

CAPITAL PUNISHMENT: RACE, POVERTY & DISADVANTAGE

Yale University
Professor Stephen B. Bright

Class Seven: Part Two Implementation of *Gideon v. Wainwright* – The Right to Counsel

Anthony Lewis observed in *GIDEON'S TRUMPET*:

It will be an enormous social task to bring to life the dream of *Gideon v. Wainwright* – the dream of a vast, diverse country in which every person charged with a crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense.¹

The extent to which the dream – actually, the constitutional requirement – of *Gideon* has been brought to life has varied from state to state and, in many states, from one locality to another. The Court made the right to counsel a constitutional requirement, but funding and implementing a system of providing representation was left to the governments that prosecute criminal cases. State and local governments prosecute over 95 percent of criminal cases. Some states were already providing lawyers to poor defendants in many cases, others responded to *Gideon* by funding and creating systems for representation, but many states have strongly resisted *Gideon*.

Attorney General Robert F. Kennedy provided leadership in establishing a system for representation in the federal courts that serves as a model for public defense today. Two years before the *Gideon* decision, Kennedy appointed a committee of scholars, practicing lawyers and state and federal judges to review the

representation being provided to poor defendants in the federal courts and make recommendations for improving it. The committee recommended the use of public defender programs and the appointment of lawyers to handle individual cases, but with compensation for their services instead of conscription, or a combination of the two. President Kennedy submitted the committee's recommendations to Congress as the Criminal Justice Act of 1963 just ten days before *Gideon* was decided.

The Senate passed the legislation with little change, but the House Judiciary Committee removed the provision for public defender offices. After reconciliation in conference, the legislation was passed as the Criminal Justice Act of 1964. It established a system for appointing and compensating lawyers to represent indigent defendants in federal criminal proceedings, reimbursement of reasonable out-of-pocket expenses and payment of expert and investigative funds necessary for an adequate defense. In 1970, the Act was amended to authorize districts to establish federal defender organizations. Today, 79 federal public defender offices provide representation in 90 of the 94 federal districts.

Florida, the state where Clarence Earl Gideon was convicted, responded promptly and positively to the Supreme Court's decision. Governor Farris Bryant called upon the legislature to establish a public defender system, saying that it was essential not only to protect the innocent but "in order that valid judgments of guilty may be entered and criminals kept confined for the

1. Anthony Lewis, *GIDEON'S TRUMPET* at 215.

protection of society.”² In May, 1963, barely two months after the *Gideon* decision, the Florida legislature enacted a statute creating a public defender office in each of the state’s judicial circuits. Those offices have continued until this day. Many developed reputations for representing clients well, although in more recent times they have struggled with high caseloads and inadequate funding.³

But far more states, counties and municipalities resisted *Gideon* and its progeny. *Gideon* was decided at the time that the southern states were engaged in “massive resistance” to the Supreme Court’s decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), requiring integration of the public schools. *Gideon* was decided on March 18, 1963. Three months later, Alabama Governor George Wallace personally blocked the door of a building at the University of Alabama to prevent the enrollment of two black students in an attempt to keep the promise he made in his inaugural speech – “segregation now, segregation tomorrow, segregation forever.”⁴

Governments resisting *Brown*, which the federal courts attempted to enforce in response to challenges by civil rights lawyers,⁵ found it easy to ignore *Gideon* and its progeny. Poor people accused of crimes were caught in a catch-22: they had no lawyers to enforce their right to counsel. Many state legislatures, county commissions and city governments were and remain unwilling to provide the funding needed for a comprehensive

public defense programs. As Attorney General Kennedy observed, “the poor person accused of a crime has no lobby.” Governments that fail to fund adequately representation of the poor are seldom challenged in the courts. Many elected state court judges have welcomed or tolerated inadequate representation because it allows them to process cases quickly. With a few notable exceptions, state bar associations did not take on implementing *Gideon* in their states.

Some state and local governments were unwilling to spend anything to provide lawyers for the poor. Instead, they conscripted lawyers to represent defendants without compensation on the theory that representing the poor is part of a lawyer’s professional responsibility.⁶ Lawyers, regardless of their area of specialization or knowledge of criminal law, were required to take a criminal case when their turn came. However, as Clarence Darrow observed, judges seldom bothered prosperous lawyers to assist in the representation of poor defendants. The lawyers who were drafted usually provided only token representation.

Conscription was eventually abandoned in most places not because of the quality of representation the poor were receiving, but because of its imposition on lawyers. The

2. *Id.* at 212.

3. See *Public Defender, Eleventh Judicial Circuit v. State*, 115 So.3d 261 (2013) (describing caseloads of public defenders and holding that public defenders could decline representation of additional clients where caseloads made it impossible to meet ethical and constitutional responsibilities to competently represent existing clients).

4. Dan T. Carter, *THE POLITICS OF RAGE*, 108-09, 142-51 (1995).

5. See, e.g., Jack Bass, *UNLIKELY HEROES* (1981) (describing the role of the judges of the Fifth Circuit Court of Appeals in enforcing the *Brown* decision).

6. See *Martin County v. Makemson*, 479 U.S. 1043 (1987) (White, J., dissenting from denial of certiorari) (expressing the view that lawyers can be required to represent indigent defendants without compensation); *State v. Citizen*, 898 So.2d 325, 330 (La. 2005) (describing state constitutional provision, repealed in 2007, requiring each parish to maintain “lists of volunteer and non-volunteer attorneys” to be appointed to represent poor defendants); *State v. Wigley*, 624 So.2d 425 (La. 1993) (holding that requiring the uncompensated representation even in a capital case does not violate the constitutional rights of attorneys); *Wilson v. State*, 574 So.2d 1338 (Miss. 1990) (holding that attorneys may be required to represent indigent defendants in capital cases “by virtue of the license conferred upon them to practice law in the State of Mississippi” and therefore the statutory fee of \$1000 is an “honorarium” or “pure profit”); Jerry L. Anderson, *Court-appointed Counsel: the Constitutionality of Uncompensated Conscription*, GEO. J. LEGAL ETHICS (Winter, 1990).

Missouri Supreme Court framed the question as follows:

* * * The lawyers of Missouri, as officers of the Court, have fulfilled this State obligation [of representing poor defendants], without compensation, since we attained statehood, although other persons essential to the administration of criminal justice (*e.g.* prosecuting attorneys, assistants to the Attorney General, psychiatrists, et al.) have not been asked to furnish services gratuitously. The question is whether the legal profession must continue to bear this burden alone. * * *

“ * * * [S]ince 1795, the burden of those assignments has increased vastly. The increase has been not only in the number of assignments, but also in the demand a criminal case makes upon counsel. A criminal case used to be a fairly simple affair. The issue usually was a pure question of fact – did the defendant commit the crime? Today, with rapidly changing concepts relating to sundry matters, such as confessions, search and seizure, joinder of defendants, right to counsel, etc., the defense of criminal charges consumes far more time than when we came to the bar. * * * Further, the total demand will likely increase, for while criminal proceedings now dominate the stage, in the wings are other matters – minor offenses, juvenile delinquency, and civil commitments, areas in which counsel are now furnished but on a selective basis. We are satisfied the burden is more than the profession alone should shoulder, and hence we are compelled to relieve the profession of it.”

Green v. State, 470 S.W.2d 571, 572-73 (Mo. 1971) (quoting *State v. Rush*, 217 A.2d 441, 448 (N.J. 1966)). The Court left it to the legislature to provide for the payment and compensation of lawyers, but held that after September 1, 1972, it would not “compel the attorneys of Missouri to discharge alone ‘a duty which constitutionally is the burden of the State.’” 470 S.W.2d at 573 (again quoting *Rush*, 217 A.2d at 446). The legislature established a public defender system the following year.

