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RESOURCE DEPRIVATION AND THE RIGHT TO COUNSEL

JOE MARGULIES*

I. INTRODUCTION

If the state passed a statute prohibiting defense counsel from attending arraignments, requiring representation of multiple defendants by a single counsel, and preventing pretrial investigation, the statute would be struck down. Indeed, the Supreme Court has held as much.¹

Our certainty that such a statute is unconstitutional is not in the least shaken by the knowledge that some defendants, despite such a statute, would be acquitted at trial. A law violates the sixth amendment long before it guarantees a conviction for every defendant. The constitutional flaw in such a statute is not that it will predetermine every outcome, but that it will taint every trial, such that we have no confidence in any given outcome. In these cases, relief comes in the form of a per se rule of reversal, without regard to the facts in a particular case, and independent of whether the defendant can show prejudice.²

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¹ In *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961), the Court recognized that arraignment "is a critical stage in a criminal proceeding" where available defenses may be irretrievably lost "if not then and there asserted" In *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978), the Court observed that the multiple representation of clients with conflicting interests deprives defendants of "the guarantee of 'assistance of counsel.'" "[I]n a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process." *Id.* at 490 (emphasis in original). In addition, in *Avery v. Alabama*, 308 U.S. 444, 446 (1940), the Court wrote:

[T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.

This dicta in *Avery* has been more recently reaffirmed. See, e.g., *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

² The one qualification to this is the harmless error doctrine. As argued elsewhere,

Now suppose the state passes another statute that produces the same effect, but without the positive prohibitions of the first statute. That is, suppose the state designates a set of attorneys to represent all indigent defendants in the jurisdiction, but at the same time refuses to provide adequate funding. On the average, each attorney will represent well over 500 defendants at any given time. The office has no investigators, nominal support staff, and no money for expert witnesses. In fact, suppose the state provides just enough funding so these attorneys can do nothing more than appear at those proceedings to which they are entitled to appear. Time spent preparing for any particular proceeding is, necessarily, time taken away from an appearance. Time spent investigating, for example, means that the attorney cannot attend proceedings. Time spent conferring with clients may mean no legal research. In short, the statute guarantees nothing more than the right to a body beside the defendant—counsel only by the accident of having passed the local bar exam.

Just as with the first statute, one can be confident that some defendants prosecuted under this regime will be acquitted. Many, however, will no doubt be convicted. The question immediately arises, then, of how to analyze this problem—the problem of systemic resource deprivation.

On the one hand, there are obvious similarities between the regime created by resource deprivation and the regime created by direct statutory prohibitions. One accomplishes directly what the other achieves indirectly, but both lead to the same result. It is the result which causes the injury to the defendant, and in that respect the two are precisely the same.

On the other hand, there are equally obvious similarities between the resource poor counsel and the incompetent counsel. Both often create the same trial record, so for the reviewing court, the two are indistinguishable. The explanation for a failure to inves-

however, harmless error has no application to the problem of systemic resource deprivation. A constitutional violation is subject to harmless error analysis only when its scope can be readily identified and its effect isolated from the remainder of the proceeding. See, e.g., *Satterwhite v. Texas*, 486 U.S. 249 (1988); *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978). Systemic resource deprivation cannot be so easily contained: "[t]he insidiousness of overburdening defense counsel is that it can result in concealing from the courts, and particularly the appellate courts, the nature and extent of damage that is done to defendants." *State v. Smith*, 140 Ariz. 355, 362, 681 P.2d 1374, 1381 (1984). See *infra* notes 190 through 200 and accompanying text. Furthermore, the federal harmless error standard *presumes* prejudice to the defendant. The question is whether the state can prove beyond a reasonable doubt the *absence* of prejudice, or that the error had no effect on the outcome. *Chapman v. California*, 386 U.S. 18, 23 (1967).

tigate,³ or a failure to object to inadmissible evidence,⁴ cannot be determined by reference to the record alone. Moreover, a defendant who alleges ineffective assistance because of attorney errors must demonstrate actual prejudice in the outcome of the trial.⁵ Relief is limited to the individual case and establishes no per se rule.

After the comparison, the question of how to analyze the impact of resource deprivation in indigent defense remains. That is the topic of this Article.⁶

The Article contains three parts. The first part briefly in-

³ See *Strickland v. Washington*, 466 U.S. 668 (1984).

⁴ See *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

⁵ *Strickland*, 466 U.S. at 687, 692-93. One qualification to this rule is *United States v. Cronin*, 466 U.S. 648 (1984). See *infra* note 135 and accompanying text.

⁶ The notion that a court could compel a governmental body to raise funding of public defenders' offices is certain to trigger discordant views. Decisions about the allocation of public funds reside classically in the legislative domain. Some may argue that—without exception—it is up to elected officials to debate, bargain, and conclude who deserves what.

The sixth amendment, however, guarantees a certain quality of representation; expenditures for the defense of indigent defendants therefore transcend the purely legislative domain. It is a court's duty to determine when, for instance, a public defenders' office has too many cases and too few resources to provide representation that satisfies the sixth amendment.

Concern over the court's role is common to most, if not all, institutional litigation. Sometimes also labeled public law litigation, these lawsuits challenge the systemic violation of constitutional norms by social institutions. Based on such claims, courts have grappled with attacks relating to, for instance, the following: reapportionment, *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964); school desegregation, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Milliken v. Bradley*, 433 U.S. 267 (1977); prison conditions, *Hutto v. Finney*, 437 U.S. 678 (1978); juvenile detention, *Patterson v. Hopkins*, 350 F. Supp. 676 (N.D. Miss. 1972), *aff'd*, 481 F.2d 640 (5th Cir. 1973); and police practices, *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

Challenging social institutions in the courts has spawned considerable scholarly debate. Most of this literature addresses the policy questions noted above. This Article does not seek to add to or review this debate, except to the inevitable extent that proposing a new systemic challenge fuels the controversy. Rather, this Article concerns the related, and arguably more fundamental question of whether a systemic challenge to resource deprivation in representation of indigent defendants is viable under the sixth amendment. The following articles discuss the policy questions: O. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982); Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978); Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978); Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977).

Given the extensive body of literature, of which this is only a sample, it is noteworthy that so little attention has been given to institutional litigation in indigent defense. But see Mounts, *The Right to Counsel and the Indigent Defense System*, 14 N.Y.U. REV. L. & SOC. CHANGE 221 (1986).

roduces the problem of resource deprivation in the defense of the criminally accused. The second part analyzes the right to effective assistance of counsel. The Article will demonstrate in this part that all right to counsel jurisprudence protects the same interest—the right of the accused to a fair trial. A defendant may be denied this right because either the state failed to provide counsel, the state interfered with the attorney-client relationship, counsel was incompetent, or counsel labored under an actual conflict of interest. Yet in all cases, the cornerstone of the analysis is whether the defendant received a fair trial. If he or she did, the inquiry ends and no right to counsel violation has been stated.

When the Court writes of a “fair trial,” in the context of right to counsel jurisprudence, it means one of two things. In one line of cases, fairness is a product of procedural rigor. A trial is fair when counsel is able to subject the state’s case to meaningful adversarial testing. Defects which undermine, or threaten to undermine, the adequacy or integrity of the adversarial fact-finding process violate the right to counsel and must be removed.⁷ In a second line of cases, the focus shifts to the result: a trial is fair if the result is “just”—the person convicted is in fact guilty. Procedural irregularity in these cases, while important, justifies relief only if the defendant can prove his or her innocence.⁸

The explanation for this division in right to counsel cases is the difference between system and attorney ineffectiveness. In the former, the trial is unfair because of systemic conditions operating apart from either the performance of individual counsel or the facts of particular cases. Relief in these cases is systemic and targeted at the offending condition. In the latter cases, however, unfairness is a product of attorney incompetence. Thus, the system separate from counsel is presumed to have operated correctly. Relief reaches only the individual case, since by definition nothing else is wrong.

Finally, the third part of the Article turns from theory to practice. The possible applications of a claim of ineffective assistance caused by resource deprivation are numerous; the implications are enormous. Surprisingly, few cases have considered the question in detail, and they unfortunately fail to distinguish clearly between attorney and system ineffectiveness. This confuses rather than clarifies the law. This Article is an attempt to shed some light on that confusion.

⁷ See *infra* notes 89 through 115 and accompanying text.

⁸ See *infra* notes 116 through 142 and accompanying text.

