

PUBLIC DEFENSE LITIGATION: AN OVERVIEW

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In *Gideon v. Wainwright*,¹ the Supreme Court held that all criminal defendants facing serious criminal charges are entitled to the assistance of counsel, regardless of whether they can afford an attorney.² In the years since *Gideon*, however, the provision of public defense to those who cannot afford counsel has fallen far short of the ideal expressed in *Gideon* that “every defendant stands equal before the law.”³ The failure of public defense systems to provide adequate representation to indigent defendants is often caused by severe underfunding and has resulted in the chronic appointment of “incompetent or inexperienced” counsel; delays in the appointment of counsel and discontinuity of attorney representation; a lack of training and oversight for counsel representing indigent defendants; excessive public defender caseloads and understaffing of public defender offices; inadequate or nonexistent expert and investigative resources for defense counsel; and a lack of meaningful attorney-client contact.⁴ Many of these failings are described in more detail in other articles that are a part of this symposium.⁵

One response to these failings—as is often the case when constitutional violations are afoot—has been to challenge them in court.⁶ The focus of this short Article is on how the courts can address and have addressed the failings of

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1. 372 U.S. 335 (1963).

2. *Id.* at 344-45.

3. *Id.* at 344.

4. See THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 7-8, 50-52, 65-70 (Nat’l Right to Counsel Comm. 2009), available at <https://constitutionproject.org/wp-content/uploads/2012/10/139.pdf> [<https://perma.cc/S6GN-RF3C>]; see also ROBERT C. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS 20-24 (Nat’l Ass’n of Criminal Def. Lawyers 2009), available at <https://www.nacdl.org/reports/misdemeanor/> [<https://perma.cc/HB6U-F7BC>]; AM. BAR. ASS’N STANDING COMM. LEGAL AID & INDIGENT DEFENDANTS, GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE, REP. ON THE AM. BAR ASS’N’S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS, at 7-11, 14-19 (2004), available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [<https://perma.cc/FE4U-DMDQ>] [hereinafter ABA GIDEON’S BROKEN PROMISE]; Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1045-59, 1090-1103 (2006).

5. *Implementing Gideon’s Promise: The Right to Counsel in the Nation and Indiana*, Indiana Law Review Symposium was held at the Robert H. McKinney School of Law on Friday, April 7, 2017.

6. See *infra* Part I.

underfunded and structurally flawed indigent defense systems. More specifically, it explores lawsuits that identify systemic failures—such as underfunding, excessive caseloads, and inadequate training and oversight—and seek system-wide remedies, capable of transforming the provision of defense services. Although there are a host of other cases related to indigent defense—for example, relating to money bail and fines and fees—those are outside the scope of this Article.

This Article is intended to provide a brief, high-level overview of public defense litigation in the United States. Part I of the Article will provide an overview of the legal basis for such lawsuits and the obstacles they often encounter. Part II provides an aggregate depiction of how such litigation efforts have fared in state and federal court and highlights several examples, illustrative of some of the points made in Part I. Finally, Part III concludes by pointing to suggestions that have been made to increase the scope and effectiveness of such litigation and an alternative basis for future litigation efforts.

I. SIXTH AMENDMENT STRATEGIES AND OBSTACLES

Many lawsuits to challenge systemic failures like those referenced above have relied on the Sixth and Fourteenth Amendments, and their parallel state constitutional provisions.⁷ Grounded in due process and the right to counsel, one obvious reference point for such challenges—particularly when they emphasize counsel's inability to do her job effectively under certain conditions—is *Strickland v. Washington*,⁸ in which the Supreme Court held that the Sixth Amendment guarantees criminal defendants the effective assistance of counsel.⁹ In some cases, indigent defendant plaintiffs have argued that as a result of systemic failures, defense attorneys' performance has fallen below the objective standard of reasonableness required by *Strickland*.¹⁰

One of the issues in using *Strickland* to address systemic failings is that it does not readily lend itself to claims raised pre-conviction, when the challenge would be most effective. By design, *Strickland* is meant to assess ineffectiveness post-trial, after any harm has occurred.¹¹ Under *Strickland*, a defendant claiming ineffective assistance of counsel must show not only that counsel's performance was deficient, but also that but for such deficient performance, there is a reasonable probability that the outcome would have been different.¹² The requirement to demonstrate prejudice can make it difficult for plaintiffs to argue

7. See, e.g., Complaint at 2, *Duncan v. State*, No. 07-000242-CZ (Mich. Cir. Ct. Ingham Cty. Feb. 22, 2007); Complaint at 102, *Hurrell-Harring v. State*, 75 A.D. 3d 667 (N.Y. Civ. Sup. Ct. Albany Cty. Nov. 8, 2007) (No. 8866-07).

8. See generally 466 U.S. 668 (1984).

9. *Id.* at 685-86.

10. *Id.* at 687-88; see, e.g., *Hurrell-Harring v. State*, 75 A.D.3d 667, 668-69 (N.Y. App. Div. 2010).

11. See *Strickland*, 466 U.S. at 686.

12. *Id.* at 694.

that the system is failing both those defendants who are currently before the court and those who will appear in the future, even when systemic failures render counsel's inability to provide effective assistance all but certain.¹³ As a result, some courts have refused to apply *Strickland* prospectively—that is, to assess whether counsel has been or will be ineffective prior to conviction.¹⁴ Instead, they view *Strickland* as applicable only to post-conviction ineffectiveness claims.

Given the challenges inherent in basing such arguments on *Strickland*, plaintiffs seeking to attack such conditions in court have also relied on *United States v. Cronic*,¹⁵ arguing that the system's failures are so severe that they have resulted in the constructive denial of counsel.¹⁶ In other words, the argument goes, the conditions of representation are such that it is as if defendants are not represented by counsel at all. Most recent lawsuits have been based on constructive denial of counsel arguments.¹⁷ One important difference between these two theories—and one reason why some courts have been more receptive to these arguments than those based on *Strickland*—is that *Cronic* claimants need not prove prejudice.¹⁸ Under *Cronic*, prejudice is presumed because counsel's failure was "complete."¹⁹ As discussed below, however, it can be quite difficult to prove the failures were so severe as to render counsel's presence a nullity.²⁰ Neither *Strickland* nor *Cronic* directly contemplated constructive denial of

13. See Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1212-14 (2013) (elaborating on the problems posed by *Strickland*'s prejudice requirement).

14. See, e.g., *Platt v. State*, 664 N.E.2d 357, 363 (Ind. Ct. App. 1996) (holding pre-conviction ineffectiveness claims unreviewable); *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991) (ineffective assistance of counsel claims more properly considered in post-conviction proceedings to allow for development of record regarding counsel's performance); Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, 24 CRIM. JUST. 6, 8-10 (2009) (noting that "a majority of states require defendants to raise ineffectiveness challenges in state post-conviction proceedings").

15. 466 U.S. 648 (1984).

16. See generally Complaint, *Duncan v. State*, No. 07-000242-CZ (Mich. Cir. Ct. Ingham Cty. Feb. 22, 2007); Complaint, *Hurrell-Harring v. State*, 75 A.D. 3d 667 (N.Y. Civ. Sup. Ct. Albany Cty. Nov. 8, 2007) (No. 8866-07).

17. See, e.g., Memorandum Decision and Order Granting Motion to Dismiss at 1-2, *Tucker v. State*, No. CV-OC-2015-10240 (Idaho 4th Jud. Dist. Ada Cty. Jan. 20, 2016); *Hurrell-Harring v. State*, 75 A.D.3d 667, 668-69 (N.Y. App. Div. 2010); *Kuren v. Luzerne Cty.*, 146 A.3d 715, 730 (Pa. 2016).