Kentucky abandoned conscription and created a public defender program the next year after state’s highest court held that requiring lawyers to represent the poor without compensation was an unconstitutional taking of an attorney’s property (professional services). *Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. 1972). The public defender program, called the Department of Public Advocacy, provided representation in 185,702 cases at an average cost per case of \$211.87 in fiscal year 2011.

Some states refused to fund representation and delegated responsibility for providing representation to their counties (or, in Louisiana, its parishes). Because of local pressures to keep taxes low and fund other priorities, many counties were not inclined to spend much on providing representation for poor people accused of crimes. This also resulted in a fragmented system which varied from county to county over the 252 counties in Texas, the 159 in Georgia, the 120 in Kentucky, the 92 in Indiana, the 89 in Michigan, the 67 in Pennsylvania, and the 58 in California and the counties in other states. Some counties appointed lawyers to cases on an *ad hoc* basis, compensating them by the hour or by the case at rates well below market rates, while others contracted with lawyers to provide representation to a certain number of defendants for a flat fee and others set up public defender offices.

The quality of representation provided often differed by the relative wealth of the counties – and still does in some states – with wealthier counties spending more and providing better representation than found in poorer counties that resorted to token compensation for lawyers assigned to defend the poor and fixed fee contracts. In Louisiana, the primary funding for indigent defense has come from fines on traffic tickets. As a result, the resources for representation vary in accordance with the amount of traffic that goes through parishes and how aggressively traffic laws are enforced in them.⁷

7. Although the Louisiana Constitution requires “a uniform system for securing and compensating qualified counsel for indigents,” La. Const. Art. I § 13, the Louisiana Courts have held the provision allows “workability in a state with political subdivisions of

States have increasingly taken responsibility for funding representation of the poor, although funding is usually inadequate. Twenty-eight states now provide more than 90% of the funding; four states provide over 50% of the funding, leaving the rest to their counties; 16 states provide less than 50% of funding, leaving the rest to their counties; and two states leave funding completely up to their counties.⁸

Colorado is an example of a state that has an impressive state-wide public defender program that provides good representation to the poor. After first leaving representation to its counties, its legislature created the Office of the State Public Defender in 1970 with state-wide responsibility for the appointment and funding of counsel for indigent defendants. The [state office](#) hires and trains public defenders, assigns them to offices throughout the state, where they are supervised, have reasonable workloads, and access to investigators, interpreters, social workers and experts. The state office also provides ongoing training and has specialized units in areas where special expertise is needed, such as capital and other complex cases, juvenile cases, and cases involving the mentally ill or intellectual disabled.

But other states lag far behind. Georgia established a state-wide public defender program in 2005, over 40 years after *Gideon*. Montana established one the following year. But it will take those programs years to equal the program that Colorado has built since 1970. A number of states, including Alabama, California, Michigan, New York, Pennsylvania and Texas, still have no state-wide public defender programs and great variation in the quality of representation from one county to another. Some California counties, for example,

have outstanding public defender offices, while other counties contract with lawyers to represent the poor based on the lowest bid, a system that virtually guarantees quick processing of defendants that does not resemble legal representation by an attorney.

Resistance to *Gideon* continues to this day in those California counties and throughout the country. This is particularly so with regard to funding representation for the poor. Over fifty years after *Gideon*, most governments fail in varying degrees to fund adequately representation of the poor. While most government officials profess to support the right to counsel, some are open in their disregard for Supreme Court decisions regarding counsel. The Chief Justice of South Carolina, Jean Hoefer Toal, was comfortable stating at state bar meeting in 2007, that *Alabama v. Shelton*, which prohibited revocation of probation if the accused had not been represented by counsel when found guilty, was “one of the more misguided decisions of the United States Supreme Court... so I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation.”⁹

A Georgia legislator said that poor people accused of crimes were entitled to “adequate” but not “zealous” representation. And public officials in different states have repeatedly said that their programs for public defense should be a “Chevy not a Cadillac.”

A Texas county did not provide lawyers for the accused in its misdemeanor courts until the Texas Supreme Court held in 2012 that it was subject to a class action lawsuit challenging the denial of counsel.¹⁰ A study of 21 Florida counties found that one third of people facing misdemeanor

widely varying population, geography, customs and problems.” *State v. Citizen*, 898 So.2d 325, 330 (La. 2005) (quoting *State v. Bryant*, 324 So.2d 389, 393 (La.1975).

8. National Right to Counsel Committee, [Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel](#) at 53-54 (2009) (listing states by the percentage of their funding for representation of the poor).

9. Chief Justice Jean Hoefer Toal, South Carolina Bar Association, 22nd Annual Criminal Law Update (January 26, 2007).

10. *Heckman v. Williamson County*, 369 S.W.3d 137 (Tex. 2012) (holding that people accused of crimes could maintain a class action suit seeking counsel in misdemeanor cases).

charges were not represented by counsel.¹¹ In Kentucky, even fewer people accused of misdemeanor offenses – about thirty percent – were represented by counsel.¹²

Systems for Providing Representatin

Jurisdictions use one of four systems for providing representation to indigent defendants: public defender programs, assigned counsel programs (also called “panel programs”), contracts with lawyers to handle a certain number of cases for a flat fee, and, in a few jurisdictions, conscription. A combination of approaches may be employed in order to have separate lawyers for defendants with conflicting interests. That is particularly true where there are public defender programs because the lawyers in those programs cannot represent defendants with conflicting interests. However, a combination is not needed in jurisdictions which have only an assigned counsel program.

Public defender programs. Adequately funded and properly managed public defender programs employ full-time lawyers, investigators, social workers, and support staff and may have divisions which specialize in certain areas, such as capital defense, representation of children, mental health issues, sex crimes, appellate practice, post-conviction representation and other areas. Poorly funded public defender offices may not have many, if any, investigators and social workers, and not enough attorneys to handle the number of defendants the offices are required to represent. In addition to the defense of criminal cases, public defender programs may represent individuals facing involuntary civil commitment due to mental illness and people faced with jail for failure to pay child support or other areas relevant

to their clients.¹³

Most public defender offices are government agencies. Some may cover an entire state, such as the Colorado, Connecticut, Kentucky, Missouri and New Jersey public defender programs, with offices throughout the state. Some may cover a single county, such as the Philadelphia and San Francisco public defender offices, or a judicial circuit, such as the public defenders in Florida and Tennessee. There is a public defender in each judicial district in those states, but the offices are independent of each other, unlike state-wide systems operated by a central office.

Some jurisdictions contract with one or more not-for-profit organizations to provide representation. The New York Legal Aid Society, one of the oldest and largest provider of legal services to indigents in the United States, is an example of such a not-for-profit program. The City of New York contracts with the Legal Aid Society and five defender programs – one in each borough – to provide representation from arrest through sentencing and three additional non-profit organizations for the provision of appellate services. It also maintains a roster of lawyers, managed by an administrator, to handle cases at an hourly rate.

Some jurisdictions have more than one public defender office because people accused of crimes may have conflicting interests and require separate lawyers from different offices. One co-defendant may want to testify against the others in exchange for dismissal of his or her charges or a reduced sentence. A defendant may be a victim or witness in another case.

As previously noted, Congress created the federal defender organizations in legislation in the

11. Alisa Smith & Sean Maddan, *Three-Minute Justice: Haste and Waste in Florida's Misdemeanor Courts*, 23 *tbl*.9 (report for the National Association of Criminal Defense Lawyers, 2011).

