigation would have been fruitless.[39]

Six years after *Powell*, the Court ruled that the Sixth Amendment requires the appointment of counsel for indigent defendants in all fed-

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31 287 U.S. 45 (1932).

32 See id. at 71. Prior to the day of the trial, the judge had appointed somewhat vaguely "all members of the [local] bar" for the purpose of arraigning the defendants. Id. at 56.

33 See id. at 68-69.

34 Id. at 69.

35 See id. at 71.

36 Id. at 58 (internal quotation marks omitted).

37 Id. at 57.

38 See id. at 58.

39 See id. ("Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts.").

eral criminal proceedings.[40] The right to counsel was extended to the states in *Gideon v. Wainwright*,[41] which held that the appointment of counsel is "'so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment.'"[42] In subsequent decisions, the Court further expanded the right to counsel to reach an indigent defendant's first nondiscretionary appeal,[43] and to apply to any misdemeanor prosecution that leads to imprisonment.[44]

The Sixth Amendment is not satisfied simply because an attorney has been appointed to represent the indigent accused.[45] As the Court delineated the bounds of the right to counsel, it also expounded on the substance of that right, making clear that the Sixth Amendment guarantees "the right to the effective assistance of counsel."[46] The requirement of effective assistance is an obvious corollary to the right to counsel, for "a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all."[47] Indeed, the text of the Sixth Amendment suggests as much: The criminal defendant must be afforded the "Assistance of Counsel for his defence."[48] Thus, the constitutional guarantee is violated if counsel does not provide actual "assistance" for the accused's "defense."[49]

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[40] See Johnson v. Zerbst, 304 U.S. 458 (1938).

[41] 372 U.S. 335 (1963).

[42] Id. at 340-41 (quoting Betts v. Brady, 316 U.S. 455, 465 (1942)).

[43] See Douglas v. California, 372 U.S. 353, 356-57 (1963).

[44] See Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). The right to counsel also applies to juvenile delinquency proceedings in which the indigent youth is threatened with incarceration. See In re Gault, 387 U.S. 1, 35-37 (1967).

[45] See Avery v. Alabama, 308 U.S. 444, 446 (1940) (stating that right to counsel is not satisfied by "mere formal appointment" of counsel); see also Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding that duty to appoint counsel for indigent accused "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case").

[46] McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); see also Cuyler v. Sullivan, 446 U.S. 335, 344 (1980) (stating that right to counsel comprehends right to effective assistance of counsel); Glasser v. United States, 315 U.S. 60, 76 (1942) (holding that Sixth Amendment guarantees right to effective assistance of counsel); *Powell*, 287 U.S. at 58, 71 (stating that right necessarily implies "effective," "zealous" advocate); Klein, supra note 16, at 629 (noting that, "by 1964, the right to effective assistance in the qualitative sense was firmly imbedded in case law").

[47] Evitts v. Lucey, 469 U.S. 387, 396 (1985).

[48] U.S. Const. amend. VI.

[49] See United States v. Cronic, 466 U.S. 648, 654 (1984).

B. *Postconviction Review of Claims of Ineffective Assistance of Counsel*

Prior to 1984, the Supreme Court provided little guidance to courts seeking to determine the meaning of the constitutional requirement of "effective assistance."[50] Then, in *Strickland v. Washington*,[51] the Court for the first time announced the standard for evaluating postconviction claims of ineffective assistance. Under *Strickland*, an indigent defendant seeking to overturn his conviction must show that his right to counsel was violated, that is, that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[52] However, the inquiry does not end there. The defendant also must demonstrate that the denial of his right to effective assistance prejudiced his defense[53]—that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[54] *Strickland* therefore stands for the proposition that a criminal defendant whose counsel made such serious errors as to violate the Sixth Amendment still may receive a "fair trial"[55]—a proposition that directly contradicts the Court's earlier indications that any trial in which the defendant is denied meaningful assistance of counsel is presumptively unfair.[56]

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50 See Jennifer N. Foster, Note, *Lockhart v. Fretwell*: Using Hindsight to Evaluate Prejudice in Claims of Ineffective Assistance of Counsel, 72 N.C. L. Rev. 1369, 1379-81 (1994) (describing various tests developed by state and lower federal courts to evaluate claims of ineffective assistance).

51 466 U.S. 668 (1984).

52 Id. at 687. To satisfy the performance prong of the *Strickland* test, the defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness, based on prevailing professional norms. See id. at 688. In evaluating counsel's performance, reviewing courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

53 The prejudice prong of the *Strickland* test requires that the indigent defendant demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. See id. at 694. The Court emphasized that, "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice," reviewing courts may forego inquiry into counsel's performance and focus solely on the degree of prejudice to the defendant. Id. at 697.

54 Id. at 687.

55 See id. (stating that constitutionally inadequate performance by defense counsel will not warrant reversal of criminal conviction unless defendant *also* can show that she did not receive fair trial).

56 See Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (stating that, under adversary system of justice, indigent criminal defendant "cannot be assured a fair trial unless counsel is provided"); Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding that provision of counsel to indigent criminal defendant is "a necessary requisite of due process of law"); cf. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) (describing right to counsel as fundamental right that "assures the fairness, and thus the legitimacy, of our adversary process"); Polk County v. Dodson, 454 U.S. 312, 318 (1981) (noting that system assumes that adversarial testing ultimately will advance public interest in truth and fairness); Herring v. New

United States v. Cronic,[57] decided the same day as *Strickland*, further illustrates the Court's attempt to divorce the right to counsel from its due process underpinnings. In *Cronic*, as in *Strickland*, the Court acknowledged that the purpose of the right is to ensure that the indigent defendant receives a fair trial.[58] The right to effective assistance of counsel, the Court explained, is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."[59] Yet the Court went on to reverse the Tenth Circuit's holding that Cronic's right to counsel had been violated by such features of his trial as his court-appointed attorney's lack of experience and the lack of time for investigation and preparation, particularly given the complexity of the case.[60] The Court stated that a "competent attorney would have no reason to question the authenticity, accuracy, or relevance of [the government's] evidence,"[61] and emphasized that, since government attorneys already had reviewed the mountain of documentary evidence, defense counsel's job was simplified because he only needed to examine the limited number of exhibits that would be introduced at trial.[62] Thus *Cronic* suggests that the Sixth Amendment is satisfied—and a fair trial assured—by the appointment of passive defense attorneys who rely on the prosecution's investigation to produce all the relevant facts of the case.

Under *Powell* and *Gideon*, if the defendant did not receive effective assistance of counsel, she presumptively did not receive a fair trial. Under *Strickland* and *Cronic*, the inquiry is inverted: A defendant will be found to have had ineffective assistance *only* if her trial appears to have been unfair. The inversion would be innocuous, al-

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York, 422 U.S. 853, 862 (1975) (stating that vigorous advocacy by both defense counsel and prosecutor is needed to promote ultimate objective that guilty be convicted and innocent go free).

57 466 U.S. 648 (1984).

58 See id. at 658.

59 Id. at 656.

60 See id. at 652-53. Cronic was charged with mail fraud involving the transfer of more than $9,400,000 in checks between two banks in separate states and was assigned counsel by the court. At the time of his appointment, Cronic's young lawyer had no previous experience in criminal law and had never participated in a jury trial. See id. at 649, 665. He was given 25 days for pretrial preparation, whereas the government, represented by experienced criminal lawyers, had spent over four and one-half years reviewing thousands of documents to prepare its case. See id. at 649; see also Chester L. Mirsky, Systemic Reform: Some Thoughts on Taking the Horse Before the Cart, 14 N.Y.U. Rev. L. & Soc. Change 243, 247 (1986) (arguing that, by any measurement, these circumstances resulted in constructive denial of counsel).

61 *Cronic*, 466 U.S. at 664.

62 See id. at 663-64 & 664 n.33. But see Powell v. Alabama, 387 U.S. 45, 57-58 (1932) (stressing importance of full investigation by counsel even when it appears unlikely that such investigation will uncover viable defense).

beit rather odd, had the meaning of "fair trial" not been altered significantly in the process. While previous cases suggested that the fairness of a trial is determined in part by the fact that the defendant received effective assistance of counsel,[63] *Strickland* and *Cronic* define a fair trial by the probable reliability of its result, regardless of the performance of defense counsel or the circumstances under which counsel was appointed.[64] As the following subpart will demonstrate, however, it is unclear how courts meaningfully can determine that a trial produced a reliable result—and was therefore "fair"—without first inquiring into whether defense counsel was equipped to, and actually did, investigate independently the facts of the case so as to discover and present all possible defenses.[65]

C. *The Inadequacy of Postconviction Review*

To understand what was driving the Court in *Strickland* and *Cronic*, it is necessary to focus on the context in which claims of ineffective assistance are usually heard. Ineffectiveness claims obviously cannot be raised at trial, and so normally are raised on direct appeal or in state or federal collateral review,[66] where the only remedy is reversal of the conviction and the opportunity to retry the accused. In such a context, the demands of the Sixth Amendment are pitted against society's desire for prompt and efficient punishment of those convicted of crimes. Arguably, an inquiry into prejudice is necessary in the postconviction context to balance the systemic interests of judicial economy and finality with the interests of the individual defen-

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[63] See supra note 56.

[64] An indigent defendant claiming ineffective assistance of counsel may offer incontrovertible proof that her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," Strickland v. Washington, 466 U.S. 668, 687 (1984), yet still fail to satisfy the *Strickland* test if she cannot establish a "reasonable probability" that, but for counsel's errors, the result of her trial would have been different. Id. at 694.

[65] See infra Part I.C.1; see also *Powell*, 287 U.S. at 71 (holding that due process is not satisfied "by an assignment [of defense counsel] at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case").