II. THE PROBLEM

Repeated studies have documented some of the inadequacies in indigent defense.⁹ As one scholar correctly observed, oppressive workloads are the single greatest systemic obstacle to effective representation.¹⁰ The National Advisory Commission on Criminal Justice Standards and Goals estimates that the maximum effective felony caseload per attorney per year is 150 cases.¹¹ Public defender directors say a more likely estimate is 100 cases per attorney per year.¹² The District of Columbia Public Defender Service tries to impose an annual limit of 40 cases per year, of which 20 are open at any one time.¹³

Against these aspirations are the realities. In 1975, one researcher reported that New York defenders carried on average a caseload of 922 cases per year. In Philadelphia, the average caseload was 600 to 800 cases per year, and in Oakland, the average

⁹ See, e.g., THE AMERICAN BAR ASSOCIATION & THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING (1982); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE OTHER FACE OF JUSTICE (1973) (hereinafter NLADA); N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING (1982); Benner, *Tokenism and the American Indigent: Some Perspectives on Defense Services*, 12 AM. CRIM. L. REV. 667 (1975).

The effect of the most significant inadequacy—too many cases—has not escaped the notice of the courts:

[T]rial counsel testified that although she was aware of several issues regarding the admissibility of certain physical and testimonial evidence, she conducted no legal research and made no objections to its introduction. She further testified that within a few months after petitioner's conviction, she collapsed in court, her health "seriously threatened" by a caseload of approximately 2,000 cases per year. She then resigned from the Public Defender's Office, having come to the conclusion that she was "actually doing the defendants more harm by just presenting a live body than if they had no representation at all."

Cooper v. Fitzharris, 551 F.2d 1162, 1163 n.1 (9th Cir. 1977), *modified*, 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979). See Thomas v. State, 251 Ind. 546, 556-57, 242 N.E.2d 919, 925 (1969) (emphasis added), which states:

[W]e do not hold or intend to imply that the public defender was incompetent or acted in an improper manner. Confronted with twice the normal case load, he may well have done all that he possibly had time to do for the appellant. If he did so, he properly performed the duties of his office. On the other hand, the appellant's rights can not (sic) be determined by the case load of the public defender. *It is reversible error not to provide a defendant . . . with adequate representation at each stage of the proceeding, regardless of the circumstances which cause the public defender's office to become overloaded.* If the public defender was too busy to adequately represent each of his clients, the court should have appointed other counsel to assist him in carrying out his responsibilities.

¹⁰ Mounts, *supra* note 6 at 224 n.13. Systemic here means unrelated to the failings of any particular counsel. The idea of a system ineffectiveness, as opposed to attorney ineffectiveness, is developed more fully in the following section.

¹¹ NLADA, *supra* note 9, at 29.

¹² *Id.*

¹³ *An Exemplary Project: The Public Defender Service of the District of Columbia*, 14 (1974).

was 300.¹⁴ In Minneapolis, the average caseload in felony and misdemeanor court has increased thirty percent in the last two years, and 100% since 1981.¹⁵ In San Francisco County between 1983 and 1984, public defenders experienced a thirty-five percent increase in caseload per attorney. In Los Angeles County over the same period, the increase was twenty-eight percent.¹⁶

Excessive caseloads stem from the well-documented problem of chronic underfunding in criminal defense agencies.¹⁷ After a comprehensive three year study, the ABA Standing Committee on Legal Aid and Indigent Defendants reported on the problem of underfunding in criminal defense:

Overall, there is abundant evidence in this report that defense services for the poor are inadequately funded. As a result, millions of persons in the United States who have a constitutional right to counsel are denied effective legal representation. Sometimes defendants are inadequately represented: other times . . . no lawyer is provided or a constitutionally defective waiver is accepted by the court. Defendants suffer quite directly, and the criminal justice system functions inefficiently¹⁸

Inadequate funding forces appointed counsel to ration his or her time, which inevitably compromises his or her ability to prepare

¹⁴ Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975).

¹⁵ The problem of excessive workload has found mention in cases. See, e.g., *O'Berry v. Wainwright*, 546 F.2d 1204, *reh'g denied*, 549 F.2d 203 (5th Cir.), *cert. denied*, 433 U.S. 911 (1977) ("oppressive caseloads in public defender offices"); *Greenfield v. Gunn*, 556 F.2d 935 (9th Cir.), *cert. denied*, 434 U.S. 928 (1977) (same); *Gaglie v. Ulibarri*, 507 F.2d 721 (9th Cir. 1974) (same); *Cooper v. Fitzharris*, 551 F.2d 1162 (9th Cir. 1977), *aff'd on rehearing*, 586 F.2d 1325 (1978), *cert. denied*, 440 U.S. 974 (1979) (2000 cases per year for attorney in felony court). The figures for Minneapolis are based on personal conversations with current defenders in the Hennepin County Office of the Public Defender.

¹⁶ Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1984 WIS. L. REV. 473, 488, n.66.

¹⁷ 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, 658-60, nn.189-92. See, e.g., ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, REPORT ON SAN FRANCISCO COUNTY (1980) (office "woefully underfunded"); BOSTON BAR ASSOCIATION, ACTION PLAN FOR LEGAL SERVICES (1978) ("insufficient funding is the major problem in providing effective representation for indigent defendants"); OHIO PUBLIC DEFENDER COMMISSION, REPORT ON THE REPRESENTATION AFFORDED INDIGENT PERSONS IN FELONY CASES (1982) (same); see also Mounts, *supra* note 16, at 483 ("almost every study made of defender programs has noted very serious shortcomings that are traceable directly to lack of funds").

¹⁸ ABA STANDING COMMITTEE, *supra* note 17. See also N. LEFSTEIN, *supra* note 9, at 2; NLADA, *supra* note 9, at 77 ("[T]he lack of adequate financial and manpower resources has seriously crippled the attempts . . . to provide truly effective representation. The financial inability of local governmental units to supply indigent defense services . . . has resulted in vast disparities in the scope and quality of representation provided for indigent felony defendants.").

the case.¹⁹ The inability to prepare adequately for upcoming cases is likewise well documented.²⁰ In one study of Cook County, Illinois trial attorneys, subjects were asked to evaluate the competency of other trial lawyers. Lack of preparation was the most common complaint of over half of the responding attorneys.²¹ Yet thorough preparation is generally recognized as the *sine qua non* of effective advocacy.²² In fact, the appeal most likely to succeed in an ineffective assistance claim is failure of counsel to investigate and call defense witnesses.²³

Failure to prepare affects every stage of the defense case. At each point where the attorney must rely on his or her expertise, a failure to prepare defeats his or her ability to test the adequacy of the state's case. Studies have documented some of the practices which follow from the chronic shortage of resources: attorneys conducting cross-examination of police officers at preliminary hearings without prior opportunity to study police reports; lack of funding to hire experts and investigators; minimal use of pretrial discovery; and incomplete or inadequate training.²⁴

Some of the more appalling defense conditions were documented in the exhaustive study by the National Legal Aid and Defender Association (NLADA).²⁵ The study researched the availability of investigative support in defender offices. As explained above, fact investigation is an essential part of case preparation.²⁶ But despite the absolutely crucial nature of investigation, the

¹⁹ See Klein, *supra* note 17, at 663 n.212 for catalog of studies correlating "caseload pressures . . . with inadequate preparation time."

²⁰ *Id.* at 664 n.216.

²¹ Maddi, *Improving Trial Advocacy: The Views of Trial Attorneys*, 1981 AM. B. FOUND. RES. J. 1049, 1071-72.

²² Klein, *supra* note 17, at 663, 664 (collecting commentary on the importance of preparation in the defense of criminal cases).

²³ See *In re Snyder*, 734 F.2d 334, 340 (8th Cir.), *rev'd*, 472 U.S. 634 (1985); *United States v. Baynes*, 687 F.2d 659 (3d Cir. 1982); Levine, *Preventing Defense Counsel Error—An Analysis of Some Ineffective Assistance of Counsel Claims and Their Implications for Professional Regulation*, 15 U. TOL. L. REV. 1275 (1984) (most common allegation to support claim of ineffective assistance was failure to investigate); Note, *Incompetency of Counsel*, 25 BAYLOR L. REV. 299, 304 (1973) (appeal pressing lack of pretrial investigation and preparation warrants reversal for ineffective assistance more than any other claim).

²⁴ Klein, *supra* note 17, at 662 nn.203-10.

²⁵ NLADA, *supra* note 9, at 14.

²⁶ Underscoring the importance of investigation, some of the pre-*Strickland* decisions suggested that ineffective assistance may be presumed when an attorney has failed to interview potentially crucial witnesses. *Eldridge v. Atkins*, 665 F.2d 228 (8th Cir. 1981), *cert. denied*, 456 U.S. 910 (1982); *Marrow v. Parrot*, 574 F.2d 411 (8th Cir. 1978); see also Klein, *supra* note 17, at 665 nn.221-22. While these cases may have been decided differently after 1984, the point remains that investigation is crucial to the ability to test effectively the adequacy of the state's case.