12. David Carroll, *Underrepresentation in Kentucky Misdemeanor Courts*, National Legal Aid & Defender Association, <http://nlada.net/jscri/blog/underrepresentation-kentucky-misdemeanor-courts> (Nov. 16, 2011).

13. Some programs are loosely referred to as “public defender programs” and many lawyers as “public defenders” but do not fit this definition. For example, the “public defenders” in New Orleans prior to 2006 worked part time, were allowed to take private clients and there was no limit on their private practices. They would more accurately be described as “contract attorneys,” discussed *infra*, than public defenders.

1963 and 1970. Today, there are 79 federal defender organizations that serve 90 of the 94 federal judicial districts in the country.

There are two types of federal defender organizations. *Community defender organizations* are non-profit organizations that receive initial and sustaining grants from the federal judiciary and operate under the supervision of a board of directors. A community defender may be a branch or division of a parent non-profit legal services corporation, such as the Defender Association of Philadelphia.

Federal public defender organizations are federal entities, and their staffs are federal employees. The chief federal public defender is appointed to a four-year term by the court of appeals of the circuit in which the organization is located.

In states and localities, chief public defenders may be selected by a board of directors of the public defender agency or a public official like the governor or a judicial officer. Florida and Tennessee elect their public defenders in each judicial district. In both states candidates run with a political party affiliation. San Francisco and Lincoln, Nebraska also elect their public defenders.

Some public defender programs provide clients with representation by the same lawyer from initial appearance in court through sentencing. Other programs have responded to the challenge of inadequate funding by providing lawyers who represent all clients at each stages of the process – initial hearings, preliminary hearings, arraignments, and trials. This approach is often referred to as “horizontal representation” or the “zone defense.”¹⁴ While this approach makes it possible for public defender offices to represent more clients, the defendant encounters a new attorney at each stage of the case. The lawyer who spends every day in the same courtroom will build

an expertise in handling a certain kind of case and develop relationships with the prosecutors and judges which may be beneficial to some clients. On the other hand, the lawyers may not build relationships of trust and confidence with the clients. Representation may suffer because no lawyer takes full responsibility for knowing the case and preparing a defense. In addition, a lawyer who deals exclusively with one or two prosecutors and appears before the same judge every day may be less likely to risk antagonizing the judge or the prosecutor by providing zealous representation to a particular client.

Public defender offices handled 352 cases per attorney in 2007, according to a report by the Justice Department, the only such report that has been made. U.S. Department of Justice, Bureau of Justice Statistics, *Public Defender Offices, 2007 - Statistical Tables* (Nov. 2009).

The concept of the public defender was first introduced by Clara Shortridge Foltz, California’s first woman lawyer, in a speech at the Congress of Jurisprudence and Law Reform at the Chicago World’s Fair in 1893. Her experiences in representing the poor and witnessing incompetent defense lawyers and prosecutorial misconduct led her to come up with the idea of a public defender to balance the public prosecutor. A public defender office opened in Los Angeles in 1913 and the “Foltz Defender Bill” was adopted in 1921 in the California legislature.

During a career that spanned 56 years, Foltz, a single mother of five, drafted a bill to amend California’s law limiting the practice of law to men by replacing the word “male” with “person,” persuaded the governor to sign it into law, filed and won a lawsuit seeking entrance to the state’s only law school, Hastings, became the first woman lawyer on the Pacific Coast, tried cases in court when women were not allowed to serve on juries, and played a key role in winning women’s suffrage in California.

Looking back on her life, Foltz wrote, “Everything in retrospect seems weird, phantasmal, and unreal. I peer back across the misty years into that era of prejudice and limitation, when a woman lawyer was a joke ...

14. See 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 (1986)

but the story of my triumphs will eventually disclose that though the battle has been long and hard-fought it was worth while.” In 1991, Hastings College of the Law granted Foltz a posthumous degree of Doctor of Laws. In 2002, the central criminal court building in Los Angeles was renamed the Clara Shortridge Foltz Criminal Justice Center.¹⁵

“Assigned counsel” or “panel” programs. A common way of providing counsel for a defendant is for judges or court administrators to assign lawyers to represent individuals from a panel of private attorneys or any attorney that may be available to accept the appointment.

The extent to which lawyers’ qualifications are examined before they are put on the panel and appointed to cases varies greatly from one jurisdiction to another. Some courts require that attorneys meet certain qualifications, have a certain level of experience, and attend continuing legal education programs on trial practice in order to be listed on the panel of attorneys who are available to accept appointments.

Appointments may be rotational – an administrator maintains a list of the panel attorneys and lawyers are appointed off of it so that when a new defendant comes before the court, the next lawyer on the list is appointed; this continues until the list is exhausted and then repeated. But often judges or administrators may select lawyers from the list.

In many courts, there is no panel and appointments are made by judges. Elected judges may appoint lawyers who have contributed to their campaigns. Judges may prefer certain lawyer for various reasons. And some judges appoint lawyers who happen to be in the courtroom when cases are called. Lawyers may put their business cards on the bench before court starts or give them to the clerk to let the judge know they are available for appointments.

The lawyers are paid by the hour or by the case. Lawyers who are members of a panel approved to represent defendants in federal court were authorized to be paid an hourly rate of \$126 for non-capital and \$180 for capital work as of March 2014. Compensation is usually much lower in the state courts and almost invariably below market rates. Some courts pay as little as \$50 a case or meager hourly rates, which requires lawyers to handle a high volume of cases with little time spent on each case if the lawyers are going to make a profit.

The contract system. A jurisdiction may contract with a lawyer, group of lawyers or law firm to represent indigent defendants for a set amount during a time period, usually a year. The contracts are often awarded on the basis of the lowest bid.

For example, a jurisdiction which does not have a large volume of criminal cases may contract with a lawyer to handle all of its criminal cases for a year for a fixed fee. A jurisdiction with more cases may contract with several lawyers or a firm to handle a percentage of all the cases – or all of the cases that come before a particular judge – for a fixed fee. Or a lawyer may agree to handle a certain number of cases for a fixed fee, *e.g.*, 175 cases for \$50,000.

The contracts usually allow the lawyers to maintain private practices. Thus, the lawyers have an incentive to dispose of the cases of their poor clients as quickly as possible since they will be paid the same regardless of how much time they devote to the case and they will have more time for their private cases. “They should be illegal,” according to Gerald Uelmen, a professor and former dean at Santa Clara University School of Law who was executive director of a California Commission on the Fair Administration of Justice. “They create a conflict of interest between the attorney and the client – the less work you do, the more money you make.”

Twenty four of California’s 58 counties use contracts. Most contracts provide that the flat sum paid by the jurisdiction not only covers the services of the lawyer, but also investigators, expert witnesses and any other expenses, thus

15. See Barbara Babcock, *WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ* (Stanford University Press 2011).

creating a disincentive for the lawyers to spent much on investigations and expert assistance. The U.S. Justice Department's Bureau of Justice Assistance reported the following experience of a California which contracted for indigent defense:

In 1997 and 1998, a rural county in California agreed to pay a low bid contractor slightly more than \$400,000 a year to represent half of the county's indigent defendants. The contractor was a private practitioner who employed two associates and two secretaries, but no paralegal or investigator. The contract required the contractor to handle more than 5,000 cases each year. All of the contractor's expenses came out of the contract. To make a profit, the contractor had to spend as little time as possible on each case. In 1998, the contractor took fewer than 20 cases – less than 0.5 percent of the combined felony and misdemeanor caseload – to trial.