[66] The right to effective assistance of counsel has been extended to an indigent defendant's first appeal as of right. See Evitts v. Lucey, 469 U.S. 387, 396 (1985). However, there is no constitutional right to counsel in the postconviction context, which is where most claims of ineffective assistance are raised for the obvious reason that a lawyer is unlikely to argue on direct appeal that her performance at trial was constitutionally inadequate. See, e.g., Murray v. Giarratano, 492 U.S. 1, 10 (1989) (holding that there is no right to counsel in state postconviction review of capital convictions); Ross v. Moffitt, 417 U.S. 600, 616 (1974) (holding that indigent defense counsel is not constitutionally required in discretionary review of criminal convictions). Few states provide counsel to aid criminal defendants in postconviction collateral attacks on their convictions. See Bright et al., supra note 24, at 12.

dant.[67] Judicial resources are wasted in relitigation unless the second proceeding is demonstrably likely to reach a different result from that reached in the first. Therefore, the fact that counsel's performance was constitutionally deficient does not, by itself, "warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[68]

Similar concerns help explain the Court's insistence that judicial scrutiny of counsel's performance be highly deferential.[69] The Court believed that a lower standard of proof for postconviction review "would encourage the proliferation of ineffectiveness challenges."[70] Furthermore, the Court was worried that a more "intrusive" inquiry into performance would discourage counsel from taking indigent defense cases and threaten the independence of defense attorneys.[71]

The Court's emphasis on finality led it to adopt a standard for postconviction review that requires the defendant to prove that, but for counsel's errors, the result of the proceeding likely would have been different.[72] By emphasizing that "the presumption that a criminal judgment is final" will take precedence over the fact that counsel's performance failed to satisfy the effective representation requirements of the Sixth Amendment,[73] *Strickland* painted a picture of a "reliable" outcome as one that finds support in the evidence presented at trial.[74] *Cronic* completed the picture by inviting courts to

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67 See *Strickland*, 466 U.S. at 693-94 (noting "profound importance of finality in criminal proceedings"); see also Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 451-53 (1963) (discussing economic and psychological value of finality in criminal cases).

68 *Strickland*, 466 U.S. at 691.

69 See id. at 689.

70 Id. at 690. Commentators have noted the cynicism on the part of appellate courts toward claims of ineffective assistance. See, e.g., Bazelon, supra note 14, at 26 (describing attitude of appellate courts as "the belief—rarely articulated but . . . widely held—that most criminal defendants are guilty anyway. From this assumption it is a short path to the conclusion that the quality of representation is of small account."); Klein, supra note 16, at 635-36 ("The opportunity to try his former lawyer has its undoubted attraction to a disappointed prisoner. . . . He may realize that his allegations will not be believed but the relief from monotony offered by a hearing in court is well worth the trouble of writing them down." (quoting Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir. 1945)). However, it bears emphasis that, despite the difficulty in overcoming *Strickland*'s prejudice component, postconviction claims of ineffective assistance abound. See Donald A. Dripps, Ineffective Assistance of Counsel: The Case for an *Ex Ante* Parity Standard, 88 J. Crim. L. & Criminology 242, 281-83 (1997).

71 See *Strickland*, 466 U.S. at 690.

72 See id. at 694.

73 Id. at 697.

74 See id. at 695-96. For a rather disturbing discussion of denial of claims of ineffective assistance under *Strickland*, see McFarland v. Scott, 512 U.S. 1256, 1259-61 (1994) (Blackmun, J., dissenting from denial of cert.).

rely on the strength of the government's case against the defendant[75] and making clear that reference to "external constraints" that called into question the fairness of the trial would not satisfy the prejudice component.[76] As a result, courts are encouraged, not only to determine whether the defendant's conviction was "reliable" by reference to what happened at the trial as opposed to what might have happened had defense counsel performed adequately, but also to ignore the systemic causes of ineffective assistance.

1. Reliance on an Unreliable Trial Record

One of the crucial deficiencies of postconviction review under *Strickland* and *Cronic* is that both cases encourage reliance on the evidence submitted at trial in order to determine whether counsel's errors prejudiced the defendant's case.[77] However, if defense counsel is overworked, underpaid, inexperienced, or uncommitted, her errors always will include errors of *omission*.[78] The result is an undeveloped record that does not reveal evidence that defense counsel should have discovered and presented.[79] As Justice Marshall pointed out in his *Strickland* dissent, it is difficult for reviewing courts to ascertain prejudice correctly given that "evidence of injury to the defendant

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[75] See supra notes 60-62 and accompanying text.

[76] United States v. Cronic, 488 U.S. 648, 662 n.31 (1984). The consequences of *Cronic*'s message, that defendants must point to the specific errors rather than the circumstances surrounding the trial, are illustrated in Gardner v. Dixon, No. 92-4013, 1992 U.S. App. LEXIS 28147 (4th Cir. Oct. 21, 1992) (per curiam), where the Fourth Circuit denied relief to an indigent defendant sentenced to death whose assigned attorney was a cocaine addict and was actively abusing cocaine and other narcotics during the trial. See 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, 124 (1995); see also Jeffrey Kirchmeier, Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the *Strickland* Prejudice Requirement, 75 Neb. L. Rev. 425, 455-63 (1996) (discussing cases in which courts concluded that counsel was effective under *Strickland* and *Cronic* despite fact that counsel was sleeping or under influence of drugs or alcohol during trial).

[77] See *Cronic*, 488 U.S. at 665-67; *Strickland*, 466 U.S. at 695-97.

[78] See State v. Smith, 681 P.2d 1374, 1381 (Ariz. 1984) ("The insidiousness of overburdening defense 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.").

[79] See Dripps, supra note 70, at 270-71 (explaining that "the consequences of a lawyer's incompetence both pervade and exceed the scope of the record . . . . To limit scrutiny of counsel's performance to a record made by counsel is for the reviewing court to don the very blinders worn by counsel."); Klein, supra note 21, at 415-16 (arguing that reliance on trial record to determine prejudice "is inherently flawed since any record of a trial in which counsel was ineffective is likely to be incomplete and not truly indicative of all that could have been done by a competent attorney"). New evidence not presented at trial may be introduced in a collateral attack on conviction; however, states are under no constitutional obligation to provide counsel in the postconviction context, and few states do. See supra note 66. Accordingly, this section will focus on claims of ineffective assistance raised on direct appeal.

may be missing from the record precisely because of the incompetence of defense counsel."[80]

The absence of effective representation may influence the outcome of a trial in numerous ways that will not be evident to the reviewing court.[81] How can an appellate court determine the possible success of defenses that were never raised or the persuasiveness of evidence never uncovered?[82] Although the record may reveal an apparently strong case against the defendant, "it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer."[83]

The inadequacy of postconviction review is especially stark in the context of guilty pleas. In order to overturn a guilty plea on the ground of ineffective assistance of counsel, the indigent defendant must show that, but for counsel's errors, she would have opted to go to trial and *likely would have been acquitted*.[84] In *Hill v. Lockhart*,[85] the Supreme Court explained that, when the claim is that counsel failed to investigate, the determination of prejudice is governed by the likelihood that an investigation would have yielded potentially exculpatory evidence that would have led counsel to recommend that the defendant go to trial.[86] This assessment, in turn, will "depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial."[87] Similarly, when the defendant claims that her attorney failed to advise her of a possible affirmative defense, the prejudice inquiry will depend on "whether the affirmative defense likely would have succeeded at trial."[88] It is altogether unclear how a reviewing court can confidently determine whether evidence that was never uncovered or a defense that was never presented would have affected the outcome of a trial that never happened. Thus, for indigent defendants like those in McDuffie County, who pled guilty on the advice of an attorney who never even attempted to investigate

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[80] *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting).

[81] Recall the *Powell* Court's emphasis on trial preparation: The Court made clear that the strength of the case against the indigent defendants does not excuse failure to investigate, as it is impossible to determine after the fact what information a thorough investigation would have yielded. See Powell v. Alabama, 287 U.S. 45, 58 (1932).

[82] See Klein, supra note 16, at 641-42 (arguing that ineffective assistance may affect trial so pervasively as to make it impossible to determine accurately degree of prejudice).

[83] *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting).

[84] See Hill v. Lockhart, 474 U.S. 52, 59 (1985).

[85] 474 U.S. 52 (1985).

[86] See id. at 59.

[87] Id.

[88] Id.

their cases, success in postconviction claims of ineffective assistance is all but impossible.

2. *Failure to Address the Causes of Ineffective Assistance*

Perhaps the most important shortcoming of postconviction review is that it addresses only the most pernicious symptoms of ineffective assistance of counsel, but fails to remedy the defects that cause inadequate representation in the first instance.[89] Many indigent defendants convicted of crimes are never able to litigate claims of ineffective assistance because the appointed attorney whose competence they seek to challenge is the only lawyer ever provided to them.[90] Even if the indigent defendant is able to secure a new attorney for her direct appeal (or is lucky enough to be afforded counsel for a postconviction collateral attack on her conviction), appellate counsel often have the same crushing workloads as trial attorneys and, as a result, prompt, thorough, and adequately prepared appeals are far from the norm.[91] Finally, satisfaction of the *Strickland* standard is a hollow victory for the indigent defendant whose new trial is assigned to yet another overburdened or uninterested defense attorney.

II
PREVENTIVE MEDICINE: CIVIL CHALLENGES TO LOW-BID CONTRACTS FOR INDIGENT DEFENSE

In order to ensure that the right to counsel serves the purpose of guaranteeing that every defendant, rich or poor, receive a fair trial,[92] challenges to the adequacy of representation available to indigent criminal defendants must be moved away from the postconviction context. Adjudication of ineffective assistance claims on a case-by-case basis has proven incapable of addressing and remedying the causes of ineffective assistance. Furthermore, when the right to counsel is invoked in order to overturn a criminal conviction, concerns about finality and judicial economy compel a narrow understanding of effective assistance of counsel, one in which the facial reliability of the

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89 See Bright et al., supra note 24, at 12 (noting that even if defendant prevails on claim of ineffective assistance, "the remedy is the reversal of the conviction in that case, not remediation of factors in the system that may have caused the deficient performance of counsel").