18. See *Cronic*, 466 U.S. at 659-67.

19. See *Bell v. Cone*, 535 U.S. 685, 696-97 (2002) (explaining counsel must have "failed to oppose the prosecution throughout the . . . proceeding as a whole").

20. See Lucas, *supra* note 13, at 1212 (noting that in one case, a federal appeals court refused to apply a presumption of prejudice even where the defendant's lawyer slept through parts of the trial).

counsel claims brought prospectively in the context of a civil suit.²¹

Aside from any problems with their prospective applicability, litigation strategies based on the Sixth Amendment are also vulnerable to other flaws inherent in an approach that focuses solely on the role of counsel. Such an approach makes it difficult to account for a lack of resources dedicated to public defense outside of its impact on attorney performance.²² Under a framework that is focused on the lawyer's role, intervening factors like deference to strategy and exceptional lawyering talent in a particular case (or low standards for attorney performance²³) can mask underlying deficits like underfunding.²⁴ William Stuntz captured this shortcoming of ineffective assistance of counsel claims when he wrote that the doctrine:

rules out claims based on inadequate resources. If defense counsel did indeed fail to provide constitutionally adequate assistance, the state's pay scale is irrelevant - the defendant wins no matter how well or poorly counsel was paid. If, on the other hand, defense counsel met the constitutional performance standard, the state's pay scale is again irrelevant - the defendant loses regardless of attorney pay because he got what the Sixth Amendment guarantees him: constitutionally adequate representation. This doctrinal box explains why very few cases even address the question whether states' compensation of appointed counsel can give rise to a constitutional claim. Existing law simply leaves no room for the claim.²⁵

Moreover, to the extent that an analysis of counsel's effectiveness asks whether the attorney's performance is "reasonable," such a standard is subject to a variety of interpretations, some of which may fall well below what professional legal organizations view as necessary. A survey of Alabama state court decisions assessing ineffectiveness of counsel claims revealed, for example, that the Alabama courts were much less likely to rely on guidance from entities like the American Bar Association to determine whether counsel's conduct was reasonable than on state precedent and even local customs.²⁶ In some cases, counsel's failure to take certain actions was deemed not to be unreasonable simply because other attorneys in that jurisdiction had not taken such action in the past.²⁷

21. See generally *Strickland v. Washington*, 466 U.S. 668 (1984); *Cronic*, 466 U.S. 648.

22. Lucas, *supra* note 13, at 1204 (explaining how right to counsel claims must filter the impact of resources through the attorney medium).

23. See *infra* notes 26-27 and accompanying text.

24. Lucas, *supra* note 13, at 1205-06.

25. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 21 (1997).

26. Lauren Sudeall Lucas, *Lawyering to the Lowest Common Denominator: Strickland's Potential for Incorporating Underfunded Norms into Legal Doctrine*, 5 FAULKNER L. REV. 199, 213 (2014).

27. *Id.* at 215-17.

In addition to the difficulty of identifying a fertile legal basis for the lawsuit, litigants seeking to challenge systemic indigent defense failures also encounter obstacles in determining when and how these cases can be filed. Based on federalism concerns, the doctrine of *Younger* abstention suggests that federal courts should not intervene in cases involving pending state criminal proceedings.²⁸ Thus, most of these cases have been filed in state court; many filed in federal court have been dismissed on abstention grounds.²⁹ To provide one recent example, the application of this doctrine resulted in dismissal by a federal district court of a recent case filed in New Orleans, Louisiana—*Yarls v. Bunton*.³⁰ Due to chronic underfunding and excessive caseloads, the Orleans Parish Public Defender's Office (OPD) had refused to accept additional cases, instead placing plaintiffs on a waiting list for appointed counsel.³¹ Plaintiffs subsequently complained that the indefinite denial of counsel by OPD violated their rights under the Sixth and Fourteenth Amendments.³² Relying on concerns about federalism and comity, the district court found itself compelled to abstain from reaching the merits of the claim, asking questions about how it would have any authority to enforce either injunctive³³ or declaratory relief.³⁴

Given the collective nature of the claim, and the desire to use such lawsuits to achieve systemic reform, many of these cases are brought as class-action lawsuits.³⁵ This can raise other issues, given the heightened requirements to obtain such certification and proceed as a class.³⁶ As Stephen Hanlon has pointed out in a recent article, given recent changes in the law governing class action certification (and cases like *Wal-Mart v. Dukes*³⁷), it has become increasingly difficult to certify a class of defendants under a constructive denial of counsel theory of the case.³⁸

28. *Younger v. Harris*, 401 U.S. 37, 42 (1971).

29. Eve Brensike Primus, Issue Brief, *Litigation Strategies for Dealing with the Indigent Defense Crisis*, AM. CONSTITUTION SOC'Y (Sept. 2010), at 4-5, available at <https://www.acslaw.org/files/Primus%20-%20Litigation%20Strategies.pdf> [<https://perma.cc/FS5H-9GNJ>] (noting that federal courts often refuse to hear cases regarding systemic violations of the right to counsel).

30. 231 F. Supp. 3d 128 (M.D. La. 2017).

31. Complaint at 1, *Yarls v. Bunton*, 231 F. Supp. 3d 128 (M.D. La. 2017) (No. 16-31-JJB-RLB).

32. *Id.* at 2.

33. *Yarls*, 231 F. Supp. 3d at 135-36 (discussing concerns about being in the position of ordering state courts to release defendants and micro-managing the matters of state judges). See, e.g., *id.* at 136 ("What if the Defendants were nominally complying with the order by assigning counsel to indigents but those attorneys were not 'competent?'").

34. *Id.* (stating declaratory judgment would be "an advisory opinion with no real impact").

35. See Stephen F. Hanlon, *The Appropriate Legal Standard Required to Prevail in a Systemic Challenge to an Indigent Defense System*, 61 ST. LOUIS U. L.J. 625, 630-40 (2017).

36. See Primus, *supra* note 29, at 4.

37. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

38. Hanlon, *supra* note 35, at 644-48 (explaining the difficulties inherent in demonstrating

Last, even if courts are willing to entertain and subsequently find that systemic failures have given rise to a constitutional violation, there remains the question of remedy. Many of these cases have resulted in settlement, and a consent decree setting out terms to which the parties have agreed and which will be monitored over time.³⁹ When such decrees are imposed, securing defendants' continued compliance with the court's order can require much more in terms of time and resources. Asking a court to provide relief can also raise separation of powers concerns, particularly if the underlying issue is funding.⁴⁰ For example, courts are generally not permitted to order the legislature to appropriate funds directly,⁴¹ so they are often limited to those actions that may indirectly require the expenditure of additional funds.

II. PUBLIC DEFENSE LITIGATION: THE PAST

Through a series of charts and correlating explanations, Part II.A provides a high-level view of how public defense suits filed across the country have fared in state and federal court. Part II.B discusses several cases in more detail to demonstrate the form such litigation can take, its impact on public defense systems, and its limitations.

A. A National Overview

Since the Supreme Court's decision in *Strickland*, there have been thirty-eight cases filed across the country challenging systemic indigent defense failures.⁴²

a common injury and a "common contention . . . that is capable of classwide resolution," particularly in the context of constructive denial of counsel claims, which rely on a highly individualized and context-specific inquiry).