One of the contractor's associates was assigned only cases involving misdemeanors. She carried a caseload of between 250 and 300 cases per month. The associate had never tried a case before a jury. She was expected to plead cases at the defendant's first appearance in court so she could move on to the next case.

One afternoon, however, the associate was given a felony case scheduled for trial the following week. The case involved multiple felony and misdemeanor charges. When she looked at the case file, the associate discovered that no pretrial motions had been filed, no witness list had been compiled, no expert witnesses had been endorsed, and no one had been subpoenaed. In short, there had been no investigation of any kind into the case, and she had no one to help her with the basics of her first jury trial.

The only material in the case file was five pages of police reports. In these reports she found evidence of a warrantless search, which indicated strong grounds for suppression. She told the judge she was not ready to proceed and that a continuance was necessary to preserve the defendant's Sixth Amendment right to counsel. The continuance was denied.

The associate refused to move forward with the case. The contractor's other associate took over the case and pled the client guilty to all charges. The associate who had asked for a continuance was fired.

In this California county, critics' worst fears about indigent defense contract systems came true. When contract systems are created for the sole purpose of containing costs, they pose significant risks to the quality of representation and the integrity of the criminal justice system.¹⁶

Jack Suter, one of the contract lawyers in the county, testified in a deposition that he was able to handle a high volume of cases because he pled 70% of his clients guilty at the first court appearance after spending thirty seconds explaining the prosecutor's plea offer.

The counties in California that award contracts on the basis of the lowest bid are part of an effort to save money without regard for the quality of representation provided that has occurred in many jurisdictions ever since *Gideon* and *Argersinger* were decided. The California Commission on the Fair Administration of Justice reported that one contract defender had repeatedly fought off low bidders by reducing his budget, which had been 41% of the District Attorney's budget in 2000, to only 27% of prosecutor's budget in 2005. Yet in 2006, he was undercut by a bid that was almost 50% less than his submission. According to the Commission:

He was undercut by a bid from John A. Barker & Associates, now operating as Richard A. Ciummo & Associates. Ciummo now contracts with eight California counties to provide defense services. . . . Ciummo's operation has been described as the "Wal-Mart Business Model" for providing defense services, "generating volume and cutting costs in ways his government-based counterparts can't and many private-sector competitors

16. U.S. Dep't of Justice, Bureau of Justice Assistance, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 1-2 (2000).

won't." Mr. Ciummo responds that he operates on a single-digit profit margin, and substantial savings result from hiring attorneys on a contract basis that does not include expensive benefit and retirement packages. While his contracts with counties provide separate reimbursement for interpreters and expert witness fees, there is no separate reimbursement for investigative services.¹⁷

The Commission noted that the successful bidder's website contains an advertisement stating: "What Would Your County Do With Hundreds of Thousands of Dollars?" The advertisement suggests the answer ("Better schools? Better fire protection? More police? Improved roads? More parks?") and boasts: "Every county we have contracted with has saved substantial funds over their previous method of providing these services."¹⁸

The contract system is popular with governments because of its fixed, low cost. It is notorious among its clients and their families as well as law professors and other legal experts because of the poor quality of representation often provided.

Conscription.

A few jurisdictions continued to conscript lawyers to represent indigent defendants—usually because of lack of funding for any other system. Some jurisdictions may require lawyers to take cases and pay a nominal amount and not provide compensation for some expenses incurred in representing the client.



All of these systems may be employed in a single jurisdiction. For example, a jurisdiction may use one approach in its felony courts, another in its misdemeanor courts and another in its juvenile courts. Municipal courts within the

17. Cal. Comm'n on the Fair Admin. Of Justice, REPORT AND RECOMMENDATIONS ON FUNDING OF DEFENSE SERVICES IN CALIFORNIA 11-12 (Apr.14, 2008).

18. *Id.* at 11 n. 4.

jurisdiction may have different approaches or not provide counsel at all.

Attorneys in a public defender office cannot represent defendants with conflicting interests so counsel must be provided to some defendants by panel or contract attorneys. there will remain a need for lawyers to handle cases of defendants with conflicting interests or some other reason prohibits the public defender from representing a defendant. In those cases, contract lawyers or individual lawyers paid by the hour or the case may be assigned to represent those not represented by the public defender.

The success of any of these systems depends upon the adequacy of funding, which determines the reasonableness of the workload and the availability of investigative and expert assistance; a structure (such as a public defender office) for the delivery of defense services that ensures competent representation; the independence of the system from the judicial and executive branches, so that defenders are loyal to their clients, and are not in danger of being removed from cases or their jobs if their representation displeases judges, the governor, or some other entity more concerned with cost saving and politics than effective representation; the competency of the people involved, which is determined by hiring standards, the quality of training provided, and the experience and commitments of the lawyers, investigators and entire staff; and supervision so that the quality of representation is monitored and, if it becomes deficient, can be corrected.

If the elements are present, clients should receive thorough and individual representation because their lawyers have time to visit them at the jail, conduct interviews, and assess the strength of the prosecution's case and the possibility of mounting a defense (such as misidentification or self defense); investigators will conduct investigations regarding the charges and to build a defense; the lawyers will research legal issues presented by the cases; the lawyers will negotiate plea dispositions in cases where appropriate and take to trial the cases that should be tried; lawyers and social workers will explore sentencing alternatives if the case is one going to sentencing; the lawyers will meet with a probation

officer regarding sentencing, work on a sentencing proposal based on individual circumstances of the client and perhaps prepare a sentencing memorandum for the judge; and the lawyer will take whatever other actions are necessary, involving investigators, social workers, student interns and support staff to represent the client.

Public defender offices provide structure and full-time lawyers, investigators, social workers, mitigation specialists, paralegals and other staff devoted exclusively to the defense of their clients. As a model, they generally provide the highest quality representation while being the most cost effective way of providing it. While low-bid contracts may cost less, they seldom result in competent representation of clients.

Most public defender offices, assigned counsel programs, and contracts for representation are not adequately funded, resulting in overwhelming caseloads and insufficient investigative and expert assistance and administrative support, making it immensely difficult – if not impossible – to represent clients effectively.

For further reading: American Bar Association’s TEN PRINCIPLES OF A PUBLIC DEFENDER DELIVERY SYSTEM, available at www.americanbar.org/content/dam/aba/migrated/legal_services/downloads/sclaid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf.

The ABA Performance Standards on the Defense Function can be found at www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_toc.html.

The ABA Standards on Providing Defense Services can be found at: www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_toc.html.

When and at what proceedings is an accused entitled to counsel

A person arrested for a crime may be released on citation or pursuant to an established bond schedule by law enforcement officers. Those who remain in custody should be brought before a judicial officer within a day or two of arrest for a “first appearance hearing” where they are advised of the charges against them and their right to counsel and bail is set.

For those in custody who were not arrested on a warrant, a determination of probable cause must be made by a judicial officer within 48 hours of arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (setting 48-hour requirement); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (requiring a “prompt” determination of probable cause). This determination can be informal without an adversary hearing. Despite these constitutional requirements, there are long delays before the first appearance hearing in many jurisdictions. A poor person arrested and charged with an offense may languish for weeks or months before seeing a lawyer or judge.