NLADA reported that sixty percent of all defenders who responded to the survey did not have the assistance of full-time staff investigators, and eighty-three percent of all individual defenders had no staff investigators at all.²⁷ Over twenty-five percent of the defenders who did not have staff investigators also reported that they could not get expenses for investigators from the court.²⁸ Most attorneys felt that one investigator could adequately serve no more than three attorneys. Yet the study also reported that the average investigator to attorney ratio was well past 1 to 3.²⁹

It is difficult to imagine effective representation without adequate fact investigation. Yet it is impossible to conceive of effective representation where no lawyer is present.³⁰ The NLADA study also documented the fraction of cases where attorneys were absent from proceedings where they were entitled to be. For instance, only twenty percent of the defenders practicing in rural and urban areas estimated they were always present to cover proceedings at which bail is set.³¹ A full thirty percent in urban areas and forty percent in rural areas reported they never, or at best not often, covered bail hearings.³² On average, only one in ten defenders reported they always covered lineups. In urban areas, twenty percent of the attorneys, and in rural areas thirty-five percent, never cover lineups.³³ Only seventy percent of the rural attorneys reported they were always able to cover arraignments.³⁴

²⁷ NLADA, *supra* note 9, at 21.

²⁸ *Id.*

²⁹ *Id.* Can one investigator adequately serve three attorneys with full felony caseloads? An attorney with 30 to 40 active felonies should easily occupy one full time investigator.

³⁰ "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

[T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities . . . our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings.

United States v. Wade, 388 U.S. 218, 224 (1967).

³¹ NLADA, *supra* note 9, at 25. Urban is defined as a population from 50,001 to 500,000; rural is defined as a population less than 50,000. *Id.* at 13. The figures are somewhat better for defenders in metropolitan areas (defined as an area with a population over 500,000), where 80% of the reporting defenders estimate they always cover bail hearings.

³² *Id.*

³³ *Id.* Again, the figures are slightly better for metropolitan areas, where only 10% of the attorneys said they never cover lineups, but where 40% reported that they were not often present for lineups. *Id.*

³⁴ *Id.* Though the NLADA study is now 15 years old, more recent research indicates that conditions remain inadequate. For instance, Professor Klein discusses some of the

By contrast, prosecutors endure none of the hardships of defenders. Prosecutors receive almost four times more funding from state and local governments than do defenders.³⁵ Funding for representation of indigent defense is less than three percent of all criminal justice spending nationwide.³⁶ The NLADA reported that attorney salaries in sixty-three percent of all defender offices were lower than prosecutor salaries, and in only three percent of the offices was the relation reversed.³⁷ In addition, the support services essential to the preparation of the prosecutor's case—police investigation, FBI and local crime labs, and state and local forensic experts—are not paid for by the prosecutor's office.³⁸ The analogous expenses, however, generally are incurred by defenders.³⁹

In sum, defenders nationwide regularly find themselves overworked, underpaid, understaffed, and out-resourced. A fair trial

studies documenting office-wide violations of *Argersinger v. Hamlin*, 407 U.S. 25 (1972). In one study of the Tennessee system, the report concluded that attorneys were not assigned at all in misdemeanor cases, and defendants were forced to proceed pro se. Klein, *supra* note 17, at 659-60 nn.191-93. As recently as 1984, the author spoke with defenders who described appointment practices in rural counties in Arkansas. According to them, it is not unusual for a suspect to be arraigned and a plea entered before counsel is appointed.

³⁵ Klein, *supra* note 17, at 675 (citing UNITED STATES DEPARTMENT OF JUSTICE, 1980 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 11 (1981)).

³⁶ *Id.* at 675 n.267 (citing UNITED STATES DEPARTMENT OF JUSTICE, SPECIAL REPORT, CRIMINAL DEFENSE SYSTEMS 7 (1984)).

³⁷ NLADA, *supra* note 9, at 20-21. The NLADA also reported average starting salaries for defenders. Over half of the reporting offices paid a starting salary of less than \$11,000. This includes offices employing part-time attorneys. Of those offices which employ only full-time attorneys, over half reported a starting salary between \$11,000 and \$13,999. Of course, the figures are for a report written in 1973. But even assuming 100% inflation, the average salary for these defenders would still be between \$22,000 and \$28,000. At least for some major cities, this estimate does not seem far off: in 1984, the Public Defender Service in Washington, D.C. started its attorneys at \$24,000. In 1985, the Minneapolis Public Defender started its attorneys at \$26,000. In 1987, The Legal Aid Society in New York City started its defenders at \$28,000.

³⁸ Klein, *supra* note 17, at 675-76.

³⁹ The inequality caused by pitting the layman against the professional prosecutor figured prominently in the early decisions on the right to counsel in criminal prosecutions. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) (The sixth amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel."); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society.").

If the disparity between prosecution and the "average defendant" can form the basis for a sixth amendment violation, then by implication, the disparity between the state and the "average defendant" represented by counsel so overburdened as to be constructively absent must likewise be a sixth amendment violation.

presumes diligent advocacy—something other than a live body—by defense counsel. But in jurisdictions across the country, diligent advocacy is no more than an aspiration.

III. THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

A. THE SIXTH AMENDMENT AND THE RIGHT TO A FAIR TRIAL

Nearly two decades ago, Justice Black in his concurring opinion in *Coleman v. Alabama*⁴⁰ wrote:

I fear that the prevailing opinion seems at times to proceed on the premise that the constitutional principle ultimately at stake here is not the defendant's right to counsel as guaranteed by the Sixth and Fourteenth Amendments but rather a right to a "fair trial" as conceived by judges. While that phrase is an appealing one, neither the Bill of Rights nor any other part of the Constitution contains it. . . . The explicit commands of the Constitution provide a full description of the kind of "fair trial" the Constitution guarantees, and in my judgment that document leaves no room for judges either to add or detract from these commands.

Despite its intuitive appeal, this view has not prevailed. The right to counsel embraces a number of protections: the right to representation in any criminal proceeding which may lead to incarceration;⁴¹ the right to be free from governmental interference in the attorney-client relationship;⁴² the right to representation at all "critical stages" of the prosecution;⁴³ the right to be free from representation by counsel laboring under an actual conflict of interest;⁴⁴ and the right to competent defense counsel.⁴⁵ In all of these cases, the central inquiry is whether the defendant received a "fair trial." If he or she did, the inquiry ends, for no violation has been stated.⁴⁶

⁴⁰ 399 U.S. 1, 12-13 (1970).

⁴¹ See *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932).

⁴² See *Perry v. Leeke*, 109 S. Ct. 594 (1989); *Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975); *Brooks v. Tennessee*, 406 U.S. 605 (1972); *Ferguson v. Georgia*, 365 U.S. 570 (1961).

⁴³ See *Estelle v. Smith*, 451 U.S. 454 (1981); *Moore v. Illinois*, 434 U.S. 220 (1977); *Kirby v. Illinois*, 406 U.S. 682 (1972); *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967).

⁴⁴ See *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978).

⁴⁵ *Kimmelman v. Morrison*, 477 U.S. 365 (1986); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Cronin*, 466 U.S. 648 (1984).

⁴⁶ For example, see *United States v. Morrison*, 449 U.S. 361, 365 (1980), in which the Court stated:

The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation Absent such impact on the criminal proceeding, however, there is no basis

The premier right to counsel decision, and the case upon which all right to counsel jurisprudence builds, is *Powell v. Alabama*.⁴⁷ *Powell* established the right to representation by counsel in capital cases. The holding is so firmly rooted in the American sense of fairness that we must remind ourselves the decision was not unanimous.⁴⁸ The condition under attack in *Powell* was the "casual fashion" in which counsel was appointed for seven black youths accused of raping two white girls. Until the morning of the trial, the trial court had "appointed all the members of the [Scottsboro] bar" for the limited "purpose of arraigning the defendants."⁴⁹ Whether counsel would appear to represent the defendants at trial was left unsettled.

The Court rejected this practice as a denial of the right to counsel. Because the assistance of counsel was a "necessary incident of a fair trial," permitting the trial to go forward without counsel—or with the counsel "appointed" in this case—made a mockery of the adversarial process.⁵⁰ Justice Sutherland's now familiar passage described the effects of a trial without the "guiding hand of counsel":

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. . . . Without . . . [the assistance of counsel], though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.⁵¹

This passage, perhaps more than any other in any decision of the Court, has been invoked to support what quickly became the less eloquent statement of the rule: the sixth amendment right to the assistance of counsel protects the defendant's right to a fair trial.