90 See supra note 66.

91 See Klein, supra note 16, at 637 & n.76 (observing that appellate counsel with heavy caseloads cannot research their cases adequately).

92 See Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

conviction outweighs considerations of the requirements of a fair trial.[93]

A. *The Advantages of Civil Challenges to Indigent Defense Systems*

There are two obvious advantages to addressing the problem of ineffective assistance of counsel in a civil suit aimed at improving the system by which indigent defense services are provided. First, civil claims alleging deprivation of the right to counsel are designed to remedy the systemic defects that give rise to inadequate representation.[94] By eliminating the causes of ineffective assistance, such suits can effect meaningful change in a way that case-by-case postconviction review cannot. Second, civil claims do not implicate the concerns that informed the standard of review for postconviction challenges.[95] Indeed, civil suits of this sort foster the interests of judicial economy and finality by ensuring that future convictions will not be overturned on the ground of ineffective assistance.[96] Raising the issue of ineffective assistance in a civil suit allows courts to focus on the role of the right to counsel in preserving the integrity of the trial process without weighing fairness against finality. Highly deferential scrutiny of counsel's performance is not necessary in civil suits that do not question the litigative choices made by individual attorneys, but rather point to defects in the system by which indigent defense services are provided. Likewise, an inquiry into prejudice is not appropriate when concerns of finality and judicial economy are not implicated.

The crux of a civil claim is that systemic defects, such as inadequate compensation, overwhelming caseloads, lack of supervision or performance standards, and lack of inquiry into attorney qualifications, create a situation in which it is all but impossible to provide effective assistance. Thus, the critical question is whether the state has failed to satisfy its constitutional responsibility to provide every indigent criminal defendant with effective assistance of counsel.

B. *The Anatomy of a Claim*

A challenge to the constitutionality of a low-bid contract system for indigent defense should be brought on behalf of the class of indigent defendants who are or will be represented by the contract attor-

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93 See supra Part I.C.

94 See infra notes 99-102 and accompanying text (discussing possible remedies).

95 See supra notes 67-76 and accompanying text (discussing *Strickland* Court's emphasis on concerns of finality and judicial economy).

96 Cf. State v. Peart, 621 So. 2d 780, 787 (La. 1993) (stating that adjudicating claims of ineffective assistance prior to trial will further interests of judicial economy).

ney(s).[97] Such a challenge is based on the claim that the contract system is so flawed that indigent defendants are routinely denied the quality of representation required by the Sixth Amendment. The constitutional violation is found in the indigent defense system itself; it is not the performance of defense counsel that is challenged, but the structure of the system through which counsel is provided.[98] Therefore, the goal of the suit is not to overturn particular criminal convictions, but rather to remedy the defects in the system through prospective injunctive relief.[99] Although the specifics of the desired relief may differ from case to case, model standards for indigent defense contracts promulgated by the American Bar Association (ABA) may serve as a useful blueprint for the changes that should be made to the existing low-bid contract system.[100] The standards state that contracts for indigent defense services should prescribe allowable workloads for individual attorneys, minimum levels of experience and specific qualification standards, and limitations on the practice of law outside the contract.[101] In addition, the standards require that con-

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97 Cf. Luckey v. Harris, 860 F.2d 1012, 1013 (11th Cir. 1988) (action challenging public defender system brought on behalf of all indigent defendants presently charged or who will be charged in future with criminal offenses in courts of Georgia), rev'd on abstention grounds sub nom. Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992); Wallace v. Kern, 392 F. Supp. 834, 835 (E.D.N.Y. 1973) (action challenging indigent defense system brought on behalf of all felony defendants who are or may be incarcerated pending indictment, trial, or sentence), rev'd on state action grounds, 481 F.2d 621 (2d Cir. 1973); Rivera v. Rowland, No. CV-95-545629, 1996 WL 677452, at *7 (Conn. Super. Ct. Nov. 8, 1996) (memorandum of decision on plaintiffs' motion for class certification) (action challenging public defender system brought on behalf of all indigent persons who are or will be represented by public defenders or special public defenders).

98 See, e.g., *Luckey*, 860 F.2d at 1013 (involving allegations that systemic deficiencies in public defender system violated indigent criminal defendants' right to counsel and due process under Sixth and Fourteenth Amendments); *Wallace*, 392 F. Supp. at 844 (involving claim that practice of state and city agencies charged with furnishing counsel failed to meet standards of Sixth Amendment); Kennedy v. Carlson, 544 N.W.2d 1, 3 (Minn. 1996) (involving claim that underfunding of public defender system violated constitutional right of indigent defendants to effective assistance of counsel); Rivera v. Rowland, No. CV-95-0545629-S, 1996 WL 636475, at *1 (Conn. Super. Ct. Oct. 23, 1996) (order denying defendants' motion to dismiss) (involving alleged violations of rights under Sixth and Fourteenth Amendments due to high caseloads and lack of sufficient resources in public defender system).

99 Cf. *Luckey*, 860 F.2d at 1014 (noting plaintiffs' request for injunctive relief, including provision of attorneys at probable cause determinations, speedy appointment of counsel at all stages in criminal process, adequate compensation of indigent defense attorneys, and establishment of uniform standards governing representation of indigents); *Rivera*, 1996 WL 636475, at *3 (considering plaintiffs' claim for injunctive relief, including adoption of caseload limitations and performance standards and provision of adequate support services, conditions in public defender offices, and compensation for special public defenders).

100 See ABA Standards, supra note 15, Standard 5-3.3.

101 See id.

tract systems be structured so as to ensure sufficient compensation and support services for contract attorneys; adequate supervision, evaluation, training, and professional development; and provision of, or access to, an appropriate library.[102]

Plaintiffs challenging the use of low-bid contracts for indigent defense on constitutional grounds face various procedural and jurisdictional hurdles. First is the question whether their claims can be brought in federal court. Second, in order to state a justiciable claim, plaintiffs must prove that they are in immediate danger of sustaining a real and immediate injury due to the state's use of a low-bid contract system. Because the injury plaintiffs complain of is a violation of their right to effective assistance of counsel, they must be prepared to show that the systemic defects in the contract system constitute a Sixth Amendment violation rather than merely a poor policy choice. Finally, plaintiffs must demonstrate that the constitutional violation is caused by the actions of the state officials charged with administering the indigent defense system.

1. *Choice of Forum*

Section 1983 actions may be brought in either state or federal court.[103] There is, however, one potential obstacle to suit in federal court that warrants discussion. In *Younger v. Harris*,[104] the Supreme

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[102] See id.

[103] See Martinez v. California, 444 U.S. 277, 283 n.7 (1980); see also Howlett v. Rose, 496 U.S. 356, 378 n.20 (1990) (noting that "[v]irtually every State has expressly or by implication opened its courts to § 1983 actions, and there are no state court systems that refuse to hear § 1983 cases"). The choice of forum in each case will depend on several factors beyond the scope of this Note. The decision to bring suit in state or federal court ultimately will depend on case-specific considerations and, in particular, on the perceived willingness of local courts to order changes in the indigent defense system. For example, Professor Chester Mirsky argues that state court judges "perceive their role as controlling and reducing case backlog." Mirsky, supra note 60, at 250. As a result, state courts may encourage plea bargaining by uninformed attorneys and employ practices such as assigning court-appointed attorneys to courtrooms, rather than to particular cases and clients, in order to reduce "down time." See id. at 249. Because state court judges have an interest in the speedy resolution of as many trials as possible, Mirsky questions whether they will be willing to order changes in the system providing for indigent defense if the result will be fewer plea bargains and longer trials. See id. at 250. However, Professor Richard Wilson points out that federal courts, guided by the Supreme Court decisions in *Strickland* and *Cronic*, have "eroded many of the fundamental concepts of sixth amendment construction." 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, 211 (1986). Moreover, several state courts have mandated increased compensation for indigent defenders on the grounds that inadequate compensation leads to precisely the kind of lackluster representation Mirsky suggests state courts support. See infra notes 134-38. Again, these are but a few of the factors that must be taken into consideration when deciding where to bring suit.

[104] 401 U.S. 37 (1971).

Court held that federal courts should "not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[105] The concept of federal abstention is based on considerations of federalism and comity between state and federal government, and typifies the hesitance of the federal courts to "unduly interfere with the legitimate activities of the States."[106] In practice, *Younger* requires federal courts to avoid interfering with ongoing state criminal proceedings when intervention would be "intrusive and unworkable" or would result in "continuous or piecemeal interruptions of the state proceedings by litigation in the federal courts."[107] To date, the majority of federal courts that have heard civil challenges to a state's provision of indigent defense services has held that abstention is required.[108]

Nevertheless, it is not clear that *Younger* obligates federal courts to refuse to hear such claims. Although plaintiffs in civil suits request federal intervention to cure alleged Sixth Amendment violations, they do not contest any criminal conviction or seek to restrain any criminal prosecution.[109] Moreover, plaintiffs do not have an adequate remedy

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105 Id. at 43-44.

106 Id. at 44.

107 O'Shea v. Littleton, 414 U.S. 488, 500 (1974).

108 See, e.g., Luckey v. Miller, 976 F.2d 673, 677-79 (11th Cir. 1992) (noting that requested relief would require federal court to intervene with every state criminal proceeding), rev'g on abstention grounds sub nom. Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988); Hadley v. Werner, 753 F.2d 514, 516 (6th Cir. 1985) (stating that disposition of § 1983 action would involve ruling implying that state conviction is illegal); Gardner v. Luckey, 500 F.2d 712, 715 (5th Cir. 1974) (stating that relief would involve impermissible supervision of state courts); Noe v. County of Lake, 468 F. Supp. 50, 53 (N.D. Ind. 1978) (noting that relief would involve interference with state court proceedings).