39. See, e.g., Consent Decree at 4-7, 9, 21, *Flournoy v. State*, No. 2009CV178947 (Ga. Super. Ct. Fulton Cty. Dec. 14, 2011) (three-year consent order outlining future procedures for hiring, training, and workloads of public defenders, establishing fees based on the complexity of cases, and providing for ongoing monitoring of compliance); Consent Order at 4, 6-8, 12, *Cantwell v. Crawford*, No. 09EV275M (Ga. Super. Ct. Elbert Cty. July 8, 2010) (thirty-month consent order requiring appointment of conflict counsel within one day, capping the number of cases an attorney can have at one time, and setting employment standards for contract attorneys, terminated in 2013); Settlement Agreement at 5-9, 17, *Best v. Grant*, No. 04-2-00189-0 (Wash. Super. Ct. Kittitas Cty. Nov. 2, 2005) (six-year agreement requiring the reduction of caseloads, provision of adequate funding for investigations and witnesses, and compliance with state public defender standards, terminated in 2013).

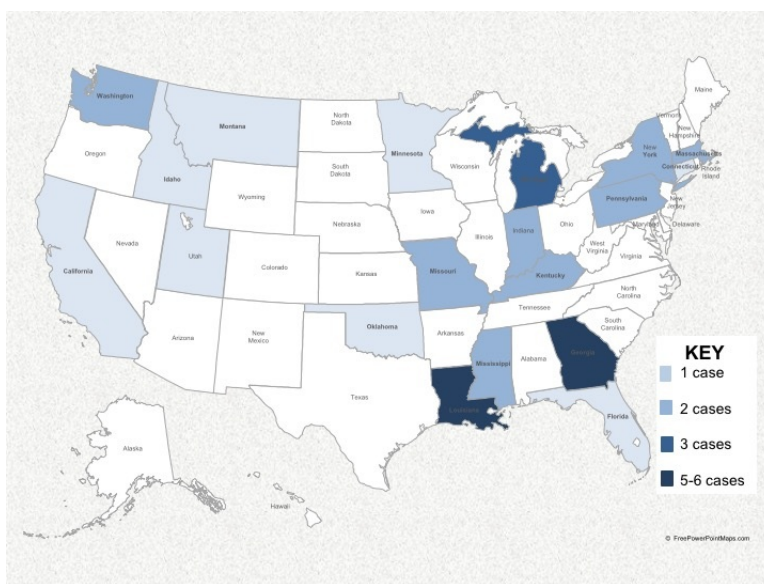
40. Note: *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV L. REV. 1731, 1744-45 (2005) [hereinafter *Note: Effectively Ineffective*].

41. *Id.* at 1744-47.

42. Cases were compiled from various sources, including the Civil Rights Clearinghouse database, housed at the University of Michigan (<https://www.clearinghouse.net>), the Sixth Amendment Center (<http://sixthamendment.org/>), and the pages of the Department of Justice and American Bar Association websites listing relevant amicus briefs and statements of interest filed

For purposes of this survey, which relies on case data compiled as of March 2017, only those cases decided post-*Strickland* and in which plaintiffs challenged systemic indigent defense failures are included. This count does not include cases challenging other aspects of indigent defense, including bail, fines and fees, or pre-trial detention.

Chart 1

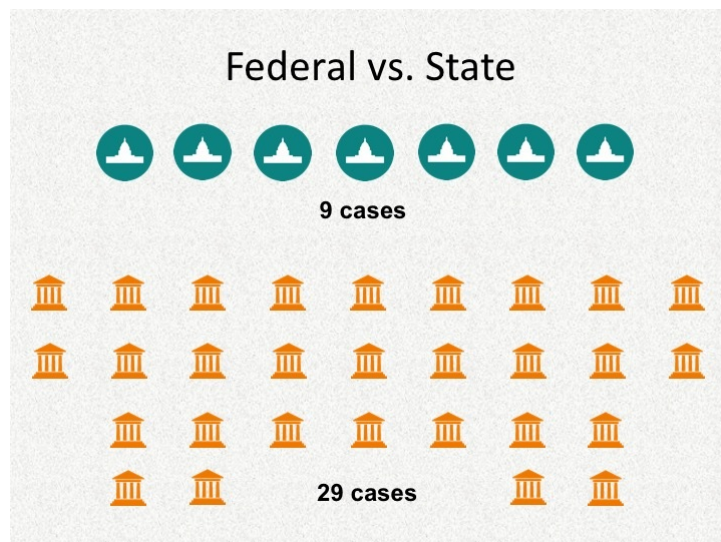


Likely due in part to concerns regarding *Younger* abstention, many more of these lawsuits have been filed in state court (twenty-nine cases) than in federal court (nine cases).⁴³

in such cases.

43. *See id.*

Chart 2



Of those cases filed in federal court, the outcomes have been mixed. Only one case has reached the merits, but in that case, *Wilbur v. City of Mount Vernon*, the district court found that the plaintiffs' constitutional rights had been violated.⁴⁴ It may be worth noting that *Wilbur* was originally filed in state court and removed to federal court by the defendant cities.⁴⁵ The Department of Justice also filed a statement of interest in the case, arguing that if the plaintiffs' claims were found meritorious, the system would violate the Sixth Amendment.⁴⁶ Four cases were dismissed on abstention grounds,⁴⁷ and one on standing as well as abstention.⁴⁸ One case settled,⁴⁹ and as of the time the case data was compiled, two cases were

44. The District Court found that the flaws in the cities' system deprived defendants facing misdemeanor charges of their Sixth Amendment right to counsel. *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1131 (W.D. Wash. 2013). It further found that plaintiffs had established that the denial of counsel was the "direct and predictable result of the deliberate choices of City officials charged with the administration of the public defense system." *Id.* at 1132. The court issued a continuing injunction requiring the cities to hire a supervisor to ensure constitutional compliance for the indigent defense system and retaining jurisdiction over the case while reforms are made. *Id.* at 1134-37.

45. See Notice of Removal at 1, *Wilbur*, 989 F. Supp. 2d 1122 (No. 11CV01100).

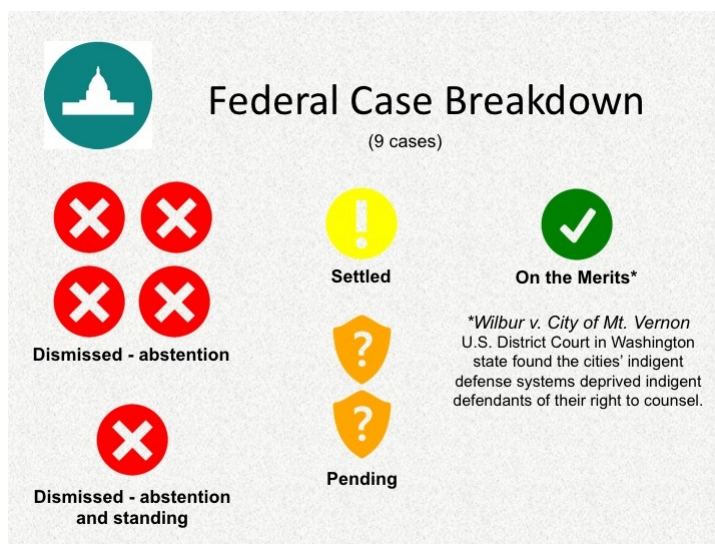
46. Statement of Interest of the United States at 1, *Wilbur*, 989 F. Supp. 2d 1122 (No. C11-1100RSL). For further discussion of the Department of Justice's involvement in public defense litigation, see *infra* notes 67 and 69 and accompanying text.

47. *Luckey v. Miller*, 976 F.2d 673, 676-79 (11th Cir. 1992); *Foster v. Kassulke*, 898 F.2d 1144, 1146-48 (6th Cir. 1990); *Yarls v. Bunton*, 231 F. Supp. 3d 128, 129 (M.D. La. Jan. 31, 2017); Order at 1, *Burks v. Scott Cty.*, No. 3:14-cv-745-HTW-LRA (S.D. Miss. Mar. 27, 2015).

48. *Kowalski v. Tesmer*, 543 U.S. 125, 130-31, 133 (2004).