People who have been arrested who can afford an attorney will usually retain one as soon after arrest as possible to secure their release and begin preparing for trial. Those who cannot afford a lawyer will be assigned one in accordance with practice in the jurisdiction in which they are arrested. The Supreme Court observed in 2008 that 43 states and the federal government, including the District of Columbia, appoint counsel before, at, or just after this initial appearance pursuant to statute or court rule. *Rothgery v. Gillespie County*, 554 U.S. 191, 203-04 (2008). See Fed. R. Crim. Pro. 44 (a) and statutes and rules collected in *Rothgery*, 554 U.S. at 204 n.14. However, these statutes and rules do not establish the constitutional requirement regarding when counsel must be provided. In *Rothgery*, the Court summarized its cases regarding when provision of counsel is constitutionally required as follows:

The Sixth Amendment right of the “accused” to assistance of counsel in “all criminal prosecutions” is limited by its terms: “it does not attach until a prosecution is commenced.”

McNeil v. Wisconsin, 501 U.S. 171, 175 (1991); see also *Moran v. Burbine*, 475 U.S. 412, 430 (1986). We have, for purposes of the right to counsel, pegged commencement to “the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,” *United States v. Gouveia*, 467 U.S. 180, 188 (1984) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)). The rule is not “mere formalism,” but a recognition of the point at which “the government has committed itself to prosecute,” “the adverse positions of government and defendant have solidified,” and the accused “finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.” *Kirby, supra*, at 689.

554 U.S. at 198 [footnote omitted]. The Court held in *Rothgery*, by a vote of 8-1, that an initial appearance before a magistrate judge, where an arrested person is informed of the charges and his or her constitutional rights and bail is set, marks the initiation of adversary judicial proceedings at which the right to counsel “attaches.” As a result, the state is required to appoint counsel “within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.” *Id.* at 212. The Court also made it clear that attachment does not require knowledge or formal action on the part of a prosecutor. Arrest by a police officer and a first appearance before a magistrate constitute the “initiation of adversary judicial proceedings.”

Rothgery was a civil rights case brought to recover damages for the failure to appoint counsel after Rothgery’s arrest and first appearance before a magistrate. The magistrate set bond, which Rothgery was able to post to obtain his release. Rothgery was not assigned counsel despite several written and oral requests for counsel that he made. He was later indicted by a Texas grand jury for unlawful possession of a firearm by a felon, resulting in his rearrest and an order increasing his bail. Because he could not post the higher bail, he was put in jail and remained there for three weeks. Finally – six months after the first appearance hearing – Rothgery was assigned a lawyer, who

promptly obtained a bail reduction so Rothgery could get out of jail, and demonstrated to the district attorney that Rothgery had never been convicted of a felony. As a result, the district attorney dismissed the indictment. Rothgery claimed that if counsel had been provided at or near the initial hearing the charges would have been dismissed earlier and he would not have been subject to rearrest and three weeks in jail.

The Supreme Court dealt only with the question of when the right to counsel “attaches.” It did not decide what constituted “a reasonable time after attachment” that counsel must be appointed “to allow for adequate representation at any critical stage” or during trial or whether Rothgery was entitled to damages for the delay in providing him with a lawyer. It remanded the case to the lower courts for a determination of those issues. Justice Alito expressed his view of the Court’s decision in a concurring opinion joined by Chief Justice Roberts and Justice Scalia:

I join the Court’s opinion because I do not understand it to hold that a defendant is entitled to the assistance of appointed counsel as soon as his Sixth Amendment right attaches. As I interpret our precedents, the term “attachment” signifies nothing more than the beginning of the defendant’s prosecution. It does not mark the beginning of a substantive entitlement to the assistance of counsel. * * *

* * *

* * * I interpret the Sixth Amendment to require the appointment of counsel only after the defendant’s prosecution has begun, and then only as necessary to guarantee the defendant effective assistance at trial. * * * It follows that defendants in Texas will not necessarily be entitled to the assistance of counsel within some specified period after their [first appearance before a magistrate]. * * * Texas counties need only appoint counsel as far in advance of trial, and as far in advance of any pretrial “critical stage,” as necessary to guarantee effective assistance at trial.

554 U.S. at 213-14, 217-18. Justice Thomas dissented, expressing the view that “the Court’s holding is not supported by the original meaning

of the Sixth Amendment or any reasonable interpretation of our precedents.” *Id.* at 218.

The Court held that an Alabama preliminary hearing, where a determination was made at an adversarial hearing of whether probable cause existed to hold the accused pending further proceedings, was a “critical stage” at which an accused was entitled to counsel. *Coleman v. Alabama*, 399 U.S. 1 (1970). However, it held that counsel is not constitutionally required at less formal, nonadversarial determinations of probable cause, such as when a judge considers an affidavit in determining whether probable cause is established. *See Gerstein v. Pugh*, 420 U.S. 103 (1975).

The Court held that counsel must be provided when an accused enters a guilty plea at a felony arraignment. *White v. Maryland*, 373 U.S. 59 (1963). The Court had previously held prior to *Gideon* that the absence of counsel at an arraignment in a capital case in Alabama was *per se* reversible. *Hamilton v. Alabama*, 368 U.S. 52 (1961). The Court concluded that “[a]rraignment under Alabama law is a critical stage in a criminal proceeding” and therefore, “[w]hen one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted.”

In *United States v. Wade*, 388 U.S. 218 (1967), the Court held that a lineup, after the defendant had been formally accused by indictment, was a “critical stage” at which the accused was entitled to counsel, but in *Kirby v. Illinois*, 406 U.S. 681 (1972), the Court said that the defendant was not entitled to a lawyer at a lineup conducted *before he was formally charged*, even though he had been arrested. The Court reasoned that only after “the government has committed itself to prosecute . . . the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.”

The Court further explained in *United States v. Ash*, 413 U.S. 300 (1973), that an accused is entitled to a lawyer only in circumstances where lay people have little experience or skill, such as

“arguing the law or in coping with an intricate procedural system” such as “trial-like confrontations” where a lawyer is needed “to act as a spokesman for, or advisor to, the accused” and to balance “any inequality in the adversarial process.” *Id.* at 307, 312, 319. The Court held that Ash was not entitled to a lawyer at an identification procedure in which police showed photographs to witnesses in an attempt to identify the perpetrator.

In *Mempa v. Rhay*, 389 U.S. 128 (1967), the Court held that sentencing was a critical stage at which the defendant is guaranteed counsel to assist “in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence.”

The question remains whether bail proceedings, where it is determined whether an accused is released or required to post bond and the amount of bond is set, constitute a critical stage. Although, as previously noted, many states and the federal government provide counsel at first appearance hearings where bond is set, the Court has not determined whether all jurisdictions are constitutionally required to do so. *See Douglas L. Colbert, Thirty-five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1 (1998). The Maryland Court of Appeals has held that counsel must be provided at every first appearance hearing in that state as a matter of state law. *See DeWolfe v. Richmond*, 2013 WL 5377174 (Md. Sept. 25, 2013). For a 15 minute video on the value of counsel at bail hearings see <http://video.law.umaryland.edu/OpenPlayer.asp?GUID=7E356B06-D204-43F4-B122-CD3BF6766B18>.

The attorney-client relationship; continuity of representation

The California Supreme Court described the attorney-client relationship as follows:

The attorney-client relationship . . . involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client's life or liberty. Furthermore, the relationship is independent of the source of compensation, for an attorney's responsibility is to the person he has undertaken to represent rather than to the individual or agency which pays for the service. . . . It follows that once counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained. To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused.

Smith v. Superior Court of Los Angeles County, 440 P.2d 65, 74 (Ca. 1968). In *Smith*, the Court held that it is beyond statutory and inherent powers of a trial judge to remove a court-appointed defense attorney, over objections of both attorney and defendant, on ground of judge's subjective opinion that attorney is "incompetent" because of ignorance of law to try particular case before him.