109 Compare *Luckey*, 976 F.2d at 677 (denying federal court intervention to consider systemic issues that could not be raised in any individual case), with *Younger*, 401 U.S. at 40-41 (denying federal court intervention to enjoin district attorney from prosecuting plaintiff under challenged statute). This argument, however, is not entirely satisfying. The difference between seeking injunctive relief to remedy the defects in a low-bid contract system and seeking to enjoin or invalidate ongoing criminal prosecutions is somewhat superficial. The requested relief is likely to entail a court order requiring that state or local government officials make certain changes to the indigent defense system. See supra text accompanying notes 100-02. Although a federal court could grant this relief without intervening in any criminal proceedings, it might be obligated to enjoin future state prosecutions if it appeared that state officials had not complied with its order. See *O'Shea*, 414 U.S. at 500 (holding that abstention is required, even if plaintiffs do not seek to enjoin any criminal prosecutions, if ruling in favor of plaintiffs would require federal court to intervene in future prosecutions to adjudicate claims that defendants had failed to comply with ruling); *Luckey*, 976 F.2d at 677 ("Although it is true that Plaintiffs do not seek to contest any single criminal conviction nor restrain any individual prosecution, it is nonetheless clear that plaintiff's [sic] intend to restrain every indigent prosecution and contest every indigent conviction until the systemic improvements they seek are in place."); *Gardner*, 500 F.2d at 715 (noting that plaintiffs' requested injunctive and declaratory relief contemplates "exactly the sort of intrusive and unworkable supervision of state judicial processes con-

at law and may suffer irreparable harm if they are forced to go to trial with assigned counsel who are grossly overworked and undercompensated.[110] There are two possible responses to this argument. The first is that abstention is merited because plaintiffs may bring their § 1983 claims in state, rather than federal, court. However, it is well settled that abstention cannot be ordered simply to give state courts the first opportunity to consider federal constitutional claims.[111] Thus, the mere fact that a state forum is available to hear a plaintiff's claims does not, by itself, mean that federal abstention is warranted.

The second response posits that federal courts should abstain from hearing civil challenges to the constitutionality of low-bid contract systems because any indigent defendants in the plaintiff class who are convicted of a crime at trial may raise their Sixth Amendment claims on appeal.[112] This response finds support in the core tenet of abstention doctrine that a federal plaintiff must first "exhaust his state

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demned in *O'Shea*"); *Noe*, 468 F. Supp. at 53 ("While the plaintiffs in this case do not expressly seek to enjoin a specific state criminal proceeding, the granting of the relief would come arguably close to the kind of interference with state court proceedings that *Younger* . . . forbid[s] . . . .").

110 See Wallace v. Kern, 392 F. Supp. 834, 848 (E.D.N.Y.) (holding that "crisis situation" of indigent defense system of Kings County, New York justified federal court intervention notwithstanding *Younger*), rev'd on state action grounds, 481 F.2d 621 (2d Cir. 1973); Gilliard v. Carson, 348 F. Supp. 757, 762 (M.D. Fla. 1972) (concluding that plaintiffs' claim fell under "irreparable harm" exception to *Younger* because relief would be available only after irreversible damage of denial of right to counsel and wrongful imprisonment); see also Rodger Citron, Note, (Un)*Luckey v. Miller*: The Case for a Structural Injunction to Improve Indigent Defense Services, 101 Yale L.J. 481, 494-96 (1991) (arguing that federal adjudication of civil claims of ineffective assistance should not be barred by *Younger*).

111 See Zwickler v. Koota, 389 U.S. 241, 251 (1967) (emphasizing that "abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim"); see also Alabama Pub. Serv. Comm'n v. Southern Ry. Co., 341 U.S. 341, 361 (1951) (Frankfurter, J., concurring) ("[I]t was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it."). Moreover, abstention is considered "the exception and not the rule." City of Houston v. Hill, 482 U.S. 451, 467 (1987); see also Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976) ("'The doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a [federal] court to adjudicate a controversy properly before it.'" (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959))). Absent exceptional circumstances that implicate the interests of federalism and comity detailed in *Younger*, federal courts must respect the general principle that a plaintiff may choose between a federal and state forum to vindicate her constitutional rights. See *Zwickler*, 389 U.S. at 248 (emphasizing duty of federal courts to "give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims").

112 See *Luckey*, 896 F.2d at 482 (Edmondson, J., dissenting) ("Plaintiffs have an adequate remedy at law for any ineffective assistance of counsel they may actually receive. . . . [T]hey can present objections to sixth amendment violations at their state trials and in their state appeals."); *Noe*, 468 F. Supp. at 54 ("Each plaintiff in the state criminal proceedings involved here have [sic] a full opportunity to develop the issue of inadequate assistance of counsel on a full record in each particular proceeding.").

appellate remedies before seeking relief in [federal court]."[113] It rests, however, on a fundamental misunderstanding of the nature of the indigent defendants' claim. Their claim is not that a particular attorney has performed deficiently in a particular case, but that the state, by maintaining a low-bid contract system, has failed to discharge its responsibility to provide every indigent defendant with effective assistance of counsel.[114]

Federal abstention is premised on the presumption that state courts will provide an adequate forum for testing plaintiffs' federal claims and providing necessary relief.[115] But the relief sought by plaintiffs in a civil suit attacking the use of low-bid contracts for indigent defense is *not* available in case-by-case review of postconviction claims of ineffective assistance. Postconviction remedies do not address—much less cure—the systemic defects of which plaintiffs complain.[116] Moreover, it is not clear that plaintiffs would have the opportunity to raise their constitutional claims in the course of defending their individual criminal prosecutions. Some state courts will not consider claims of ineffective assistance prior to trial,[117] and others have refused to entertain postconviction claims of ineffective

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113 Huffman v. Pursue, Ltd., 420 U.S. 592, 608 (1975); see also Ohio Civil Rights Comm'n v. Dayton Christian Sch., 477 U.S. 619, 627 (1986) (noting that *Younger* abstention applies to civil proceedings in which important state interests are involved, as long as federal plaintiff will have full and fair opportunity to litigate his constitutional claims in course of state proceedings); Moore v. Sims, 442 U.S. 415, 425-26 (1979) (stating that abstention is appropriate unless state law clearly bars adjudicating constitutional claims); Juidice v. Vail, 430 U.S. 327, 337 (1977) ("Appellees need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings . . . ."); Simopolous v. Virginia State Bd. of Medicine, 644 F.2d 321, 324 (4th Cir. 1981) (stating that when relief sought by plaintiff in federal action is available in pending state criminal proceeding, federal court must abstain and require presentation of all claims to state courts).

114 See infra note 129.

115 See, e.g., *Juidice*, 430 U.S. at 338 (noting that *Younger* principles do not apply if state proceeding cannot be relied upon for fair and complete adjudication of plaintiff's federal claims); *Simopolous*, 644 F.2d at 331 (Butzner, J., dissenting) (noting that Supreme Court has held that *Younger* may be disregarded if state procedure fails to afford plaintiff adequate forum in which to adjudicate constitutional claim).

116 See supra Part I.C.

117 See, e.g., People v. District Court, 761 P.2d 206, 210 (Colo. 1988) (rejecting claim of ineffective assistance of appointed counsel due to inadequate compensation where defendant was unable to demonstrate any specific errors, but alleged only that counsel's representation might at some future time prove constitutionally deficient should case go to trial); Platt v. State, 664 N.E.2d 357, 363 (Ind. Ct. App. 1996) (refusing to consider indigent defendant's allegations of ineffective assistance of counsel due to inadequate resources prior to trial because "any violation of the Sixth Amendment must be reviewed in the context of the whole trial process, as the determination of the effectiveness of counsel is whether the defendant had the assistance necessary to justify reliance on the outcome of the proceeding").

assistance based on systemic defects in the method by which indigent defense services are provided.[118] Therefore, because low-bid contract systems pose a threat to indigent defendants' right to effective assistance of counsel that cannot be cured by individual challenges to their criminal prosecutions, *Younger* should not be held to bar adjudication of their civil claims in federal court.[119]

2. *Proving a Constitutional Violation*[120]

Federal rules of justiciability[121] require that there must be an actual "case" or "controversy" between the parties to the suit.[122] Plaintiffs must show that they have sustained or are immediately in danger of sustaining some real and immediate injury due to the challenged official conduct.[123] In *Luckey v. Harris*,[124] the Eleventh Circuit held that a civil suit alleging that systemic defects in the public defender

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[118] In United States v. Cronic, 466 U.S. 648 (1984), the Supreme Court suggested that ineffective assistance may be presumed sometimes from the process under which a defendant was convicted: The Court will find a constructive denial of counsel when "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. at 659-60. Postconviction attempts to use *Cronic* to prove ineffective assistance based on systemic defects have been uniformly unsuccessful. See, e.g., Resek v. State, 715 P.2d 1188, 1191 (Alaska Ct. App. 1986) (holding that fee limitations for appointed counsel did not create circumstance that justified presumption of ineffectiveness without inquiry into counsel's actual trial performance); Williams v. State, 706 N.E.2d 149, 161 (Ind. 1999) (holding that evidence of systemic defects in Lake County public defender system did not "come close" to triggering *Cronic*'s presumption of prejudice); Coleman v. State, 703 N.E.2d 1022, 1039 (Ind. 1998) (holding that evidence of systemic defects in Lake County public defender system did not justify presumption of prejudice under *Cronic*); Games v. State, 684 N.E.2d 466, 481 (Ind. 1997) (holding that evidence of systemic defects in Marion County indigent defense system did not satisfy *Cronic* exception, as defendant failed to establish that individualized errors due to systemic problems undermined reliability of his conviction); Lewis v. Iowa Dist. Court, 555 N.W.2d 216, 220 (Iowa 1996) (holding that evidence of inadequate compensation for court-appointed attorneys did not justify presumption of prejudice under *Cronic* absent showing of specific harm to indigent's constitutional rights).