An excellent illustration of this appears in *Gideon v. Wainwright*,⁵² which established the right to counsel in felony prosecutions. The Court in *Gideon* overruled *Betts v. Brady*,⁵³ which had held that the right to counsel in felony cases is not a fundamental right

for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial.

See also, *Perry v. Leeke*, 109 S. Ct. at 600 (1989).

⁴⁷ 287 U.S. 45 (1932). Justice Stevens recently described *Powell* as the "fountain-head" for all right to counsel jurisprudence. *Murray v. Giarratano*, 109 S. Ct. 2765, 2774 (1989) (Stevens, J., dissenting on other grounds).

⁴⁸ *Powell*, 287 U.S. at 73. The Court split 7-2 to reverse the Alabama Supreme Court, with Justice McReynolds concurring in the dissent of Justice Butler.

⁴⁹ *Id.* at 56.

⁵⁰ *Id.* at 71.

⁵¹ *Id.* at 68-69.

⁵² 372 U.S. 335 (1963).

⁵³ 316 U.S. 455 (1942).

essential to a fair trial.⁵⁴ Under *Betts*, the refusal to appoint counsel was to be judged on a case-by-case basis.⁵⁵ In rejecting it, the Court reviewed a number of earlier precedents, most notably *Powell*, and concluded:

Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.⁵⁶

The "assistance" envisioned in *Powell* begins to take form in the "critical stage" cases. That is, to recognize the right to counsel, but restrict its scope by narrowing its application, would make *Powell* a nullity.⁵⁷ To that end, the Court has long recognized that the sixth amendment right to counsel attaches at all critical stages of a criminal prosecution.⁵⁸ Early cases in this line defined the "critical stage" as the point at which rights are irrevocably lost if not then and there asserted.⁵⁹ Subsequently, the Court altered the definition to the point at which the state initiates adversary proceedings.⁶⁰ The Court has also modified the doctrine to look beyond whether defenses would de jure be lost. Now, the inquiry is whether de-

⁵⁴ *Id.* at 465.

⁵⁵ *Id.* at 462. As the Court recently recognized, *Betts* was the only right to counsel decision to adopt a case-by-case approach. All other decisions, including *Gideon* in replacing *Betts*, proceed as categorical mandates: once the violation has been established, the Court categorically bars its return. See, e.g., *Murray v. Giaratanno*, 109 S. Ct. 2765, 2771 (1989); *Perry v. Leeke*, 109 S. Ct. 594, 600 (1989). See also *Herring v. New York*, 422 U.S. 853, 867-68 (1975) (Rehnquist, J., dissenting), in which the Court stated:

[O]nce we have determined that a particular right should be incorporated against the States, we have abandoned case-by-case considerations of fairness. Incorporation, in effect, results in the establishment of a strict prophylactic rule, one which is to be generally observed in every case regardless of its particular circumstances. It is a judgment on the part of this Court that the probability of unfairness in the absence of a particular right is so great that denigration of the right will not be countenanced under any circumstances.

⁵⁶ *Gideon*, 372 U.S. at 344.

⁵⁷ See *supra* note 1 for a relevant statement by the *Avery* Court.

⁵⁸ See, e.g., *United States v. Wade*, 388 U.S. 218, 224 (1967), in which the Court stated:

[T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment [right to counsel] guarantee to apply to "critical" stages of the proceedings.

⁵⁹ See, e.g., *White v. Maryland*, 373 U.S. 59, 60 (1963) (preliminary hearing in a capital case a critical stage); *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961) (arraignment in a capital case a critical stage).

⁶⁰ *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972).

fenses would de facto be eliminated or curtailed if counsel were not present.⁶¹ The rationale behind all critical stage cases, however, is the same: once the prosecution has reached a certain point, the right to counsel must attach in order to protect the underlying right to a fair trial.⁶²

The premier example of this principle appears in *United States v. Wade*.⁶³ In *Wade*, the Court held that a post-indictment pretrial lineup was a critical stage of the prosecution. The defendant was therefore "as much entitled to such aid [of counsel] . . . as at the trial itself."⁶⁴ In its analysis, the Court in *Wade* reviewed the right to counsel doctrine since *Powell* and concluded that a stage is critical when the presence of counsel is necessary to prevent the ensuing trial from becoming perfunctory. Conversely, a stage is not critical where "there is minimal risk that . . . counsel's absence at such stages might derogate from his right to a fair trial."⁶⁵

[I]n addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. *The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment*—the right of the accused to a speedy and public trial by an impartial jury, his right to be informed of the nature and cause of the accusation, and his right to be confronted with the witnesses against him

....

. . . [T]he principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial⁶⁶

The "critical stage" cases, therefore, stand for the proposition that the state cannot, consistent with the right to a fair trial, deprive the defendant of the assistance of counsel when counsel is most needed.

⁶¹ See, e.g., *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (preliminary hearing a critical stage, even though defendant neither required to advance defenses, nor penalized for failure to do so); *Wade*, 388 U.S. at 224.

⁶² See, e.g., *United States v. Ash*, 413 U.S. 300, 322 (1973) (Stewart, J., concurring), in which Justice Stewart stated:

Pretrial proceedings are "critical," then, if the presence of counsel is essential "to protect the fairness of the trial itself". . . . [A] post-indictment, pretrial lineup at which the accused was exhibited to identifying witnesses [*Wade*] was such a critical stage, because of the substantial possibility that the accused's right to a fair trial would otherwise be irretrievably lost.

(citation omitted).

⁶³ 388 U.S. 218 (1967).

⁶⁴ *Id.* at 237 (quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932)).

⁶⁵ *Id.* at 228.

⁶⁶ *Id.* at 226-27 (emphasis added).

Likewise, in another line of cases, the Court has held that the state cannot impose conditions upon the defendant which distort the adversarial process by relieving the state of its burden of proof.⁶⁷ *Herring v. New York*⁶⁸ best illustrates this point. In *Herring*, the Court struck down a New York law which gave the trial judge the discretion to refuse to hear closing arguments.⁶⁹ Speaking for the six member majority of the Court, Justice Stewart observed that the right to counsel is a fundamental right, the contours of which have been broadly construed. More particularly, the right to the assistance of counsel bars "restrictions upon . . . [defense counsel which are not] in accord with the traditions of the adversary factfinding process The right to the assistance of counsel has thus been given a meaning that ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process."⁷⁰ Because closing argument "is a basic element of the adversary factfinding process,"⁷¹ the statute must be struck down.

The next year, in *Geders v. United States*,⁷² the Court unanimously reaffirmed these principles. *Geders* involved a challenge to a ruling of the trial judge barring counsel from meeting with his client during an overnight recess.⁷³ The Fifth Circuit had considered and rejected the claim because the defendant had shown no prejudice arising out of the trial court's action.⁷⁴ The Supreme Court reversed, holding that the defendant had been denied the assistance of counsel.⁷⁵ The Court made no mention of the lack of prejudice, although they expressly approved a decision of the Third Circuit holding that a defendant in such a case need not show prejudice to secure relief.⁷⁶ Once again, the Court relied on the familiar language in *Powell*: to confront the state and adequately present his or her defense, the defendant required the guiding hand of counsel at every step in the proceedings against him or her.⁷⁷ Because the trial

⁶⁷ See, e.g., *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853, 857 (1975); *Brooks v. Tennessee*, 406 U.S. 605 (1972).

⁶⁸ 422 U.S. 853 (1975).

⁶⁹ *Id.* at 858.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² 425 U.S. 80 (1976).

⁷³ *Id.* at 82.

⁷⁴ *Id.* at 85-86.

⁷⁵ *Id.* at 91.

⁷⁶ *Geders v. United States*, 425 U.S. 80, 89 (1976) (citing *United States v. Venuto*, 182 F.2d 519 (3d Cir. 1950)).

⁷⁷ *Id.*

judge deprived the defendant of this guidance, reversal was automatic.⁷⁸

The point by now should be clear: the sixth amendment protects the right to a fair trial. In addition to the appointment cases,⁷⁹ the critical stage cases,⁸⁰ and the governmental interference cases,⁸¹ the right to counsel protects the right to minimally effective counsel.⁸² In *Strickland v. Washington*,⁸³ the Court wrote:

In a long line of cases that includes *Powell v. Alabama* . . . and *Gideon v. Wainwright* . . . this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney . . . to ensure that the trial is fair.⁸⁴

Moreover, the right to counsel ensures that the defendant is free from representation by counsel laboring under an actual conflict of interest.⁸⁵ In *Holloway v. Arkansas*,⁸⁶ the Court observed:

The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters. . . . [I]n a case of joint representation of conflicting interests the evil—it bears repeat-

⁷⁸ *Id.* at 91. Last term, the Court limited *Geders* by holding that the defendant had no sixth amendment right to confer with counsel during a 15 minute break in his testimony. *Perry v. Leeke*, 109 S. Ct. 594, 600 (1989). At the same time, however, the Court reaffirmed that sixth amendment violations for interference with the attorney-client relationship are not subject to a prejudice analysis. In fact, the Court expressly rejected the approach of the South Carolina Supreme Court below, which had found a violation but affirmed the conviction as harmless error. The Court noted that, had there been a violation, prior cases made it clear that the case would not be "subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective." *Id.* at 595. This, in turn, underscores the difference between system error, for which no inquiry into prejudice is required, and attorney error, for which prejudice is an essential part of the analysis. See *infra* notes 89 through 142 and accompanying text.