49. Consent Order at 2, *Stinson v. Fulton Cty.*, No. 1-94-CV-240-GET (N.D. Ga. May 21,

still pending in federal court.⁵⁰



In state court, more cases have reached the merits, although many have been dismissed for procedural reasons as well. Seven cases in total reached the merits, five with a positive verdict for the plaintiffs,⁵¹ and two with a negative outcome for plaintiffs.⁵² Nine cases were dismissed,⁵³ eight settled,⁵⁴ and as of the time the

1999).

50. *Wilson v. Allen Cty.*, No. 1:15-cv-00402 (N.D. Ind. filed Dec. 31, 2015); *Remick v. Utah*, No. 2-16-cv-00789 (D. Utah filed July 13, 2016).

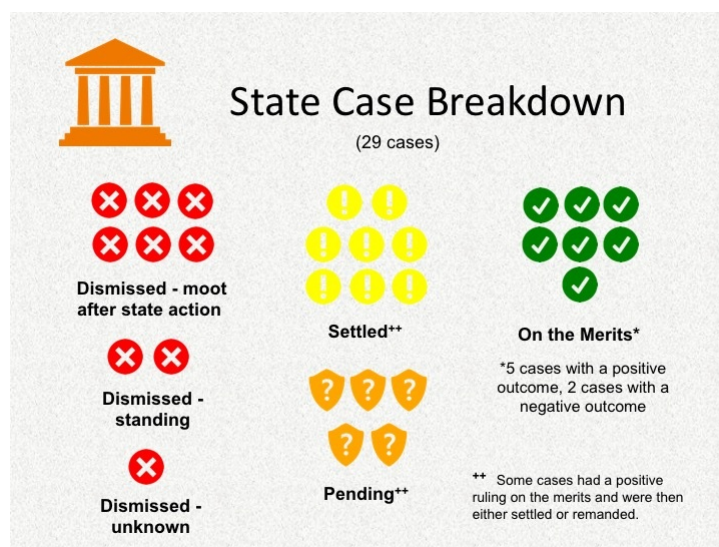
51. *See* *Pub. Def. v. State*, 115 So. 3d 261, 283 (Fla. 2013); *State v. Peart*, 621 So. 2d 780, 791-792 (La. 1993); *Lavallee v. Justices in Hampden Super. Ct.*, 812 N.E.2d 895, 912-913 (Mass. 2004); *State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592, 612 (Mo. 2012); *State v. Lynch*, 796 P.2d 1150, 1164 (Okla. 1990).

52. *See* *Wayne Cty. Criminal Def. Bar Ass'n v. Chief Judges of Wayne Cir. Ct.*, 663 N.W.2d 471, 472 (Mich. 2003); *Quitman Cty. v. State*, 910 So. 2d 1032, 1048 (Miss. 2005).

53. *See generally* *Order of Dismissal, Gadson v. Crawford*, No. 2008CV151884 (Ga. Super. Ct. Fulton Cty. dismissed Jan. 28, 2009); *Memorandum Decision and Order Granting Motion to Dismiss, Tucker v. Idaho*, No. CV-OC-2015-10240 (Idaho 4th Jud. Dist. Ada Cty. dismissed Jan. 20, 2016); *Order and Entry of Judgment on Judicial Defendants' Motion to Dismiss, Alford v. Johnson Cty. Comm'rs*, No. 73D01-1601-PL-000003 (Ind. Super. Ct. Shelby Cty. dismissed Jan. 30, 2017); *Motion to Dismiss, Lewis v. Hollenbach*, No. 08-CI-1094 (Ky. dismissed May 13, 2009); *State v. Citizen*, 916 So. 2d 1040 (La. 2005); *Arianna S. v. Commonwealth*, No. SJ-2004-0282 (Mass. dismissed Oct. 30, 2007); *Duncan v. State*, 784 N.W.2d 51 (Mich. 2010); *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996); *White v. Martz*, No. CDV-2002-133, 2006 Mont. Dist. LEXIS 136 (Mont. 1st Jud. Dist. Lewis & Clark Cty. dismissed Jan. 12, 2006).

54. *See generally* *Notice of Settlement, Rivera v. Rowland*, No. CV-95-0545629S, 1998 WL 96407 (Conn. Super. Ct. Jud. Dist. Hartford July 2, 1999); *Consent Decree, N.P. v. State*, No.

case data was compiled, five were still pending in state court.⁵⁵ Some of the cases listed as pending did have an intermediate ruling for plaintiffs;⁵⁶ because the case was then remanded or settled, they were included in the settled and pending categories respectively.



B. Examples of Public Defense Litigation

One of the more commonly referenced (successful) examples of public

2014CV241025 (Ga. Super. Ct. Fulton Cty. Apr. 20, 2015); Consent Decree, *Flournoy v. State*, No. 2009CV178947 (Ga. Super. Ct. Fulton Cty. Dec. 14, 2011); Consent Decree, *Cantwell v. Crawford*, No. 09EV275M (Ga. Super. Ct. Elbert Cty. July 8, 2010); Stipulation and Order of Settlement, *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010) (No. 8866-07); N.Y. Cty. Lawyers' Ass'n v. State, 305 A.D.2d 1123 (N.Y. App. Div. 2003) (dismissing case as moot by stipulation of the parties after passage of legislation reforming the compensation system); Settlement Agreement, *Doyle v. Allegheny Cty. Salary Bd.*, No. 96-13606 (Pa. C.P. Allegheny Cty. May 15, 1998); Settlement Agreement, *Best v. Grant Cty.*, No. 04-2-00189-0 (Wash. Super. Ct. Kittitas Cty. Nov. 2, 2005).

55. See *Phillips v. State*, No. 15CECG02201 (Cal. Super. Ct. Fresno Cty. July 14, 2015); *Allen v. Edwards*, No. 655079 (La. 19th Jud. Dist. Ct. Feb. 6, 2017); *Anderson v. State*, 916 So. 2d 431 (La. Ct. App. 2005) (No. 2004-005405); *Church v. State*, No. 17AC-CC00130 (Mo. Cir. Ct. Cole Cty. Mar. 9, 2017); *Kuren v. Luzerne Cty.*, 146 A.3d 715 (Pa. 2016) (No. 04517).

56. See, e.g., *Hurrell-Harring*, 930 N.E.2d at 222 (holding that a pre-conviction claim for constructive denial of counsel is a cognizable claim); *Kuren*, 146 A.3d at 751-52 (holding that plaintiffs can bring claims for denial of counsel prospectively where they can demonstrate the likelihood of substantial and immediate irreparable injury and the inadequacy of other remedies at law).

defense litigation is the *Hurrell-Harring v. State* case, filed as a class action lawsuit in New York state court in 2007.⁵⁷ The *Hurrell-Harring* plaintiffs sought declaratory and injunctive relief, claiming violations of the state and federal constitution (based on the Sixth and Fourteenth Amendments).⁵⁸ Alleged in the case were multiple systemic deficiencies, including, among others:

incoherent or excessively restrictive client eligibility standards; no written hiring and performance standards or meaningful systems for attorney supervision and monitoring; lack of adequate attorney training; a lack of resources for support staff, appropriate investigations and expert services; no attorney caseload or workload standards; an absence of consistent representation of each client by one lawyer; a lack of independence from the judiciary, the prosecutorial function, and political authorities; and inadequate resources and compensation for public defense service providers, especially as compared to their prosecutorial counterparts.⁵⁹

As a result of such deficiencies, the plaintiffs alleged, many public defense providers often failed to:

provide representation for indigent defendants at all critical stages of the criminal justice process, especially arraignments where bail determinations are made; meet or consult with clients prior to critical stages in their criminal proceedings; investigate adequately the charges against their clients or obtain investigators who can assist with case preparation and testify at trial; employ and consult with experts when necessary; file necessary pre-trial motions; or provide meaningful representation at trial and at sentencing.⁶⁰

Thus, public defense counsel lacked the ability to “put the case against their clients to meaningful adversarial testing.”⁶¹

In response to the plaintiffs’ claims, the state argued that a claim of ineffective assistance of counsel could not be brought prospectively, that the claim the plaintiffs’ rights would be violated was speculative, and that plaintiffs could not demonstrate actual injury.⁶² The state also argued that plaintiffs had appropriate remedies at law through their criminal proceedings, challenged the plaintiffs’ standing (and ripeness of the claim), and asserted that judicial interference would violate the separation of powers.⁶³ The trial court denied the state’s motion to dismiss, but the intermediate appellate court reversed, granting the motion and holding that the right to counsel could only be enforced through

57. See generally Class Action Complaint, *Hurrell-Harring*, 930 N.E.2d 217 (No. 8866-07).

58. *Id.* at 102.