[119] See Younger v. Harris, 401 U.S. 37, 46 (1971) (stating that plaintiffs properly may allege irreparable harm if threat to their federal rights is one that cannot be eliminated by defense against single criminal prosecution).

[120] For the sake of simplicity, the following subparts proceed on the assumption that indigent defendants' § 1983 claims will be brought in federal court.

[121] Federal justiciability rules are inapplicable in state courts, many of which have adopted more liberal justiciability doctrines in areas such as standing, causation, and mootness. For an excellent compilation of state justiciability rules, see Steven H. Steinglass, Litigating Section 1983 Actions in State Courts, in 1 Fifteenth Annual Section 1983 Civil Rights Litigation 45, 123-27 (PLI Litig. & Admin. Practice Course Handbook Series No. H-618, 1999).

[122] See U.S. Const. art. III, § 2.

[123] See United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 89-90 (1947).

[124] 860 F.2d 1012 (11th Cir. 1988), rev'd on abstention grounds sub nom. Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992).

system violated indigent defendants' right to effective assistance of counsel stated a justiciable claim.[125] The district court had dismissed the plaintiffs' claims on the ground that, under *Strickland*, a finding of ineffective assistance must be determined by reference to the particular facts of a certain case, and plaintiffs' systemic challenge could not survive such a particularized inquiry.[126]

Recognizing that the *Strickland* standard of review is informed by considerations peculiar to the postconviction context, the Eleventh Circuit ruled that the district court erred when it applied *Strickland* to the plaintiffs' claims.[127] The inquiry into prejudice, the court explained, is necessary to determine if an indigent defendant convicted of a crime is entitled to have his conviction overturned.[128] But deficiencies that do not satisfy the *Strickland* test for reversal of a criminal conviction still may be sufficient to violate an indigent defendant's rights under the Sixth Amendment.[129] In a suit for prospective relief, the court explained, plaintiffs need only show "'the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.'"[130] The court concluded that plaintiffs' claims satisfied this standard.[131]

To demonstrate that indigent criminal defendants are at risk of real and immediate constitutional injury, plaintiffs challenging public defender programs have pointed to elements of the programs that cause defective representation, such as inadequate funding, excessive caseloads, lack of supervision and performance standards, and insuffi-

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125 See id. at 1018.

126 See id. at 1016 ("Few are the circumstances that a court can declare so compromising that ineffective assistance is essentially inevitable." (internal quotation marks omitted)).

127 See id. at 1017 ("This standard is inappropriate for a civil suit seeking prospective relief.").

128 See id.

129 See id. ("The sixth amendment protects rights that do not affect the outcome of a trial.").

130 Id. (quoting O'Shea v. Littleton, 414 U.S. 488, 502 (1974)); cf. Wallace v. Kern, 392 F. Supp. 834, 844-45 (E.D.N.Y.) (stating that relevant question was not whether any conviction may be overturned because of ineffective assistance, but whether state's system for furnishing indigent defense is constitutionally sufficient and whether it would be "fair or realistic to leave consideration of [plaintiffs'] claims for postconviction adjudication in individual cases"), rev'd on state action grounds, 481 F.2d 621 (2d Cir. 1973).

131 See *Luckey*, 860 F.2d at 1018. As the *Wallace* court stated, the proper question when plaintiffs seek civil remedies for systemic defects in the provision of indigent defense services is not whether the outcome of a given trial will be overturned because of ineffectiveness of counsel, but whether the state's system for furnishing counsel meets the standards of the Sixth Amendment. See *Wallace*, 392 F. Supp. at 844; see also Rivera v. Rowland, No. CV-95-0545629-S, 1996 WL 636475, at *6-*7 (Conn. Super. Ct. Oct. 23, 1996) (holding that plaintiffs had alleged "actual harm" sufficient to withstand motion to dismiss).

cient support services.[132] The same approach should be utilized in a challenge to the constitutionality of a low-bid contract system. Various factors of a typical contract system conduce to ineffective assistance: (a) lack of inquiry into the experience or competence of attorneys submitting bids, (b) absence of performance standards or minimum requirements regarding the amount of time contracting attorneys must devote to indigent defense, (c) failure to supervise attorneys' performance under the contract, (d) failure to link contract renewal to adequate performance, (e) lack of provision for the costs of support services, such as investigators, experts, paralegals, and law clerks, and (f) absence of a link between compensation levels and the actual number and complexity of cases the contracting attorneys must handle. Due to such flaws in low-bid contract systems, indigent defendants are often denied the benefit of "the guiding hand of counsel at every step in the proceedings" against them.[133]

In recent years, courts have begun to recognize the connection between such systemic flaws and the likelihood that effective assistance will be rendered. For example, several courts have found that inadequate compensation for indigent defense counsel both restricts the pool of attorneys willing to represent indigent defendants[134] and

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132 See *Luckey*, 860 F.2d at 1013; *Wallace*, 392 F. Supp. at 836-39; *Rivera*, 1996 WL 636475, at *6; Kennedy v. Carlson, 544 N.W.2d 1, 3-5 (Minn. 1996).

133 Powell v. Alabama, 287 U.S. 45, 69 (1932). In this regard, the structure of a claim that a low-bid contract system is constitutionally inadequate is similar to that of the claims brought against underfunded and understaffed public defender systems. However, a challenge to a contract system is in one sense more straightforward than a challenge to a public defender system. The strength of a claim that a particular low-bid contract system is constitutionally deficient lies in the fact that the defects are found in the structure of the system itself rather than in the way that the system is administered. While both low-bid contract systems and public defender systems are hampered by the fact that a predetermined amount of money must suffice to cover an unknown number of cases, the defects in many public defender systems are often problems of inadequacy: insufficient investigative services and support staff, inadequate supervision, and inadequate training. See Wilson, supra note 21, at 1138-40; Bright et al., supra note 24, at 12; Spangenberg & Schwartz, supra note 21, at 14-15. By comparison, the defects in a low-bid contract system are more stark: no investigative services and support staff, no supervision, and no training. See NACDL, supra note 15, at 24 (noting that low-bid contract systems discourage use of training, support, and investigative services to contain costs); Spangenberg & Beeman, supra note 15, at 34 (providing example of Arizona's low-bid contract system as system with no funding for support costs).

134 See Arnold v. Kemp, 813 S.W.2d 770, 775 (Ark. 1991) (concluding that mandatory fee caps made it difficult for courts to find skilled counsel to defend indigents charged with capital crimes); White v. Board of County Comm'rs, 537 So. 2d 1376, 1379 (Fla. 1989) (holding statutory fee cap unconstitutional when applied in manner that curtails courts' inherent power to secure effective, experienced counsel for indigent defendants in capital cases); State ex rel. Friedrich v. Circuit Court, 531 N.W.2d 32, 35 (Wis. 1995) (holding that courts should order compensation at rate exceeding statutory fee schedule when necessary to secure qualified and effective counsel).

hampers the ability of defense counsel to provide effective assistance.[135] Likewise, courts have recognized that excessive caseloads may lead to ineffective assistance[136] by creating an inherent conflict of

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[135] In *Okeechobee County v. Jennings*, Chief Judge Anstead observed:

> [I]t would be foolish to ignore the very real possibility that a lawyer may not be capable of properly balancing the obligation to expend the proper amount of time in an appointed criminal matter where the fees involved are nominal, with his personal concerns to earn a decent living by devoting his time to matters wherein he will be reasonably compensated. The indigent client, of course, will be the one to suffer the consequences if the balancing job is not tilted in his favor.

473 So. 2d 1314, 1318 (Fla. Dist. Ct. App. 1985) (Anstead, C.J., concurring specially), quashed, 491 So. 2d 1115 (Fla. 1986) (upholding trial court's finding of statutory fee limit's unconstitutionality as applied to representation in extraordinary or unusual circumstances); see also *White*, 537 So. 2d at 1380 (emphasizing that "[t]he relationship between an attorney's compensation and the quality of his or her representation cannot be ignored"); Makemson v. Martin County, 491 So. 2d 1109, 1112 (Fla. 1986) (finding that attorney's right to adequate compensation and violations of indigent defendants' rights to effective assistance are "inextricably interlinked"); State ex rel. Stephan v. Smith, 747 P.2d 816, 831 (Kan. 1987) (noting that system of court appointments for indigent defense may violate right to effective assistance of counsel because it creates inherent conflict of interest between attorney and client and requires attorneys with no criminal law experience to represent indigent criminal defendants); State v. Robinson, 465 A.2d 1214, 1216 (N.H. 1983) (holding that fee limit must sometimes be exceeded in order to protect indigent defendant's right to effective assistance of counsel); Madden v. Township of Delran, 601 A.2d 211, 219 (N.J. 1992) ("[F]inancial pressures on unpaid counsel can affect their performance."); Jewell v. Maynard, 383 S.E.2d 536, 544 (W. Va. 1989) ("[I]t is unrealistic to expect all appointed counsel . . . to remain insulated from the economic reality of losing money each hour they work. . . . Inevitably, economic pressure must adversely affect the manner in which at least some cases are conducted."). But see Ex parte Grayson, 479 So. 2d 76, 79-80 (Ala. 1985) (holding that maximum fee of $1000 for capital case did not make effective assistance impossible, because attorneys have ethical obligation to give their best efforts to their clients); Sparks v. Parker, 368 So. 2d 528, 530-31 (Ala. 1979) (rejecting claim that underpayment of court appointed attorneys violated right to effective assistance of counsel); Postma v. Iowa Dist. Court, 439 N.W.2d 179, 182 (Iowa 1989) (rejecting claim that fee guidelines create chilling effect on representation of indigent criminal defendants).