Many courts have followed *Smith* in prohibiting the removal of a court-appointed attorney once the attorney-client relationship has been established, often quoting the foregoing passage from *Smith*. See, e.g., *McKinnon v. State*, 526 P.2d 18, 22-23 (Aka. 1974); *State v. Madrid*; 468 P.2d 561, 563 (Ariz. 1970); *Grant v. State*, 607 S.E.2d 586 (Ga. 2005); *People v. Davis*, 449 N.E.2d 237, 241 (Ill. 1983); *English v. State*, 259 A.2d 822, 826 (Md. App. 1969); *State v. Huskey*, 82 S.W.3d 297, 305 (Tenn. Crim. App. 2002); *Stearnes v. Clinton*, 780 S.W.2d 216, 223 (Tex. Crim. App 1989).

Courts have reversed convictions where court-appointed lawyers were replaced before trial. See, e.g., *Michigan v. Johnson*, 547 N.W.2d 65, 68-71 (Mich. App. 1996) (holding that the removal of counsel "involves a structural error that infect[s] the entire trial mechanism because defendant's Sixth Amendment right to counsel [is] violated by the trial court by its removal of [defense counsel] before the trial beg[ins] . . . [and] a harmless-error analysis is not applicable"). See also *Clements v. State*, 817 S.W.2d 194, 200 (Ark. 1991) (court may not terminate the representation of an attorney absent just cause or factors necessary for the efficient administration of justice); *Harling v. United States*, 387 A.2d 1101, 1105 (D.C. 1978) (reversing conviction where trial court replaced counsel).

Nevertheless, some courts have upheld the replacement of counsel for financial reasons – i.e., the inability of the state to pay for one counsel – is an acceptable reason to substitute another, cheaper lawyer. See *Phan v. State*, 699 S.E.2d 9 (Ga. 2010), after remand, 723 S.E.2d 876 (Ga. 2012); *Weis v. State*, 694 S.E.2d 350, 354-58 (Ga. 2010); *State v. Reeves*, 11 So.3d 1031, 1066 (La. 2009).

Morris v. Slappy

Joseph D. Slappy, an indigent person facing trial, asked for a continuance of the trial because the public defender representing him on five felony charges, Harvey Goldfine of the San Francisco Public Defender office, had been hospitalized for emergency surgery. *Morris v. Slappy*, 461 U.S. 1, 5 (1983). Slappy did not want to proceed with a substitute attorney who had been appointed only six days before the trial was to begin. Slappy claimed that the new counsel, Bruce Hotchkiss, had insufficient time to prepare and investigate, insisting that there was "just no way, no possible way, that he [the substituted lawyer] has had enough time to prepare this case." 461 U.S. at 6.

Nonetheless, the trial court, after being informed by Hotchkiss that he was ready to proceed, denied the continuance request and ordered the trial to begin. Slappy maintained throughout the three day trial that he had no attorney representing him since his attorney was

in the hospital. On the third day of the trial, Slappy presented the court with a *pro se* petition for a writ of habeas corpus, claiming he was unrepresented by counsel. *Id.* at 8. After the judge denied the petition, the defendant told the court: “I don’t have no attorney. My attorney’s name is Mr. P.D. Goldfine, Harvey Goldfine, that’s my attorney, he’s in the hospital.” *Id.*

The Court of Appeals for the Ninth Circuit, while acknowledging that an indigent defendant does not have an unqualified right to the counsel of his choice, granted relief. It found error in the trial court’s failure to inquire about the probable length of Goldfine’s absence which made it unable to weigh Slappy’s interest in continued representation by Goldfine against the state’s interest in proceeding with the scheduled trial. The Ninth Circuit also declared that the right to counsel would “be without substance if it did not include the right to a meaningful attorney-client relationship.” *Slappy v. Morris*, 649 F.2d 718, 720 (9th Cir. 1981).

The Supreme Court reversed and upheld the trial court’s refusal to grant the continuance. The Court noted that “[t]rial judges necessarily require a great deal of latitude in scheduling trials,” and found, based on the new lawyer’s assurance that he was ready to go to trial, that “[i]n the face of the unequivocal and uncontradicted statement by a responsible officer of the court that he was fully prepared and ‘ready’ for trial, it was far from an abuse of discretion to deny a continuance.” 461 U.S. at 11, 12.

The Court also noted that while Slappy objected from the outset, he did not assert a concern for continued representation by Goldfine until the third day of trial and thus his motion was untimely. *Id.* at 13.

Finally, Chief Justice Burger’s opinion held that there is no Sixth Amendment right to a “meaningful” attorney-client relationship, reasoning that “no court could possibly guarantee that a defendant will develop the kind of rapport with his attorney * * * that the Court of Appeals thought part of the sixth amendment guarantee of counsel.” 461 U.S. at 13-14. In addition, Chief Justice Burger stated:

In its haste to create a novel sixth amendment right, the [Ninth Circuit] wholly failed to take into account the interest of the victim of these crimes in not undergoing the ordeal of yet a third trial in this case. . . . [I]n the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources.

Id. at 14.

Justice Brennan, joined by Justice Marshall, concurred in the result. He agreed with the majority that Slappy had not made a timely motion for a continuance based on his public defender’s unavailability, but took issue with everything else in Chief Justice Burger’s opinion, saying, “the Court reaches issues unnecessary to its judgment, mischaracterizes the Court of Appeals’ opinion, and disregards the crucial role of a defendant’s right to counsel in our system of criminal justice.” *Id.* at 15. He cited a number of cases where appellate courts found constitutional violations when a trial court denied a continuance that was sought so that an attorney retained by the defendant could represent him at trial and quoted from the description of the attorney-client relationship in California Supreme Court’s decision in *Smith v. Superior Court of Los Angeles County*, *supra*, 461 U.S. at 24, quoting *Smith*, 440 P.2d at 74. Justice Brennan also noted in a footnote:

Although the Court acknowledges that “inconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of an accused,” it nonetheless appears to suggest that the interests of a victim in a particular case should be considered by courts in determining whether to enforce the established rights of a criminal defendant. Such a suggestion finds no support in our cases.

Justice Blackmun, joined by Justice Stevens, also concurred, expressing the view that Slappy did not make a timely request to continue the trial until Goldfine was available, but finding “the Court’s rather broad-ranging dicta about the right to counsel and the concerns of victims (deserving of sympathy as they may be) to be unnecessary in this case.” *Id.* at 29.

Wheat v. United States

In *Wheat v. United States*, 486 U.S. 153 (1988), a defendant sought to waive any conflict and replace the lawyer who had been defending him with a lawyer who was representing two of his co-defendants who had plead guilty to being part of a drug distribution conspiracy. Wheat was charged with being part of the same conspiracy. The prosecution objected, arguing, *inter alia*, that Wheat might be a witness against one co-defendant if he withdrew his guilty plea and one of the lawyer’s other clients might testify against Wheat. Understanding this, Wheat and the co-defendants were willing to waive any conflict. The trial court rejected the waivers and refused to allow the lawyer to represent Wheat.

The Supreme Court, over the dissents of four justices, held that the trial court’s refusal to accept the waiver and allow Wheat to be represented by the lawyer did not violate Wheat’s right to counsel. The Court held that a trial court must be allowed “substantial” or “broad” latitude in refusing waivers of conflicts of interest not only where there is an actual conflict but “where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.” 486 U.S. at 163.

Justices Marshall in a dissent joined by Justice Brennan disagreed with Court’s holding that trial courts had “broad latitude” to refuse defendants representation by the lawyers of their choosing where there was only a potential conflict. He argued that the trial court’s decision was entitled to no deference and should be reviewed *de novo* because “[t]he interest at stake in this kind of decision is nothing less than a criminal defendant’s Sixth Amendment right to counsel of his choice.” 486 U.S. at 168.