59. Amended Class Action Complaint at 4, *Hurrell-Harring*, 930 N.E.2d 217 (No. 8866-07).

60. *Id.* at 4-5.

61. *Id.* at 5.

62. Brief for Respondents at 14-20, 28-30, *Hurrell-Harring*, 930 N.E.2d 217 (No. 8866-07).

63. *Id.* at 17, 28-36.

retrospective, post-conviction claims.⁶⁴

In May 2010, the New York Court of Appeals overturned the intermediate state court's decision, holding that the plaintiffs had properly stated a claim for prospective relief from systemic violations of the right to counsel, and remanded for further proceedings.⁶⁵ Important to note, however, was the court's emphasis that to prevail on such a claim, plaintiffs would have to show more than just ineffectiveness; instead, the court relied heavily on counsel's unavailability and the fact that defendants were regularly left without representation at all.⁶⁶ "[P]laintiffs' claims for prospective systemic relief cannot stand if their gravamen is only that attorneys appointed for them have not, so far, afforded them meaningful and effective representation."⁶⁷ The case eventually settled in 2014, the day before it was set to go to trial.⁶⁸ The settlement agreement ensures that defendants will have a lawyer at their first court appearance, requires New York to adequately staff public defenders' offices, mandates caseload standards and the creation of eligibility standards, increases the oversight authority of New York's Office of Indigent Legal Services, and provides for monitoring compliance and enforcement.⁶⁹ The agreement lasts for seven and a half years, with the court retaining jurisdiction to monitor its implementation.⁷⁰ Although *Hurrell-Harring*

64. *Hurrell-Harring v. State*, 66 A.D.3d 84, 86 (N.Y. App. Div. 2009).

65. *Hurrell-Harring*, 930 N.E.2d at 225-28 ("Collateral preconviction claims seeking prospective relief for absolute, core denials of the right to the assistance of counsel cannot be understood to be incompatible with *Strickland*. These are not the sort of contextually sensitive claims that are typically involved when ineffectiveness is alleged. The basic, unadorned question presented by such claims where, as here, the defendant-claimants are poor, is whether the State has met its obligation to provide counsel, not whether under all the circumstances counsel's performance was inadequate or prejudicial. Indeed, in cases of outright denial of the right to counsel prejudice is presumed.").

66. *Id.* at 222 ("In addition to the foregoing allegations of outright nonrepresentation, the complaint contains allegations to the effect that although lawyers were eventually nominally appointed for plaintiffs, they were unavailable to their clients—that they conferred with them little, if at all, were often completely unresponsive to their urgent inquiries and requests from jail, sometimes for months on end, waived important rights without consulting them, and ultimately appeared to do little more on their behalf than act as conduits for plea offers, some of which purportedly were highly unfavorable. It is repeatedly alleged that counsel missed court appearances, and that when they did appear they were not prepared to proceed, often because they were entirely new to the case, the matters having previously been handled by other similarly unprepared counsel. There are also allegations that the counsel appointed for at least one of the plaintiffs was seriously conflicted and thus unqualified to undertake the representation.").

67. *Id.*

68. *Settlement Begins Historic Reformation Of Public Defense In New York State*, N.Y. CIVIL LIBERTIES UNION (Oct. 21, 2014), <https://www.nyclu.org/en/press-releases/settlement-begins-historic-reformation-public-defense-new-york-state> [<https://perma.cc/LZ3M-5ULU>].

69. *Id.*

70. Stipulation and Order of Settlement at 23, *Hurrell-Harring*, 930 N.E.2d 217 (No. 8866-07).

is perceived by many as a victory, others view its holding more narrowly, limiting the claim at issue to instances of actual denial, rather than setting precedent for broader constructive denial claims.⁷¹

Another more recent example is more uniformly viewed as a victory for prospective right to counsel claims.⁷² In *Kuren v. Luzerne County*, the plaintiffs argued that the Office of the Public Defender (OPD) could not provide adequate representation with its current funding.⁷³ The office could not provide or fund adequate training and lacked necessary investigative resources.⁷⁴ Attorneys were unprepared, unable to provide meaningful advice (often resulting in unsupportable or unfavorable plea bargains), did not have the time or resources to visit clients in jail or have in-person, confidential communications with their clients, and frequently missed filing deadlines.⁷⁵ Furthermore, OPD caseloads exceeded national standards.⁷⁶ As a result, OPD public defenders were often unable to represent clients at preliminary arraignments or other hearings and had to request continuances of critical proceedings leading to longer pre-trial incarceration times for clients.⁷⁷ Ultimately, plaintiffs argued, these failures amounted to a constructive denial of counsel.⁷⁸

The Commonwealth Court held that *Strickland v. Washington* governs such claims—thus, a defendant must first be convicted, and the appropriate remedy in the event of a violation would be a new trial.⁷⁹ On appeal, the plaintiffs argued that *Strickland* applies only in the post-conviction context and that if the right to counsel is actively violated before trial, pre-trial remedies should be available (particularly because, in the pre-conviction context, the State has no interest in avoiding re-trial).⁸⁰ In 2015, the Pennsylvania Supreme Court certified two

71. See, e.g., Hanlon, *supra* note 35, at 646 (arguing that the court's numerous definitions of a class action constructive denial claim in *Hurrell-Harring* - "a foundational obligation . . . to provide [counsel]; the basic denial of the right to counsel; and insufficient compliance with the constitutional mandate of *Gideon*" - make it "virtually impossible" to create a common class action claim that can survive the standard created in *Wal-Mart v. Dukes*, 564 U.S. 338 (2011) (citing *Hurrell-Harring*, 930 N.E.2d at 222, 224-25)); Andrew W. Koster, *Court of Appeals of New York: Hurrell-Harring v. State*, 27 TOURO L. REV. 709, 727-28 (2011) (arguing that *Hurrell-Harring*'s holding is necessary and improves the judicial system, but it could produce problems in the future and is "unlikely to receive praise.").

72. See, e.g., David A. Love, *Why 'Public Defender' Has Become An Oxymoron*, PHILA. CITIZEN (Oct. 10, 2016), <http://thephiladelphiacitizen.org/kuren-v-luzerne-county-pennsylvania-public-defender/> [<https://perma.cc/6CUU-J6D3>] (arguing that the ruling in *Kuren* is one of "the most important criminal justice reform case[s]").

73. *Kuren v. Luzerne Cty.*, 146 A.3d 715, 718, 723 (Pa. 2016).

74. *Id.* at 747.

75. *Id.* at 748.

76. *Id.* at 719.

77. *Id.* at 747-48.

78. *Id.* at 730.

79. *Id.* at 727.