[136] See State ex rel. Escambia County v. Behr, 384 So. 2d 147, 150 (Fla. 1980) (holding that trial courts should appoint, at public expense, private counsel to represent indigent criminal defendant when public defender is unable to provide effective assistance due to excessive caseload). The link between excessive caseloads and ineffective assistance is particularly obvious in the appellate context, where courts can judge easily the performance of assigned counsel as opposed to retained counsel by comparing the time it takes each attorney to file appellate briefs. Thus, litigation alleging ineffective assistance of appellate counsel due to excessive caseloads has proven successful in some states. See Hill v. Reynolds, 942 F.2d 1494, 1496 (10th Cir. 1991) (holding that public defenders' inability to file appellate briefs promptly due to excessive caseloads rendered their assistance ineffective); Harris v. Champion, 938 F.2d 1062, 1068 (10th Cir. 1991) (same); see also Simmons v. Reynolds, 898 F.2d 865, 868 (2d Cir. 1990) (holding that appointed counsel's failure to file appellate brief for five years constituted ineffective assistance as matter of law); Yourdon v. Kelly, 769 F. Supp. 112, 115 (W.D.N.Y. 1991) (holding that delay of nearly four years attributable to appointed counsel was sufficiently long to constitute ineffective assistance as matter of law); Harris v. Kuhlman, 601 F. Supp. 987, 992-93 (E.D.N.Y. 1985) (holding that counsel's failure to perfect indigent defendant's appeal for approximately seven years

interest: The more time the attorney spends representing one client, the less time she has to devote to her other clients.[137] Finally, some courts have upheld postconviction claims of ineffective assistance based, not on attorney performance, but on systemic defects in the method by which counsel is provided to indigent criminal defendants.[138]

By demonstrating that a judicially cognizable link exists between the features of the indigent defense system and the quality of representation provided, these cases provide a powerful answer to the objection that allegations of ineffective assistance based on proof of systemic defects are "too speculative and hypothetical" to provide a

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must be considered gross ineffective assistance of counsel); In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Pub. Defender, 561 So. 2d 1130, 1134-35 (Fla. 1990) (recognizing that excessive caseload in public defender's office creates problem regarding effective representation); Hatten v. State, 561 So. 2d 562, 563 (Fla. 1990) ("Failing to file briefs within the mandated time period and thereby opening up the defendant to dismissal of his appeal can hardly be termed effective assistance of counsel."); cf. People v. Johnson, 606 P.2d 738, 747-48 (Cal. 1980) (holding that excessive caseloads may violate defendants' right to speedy trial). But see Williams v. James, 770 F. Supp. 103, 107 (W.D.N.Y. 1991) (holding that delay of two and one-half years, even if attributable to counsel, was not sufficient to constitute ineffective assistance of counsel as matter of law).

137 See, e.g., *In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Pub. Defender*, 561 So. 2d at 1135 ("When excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created."). In *People v. Johnson*, the California Supreme Court recognized that excessive caseloads at the trial level force attorneys to balance their various clients' rights to a speedy trial and to effective assistance of counsel: "[D]efense counsel should not be placed in a situation in which he must subordinate the right of one client to a speedy trial to the rights of another client; once counsel must confront that dilemma, his best efforts may be insufficient to protect the individual rights of each of his clients." *Johnson*, 606 P.2d at 745 n.10.

138 In State v. Peart, 621 So. 2d 780 (La. 1993), the Louisiana Supreme Court held that excessive caseloads and insufficient support services for New Orleans public defenders created a rebuttable presumption that indigent defendants were not provided constitutionally required effective assistance of counsel. See id. at 790-91. Although the court did not conclude that the public defender system was unconstitutional as such, it ruled that in the absence of systemic reform, any defendant in the district who alleged ineffective assistance prior to trial should be provided an individual hearing. See id. at 791. If the trial court, applying the presumption of ineffectiveness, were to find that the defendant was not receiving effective assistance, and if it was unable to remedy the situation, the court should stay the prosecution until the defendant was provided an attorney able to provide effective assistance. See id. at 791-92. Similarly, in State v. Smith, 681 P.2d 1374 (Ariz. 1984), the Arizona Supreme Court found the Mohave County low-bid contract system for indigent defense to be deficient in four regards: First, the system failed to take into account the time an attorney was expected to spend representing indigent defendants; second, there was no provision for support services; third, there was no inquiry into the competency of attorneys who submitted bids; finally, the complexity of each case was not considered. See id. at 1381. The court held that if the same procedure for selecting and compensating counsel was followed in future cases, courts should presume that the procedure resulted in ineffective assistance of counsel. The state then would have the burden of rebutting the inference of ineffectiveness. See id. at 1384.

basis for judicial relief.[139] This is not to say, however, that attorney performance is entirely irrelevant. Standards promulgated by groups such as the ABA and the National Legal Aid and Defender Association (NLADA), which provide minimum requirements for effective representation[140] and set forth recommended caseload limits,[141] will help confirm that the contract system does not meet the requirements of the Sixth Amendment. Such standards state that effective assistance of counsel requires, at a minimum, adequate knowledge of relevant areas of the law;[142] a reasonable factual and legal pretrial investigation into the charges against the accused;[143] and consultation with the defendant to obtain relevant information, inform him of his rights, and enable him to make informed decisions about the direction of his case.[144] Plaintiffs challenging a low-bid contract system should

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139 Kennedy v. Carlson, 544 N.W.2d 1, 6-8 (Minn. 1996) (holding that plaintiff failed to establish justiciable controversy because he did not present evidence that indigent defendants "actually ha[d] been prejudiced due to ineffective assistance of counsel").

140 See generally ABA Standards, supra note 15; NLADA, Performance Guidelines for Criminal Defense Representation (1995) [hereinafter NLADA Guidelines]. For a compilation of attorney performance standards promulgated by state courts and indigent defense groups, see Spangenberg Group, Indigent Defense Standards and Guidelines Index (Sept. 1997) (on file with *New York University Law Review*).

141 See ABA Standards, supra note 15, Standard 5-5.3 commentary at 72 (stating that full-time attorney should be required to defend no more than 150 felonies per year, or 400 misdemeanors, or 200 juvenile cases (citing National Advisory Comm'n on Criminal Justice, Standards and Goals, Courts 13.12 (1973))); see also NLADA, Guidelines for Negotiating and Awarding Indigent Legal Defense Contracts Guideline III-6 (1984) ("The [indigent defense] contract should specify a maximum allowable caseload for each full-time attorney, or equivalent, who handles cases through the contract."). For a compilation of caseload and workload guidelines promulgated by state courts and indigent defense groups, see Spangenberg Group, supra note 140.

142 See ABA Standards, supra note 15, Standards 5-1.5, 5-2.2 commentary at 33-34 (providing that defenders should undergo training and continuing education to stay abreast of complex criminal law); NLADA Guidelines, supra note 140, Guideline 1.2; see also Banks v. State, 819 S.W.2d 676, 682 (Tex. App. 1991, pet. ref'd) (holding that attorney must have firm command of facts of case and governing law); Jewell v. Maynard, 383 S.E.2d 536, 542 (W. Va. 1989) (stating that right to counsel is not satisfied by "compelled or random appointment of a specialist in real estate law").

143 See ABA Standards for Criminal Justice: Prosecution Function and Defense Function Standards 4-4.1, -4.2, -6.1(b) (3d ed. 1992); NLADA Guidelines, supra note 140, Guideline 4.1; see also Powell v. Alabama, 287 U.S. 45, 59 (1932) (recognizing that it is "vain" to guarantee counsel for accused without giving counsel opportunity to familiarize herself with facts or law of case); Bryant v. Scott, 28 F.3d 1411, 1415 (5th Cir. 1994) (stating that defense attorneys must engage in reasonable amount of pretrial investigation); Brubaker v. Dickson, 310 F.2d 30, 39 (9th Cir. 1962) (noting that failure to investigate, research, and prepare is equivalent to no representation at all); Turner v. Maryland, 303 F.2d 507, 511 (4th Cir. 1962) ("Pro forma entry of an appearance without study or preparation for useful participation in the trial is not satisfaction of the constitutional rights of an accused.").

144 See ABA Standards for Criminal Justice: Prosecution Function and Defense Function Standards 4-3.1(a), -3.2, -3.8, -5.1; NLADA Guidelines, supra note 140, Guideline

provide evidence that contract attorneys cannot or routinely do not meet these minimum requirements.[145]

3. *Attributing the Constitutional Violation to the State*

The Eleventh Amendment consistently has been interpreted to bar suit in federal court[146] against a state by its own citizens.[147] Therefore, the targets of a civil challenge to the use of low-bid contracts must be the state or local officials charged with satisfying the state's

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1.3(c); see also Von Moltke v. Gillies, 332 U.S. 708, 721-23 (1948) (discouraging short and harried interviews in courtroom); Avery v. Alabama, 308 U.S. 444, 446 (1940) ("[T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham . . . ."); United States v. Tucker, 716 F.2d 576, 582 (9th Cir. 1983) (holding that meeting with defendant for only seven hours did not constitute effective assistance); Braxton v. Peyton, 365 F.2d 563, 564 (4th Cir. 1966) (stating that "assigned lawyer should confer with the client without undue delay and as often as necessary, advise him of his rights, ascertain what defenses he may have"); Harris v. Blodgett, 853 F. Supp. 1239, 1258-59 (W.D. Wash. 1994) (finding defense attorney's assistance to be constitutionally inadequate where he met with client for less than two hours); State v. Savage, 577 A.2d 455, 466 (N.J. 1990) (holding that defense counsel did not provide adequate assistance when he met with defendant only once prior to trial).

145 Cf. Luckey v. Harris, 860 F.2d 1012, 1018 (11th Cir. 1988) (discussing allegation that defense attorneys are denied resources necessary to investigate cases effectively), rev'd on abstention grounds sub nom. Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992); Wallace v. Kern, 392 F. Supp. 834, 839 (E.D.N.Y. 1973) (discussing evidence that defense attorneys do not see their clients in jail regularly while case is pending, investigate cases, or fully research law), rev'd on state action grounds, 481 F.2d 621 (2d Cir. 1973); Kennedy v. Carlson, 544 N.W.2d 1, 6 (Minn. 1996) (discussing allegations that public defenders must "plead out" two to four cases each day, making it impossible to spend sufficient time with each client); Second Amended Class Action Complaint 13, 16, Rivera v. Rowland (Conn. Super. Ct. Jan. 22, 1997) (No. CV-95-0545629-S) (on file with the *New York University Law Review*) (alleging that public defenders often forego investigation into their cases and do not spend adequate time interviewing and counseling clients).