⁷⁹ See *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932).

⁸⁰ See *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967).

⁸¹ See *Perry*, 109 S. Ct. at 594; *Herring v. New York*, 422 U.S. 853 (1975).

⁸² See *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986); *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984); *United States v. Cronin*, 466 U.S. 648, 654 (1984).

⁸³ 466 U.S. 668 (1984).

⁸⁴ *Strickland*, 466 U.S. at 684-86.

⁸⁵ *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978).

⁸⁶ 435 U.S. 475 (1978).

ing—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process.⁸⁷

The right at issue in each of these cases is a constant: it is the right to a fair trial. The nature of the infringement varies, but the protection of the sixth amendment right to counsel, like that of the fifth amendment privilege against self-incrimination, is “as broad as the mischief against which it seeks to guard.”⁸⁸ Increasingly, the “mischief” is systemic resource deprivation, no less a threat to a fair trial than outright denial of the right to counsel.

B. THE MEANING OF THE FAIR TRIAL GUARANTEE

Unfortunately, and despite the ease and frequency with which the Court invokes the phrase “fair trial,” it has never seen fit to define it.⁸⁹ Two views emerge from the cases. In one line of decisions, fairness is perceived as a product of procedural rigor. The analysis focuses on the adequacy and integrity of the adversarial process, rather than on any particular result. The question is whether the defendant has been allowed to put the state to its proof. Most relevant to the inquiry are the conditions under which defense counsel is forced to operate, and the effect these conditions have on the fact-finding process, as well as the relative inequality the conditions create between the prosecution and defense.

The second line of cases adds another dimension to the fair trial concept. Fairness here is defined not just as a product of vigorous adversarial testing, but as a “just” result—a result which can be relied upon as having separated the guilty from the innocent. The focus in these cases is less on the proceeding itself than on the reliability of the outcome in the case before the court. Relief is predicated not just on demonstrating some defect in the process, even if

⁸⁷ *Holloway*, 435 U.S. at 490 (emphasis in original).

⁸⁸ *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1882); see also *United States v. Ash*, 413 U.S. 300, 311 (1973) (Court expands the right to counsel “when new contexts appear presenting the same dangers that gave birth initially to the right itself.”).

⁸⁹ Perhaps it eludes definition. On the other hand, the lack of a definition permits the Court to do precisely what Justice Black predicted: when the text is without meaning, the idea behind it begins to reflect nothing more than whatever meaning is shared by a current majority of the Court. *Perry v. Leeke*, 109 S. Ct. 594 (1989), is a perfect illustration of this point. The only rational explanation for *Perry* is that the majority does not believe a 15 minute interruption in the attorney-client relationship is enough to make the trial unfair. As Justice Marshall asked rhetorically in dissent, how much of an infringement is enough? What about a lunch recess? *Id.* at 608 (Marshall, J., dissenting). The more pressing problem is locating in the text of the sixth amendment support for this “*de minimis*-ness” standard. Considering the emphasis most members of this majority place on adherence to the text, *Perry* is a remarkable illustration of judicial activism.

the defect led to enormous disparity between the state and defense, but on actual prejudice in the result.

Not surprisingly, the manner in which the Court defines the substantive right affects the relief it extends. Differences in the meaning of fairness have thus given rise to differences in the relief granted. In the first line of cases—those which perceive fairness as a product of procedural integrity—relief is prophylactic. It extends to all cases as a *per se* rule, independent of the circumstances in which the violation arose. In the second line of cases, relief depends on a fact-specific showing—prejudice in the outcome—and is limited to the individual case. Much like in the totality of the circumstances cases under the due process clause, relief cannot extend beyond the facts of a particular case. Circumstances which justify reversal in one case may not suffice in the next. The decision, in other words, establishes no *per se* rule.

1. *Fairness and the Trial Process*

The view that fairness implies vigorous adversarial testing derives from the “rich historical heritage” of the right to counsel in anglo-American law.⁹⁰ Once again, the jurisprudence begins with *Powell*.⁹¹ In *Powell*, the Court reviewed the English common law principle restricting the right of accused felons to consult with counsel at trial. For a number of reasons; colonial constitutions and statutes overwhelmingly rejected this principle.⁹² One important objection was the “inherent irrationality of the English limitation”⁹³: because the rule applied only to felony proceedings, it was conceivable that the accused misdemeanor would have access to counsel, but the accused felon would not.⁹⁴

Another, more fundamental objection to the English approach was its impact on the adversarial process. The drafters of the sixth amendment recognized the “obvious truth”⁹⁵ that the layman, with “little skill in arguing the law or in coping with an intricate procedural system,”⁹⁶ would be left to flounder without “the guiding

⁹⁰ *Ash*, 413 U.S. at 306.

⁹¹ *Powell v. Alabama*, 287 U.S. 45, 64-65 (1932).

⁹² “[I]n at least twelve of the thirteen colonies the rule of the English common law, in the respect now under consideration, had been definitely rejected and the right to counsel fully recognized in all criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to the more serious crimes. . . .” *Id.*

⁹³ *Ash*, 413 U.S. at 306.

⁹⁴ *Powell*, 287 U.S. at 60.

⁹⁵ *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938).

⁹⁶ *United States v. Ash*, 413 U.S. 300, 307 (1973).

hand of counsel at every step in the proceedings against him.”⁹⁷ This concern intensified with the advent of the public prosecutor early in the eighteenth century. With this development, “the accused in the colonies faced a government official whose specific function it was to prosecute, and who was incomparably more familiar than the accused with the problems of procedure, the idiosyncrasies of juries, and, last but not least, the personnel of the court.”⁹⁸ From this historical review, and drawing on the language of the sixth amendment itself, the Court has concluded that “the core purpose of the counsel guarantee was to assure ‘Assistance’ at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor.”⁹⁹

In all respects, the emphasis in these cases is on the legitimacy of the trial process. The reliability of the result, to the extent it figures at all in the analysis, is viewed not as an end in itself but as a desirable consequence of vigorous advocacy.¹⁰⁰ Nowhere does the Court suggest that the protections afforded by the sixth amendment are conditioned upon a showing that the result was “wrong”; rarely, in fact, does the Court suggest the result is even relevant.¹⁰¹ More

⁹⁷ *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

⁹⁸ *F. HELLER, THE SIXTH AMENDMENT* 20-21 (1951) (quoted in *Ash*, 413 U.S. at 308); see also *Johnson*, 304 U.S. at 462-63 (The sixth amendment right to counsel “embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.”). See also *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), in which the Court stated:

[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . Governments . . . spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.

⁹⁹ *Ash*, 413 U.S. at 309.

¹⁰⁰ *Powell*, 287 U.S. at 69. This is particularly apparent in *Herring v. New York*, 422 U.S. 853 (1975), where the Court held that a statute granting the trial court authority to refuse closing argument deprived the defendant of the right to effective assistance of counsel. *Id.* at 858, 865. The Court observed:

The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

Id. at 862.

¹⁰¹ *Id.*

recent decisions continue to define the sixth amendment in these terms.¹⁰²

Relief in this line of cases reflects the nature of the violation. The violation is systemic, in that it operates without regard either to particular cases or to the conduct of individual defense counsel. Accordingly, relief is systemic and prophylactic in the form of a per se rule mandating the removal of the "taint," or the condition threatening to undermine the adequacy of the adversarial process.¹⁰³ Future defendants may avail themselves of the rule created in a particular case by showing they were subject to the taint.

The best example of relief by per se rule is *Gideon*. As noted, the Court in *Gideon* overruled *Betts*. In *Betts*, the Court held that a refusal to appoint counsel in a felony prosecution did not necessarily violate the Constitution. The analysis had to proceed on a case-by-case basis, because "[t]hat which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial."¹⁰⁴

Gideon rejected this case-by-case approach and replaced it with a

¹⁰² For instance, a trial is fair only so long as the defendant is able to subject the state's case "to the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656 (1984).