80. *Id.* at 729.

questions on appeal: first, whether the plaintiffs had a claim for the constructive denial of counsel under the Sixth and Fourteenth Amendments; and, second, whether the plaintiffs had a claim of mandamus to compel the County to provide adequate funding.⁸¹ In its 2016 ruling, the Pennsylvania Supreme Court recognized a prospective cause of action in cases of systematic constructive denial of counsel.⁸² It noted that the mandate of *Gideon v. Wainwright* would be thwarted if counties could create a public defender office and appoint attorneys without ensuring they had the necessary resources to provide meaningful legal representation to their clients.⁸³ The court also ruled, however, that a writ compelling the county to provide funding was not an available form of relief—primarily because the cause of action described above provided another remedy at law.⁸⁴

In contrast with the *Hurrell-Harring* opinion, the Pennsylvania Supreme Court's holding in *Kuren* seems broader in nature—focused on the right to be assisted by competent counsel, rather than requiring that counsel be wholly absent.⁸⁵ The court held:

[I]t is evident that Appellants have alleged that, on a system-wide basis, the traditional markers of representation being provided by the OPD either are absent or significantly compromised. Furthermore, the limitations, and in some cases absences, of counsel are a result of the substantial structural deficiencies that result from a lack of adequate funding. Consequently, Appellants have demonstrated the “likelihood of substantial and immediate irreparable injury,” and have stated a claim upon which relief can be granted. Further, based upon our discussion above, it also is clear that *Strickland* is not an available source of relief, and that no other remedy at law exists to redress Appellants’ claims.⁸⁶

Another point that warrants making, particularly on the heels of discussing *Hurrell-Harring* and *Kuren*, is the increased involvement in public defense litigation by the Department of Justice (DOJ), which has authored statements of interest in several cases,⁸⁷ and the American Bar Association (ABA), which has

81. *Id.*

82. *Id.* at 751-52 (“We recognize for the first time in Pennsylvania a prospective cause of action enabling indigent criminal defendants to prove that the level of funding provided by a county to operate a public defender’s office has left that office incapable of complying with *Gideon*, creating the likelihood of a systematic, widespread constructive denial of counsel in contravention of the Sixth Amendment to the United States Constitution. We further hold that Appellants have sufficiently averred facts to state a claim upon which injunctive relief can be granted.”).

83. *Id.* at 735-36.

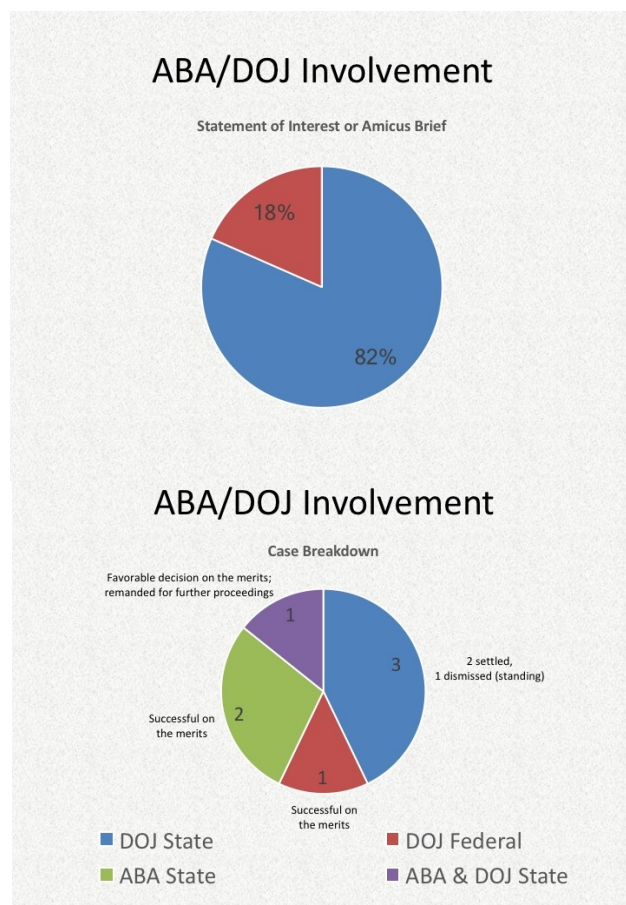
84. *Id.* at 751-52.

85. Compare *Hurrell-Harring v. State*, 930 N.E.2d 217, 222 (N.Y. 2010), with *Kuren*, 146 A.3d at 751-52.

86. *Kuren*, 146 A.3d at 748 (emphasis added).

87. See generally Statement of Interest of the United States at 2-3, *N.P. v. State*, No. 2014-CV-241025 (Ga. Super. Ct. Fulton Cty. Mar. 13, 2015); Brief for the United States as *Amicus*

filed *amicus curiae* briefs in support of plaintiffs raising such systemic challenges.⁸⁸ In many of those cases, the briefs appear to have been instrumental—or at the very least helpful—in securing relief or forcing settlement.



Curiae Supporting Plaintiffs-Appellants at 1-2, *Tucker v. Idaho*, No. 43922 (Idaho May 12, 2016); Statement of Interest of the United States, *Hurrell-Harring v. State* at 1, No. 8866-07 (N.Y. Civ. Sup. Ct. Albany Cty. Sept. 25, 2014); Brief for the United States as *Amicus Curiae* in Support of Appellants at 1-6, *Kuren*, 146 A.3d 715 (Nos. 57 MAP 2015, 58 MAP 2015); Statement of Interest of the United States at 3-4, *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013) (No. C11-01100 RSL).

88. See generally *Amicus Brief of the American Bar Association in support of Petitioner, Public Defender, Eleventh Judicial Circuit of Florida* at 1, *Pub. Def. v. State*, 115 So. 3d 261 (Fla. 2013) (Nos. SC09-1181, 10-1349); *Brief of American Bar Association as Amicus Curiae in Support of Relators* at 1-6, *State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592 (Mo. 2012) (No. SC91150); *Brief of Amicus Curiae American Bar Association in Support of Appellants* at 1-6, *Kuren*, 146 A.3d 715 (Nos. 57 MAP 2015, 58 MAP 2015).

In *Kuren*, the court looked directly to the Department's brief for guidance and its suggested framework for assessing prospective constructive denial claims, holding that "the standard proposed by the Department of Justice offers a workable, if non-exhaustive, paradigm for weighing such claims."⁸⁹

Aside from its more immediate benefits to members of the plaintiff class, public defense litigation has been instrumental in providing the impetus to create statewide public defender systems or significant reforms on the state level altering the way in which appointed counsel would be provided to defendants—for example, in Georgia,⁹⁰ Montana,⁹¹ and Michigan.⁹²

Duncan v. State was a class action lawsuit filed in 2007 on behalf of felony defendants in Michigan state court.⁹³ The plaintiffs claimed the State of Michigan had abdicated its responsibility for providing indigent defense by delegating that responsibility to counties and failing to provide oversight.⁹⁴ In the complaint, the plaintiffs alleged: "[M]any indigent defense providers in Berrien, Muskegon and Genesee Counties have too many cases; have insufficient support staff; have either no or insufficient resources to hire outside investigators and experts; and lack the skills and experience to handle the cases assigned to them."⁹⁵ Moreover, they argued, the plaintiff class "suffer[ed] numerous harms" due to "[t]he inability of indigent defense counsel to put the case against their clients to the crucible of meaningful adversarial testing."⁹⁶

In *Duncan*, the plaintiffs sought declaratory and injunctive relief, arguing based on the Sixth Amendment (and the parallel state constitutional provision)⁹⁷ and relying on *Cronic*, that defense counsel lacked "the tools to engage actively and meaningfully in the adversarial process."⁹⁸ Although the suit was eventually dismissed, with the agreement of all parties,⁹⁹ the litigation led to a series of systemic reforms. It led to the creation of an Indigent Defense Commission in

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

90. See ABA GIDEON'S BROKEN PROMISE, *supra* note 4, at 30 (suggesting that lawsuits filed in Georgia played a role in prompting statewide indigent defense reform).