146 As noted above, this discussion assumes that indigent defendants' § 1983 claims will be brought in federal court. The Eleventh Amendment does not apply to § 1983 suits in state court, as it restrains only the federal judicial power. See Maine v. Thiboutot, 448 U.S. 1, 9 n.7 (1980). However, some state courts have adopted the doctrine of sovereign immunity as a defense to § 1983 actions. See Steinglass, supra note 121, at 94-96, for a discussion of the sovereign immunity rules adopted by various state courts.

147 See, e.g., Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996) (stating that unconsenting state is immune from suit brought in federal court by its own citizens as well as by citizens of other states); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 97-99 (1984) (same); Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 280 (1973) (same); Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 288, 304 n.13 (1952) (same); Monaco v. Mississippi, 292 U.S. 313, 329-30 (1934) (same); Missouri v. Fiske, 290 U.S. 18, 25-26 (1933) (same); Ex parte New York, 256 U.S. 490, 497 (1921) (same); Palmer v. Ohio, 248 U.S. 32, 34 (1918) (same). Political subdivisions of the state have no immunity under the Eleventh Amendment. See Moor v. County of Alameda, 411 U.S. 693, 717-21 (1973); Hans v. Louisiana, 134 U.S. 1, 10-11 (1890) (rejecting as "anomalous" notion that state could be sued by its own citizens but not by citizens of foreign states).

responsibility to provide indigent criminal defendants with effective assistance of counsel.[148] The action will then fall under the exception to the doctrine of sovereign immunity first set forth in *Ex parte Young*,[149] in which the Supreme Court held that a suit against an officer of the state directing him to refrain from unconstitutional conduct is not a suit against the state within the meaning of the Eleventh Amendment.[150] This exception is understood to permit prospective relief against state officers in their official capacities, requiring them to refrain from unconstitutional conduct even though compliance may cost the state money.[151] *Young* does not require personal action by the named defendants; rather, the state officials named as defendants must, by virtue of their offices, "'have some connection' with the unconstitutional act or conduct complained of."[152]

By naming as defendants the local governmental officers who administer the contract system, the challenge also will satisfy the requirement of state action. Like most other constitutional rights, the right to effective assistance of counsel is enforceable only against the government.[153] This is often referred to as the "state action" doctrine, although that term is a bit misleading: The Constitution applies to

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148 Cf. *Luckey*, 860 F.2d at 1013 (action brought against governor, chief judges of two judicial circuits, and all judges responsible for providing assistance of counsel to indigent criminal defendants, all in their official capacities); *Rivera*, 1996 WL 636475, at *1 (action brought against governor, Public Defender Services Commission, and members of Commission in their official capacities); *Kennedy*, 544 N.W.2d at 3 (action brought against Governor, State Treasurer, Commissioner of Finance, State Board of Public Defense, and County Commissioners).

149 209 U.S. 123 (1908).

150 See id. at 155-56.

151 See, e.g., Milliken v. Bradley, 433 U.S. 267, 289 (1977); Edelman v. Jordan, 415 U.S. 651, 668 (1974). When a civil action under § 1983 seeks state funds to compensate for prior constitutional violations, the suit is deemed to be one against the state and is barred by the Eleventh Amendment. See *Edelman*, 415 U.S. at 668; *Luckey*, 860 F.2d at 1015. However, when the expenditure of funds by the state is an "ancillary effect" of future compliance with a court order, the *Young* exception will apply. See *Edelman*, 415 U.S. at 668; *Luckey*, 860 F.2d at 1014; see also Papasan v. Allain, 478 U.S. 265, 282 (1986) (distinguishing between suits that seek compensation for "accrued monetary liability," which are barred by doctrine of sovereign immunity, and those that require expenditures for future compliance with court order, which are permitted).

152 *Luckey*, 860 F.2d at 1015-16 (quoting *Young*, 209 U.S. at 157).

153 See United States v. Price, 383 U.S. 787, 794 n.7 (1966) ("In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment."). Private conduct typically does not have to comport with the Constitution. See The Civil Rights Cases, 109 U.S. 3, 11 (1883) (stating that Fourteenth Amendment is prohibitory upon states and that individual invasion of constitutional rights is not subject matter of Amendment). The Thirteenth Amendment is the only constitutional provision that regulates private conduct. See, e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968) (holding that Congress has broad power under Thirteenth Amendment to regulate private conduct).

government at the federal, state, and local level, and to the acts of government officers at all levels.

A person acts "under color"[154] of state law—and is therefore a state actor—when she exercises power "possessed by virtue of state law and made possible only because [she] is clothed with the authority of state law."[155] An individual employed by the government and acting in an official capacity is the most obvious example of a state actor to whom the Constitution applies.[156] In addition, municipalities and other local governmental units are themselves state actors and may be sued for damages as well as prospective relief when the constitutional deprivation is the result of an official policy, or when individual rights are violated pursuant to governmental "custom."[157] Finally, private individuals employed by the government for a limited purpose are sometimes deemed to act under color of state law. For example, doctors who are paid by the state to provide medical care to prisoners are considered state actors.[158]

However, the Supreme Court held in *Polk County v. Dodson*[159] that public defenders are not state actors.[160] The Court reasoned that the situation of the public defender may be distinguished from that of the prison doctor because, although public defenders are employed by the state, their relationship with the state is primarily adversarial.[161] Unlike doctors, public defenders owe a duty of "undivided loyalty" to

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154 42 U.S.C. § 1983 (Supp. IV 1998).

155 United States v. Classic, 313 U.S. 299, 326 (1941).

156 A government officer is acting under color of state law if she is acting in an official capacity, even if her conduct is not authorized by state law. See Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 287 (1913).

157 Monell v. Department of Social Servs., 436 U.S. 658, 690-91 (1978).

158 See, e.g., West v. Atkins, 487 U.S. 42, 54-55 (1988) (holding that private physician who provided care in prison under contract with state is state actor); Estelle v. Gamble, 429 U.S. 97, 104-05 (1976) (stating that claim that prison doctor was indifferent to prisoner's medical needs is cognizable under § 1983); O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) (holding that prison psychiatrist who was also administrator of state mental health facility was state actor).

159 454 U.S. 312 (1981).

160 See id. at 319-25. Note, however, that public defenders have been held to act under color of state law in certain circumstances. For example, in making personnel decisions on behalf of the state, a public defender is a state actor who must comply with constitutional requirements. See Branti v. Finkel, 445 U.S. 507, 520 (1980) (affirming injunction prohibiting public defender from firing assistant public defenders on basis of political affiliation). Public defenders, indeed all lawyers, also have been held to act under color of state law when exercising peremptory jury challenges because in such circumstances defense counsel "wield the power to choose a quintessential governmental body." Georgia v. McCollum, 505 U.S. 42, 54 (1992).

161 See *Polk County*, 454 U.S. at 318 (noting that proper role of defense attorney is to act on behalf of her clients in opposition to state's designated representatives).

their clients.[162] Once a public defender is assigned to the indigent defendant, their relationship is "identical to that existing between any other lawyer and client:"[163] a relationship that entails obligations that do not depend on state authority. Thus, the fact that an indigent defendant's right to effective assistance of counsel is violated by an attorney employed by the state is not sufficient to establish state action.[164]

The fact that defense attorneys are not state actors should not pose an obstacle to a civil challenge to the use of low-bid contracts, provided that plaintiffs can prove that violations of indigent defendants' right to effective assistance are caused by the contract system itself, rather than by the actions of individual attorneys.[165] This may

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162 Id. at 320.

163 Id. at 318.

164 Despite the Court's arguments to the contrary, it is difficult to square the decision in *Polk County* with the prison doctor cases. Doctors, like lawyers, have professional obligations to their patients, and in fulfilling those obligations, doctors may act against the state's interest, for instance by ordering medical treatment for which the state would rather not pay. It is therefore important to note the context in which the claim in *Polk County* was raised. Dodson had been convicted of robbery and was assigned a public defender for his appeal. He brought action in federal court under § 1983, alleging that his assigned attorney had failed to represent him adequately in his appeal to the Iowa Supreme Court. He sought injunctive relief as well as $175,000 in damages. See id. at 315. After inquiring into Dodson's case, the public defender had moved for permission to withdraw on the ground that Dodson's appeal was frivolous. The Iowa Supreme Court granted the motion to withdraw and dismissed Dodson's appeal. See id. at 314-15. Lawyers have a professional obligation not to pursue frivolous motions or actions. See id. at 323. Thus, although Dodson alleged that he had been deprived of the right to counsel, his claim was essentially one of ineffective assistance. As such, it implicated the same concerns of finality, judicial economy, and deference to the professional decisions of defense attorneys as any other post-conviction claim of ineffective assistance of counsel. See supra Part I.C. Given its desire to avoid a "proliferation of ineffectiveness challenges," Strickland v. Washington, 466 U.S. 668, 690 (1984), it is hardly surprising that the Court in *Polk County* refused to grant indigent criminal defendants another avenue to overturn their convictions—and receive damages—on the ground that their attorneys provided inadequate assistance.