When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. *But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.*

Id. at 656-57 (emphasis added).

More specifically, the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that have been constitutionalized in the Sixth and Fourteenth Amendments.

Herring, 422 U.S. at 857 n.8. "Thus, the appropriate inquiry focuses on the adversarial process . . ." *Cronin*, 466 U.S. at 656 n.21 (emphasis added).

See also *Wheat v. United States*, 486 U.S. 153, — (1988) (The sixth amendment is "designed to assure fairness in the adversary criminal process. . . . [T]he essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant . . ."); *Penson v. Ohio*, 109 S. Ct. 346, 352 (1988) (quoting *Kaufman, Does the Judge Have A Right to Qualified Counsel?*, 61 A.B.A. J. 569 (1975)) ("The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. The system is premised on the well-tested principle that truth—as well as fairness—is 'best discovered by powerful statements on both sides of the question.'"). The Court in *Strickland v. Washington*, 466 U.S. 668, 685 (1984), stated:

[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney . . . who plays the role necessary to ensure that the trial is fair.

¹⁰³ *United States v. Morrison*, 449 U.S. 361, 365 (1981).

¹⁰⁴ *Betts v. Brady*, 316 U.S. 455, 462 (1942).

categorical holding that the right to counsel is a fundamental right, made applicable against the states by the fourteenth amendment.¹⁰⁵ The result of this was to establish a per se rule that defendants are entitled to the assistance of counsel in all future felony prosecutions, regardless of the facts of a particular case.¹⁰⁶

Relief by per se rule is not limited to the actual denial of counsel cases. A per se rule also applies in critical stage cases, governmental interference cases, and conflict of interest cases. In *Wade*, by holding that a post-indictment lineup is a critical stage of the proceeding, without regard to whether the identification in that case was reliable, the Court created a per se exclusionary rule.¹⁰⁷ Since *Wade*, no post-indictment lineup can proceed without counsel present; any use of a tainted identification is inadmissible unless an independent basis can be shown for its reliability. The relief, in other words, is systemic, tailored to fit a systemic defect. Just as the defect operates without regard to particular cases, so does the relief.

Likewise, in *Herring*, now-Chief Justice Rehnquist took the majority to task for extending the right to counsel, unnecessarily in his view, to include the opportunity to give a closing argument.¹⁰⁸ By characterizing the right to counsel as "the right to present a defense 'in accord with the traditions of the adversary factfinding process,' " and closing argument as a "basic element" in that process, the Court incorporated closing argument into the fourteenth amendment, making it applicable against the states.¹⁰⁹

But once we have determined that a particular right should be incorporated against the States, we have abandoned case-by-case considerations of fairness. *Incorporation, in effect, results in the establishment of a strict prophylactic rule, one which is to be generally observed in every case regardless of its particular circumstances.* It is a judgment on the part of this Court that the probability of unfairness in the absence of a particular right is so great that denigration of the right will not be countenanced under any circumstances.¹¹⁰

In *Herring*, the condition which threatened to undermine the adversary process was the refusal by the trial court to allow closing argu-

¹⁰⁵ *Gideon v. Wainwright*, 372 U.S. 335, 339. As the Court recently recognized, every right to counsel case since *Gideon* has rejected the case-by-case approach. *Murray v. Giarratano*, 109 S. Ct. 2765, 2771 (1989). The only exception is the attorney ineffectiveness cases, where relief continues to depend on the facts of the case before the court. See *infra* notes 116 through 142 and accompanying text.

¹⁰⁶ *Gideon*, 372 U.S. at 344.

¹⁰⁷ *United States v. Wade*, 388 U.S. 218, 237 (1967). See also *Moore v. Illinois*, 434 U.S. 220, 233 (1978) (Rehnquist, J., concurring); *Kirby v. Illinois*, 406 U.S. 682, 691 (1972) (Powell, J., concurring).

¹⁰⁸ *Herring v. New York*, 422 U.S. 853, 865-72 (1975) (Rehnquist, J., dissenting).

¹⁰⁹ *Id.* at 866 (Rehnquist, J., dissenting) (quoting majority opinion *id.* at 857).

¹¹⁰ *Id.* at 867-68 (Rehnquist, J., dissenting) (emphasis added).

ments. Because the right to closing arguments is an essential part of a fair trial, which, in turn, is a fundamental right, this refusal must be removed by way of "a strict prophylactic rule." Thus, in this situation, a court will conduct no inquiry into the facts of a particular case, or into the likelihood of prejudice in a particular case. The relief is systemic, and in the future, no defendant can be tried in any criminal court without the opportunity to make a closing argument.¹¹¹

In *Holloway*, the right to counsel violation was the refusal by the trial court either to appoint separate counsel for multiple defendants, or to inquire into whether defense counsel labored under an actual conflict of interest.¹¹² Some courts and commentators had suggested that relief in such a case should require the defendant to prove prejudice in the outcome.¹¹³ The United States Supreme Court thought otherwise: "To determine the precise degree of prejudice sustained . . . is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." ¹¹⁴ The systemic defect in *Holloway* was multiple representation in the face of an actual conflict of interest. Its evil was the gag placed on counsel, which, in turn, pre-

¹¹¹ As noted earlier, the Court last term held that a defendant had no sixth amendment right to confer with counsel during a 15 minute break in his testimony. *Perry v. Leeke*, 109 S. Ct. 594, 600 (1989). At the same time, however, the Court reaffirmed the fact that sixth amendment violations for interference with the attorney-client relationship are not subject to a prejudice analysis, and can never be treated as harmless error. The Court noted that, had there been a violation, prior cases made it clear that the case would not be subject "to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective." *Id.*

¹¹² *Holloway v. Arkansas*, 435 U.S. 475, 481 (1978).

¹¹³ *Id.* at 487-88. See also *United States v. Woods*, 544 F.2d 242 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977); Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119, 122-25 (1978).

¹¹⁴ *Holloway*, 435 U.S. at 488 (quoting *Glasser v. United States*, 315 U.S. 60, 75-76 (1942)). In *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988), the Court held that the erroneous admission of psychiatric testimony at a capital sentencing proceeding was subject to a harmless error analysis. Importantly, the Court did not, however, retreat from its holding in *Holloway*. The standard for harmless error remains whether the violation affected the entire proceeding. *Id.* As argued elsewhere, the problem of systemic resource deprivation, like multiple representation of conflicting interests, is in what it prevents counsel from doing. The crisis in caseloads is such that counsel must sacrifice one client for the demands of another. Furthermore, the defect, because it impairs counsel's ability to mount any defense, affects the entire proceeding, and is effectively concealed from appellate review. That is, the court cannot tell on review of case 'A' that defense counsel spent all his or her time preparing for trial in case 'B.' Harmless error, therefore, is inapplicable in resource deprivation cases.

vented her from challenging the adequacy of the state's case. The remedy is a per se rule of reversal, allowing for pretrial correction of the offending condition. No trial can go forward in the future with the condition uncorrected. If it does, reversal is automatic.¹¹⁵

2. Fairness and a "Just" Result

As previously mentioned, there is a second line of cases in which the Court abandons procedural rigor in favor of another, more prominent concern—reliability in the outcome. The question in these cases is not merely whether the protections of the adversary process have been allowed to run their course. More important by far is whether the proceeding has produced a "just" result, one which accurately separates the guilty from the innocent. The line of cases begins with *Strickland v. Washington*.¹¹⁶

In *Strickland*, the Court faced the problem of attorney ineffectiveness, or "actual ineffectiveness," as the Court labeled it.¹¹⁷ Unlike earlier right to counsel cases, the question in *Strickland* was whether the right to counsel provided relief for the defendant represented by incompetent counsel, and if so, what showing was necessary to secure this relief. The Court concluded that the sixth

¹¹⁵ As with *Herring*, one indication that *Holloway* created a per se rule appears in the dissent, which rejected the majority's reluctance to apply a prejudice analysis.

The Court's approach in this case is not premised on an ultimate finding of conflict of interest or ineffective assistance of counsel. Rather, it presumes prejudice from the failure to conduct an inquiry, equating that failure with a violation of the Sixth Amendment guarantee. . . . I am not convinced of the need for a prophylactic gloss on the requirements of the Constitution in this area of criminal law.

Holloway, 435 U.S. at 492 (Powell, J., dissenting) (emphasis added).