91. See *White v. Martz*, No. CDV-2002-133, 2006 Mont. Dist. LEXIS 136 at *5 (Mont. 1st Jud. Dist. Lewis & Clark Cty. Jan. 12, 2006) (dismissed after the Montana legislature, in response to a report commissioned by the plaintiffs, passed a bill reforming the state's public defender system).

92. See *Duncan v. State of Michigan*, CIVIL RIGHTS LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=10659> [<https://perma.cc/2MJ9-F6N2>] (last visited May 16, 2017).

93. Complaint at 2, *Duncan v. State*, No. 07-000242-CZ (Mich. Cir. Ct. Ingham Cty. Feb. 22, 2007).

94. *Id.* at 3.

95. *Id.* at 4.

96. *Id.*

97. *Id.* at 2.

98. *Id.* at 3.

99. *Duncan v. State*, 832 N.W.2d 752 (Mich. 2013) (per stipulation of parties, application for leave to appeal is dismissed with prejudice).

2011, which released a report and recommendations regarding indigent defense in Michigan;¹⁰⁰ those recommendations led to the creation of an Indigent Defense Commission, which promulgates statewide standards to ensure that constitutionally compliant criminal defense services are provided to indigent defendants across the state.¹⁰¹

Ultimately, these cases have achieved important victories—in terms of substantial changes to the structure of indigent defense systems, enforcing defendants’ Sixth Amendment rights within existing systems, and providing doctrinal tools (in the form of prospective ineffectiveness claims) to future litigants seeking to vindicate their right to counsel. As it currently stands, state courts in Michigan, New York, and Pennsylvania have held that pretrial ineffective assistance claims are cognizable.¹⁰² (Although, as noted above, some have construed *Hurrell-Harring*’s holding more narrowly with respect to the constructive denial of counsel.)¹⁰³ In addition, one federal court of appeals has recognized such a prospective cause of action,¹⁰⁴ as has one federal district

100. MICH. ADVISORY COMM’N ON INDIGENT DEF., REPORT OF THE MICHIGAN ADVISORY COMMISSION ON INDIGENT DEFENSE (2012), *available at* <http://michiganidc.gov/wp-content/uploads/2015/05/Final-Report-Advisory-Commission.pdf> [<https://perma.cc/59R2-UB9S>].

101. *About the Michigan Indigent Defense Commission*, MICH. INDIGENT DEF. COMM’N, <http://michiganidc.gov/michigan-indigent-defense-commission/> [<https://perma.cc/5SD6-VFCF>]. (last visited May 16, 2017).

102. *See* *Duncan v. State*, 774 N.W.2d 89, 124 (Mich. Ct. App. 2009) (noting that prospective relief may be granted if “deficient performance and denial of counsel are widespread and systemic” because of the public defense system); *Hurrell-Harring v. State*, 930 N.E.2d 217, 227 (N.Y. 2010) (asserting that an indigent defendant may be harmed by lack of representation regardless of whether the defendant is convicted); *Kuren v. Luzerne Cty.*, 146 A.3d 715, 751 (Pa. 2016) (finding a prospective claim for indigent criminal defendants when a public defender system was likely to lead to “widespread constructive denial of counsel”).

103. *See* Hanlon *supra* note 35, at 645 (arguing that a *Hurrell-Harring* claim is “extremely unlikely” to survive in class actions after the *Wal-Mart* decision (citing *Wal-Mart v. Dukes*, 564 U.S. 338, 350 (2011))); *see also* *Hurrell-Harring*, 930 N.E.2d at 224 (recognizing that “[a]ctual representation assumes a certain basic representational relationship,” such that the failure to communicate with clients or appear at critical stages of the prosecution may be reasonably interpreted as nonrepresentation rather than ineffective representation).

104. *See* *Luckey v. Harris*, 860 F.2d 1012, 1017-18 (11th Cir. 1988) (clarifying the appropriate standard for determining whether a defendant is entitled to prospective relief). The court in *Kuren* summarized *Luckey*’s holding:

In *Luckey*, the United States Court of Appeals for the Eleventh Circuit held that class action plaintiffs who sought additional funding could proceed with their lawsuit, because, although they could not prove ineffective assistance of counsel in advance of trial, they nonetheless could suffer harm as a result of inadequate pre-trial representation. The Court of Appeals held that, to proceed, such plaintiffs had to show a likelihood of substantial and immediate irreparable injury and the inadequacy of a remedy at law.

Kuren, 146 A.3d at 727-28.

court.¹⁰⁵ Notably, the U.S. Supreme Court has never recognized such a claim.¹⁰⁶ That said, such litigation also has its shortcomings: Some courts are only willing to give a narrower reading to the Sixth Amendment.¹⁰⁷ In addition, courts' enforcement authority is inherently limited, as is their ability to directly require states to fund these systems adequately.¹⁰⁸

III. PUBLIC DEFENSE LITIGATION: LOOKING AHEAD

As is clear from the overview in Part II, much of the litigation regarding systemic indigent defense failures has occurred in state court.¹⁰⁹ Thus, one category of potential solutions would attempt to increase the likelihood that such claims are heard in a federal forum.¹¹⁰ For example, Eve Brensike Primus has

105. See *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1133 (W.D. Wash. 2013) (finding that indigent criminal defendants were entitled to injunctive relief).

106. See *Kuren*, 146 A.3d at 737-38 (stating that the existing U.S. Supreme Court case *Cronic* did not address prospective relief for constructive denial of counsel claims, and that the *Luckey* court found that *Strickland* did not govern prospective relief suits (quoting *Luckey*, 860 F.2d at 1017)).

107. See, e.g., *Platt v. State*, 664 N.E.2d 357, 363 (Ind. Ct. App. 1996) (holding pre-conviction ineffectiveness claims unreviewable under the Sixth Amendment).

108. See Note: *Effectively Ineffective*, *supra* note 40, at 1743-44 (noting that many courts consider ordering the legislature to spend funds an infringement on legislative power). Courts may still indirectly force expenditures by imposing legally-required judicial mandates. *Id.* at 1744-45. For example, in *Wilbur*, after finding systematic deprivation of the right to counsel, the district court ordered, among other things, that the defendant cities hire a supervisor to ensure the provision of constitutionally-compliant defense services. *Wilbur*, 989 F. Supp. 2d at 1133-35. When courts order the provision of counsel at first appearance or seek to limit caseloads, they are in effect requiring the expenditure of state or local funds. See, e.g., *supra* text accompanying note 70 (outlining the settlement agreement in *Hurrell-Harring*).

109. See *supra* note 43; see also Primus, *supra* note 29, at 4 (noting that federal courts often refuse to hear cases regarding systemic violations of the right to counsel).

110. See Primus, *supra* note 29, at 5 (asserting that legislation should "address . . . obstacles to federal court review"). In an issue brief I co-authored with Stephen Bright, we also argued for a greater federal role in improving state indigent defense systems, including:

- (1) making grants directly to state or public interest programs demonstrating best practices or attached to certain minimum requirements regarding training, caseloads, and supervision;
- (2) conditioning funds awarded to law enforcement and prosecution agencies on a showing that the indigent defense system has reached a satisfactory level of functioning; and
- (3) establishing a National Center for Defense Services, similar to the Legal Services Corporation (LSC).