He also argued that even under the majority’s deferential approach, rejection of the waiver violated the Sixth Amendment because the prosecution did not show that the circumstances of the multiple representation were sufficient to overcome the presumption in favor of the defendant’s choice of counsel. He pointed out that it was unlikely that one of the lawyer’s other clients would actually testify and that the testimony given by the other was “insignificant” and that other lawyers representing Wheat could have conducted the cross-examination.

Justice Stevens, joined by Justice Blackmun, agreed that trial judges must be afforded wide latitude in deciding whether to accept the waiver, but found it “abundantly clear” that the judge “abused his discretion and deprived [Wheat] of a constitutional right of such fundamental character that reversal is required.” 486 U.S. at 173. He found that the Court had demonstrated “its apparent unawareness of the function of the independent lawyer as a guardian of our freedom.” (quoting *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 371 (1985) (Stevens, J., dissenting)).

United States v. Gonzalez-Lopez

The Court has held that a person who *retains* counsel but is improperly denied representation by that counsel is entitled to a new trial – without an inquiry into prejudice. In a 5-4 decision with Justice Scalia writing for the majority (also made up of Stevens, Souter, Ginsberg and Breyer), the Court found that the “right at stake here is the right to counsel of choice; not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation ‘complete.’” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006).

The Court also concluded that “erroneous deprivation of the right to counsel of choice, ‘with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as “structural error”’” and therefore not subject to review for harmlessness. *Id.* at 150. However, the Court held: “the right to counsel of choice does not extend to defendants who require counsel to

be appointed for them. . . . We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar." *Id.* at 151-52 (citing both *Wheat* and *Slappy*).

The Right to Self-representation

The Supreme Court described the attorney-client relationship as follows in *Faretta v. California*, 422 U.S. 806 (1975):

The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant – not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. . . . An unwanted counsel "represents" the defendant only though a tenuous and unacceptable legal fiction.

422 U.S. at 820.

Accordingly, the Court held that a defendant has a right to dispense with a lawyer and represent himself. The Court held that when a defendant makes clear his intention to waive counsel and represent himself, the trial judge is to warn the defendant of the "dangers and disadvantages" of self representation before accepting a waiver of counsel. If the defendant, after being so warned, insists upon waiving his right to counsel and representing himself, he has a constitutional right to do so.

Many courts understood *Faretta* to require such warnings if a defendant insisted upon self-representation at any stage of the proceedings. However, the Supreme Court held in *Iowa v. Tovar*, 541 U.S. 77 (2004), that warnings are required only before a defendant proceeds to *trial* without a lawyer, but not in the far more common instances in which defendants plead guilty.

In *Tovar*, the issue was the adequacy of warnings given to Tovar before accepting his uncounseled plea of guilty to the offense of operating a motor vehicle while intoxicated.

Before accepting the plea, the judge informed Tovar that he was entitled to a speedy and public jury trial where he would have the right to counsel who could help him select a jury, question and cross-examine witnesses, present evidence, and make arguments on his behalf, and explained that by pleading guilty, he would give up those rights as well as his right to remain silent, to the presumption of innocence, and to subpoena witnesses and compel their testimony. The judge also informed Tovar of the elements of the offense and the maximum and minimum penalties that could be imposed. Upon Tovar's admission that he was guilty, the judge accepted his plea.

The Iowa Supreme Court held that the colloquy before acceptance of the guilty plea was inadequate. The Court held that two warnings are essential for a knowing and intelligent waiver of counsel at the plea stage: that proceeding without a lawyer (1) entails the risk that a viable defense will be overlooked, and (2) deprives the defendant of the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty. The U.S. Supreme Court reversed, holding that neither warning was required, that the information given to Tovar before acceptance of his plea was sufficient, and, thus, there was a valid waiver of the right to counsel.

In *Godinez v. Moran*, 509 U.S. 389 (1993), the Court held that the standard of mental competency – *i.e.*, the ability to understand the proceedings and assist counsel – for waiving counsel and entering a guilty plea is no higher than the competency standard for standing trial. Thus, once Moran was found competent for trial, he could discharge his counsel, enter a guilty plea and ask for the death penalty. However, in *Indiana v. Edwards*, 554 U.S. 164 (2008), the Court upheld a trial court's appointment of counsel over Edwards' objection based on the determination that Edwards was competent for trial, but not competent to represent himself *at trial*. The Court distinguished between the competency to enter a plea in *Godinez v. Moran* and the competency to conduct a trial in *Edwards*.

The adequacy of funding

The adequacy of funding to provide competent counsel has been an perennial issue since *Gideon* was decided. While there has usually been adequate funding for federal defender offices and for lawyers appointed to represent criminal defendants in the federal courts, funding varies greatly in the states where over 95 percent of criminal cases are prosecuted.

A report issued in 2009 found that “inadequate financial support continues to be the single greatest obstacle to delivering ‘competent’ and ‘diligent’ defense representation” and that “the most visible sign of inadequate funding is attorneys attempting to provide defense services while carrying astonishingly large caseloads.”¹⁸

As previously mentioned, responsibility for funding may be at the state or local level or a combination of both. For example, Texas, which has 254 counties, provides some state funding for poor defendants but leaves primary responsibility to its counties. New York law requires each county and the City of New York to establish a plan for providing counsel to indigent defendants. Other states have similar laws.

The Mississippi Supreme Court held that one of the state’s counties could sue the state regarding indigent defense and if the county could demonstrate that lack of state funding resulted in a local system of indigent defense representation “fall[ing] beneath the minimum standards of representation required by the Mississippi Constitution,” then the county would have established that defendant, the State of Mississippi, “breached its constitutional duty to provide indigent defendants with effective assistance of counsel.” *State v. Quitman County*, 807 So.2d 402 (Miss. 2001). However, Court later upheld a trial court’s conclusion that the county had failed to make the requisite showing. *Quitman County v. State*, 910 So.2d 1032 (Miss. 2005).

A class action suit was brought against five

New York counties for failing to provide counsel at arraignment and at subsequent critical stages before trial, problems that were the result of inadequate funding and lack of structure and organization. The New York Court of Appeals held that the suit could be maintained a class action suit. *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010).

High caseloads resulting from inadequate funding for public defender programs have been the subject of litigation in several states. The Florida Supreme Court, after reviewing the caseloads of the Miami-Dade County Public Defender office, held that public defenders could decline representation of additional clients where caseloads made it impossible to meet ethical and constitutional responsibilities to competently represent existing clients. *Public Defender, Eleventh Judicial Circuit v. State*, 115 So.3d 261 (2013).

The Missouri Supreme Court similarly held that public defender offices in that state to decline cases in certain instances. *State ex rel. Missouri Public Defender Commission v. Waters*, 370 S.W.3d 592 (Mo. 2012). The case was the third challenge to inadequate funding and excessive caseloads in Missouri.¹⁹

Public defenders are paid a salary. However, private attorneys are paid by the hour, by the case or with a flat fee for a large number of cases. There has been litigation in many states with regard to the adequacy of hourly rates or unreasonable limits on compensation for assigned counsel. *See Simmons v. State Public Defender*, 791 N.W.2d 69 (Iowa 2010) (reviewing cases and concluding that Iowa could not impose fee caps on compensation for legal representation). The Court noted the observation of the Florida Supreme Court that “the link between compensation and the quality of representation remains too clear.” *Makemson v. Martin County*, 491So.2d 1109, 1114 (Fla. 1986) (ordering

18. National Right to Counsel Committee, [Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel](#) at 7 (2009).

19. *See State ex rel. Missouri Public Defender Commission v. Pratte*, 298 S.W.3d 870 (Mo. 2009); *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981).

payment of counsel over a limit of \$3,500 set by statute for services in a death penalty case). See also *White v. Board of County Commissioners*, 537 So.2d 1376, 1379 (Fla. 1989) (also holding that the state, as part of its constitutional obligation “to ensure that indigents are provided competent, effective counsel in capital cases” “must reasonably compensate the attorney for those services”).