¹¹⁶ 466 U.S. 668 (1984). *Strickland* is the first right to counsel case in this line. The Court had already begun to move in that direction when it decided *Wainwright v. Sykes*, 433 U.S. 72 (1977). In *Sykes*, the Court adopted the "cause" and "prejudice" standard in federal collateral review as an excuse for failure to make a timely objection in state court. After *Sykes*, if defense counsel fails to observe a valid state contemporaneous objection rule, the underlying claim is waived on federal habeas review unless the defendant can show "cause" for the default and "prejudice" to the defendant as a result. *Id.* at 87-89.

Sykes replaced the rule of *Fay v. Noia*, 372 U.S. 391, 438-39 (1968), where the Court held that a failure to object would bar subsequent habeas review only if the right to object was deliberately bypassed for tactical reasons. The inquiry under *Noia* was whether the defendant knowingly and intelligently waived his right to vindicate his federal claim in state court; if he did, then habeas review could be barred. *Id.* at 439. With *Sykes*, however, what the defendant knew is irrelevant. The question instead is whether the error by trial counsel was prejudicial to the defendant. *Sykes* thus introduces a result-specific test into the area of procedural default. Significantly, the underlying problem in *Sykes* is attorney error, for which prejudice becomes part of the inquiry. See *infra* notes 117 through 142 and accompanying text. Moreover, the express rationale for *Sykes* was to discourage "sandbagging" by defense counsel, just as in *Strickland*. See *Sykes*, 433 U.S. at 89-90; *infra* notes 134 through 137 and accompanying text.

¹¹⁷ *Strickland*, 466 U.S. at 683.

amendment reached these claims, but that to secure relief the defendant had to show not only a deficiency in counsel's performance, but also that the deficient performance both fell below accepted standards of competence in the community¹¹⁸ and rendered the outcome unreliable.¹¹⁹

Thus, the Court in *Strickland* clearly indicates that the critical inquiry in a right to counsel case is whether counsel's error affected the outcome, and not merely the trial process.¹²⁰ In support of this assertion, the Court refers to *United States v. Morrison*.¹²¹ This, however, is certainly not the holding in *Morrison*. In *Morrison*, two agents of the Drug Enforcement Agency had twice met and conversed with the defendant without the knowledge or permission of defendant's counsel.¹²² The defendant subsequently moved to dismiss the indictment, alleging that the conduct of the agents violated her right to counsel.¹²³ Significantly, the motion was conspicuously devoid of any suggestion that the supposed violation had any impact on the proceeding.¹²⁴ The district court denied the motion, and the defendant pleaded guilty.¹²⁵ The Court of Appeals for the Third Circuit reversed the district court, holding that the appropriate remedy for the sixth amendment violation was to dismiss the indictment with prejudice.¹²⁶ The Supreme Court reversed.¹²⁷

In its six page opinion in *Morrison*, the Court made it clear that

¹¹⁸ *Id.* at 687.

¹¹⁹ *Id.* The critical passage in *Strickland* is as follows:

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

Id. at 691-92 (citation omitted) (emphasis added).

¹²⁰ See, e.g., *id.* at 694 ("[T]he defendant . . . [must] show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

¹²¹ 449 U.S. 361 (1980).

¹²² *Id.* at 362.

¹²³ *Id.* at 363.

¹²⁴ The motion contained no allegation that the claimed violation had prejudiced the quality or effectiveness of respondent's legal representation; nor did it assert that the behavior of the agents had induced her to plead guilty, had resulted in the prosecution having a stronger case against her, or had any other adverse impact on her legal position. The motion was based solely upon the egregious behavior of the agents, which was described as having "interfered" in some unspecified way with respondent's right to counsel.

Id. at 363.

¹²⁵ *Id.*

¹²⁶ *United States v. Morrison*, 449 U.S. 361, 363 (1980).

¹²⁷ *Id.* at 363-64.

the essential inquiry in right to counsel jurisprudence is not, as *Strickland* would later suggest, whether the error had any effect on the judgment. Rather the correct inquiry is whether the error undermined the integrity of the adversarial process. Indeed, the Court's analysis began with the familiar recognition that the right to counsel, "fundamental to our system of justice, is meant to assure fairness in the adversary criminal process."¹²⁸ After briefly reviewing the remedy applied in earlier cases, the Court summarized the doctrine in this way:

Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial. The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense. *Absent such impact on the criminal proceeding, however, there is no basis for imposing a remedy in that proceeding*, which can go forward with full recognition of the defendant's right to counsel and to a fair trial.¹²⁹

Morrison simply cannot support the weight *Strickland* places on it. Far from supporting the proposition in *Strickland*, *Morrison* instead represents the view that the right to counsel protects the process, and not merely its result. In fact, in *United States v. Cronin*,¹³⁰ decided the same day as *Strickland*, the Court cites *Morrison* for precisely that: "Absent some effect of the challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated."¹³¹ Indeed, with the exception of *Cuyler v. Sullivan*,¹³² the Court had never intimated what it now held in *Strickland*: the critical inquiry in right to counsel jurisprudence was into the reliability of the result.

Nothing in *Morrison*, or any other right to counsel decision, sup-

¹²⁸ *Id.* at 364 (emphasis added).

¹²⁹ *Id.* at 365 (emphasis added). See also *id.* at 366-67 (emphasis added), in which the Court stated:

[R]espondent has demonstrated no prejudice of any kind, either transitory or permanent, to the ability of her counsel to provide adequate representation in these criminal proceedings. . . . We . . . conclude that the solution provided by the Court of Appeals is inappropriate where the violation, which we assume has occurred, *has had no adverse impact upon the criminal proceedings.*

¹³⁰ 466 U.S. 648 (1984).

¹³¹ *Id.* at 658 (emphasis added).

¹³² 446 U.S. 335 (1980). The Court in *Strickland* meekly acknowledged that *Cuyler* also presented an example of attorney ineffectiveness. *Strickland v. Washington*, 466 U.S. 668, 683 (1984). In *Strickland*, however, the Court could not rely on *Cuyler* to support the proposition that the sixth amendment protected the reliability of the result, because in *Cuyler*, the Court had committed itself to its earlier view, expressed in *Holloway*, that no showing of prejudice in the outcome was required. For a discussion of *Cuyler*, see *infra* notes 143 through 167 and accompanying text.

ports the result in *Strickland*.¹³³ If *Strickland* purports to follow from prior right to counsel jurisprudence, and it does, then the decision is unprincipled. Indeed, *Strickland*, to the extent it makes sense at all, makes sense only if it is understood as fundamentally different from the prior right to counsel cases. That difference is the distinction between system and attorney ineffectiveness.

Every right to counsel decision before *Strickland* presented an example of system error. As the Court noted, *Strickland* was the first example of attorney error to come before the Court.¹³⁴ But the rationale driving the result in *Strickland* has no place in cases involving system error. The unarticulated concern in *Strickland* is with sandbagging. The fear is that defense counsel, if faced with the virtual certainty that his or her client would be convicted, would inject ineffective assistance into the case as a way to protect the client on appeal. With nothing to lose, defense counsel can always go belly-up and secure a reversal on appeal. The hope is that for any number of reasons, the next trial, if one occurs, will be more hospitable. The client, meanwhile, loses nothing, particularly if he is incarcerated pretrial and is receiving court-appointed counsel.

To dispel this fear, the Court introduced the requirement of actual prejudice in the outcome. Because the defendant must prove his innocence—effectively what *Strickland* requires—sandbagging is not worth its cost. In other words, if the defendant cannot secure a reversal merely by pointing to attorney errors, counsel will have no incentive to inject error into the case.¹³⁵ Although the Court in *Strickland* made only oblique reference to this concern,¹³⁶ more re-

¹³³ That is, with the possible exception of *Cuyler*, 446 U.S. at 335. See *infra* notes 143 through 167 and accompanying text.

¹³⁴ *Strickland*, 466 U.S. at 683.

¹³⁵ This explanation should by no means be read as an endorsement. The “sandbagging” rationale as a justification for the prejudice requirement has been the subject of considerable criticism. Perhaps the most significant failing, however, is that it relieves the trial judge of all responsibility for ensuring the fairness of the trial process. In practice, the trial judge can, and will, ignore attorney error, knowing that virtually no amount of incompetence is too great to support a conviction, as long as the defendant must also prove prejudice. If no amount of attorney error will disrupt the flow of convictions (the Fifth Circuit, for instance, has *never* granted relief in a capital case under *Strickland*), then a trial judge has no incentive to encourage attorneys to meet a minimum level of proficiency. The point in the text, then, is to explain and not to excuse. But in any event, even if we grant the Court its explanation, this justification loses all force outside the context of the attorney error cases.