Stephen B. Bright & Lauren Sudeall Lucas, Issue Brief, *Overcoming Defiance of the Constitution: The Need for a Federal Role in Protecting the Right to Counsel in Georgia*, AM. CONST. SOC'Y (Sept. 2010), at 15, available at <https://www.acslaw.org/files/Bright%20and%20Lucas%20-%20Right%20to%20Counsel.pdf> [<https://perma.cc/F3VW-HUQF>]. Like Professor Eve Brensike Primus, we argued that the federal government could "seek the authority to bring lawsuits to

advocated for federal legislation prohibiting “any state from engaging in a pattern or practice of conduct that deprives criminal defendants of their right to effective counsel as protected by the Sixth and Fourteenth Amendments.”¹¹¹ Under her proposed legislation, the Department of Justice could “file federal enforcement actions to obtain equitable relief from systemic right-to-counsel violations,” or could deputize private litigants, including private citizens and interest groups, to file such actions on its behalf.¹¹² One of the benefits of a legislatively-created federal enforcement action is that it would not raise the same abstention concerns as a statute that authorizes citizen suits and, to the extent that *Younger* abstention is a prudential rather than constitutional doctrine, it could arguably be displaced by statute.¹¹³

Although the possibility of a greater federal role in enforcing the Sixth Amendment would be a welcome development, such claims are still limited by the contours of the Sixth Amendment, as described in Part I.¹¹⁴ There remains a danger, particularly given the courts’ limited enforcement powers, that states will persist in doing only what is minimally necessary to satisfy the Sixth Amendment.¹¹⁵ Additionally, as described above, the Sixth Amendment framework is incapable of fully addressing the fact that the systems created to provide legal representation to indigent defendants are chronically under-resourced, resulting in unequal application of the right to a meaningful defense.¹¹⁶

This Article concludes, therefore, by offering another means to challenge such systems—based not on the Sixth Amendment, but instead on equal protection, due process, and notions of fundamental fairness. In *Keeping Gideon’s Promise: Using Equal Protection to Address the Denial of Counsel in Misdemeanor Cases*, an article I recently authored with ACLU Attorney Brandon Buskey in the *Fordham Law Review*, we argue that advocates for public defense reform should think not only about the “supply side” of these problems, but also about the “demand side.”¹¹⁷ In other words, we should question why there are so

compel states to comply with the Sixth Amendment,” and suggested that the federal government could provide support for private litigation efforts through the filing of amicus briefs. *Id.*; See Primus, *supra* note 29, at 6 (advocating for a statute that would create a federal enforcement action for systematic ineffective assistance of counsel).

111. Primus, *supra* note 29, at 5.

112. *Id.*

113. *Id.* at 6.

114. See *supra* Part I (outlining the limitations of Sixth Amendment right-to-counsel claims).

115. See Primus, *supra* note 29, at 2-4 (claiming that after more than forty-five years since *Gideon* established the right to counsel, states do not sufficiently protect the right because of low funding, political pressures, and state court structure and procedures).

116. See Brandon Buskey & Lauren Sudeall Lucas, *Keeping Gideon’s Promise: Using Equal Protection to Address the Denial of Counsel in Misdemeanor Cases*, 85 FORDHAM L. REV. 2299, 2327-28 (2017) (suggesting that denying counsel to defendants in misdemeanor cases may violate the right of meaningful access to the courts without violating the Sixth Amendment).

117. *Id.* at 2337.

many cases in the system requiring counsel in the first place.¹¹⁸

That article begins with a focus on the denial of counsel in misdemeanor cases under the actual incarceration standard set forth in *Argersinger v. Hamlin*¹¹⁹ and *Scott v. Illinois*.¹²⁰ The case law governing the right to counsel in misdemeanor cases holds that defendants are entitled to the appointment of counsel only if they are ultimately incarcerated, leaving many defendants—including those who face severe collateral consequences of conviction—to fend for themselves.¹²¹ This standard suffers from both doctrinal and practical flaws, including the abandonment of fundamental fairness principles;¹²² contradictory tension with other rights, including the right to a jury and the right to counsel on appeal;¹²³ the fact that it bears no relation to the complexity of the legal issues involved in a case;¹²⁴ the extent to which noncarceral penalties and the collateral consequences of conviction have grown in scope and severity;¹²⁵ and the fact that it requires the judge to determine—prior to trial, and without a full understanding of the evidence—whether jail would be appropriate upon conviction.¹²⁶ Another problematic manifestation of the incarceration-based standard is the prosecution's subsequent ability to control whether and which defendants have access to appointed counsel by simply deciding to take imprisonment off the table as a possible penalty.¹²⁷

After surveying other proposals to replace or reform existing Sixth Amendment doctrine (and their flaws),¹²⁸ we argue that systemic indigent defense reform should focus on which cases belong in the system and on the ways in which such cases are handled.¹²⁹ Relying on the Court's access-to-courts line of cases, which mandate that every defendant have access to a meaningful defense

118. See *id.* at 2338 (noting that “it is worth exploring why the demand for counsel is so high”).

119. 407 U.S. 25 (1972).

120. 440 U.S. 367 (1979); Buskey & Lucas, *supra* note 116, at 2302-03.

121. Buskey & Lucas, *supra* note 116, at 2307-08.

122. *Id.* at 2308.

123. *Id.* at 2311.

124. *Id.* at 2320.

125. *Id.* at 2312-13 (noting that probation and fines have increased, especially for misdemeanors).

126. *Id.* at 2314. Many states have rejected the standard set forth in *Scott v. Illinois*, 440 U.S. 367 (1979), and have extended the right to counsel beyond *Scott*'s requirements. Buskey & Lucas, *supra* note 116, at 2325. In fact, only a minority of states adhere strictly to the actual incarceration standard, with the majority providing counsel in all misdemeanor cases or when incarceration is possible (or at least probable). See *id.* at 2325-27 (providing an overview of varying state standards).

127. *Id.* at 2314-15, 2334-35.

128. *Id.* at 2320-27.

129. See *id.* at 2336-38 (recommending that states recognize a constitutional right to counsel in more misdemeanor cases and also lessen the number of cases requiring counsel by decriminalizing certain low-level offenses).

regardless of wealth,¹³⁰ we argue that equal protection and due process require that all criminal defendants—or at least far more than those who are currently entitled—receive the assistance of appointed counsel.¹³¹ In making such a claim, we acknowledge the impracticality of such a solution, given the inability to provide constitutionally-adequate representation to the current number of defendants seeking appointed counsel.¹³² As is apparent from the need described at the outset of this Article and throughout this symposium,¹³³ expansion of the right to counsel to cover all defendants who need it is an unlikely result.¹³⁴

Thus, we suggest that a better response would be to lower the number of cases that require the assistance of counsel by decriminalizing low-level offenses.¹³⁵ Although the decision to decriminalize certain offenses is ultimately a legislative decision, the courts still have a role to play in enforcing constitutional standards—grounded not only in the Sixth Amendment, but also in the Equal Protection and Due Process Clauses—that will determine the terms on which legislative debates and compromises are made.¹³⁶

130. *Id.* at 2332.

131. *Id.* at 2336 (asserting that access-to-courts principles suggest a right to counsel for defendants facing any conviction, not just incarceration, and finding that “counsel is constitutionally required in all misdemeanor cases, or at least for those defendants for whom significant consequences beyond incarceration are at stake”).

132. *See id.* at 2336 (acknowledging that many public defense systems already fail to meet current constitutional standards).

133. *See supra* note 5.

134. *Id.* at 2336-37 (noting existing problems with defense systems, including underfunding, and stating that expanding the right to counsel would “exacerbate” these problems).

135. *Id.* at 2337.

136. *See id.* at 2338 (noting that legal standards upheld by the judicial branch can “often force legislative change”).