165 The issue of state action seldom has been discussed in the cases involving challenges to public defender systems. The only claim to be rejected on state action grounds was brought directly against the New York Legal Aid Society, an organization of defense attorneys that provides indigent defense services pursuant to a contract with New York City. See Wallace v. Kern, 481 F.2d 621 (2d Cir. 1973). In the other cases, all of the named defendants were clearly state actors. See supra note 148 and accompanying text. Pursuant to state law, the named defendants were responsible for funding, staffing, and running the challenged public defender systems; therefore, defects in the systems properly could be attributed to them. See Luckey v. Harris, 860 F.2d 1012, 1015-16 (11th Cir. 1988) (noting that defendant Governor is responsible for executing laws faithfully and that defendant judges are responsible for administering system of representation for indigent criminal defendants), rev'd on abstention grounds sub nom. Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992); Rivera v. Rowland, No. CV-95-0545629-S, 1996 WL 636475, at *3 (Conn. Super. Ct. Oct. 23, 1996) (order denying defendants' motion to dismiss) (noting that defendant Governor is obliged to ensure that laws are faithfully executed and that defendant Public Defender Services Commission is responsible for overseeing public defender system);

be somewhat complicated, however. Many of the problems that plague indigent defense systems of all types can be traced directly to funding.[166] In a public defender system, for example, the level of funding is determined by the state or local officials charged with administering the system. By contrast, in a low-bid contract system, the amount of money available for trying cases and hiring investigators and support staff is in a sense determined by the contract attorney herself. Attorneys submit bids to local government officials stating the amount of money they need in order to handle the municipality's indigent defense work for a given period. Arguably, the local officials who run the contract system merely rely on the representations of licensed attorneys, and therefore are not responsible if it turns out that the contract attorney is unable to provide quality representation. Thus, the constitutional violation may be seen to reside in the actions of the private attorney (who is not a state actor) rather than the actions of governmental officials.

The notion of the blameless county misled by the wayward attorney, however, breaks down quickly. First, many counties adopt a low-bid contract system in order to cut costs on indigent defense.[167] Although local officials may believe that attorneys who bid for indigent defense contracts are more efficient than court-appointed attorneys or public defenders, they cannot be entirely oblivious to the possibility that the decrease in funding could affect the quality of representation provided. McDuffie County, for example, saved over $20,000 by switching from a program of court appointments to a low-bid contract system.[168] Given that court-appointed attorneys are generally compensated at rates below those charged by private counsel,[169] it is fairly obvious that spending significantly less on indigent defense than what

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Kennedy v. Carlson, 544 N.W.2d 1, 3-4 (Minn. 1996) (noting that defendant State Board of Public Defense is responsible for overseeing public defense system and distributing funds appropriated by state for public defense services). It should be noted, however, that the nature of relief sought may be relevant to the issue of state action. In an action for prospective relief, the need to link the constitutional violation to a particular state actor is less pressing than when damages are sought. The goal of a civil suit alleging deprivation of the right to effective assistance of counsel is not to assign blame, but to remedy the defects in the system for indigent defense. Therefore, it is the existence of a problem—as opposed to its source—that is of primary importance.

166 See supra note 14.

167 See supra note 17 and accompanying text.

168 See supra text accompanying note 4.

169 See SCHR Letter, supra note 1 (noting that compensation for court-appointed attorneys in McDuffie County was "well below market rates"); Bright, supra note 23, at 788 (quoting McDuffie County Commission chairwoman as stating that court-appointed attorneys had been paid "about half of what they would normally receive"). As of March, 1999, court-appointed counsel in Georgia must be paid at least $45 per hour for out-of-court work and at least $60 per hour for in-court work. See Guidelines of the Georgia Indigent

it costs to pay court-appointed attorneys will result in relatively low expenditures per case. In fact, from 1995 through 1998, McDuffie County spent an average of only $191 per indigent defense case.[170]

Second, the fact that the contract amount is determined by the bidding attorneys does not in any way justify the lack of supervision or minimum performance standards. Indeed, the fact that the county has moved to a less expensive system of indigent defense would itself suggest that evaluation of the contract attorneys' performance is particularly warranted. Yet, unlike virtually every other context in which local governments enter into contracts for services, low-bid indigent defense contracts do not include minimum standards that must be met to assure that the bidding attorneys will perform according to minimal standards of quality.[171] Perhaps local officials who accept bids for contracts to construct a municipal building, for example, are able to set forth general performance specifications because they know what they want, whereas the county cannot know in advance what it takes to defend each individual case. However, national standards state the minimum requirements of effective assistance,[172] and most states have adopted their own standards for attorney performance.[173] Thus it would not be difficult for the county to set out general performance standards—for example, prompt client consultation and reasonable investigation into the facts and the law of each case—with which contract attorneys substantially must comply. The need for performance standards and/or supervision of contract attorneys is especially glaring in the context of contract renewals. Local officials may be justified in relying initially on the representations of an attorney who claims that she can handle the local indigent defense work at a lower cost than a public defender or appointed counsel system.[174] However, before re-

Defense Council for the Operation of Local Indigent Defense Programs (1999) <http://www.gidc.com/guidelin.htm>.

170 See Georgia Indigent Defense Council, Calendar Year 1998, Indigent Cases Cost Per Case <http://www.gidc.com/cy98$cas.htm> (approximately $161 per case); Georgia Indigent Defense Council, Calendar Year 1997, Indigent Cases Cost Per Case <http://www.gidc.com/cy97$cas.htm> (approximately $161 per case); Georgia Indigent Defense Council, GIDC Award of Funds, Fiscal Year 1998 <http://www.gidc.com/98funds.htm> (approximately $172 per case); Georgia Indigent Defense Council, Fiscal Year 1997 Award of Funds, Population, Caseloads & Expenditures <http://www.gidc.com/97funds.htm> (approximately $265 per case).

171 See Neuhard, supra note 17, at 174.

172 See supra notes 140-44 and accompanying text.

173 See Spangenberg Group, supra note 140 (listing national, state, and local performance standards for 40 states); see also Ga. Code of Professional Responsibility (2000).

174 It should be noted that the possibility that governmental officials honestly may have believed that the low-bid contract system would result in constitutionally adequate representation is not relevant to the question of whether the defects in the system should be remedied. Plaintiffs in a civil action challenging the constitutionality of low-bid contracts

newing her contract, there is no reason why the officials responsible for providing effective assistance of counsel to indigent defendants should not inquire into the contract attorney's actual performance to determine whether the representation she provides is indeed constitutionally adequate.

Third, it is misleading to suggest that in a low-bid contract system the level of funding is determined by the attorneys themselves. Local government officials decide how bids will be awarded. The choice to award the contract to the lowest bidder without any regard to the relative competence of the various attorneys submitting bids is that of the government. Furthermore, the officials who administer the system decide whether funds for investigative and support services will be included in the contract fee or supplied by the municipality. Government officials are also responsible for choosing to compensate contract attorneys on a yearly basis rather than pursuant to a set rate per hour or per case.[175]

Finally, it strains reason to suggest that government officials can absolve themselves of their constitutional responsibility to provide effective assistance of counsel simply by entering into a contract with private attorneys.[176] The fact that indigent defense attorneys are not themselves state actors takes on great importance in this context. When states contract with private prison corporations, for example, prison officials are deemed to be state actors who must comply with the Constitution.[177] Thus, the existence of a contract merely transfers

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for indigent defense do not seek damages from the local government. They do not attempt to penalize particular state actors who are responsible for administering the indigent defense program. They ask only that changes be made to the system in order to ensure that it meets the requirements of the Sixth Amendment.

[175] See Spangenberg & Beeman, supra note 15, at 34-35 (explaining that some contract attorneys are paid on case-by-case basis).

[176] See, e.g., Georgia v. McCollum, 505 U.S. 42, 52-53 (1992) ("The State cannot avoid its constitutional responsibilities by delegating a public function to private parties."); Andrews v. Federal Home Loan Bank, 998 F.2d 214, 218 (4th Cir. 1993) ("Government cannot evade constitutional duties by delegating the responsibility to a private contractor."); see also Catanzano v. Dowling, 60 F.3d 113, 118 (2d Cir. 1995) (holding that state is liable for unconstitutional acts of home health care agencies because "it is patently unreasonable to presume that Congress would permit a state to disclaim federal responsibilities by contracting away its obligations to a private entity" (internal quotation marks omitted)).

[177] See, e.g., Street v. Corrections Corp. of Am., 102 F.3d 810, 814 (6th Cir. 1996) (holding that private company performing function of operating prison was acting under color of state law); Kesler v. King, 29 F. Supp. 2d 356, 370-71 (S.D. Tex. 1998) (same); Giron v. Corrections Corp. of Am., 14 F. Supp. 2d 1245, 1247-51 (D.N.M. 1998) (holding that corrections officer employed by private prison company who raped inmate was state actor); Blumel v. Mylander, 919 F. Supp. 423, 426-27 (M.D. Fla. 1996) (holding that private contractor that contracted with Florida county to run jail was state actor); see also Richardson v. McKnight, 521 U.S. 399, 412 (1997) (holding that private prison guards are not entitled to qualified immunity from suit).

liability for constitutional violations from the government[178] to the private corporation. However, if the inadequacies of a low-bid contract system could not be cured by suit against state or local officials responsible for providing counsel to indigent criminal defendants, there would not be a transfer of constitutional responsibility to the contract attorneys, but rather a constitutional vacuum in which the most blatant Sixth Amendment violations would go uncured.

CONCLUSION

The problems associated with low-bid contracts for indigent defense best can be addressed through civil challenges to the system itself. When an indigent defendant alleges ineffective assistance of counsel as a means to overturn her criminal conviction, the right to counsel is pitted against society's interest in effective law enforcement. By contrast, civil claims, by remedying the defects in the indigent defense system that lead to defective representation, further the state's interest in satisfying its Sixth Amendment obligations as well as its goal of securing reliable criminal convictions. A § 1983 action for the deprivation of the right to effective assistance of counsel therefore avoids the problems associated with postconviction claims that seek to overturn criminal convictions. Furthermore, by addressing the systemic causes of ineffective assistance, such an approach can achieve positive change in a way that case-by-case adjudication of postconviction claims of ineffective assistance cannot.

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[178] See, e.g., Hutto v. Finney, 437 U.S. 678, 687-88 (1978) (affirming injunction requiring government prison officials to cure constitutional violations).