Other courts have found limits on compensation in their states unconstitutional or required increases in compensation on other grounds, see, e.g., *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990); *State ex rel Stephan v. Smith*, 747 P.2d 816, 835-836 (Kan. 1987); *Jewell v. Maynard*, 383 S.E.2d 536, 542 (W. Va. 1989); *Delisio v. Alaska*, 740 P.2d 437, 443 (Ala. 1987). The courts in these cases have found a public responsibility to fund indigent defense programs. As expressed by the Supreme Court of New Hampshire:

The public has the responsibility to pay for the administration of criminal justice, and the legislature or the courts have no right or legitimate reason to attempt to spare the public the expense of providing the costs associated with the defense of an indigent by thrusting those expenses upon an individual who happens to be an attorney.

State v. Robinson, 465 A.2d 1214, 1216 (N.H. 1983).

The Supreme Courts of South Carolina and Arkansas both held that statutory limits of \$1,000 on compensation for representing a defendant in a capital case in their states were unconstitutional. *Bailey v. State*, 424 S.E.2d 503 (S.C. 1992); *Arnold v. Kemp*, 813 S.W.2d 770 (Ark. 1991).

However, the Mississippi Supreme Court upheld that state’s \$1,000 limit of fees for counsel in capital cases in *Wilson v. State*, 574 So.2d 1338 (Miss. 1990). The Court held that “[s]ince attorneys are required to provide this service by virtue of the license conferred upon them to practice law in the State of Mississippi, the \$1000 given to an attorney for representation of an

indigent is an ‘honorarium’ or pure profit”), and more recently rejected a challenge to the inadequacy of funding for indigent defense brought by one of its counties in *Quitman County v. State*, 910 So.2d 1032 (Miss. 2005).

Availability and Quality of Representation

Although the Supreme Court held that the Sixth Amendment requires that counsel must be provided to indigent defendants in federal cases in *Johnson v. Zerbst* in 1936 and in felony prosecutions in the state courts in *Gideon v. Wainwright* in 1963, and observed that “the right to counsel is the right to effective counsel,” in *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970), it did not define “effective counsel” until 1984 in the case of *Strickland v. Washington*, 466 U.S. 688 (1984). Thus, for over 40 years after *Johnson* and 20 years after *Gideon* was decided, there was no uniform definition of “counsel.”

David Bazelon, a judge on the United States Court of Appeals for the District of Columbia Circuit, observed a decade after *Gideon*:

[T]he battle for equal justice is being lost in the trenches of the criminal courts where the promise of *Gideon* and *Argersinger* goes unfulfilled. The casualties of those defeats are easy to identify. . . . The prime casualties are defendants accused of street crimes, virtually all of whom are poor, uneducated, and unemployed. They are the persons being represented all too often by “walking violations of the sixth amendment.”²⁰

His comments were echoed ten years later in an article by Professor 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 (1986). Klein found that the underfunding of defense programs and excessive caseloads were resulting in inadequate consultation with clients, inadequate preparation, improper plea bargaining

20. David Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811, 811-12 (1976); see also David Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973).

and insufficient input by defense lawyers into the sentencing process. He observed that some programs were responding with the “zone defense” or contract systems, previously discussed, in order to provide some representation to the many indigent defendants they were required to represent.

The standard for effective assistance of counsel adopted in *Strickland v. Washington*, 466 U.S. 688 (1984), did not resolve the problems of inadequate funding, overwhelming caseloads, and the use of undercompensated private or contract attorneys. The Supreme Court explicitly held in *Strickland*, “the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation.”

Studies since *Strickland* have found the same deficiencies that Judge Bazelon and Professor Klein identified, as well as others. A 2004 report on criminal counsel by the American Bar Association’s Standing Committee on Legal Aid & Indigent Defendants reached “the disturbing conclusion that thousands of persons are processed through America’s courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation.” The Committee found this was primarily because of inadequate funding of indigent defense systems nationwide. Among the report’s findings were:

- Lawyers who provide representation in indigent defense systems sometimes are unable to furnish competent representation because they lack the necessary training, funding, time and other resources;

- Too often lawyers are not provided to defendants in proceedings in which a right to counsel exists. Prosecutors often seek to obtain waivers of counsel and guilty pleas from accused people without representation, and judges accept and on occasion encourage waivers of counsel that are not knowing, voluntary, intelligent, and on the record;

- Indigent defense systems often lack basic oversight and accountability;

- Model approaches to providing indigent defense services exist, but they are difficult to duplicate without substantial financial support.

The report, *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice* is available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

Another report in 2009 describes the situation for many lawyers for the poor:

As a consequence [of heavy caseloads], defense lawyers are constantly forced to violate their oaths as attorneys because their caseloads make it impossible for them to practice law as they are required to do according to the profession’s rules. They cannot interview their clients properly, effectively seek their pretrial release, file appropriate motions, conduct necessary fact investigations, negotiate responsibly with the prosecutor, adequately prepare for hearings, and perform countless other tasks that normally would be undertaken by a lawyer with sufficient time and resources. Yes, the clients have lawyers, but lawyers with crushing caseloads who, through no fault of their own, provide second-rate legal services, simply because it is not humanly possible for them to do otherwise.²¹

Other problems identified in the report include: lack of independence from the judiciary and other authorities; lack of experts, investigators, and interpreters; insufficient client contact; and inadequate access to technology and data; lawyers not always appointed to clients’ cases in a timely manner; and the total absence of counsel in some cases because defendants either are not advised or not adequately advised of their right to counsel.

A 2011 study of misdemeanor courts in Florida found that they handled nearly a half-million cases

21. National Right to Counsel Committee, *Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel* at 7 (2009).

a year. Eight out of ten arraignments conclude in less than three minutes and nearly two out of three defendants plead guilty or no-contest at that first appearance. Two out of three defendants do not have a lawyers. In some counties, judges ask defendants less than half the time if they want to hire a lawyer or if they want a lawyer appointed. And only about one-third of the time do judges discuss the importance and benefits of having a lawyer and the disadvantages of proceeding without one.²²

For further discussion of the deficiencies in representation *see* Stephen B. Bright & Sia M. Sanneh, [*Fifty Years of Defiance and Resistance After Gideon v. Wainwright*](#), 122 Yale L. Rev. 2150, 2160-74 (2013).

Workloads and Ethical Considerations

The amount of work that lawyers for the poor are assigned is critical to the quality of representation provided. The American Bar Association issued an ethics opinion in 2006 stating:

If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients . . . lawyer supervisors must, working closely with the lawyers they supervise, monitor the workloads of the supervised lawyers to ensure that the workloads do not exceed a level that may be competently handled by individual lawyers.²³

However, for a combination of political and practical reasons, defenders are often unable to comply with this ethical requirement.

22. Alisa Smith & Sean Maddan, [*Three-Minute Justice: Haste and Waste in Florida's Misdemeanor Courts*](#) 23 tbl.9 (report for the National Association of Criminal Defense Lawyers, 2011).

23. Formal Opinion 06-441, May 13, 2006, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation*.