¹³⁶ The Court alluded to this problem when it observed:

Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or a sentence.* *Strickland*, 466 U.S. at 693 (emphasis added). The implication of this passage is that,

cent attorney ineffectiveness cases have been more explicit.¹³⁷

By contrast, cases involving system ineffectiveness raise concerns about the integrity of the adversarial process. There can be no fear of sandbagging, because the defect by definition is separate from the conduct of individual counsel. In *Powell* and *Gideon* the defect was the actual denial of counsel by the state. In the critical stage cases, the problem is the denial of counsel, again by the state, when it matters most. In *Herring* and *Geders*, as with all governmental interference cases, the question is whether the state can intrude into the attorney-client relationship in a way that impedes the ability of defense counsel to subject the state's case to adversarial testing. In *Holloway*, the issue was whether the state could require counsel to labor under an actual conflict of interest. In each case, the condition which either undermined or threatened to undermine the adequacy of the fact-finding process operated entirely apart from the performance of individual counsel.¹³⁸ Indeed, counsel's performance is irrelevant to the analysis, except that because of the condition, he or she could not provide the kind of testing envisioned by the sixth amendment.¹³⁹

where the government is responsible for, and hence can prevent, the defect, prejudice—meaning factual innocence—need not be shown. And, as demonstrated, this is precisely the rule in system ineffectiveness cases.

¹³⁷ The best example is *Kimmelman v. Morrison*, 477 U.S. 365, 382 n.7 (1986). In *Kimmelman*, the Court held that an attorney's failure to raise a fourth amendment claim was cognizable on federal habeas review under the *Strickland* standard. In a footnote, the Court rejected the suggestion that defense counsel will resort to sandbagging, because that concern was already met by the *Strickland* Court's requirement of actual prejudice:

We have no reason to believe that defense attorneys will "sandbag"—that is, consciously default or poorly litigate their clients' Fourth Amendment claims in state court in the hope of gaining more favorable review . . . in . . . federal habeas proceedings. . . . [C]ounsel's client has little, if anything, to gain and everything to lose through such a strategy. It should be remembered that the only incompetently litigated and defaulted Fourth Amendment claims that could lead to a reversal of the defendant's conviction on Sixth Amendment grounds are potentially outcome-determinative claims. . . . By defaulting, counsel shifts the burden to the defendant to prove that there exists a reasonable probability that, absent his attorney's incompetence, he would not have been convicted.

Id. This standard—a reasonable probability that, absent the attorney errors, the result would have been different—is taken directly from *Strickland*, 466 U.S. at 694-95. With this passage, then, the Court confirms two things: 1) sandbagging is indeed the concern which motivated the Court in *Strickland* to require the defendant prove actual prejudice; and 2) the Court views the requirement of actual prejudice as a sufficient response to the problem.

¹³⁸ In fact, in the one case prior to *Strickland* in which counsel's performance was relevant to the analysis, the Court required the defendant to prove that counsel's errors adversely affected the adequacy of counsel's representation. *Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980). In practice, courts read *Cuyler* to require prejudice in the outcome. See *infra* notes 163 through 167 and accompanying text.

¹³⁹ It bears repeating that while the attorney ineffectiveness cases focus principally on

Just as the meaning of the underlying right is different in attor-

the reliability of the result, there remains concern for the integrity of the process. Indeed, *United States v. Cronin*, 466 U.S. 648, 658-60 (1984), an attorney ineffectiveness case, stands for the proposition that some attorney errors are so extraordinarily egregious that no inquiry into prejudice is required. Inasmuch as this rule threatens to undermine *Strickland*, however, lower courts have been reluctant to reverse a conviction based on *Cronin*. Such a case usually requires a breakdown in counsel's performance so complete as to constitute an outright denial of counsel. For example, in *United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1016-18 (7th Cir. 1988), defense counsel neglected to file an appellate brief in response to the state's interlocutory appeal of a suppression order. The appellate court reversed suppression and the defendant was convicted at trial. The Seventh Circuit, on habeas, held that counsel's failure constituted "a complete denial of assistance of counsel," and the reversal was thereby warranted under *Cronin*.

Still, to the extent *Cronin* suggests some constitutional minima in attorney ineffectiveness cases, the matter is unsettled. Plainly, a focus only on the result of the adjudication suggests that no amount of procedural irregularity would upset the verdict, so long as a reviewing court can be confident that the person convicted is guilty. This of course is a variant of the harmless error doctrine, which likewise tolerates constitutional error, so long as the result is "correct." It is also fundamentally inconsistent with *Cronin*. What of the case where the Court could be absolutely certain of the defendant's guilt, despite attorney errors which otherwise would amount to a violation of *Cronin*?

In *Kimmelman v. Morrison*, 477 U.S. 365 (1986), the Court ventured into this tension. There the Court held that a defendant may raise an ineffective assistance claim in federal habeas review, based on trial counsel's failure to object in state court to the admission of illegally seized evidence. *Id.* at 383. In so holding, the Court rejected the argument that, because illegally seized evidence is "typically reliable and often the most probative information bearing on the guilt or innocence of the defendant," defendants should be foreclosed from challenging their conviction obtained in this way by means of attorney ineffectiveness. *Id.* at 379 (quoting *Stone v. Powell*, 428 U.S. 465, 490 (1976)). The clear import of this argument would be to overrule *Cronin*, at least as applied to fourth amendment errors. Because these defendants are factually guilty, no amount of procedural irregularity would justify a reversal.

Justice Brennan, speaking for six members of the Court, rejected the argument:

[W]e have never intimated that the right to counsel is conditioned upon actual innocence. The constitutional rights of criminal defendants are granted to the innocent and guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt.

Id. at 380.

Justice Powell, speaking for Chief Justice Burger and now-Chief Justice Rehnquist, concurred in the judgment, but added an ominous response to the majority on this issue. Relying on the "results" view of the right to counsel as it appears in *Strickland*, he wrote:

This reasoning [in *Strickland*] strongly suggests that only errors that call into question the basic justice of the defendant's conviction suffice to establish prejudice under *Strickland*. . . . As many of our cases indicate, the admission of illegally seized but reliable evidence does not lead to an unjust or fundamentally unfair verdict. . . . Indeed, it has long been clear that exclusion of illegally seized but wholly reliable evidence renders verdicts less fair and just Thus, the harm suffered by respondent in this case is not the denial of a fair and reliable adjudication of his guilt, but rather the absence of a windfall.

Id. at 395-96 (Powell, J., concurring) (citations omitted) (emphasis added on "verdict"). Justice Powell concluded with a rebuke to the majority for its "rhetoric" that the sixth amendment applies to guilty and innocent alike. "Courts and litigants should not be

ney error case, so too is the relief. The remedy in attorney error decisions is granted on a case-by-case basis. This in fact follows automatically from the structure of the decision in *Strickland*: to succeed, the defendant must demonstrate that counsel's performance fell below prevailing standards of professionalism. But, at least according to the Court, "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel" ¹⁴⁰

[A] court deciding an actual [attorney] ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of a particular case, viewed as of the time of counsel's conduct. . . . The court must . . . determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. ¹⁴¹

Moreover, a requirement that the defendant demonstrate prejudice in the outcome is necessarily fact specific, because a deficient performance in an otherwise weak case may not justify reversal, while the defendant with the colorable claim of factual innocence may, on the same deficient conduct, succeed in demonstrating prejudice.

This inquiry into the totality of the circumstances is imported from the due process analysis of the fourteenth amendment. The salient point is that *Strickland*, as well as the more recent attorney error cases, are the only right to counsel decisions to rely on this framework. In the waning days of the past term, the Court recognized that since the demise of *Betts*, right to counsel jurisprudence has rejected the case-by-case approach, relying instead on the categorical mandate of per se rules. ¹⁴² The one exception is the jurisprudence on attorney error.

deceived by such pronouncements," he warned, and apparently, *Cronic* notwithstanding, the matter remains open. *Id.* at 397.

¹⁴⁰ *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984).

¹⁴¹ *Id.* at 690. This, of course, rings of the discredited due process standard announced in *Betts v. Brady*:

Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in light of other considerations, fall short of such denial.

Betts v. Brady, 316 U.S. 455, 462 (1942). In *Strickland*, the "other circumstance" which dooms the vast majority of attorney error cases is an inability to show prejudice in the outcome.

¹⁴² *Murray v. Giarratano*, 109 S. Ct. 2765, 2771 (1989). To underscore the difference between relief in system error cases and relief in attorney error cases, the totality of the circumstances is the approach steadfastly *rejected* by the Court in the critical stage cases. See *Moore v. Illinois*, 434 U.S. 220, 233 (1979) (Rehnquist, J., concurring); *Kirby v. Illinois*, 406 U.S. 682, 690-91 n.8 (1972) (right to counsel as described in *Wade* and *Gilbert*, creating a per se rule of exclusion, does not apply to preindictment showup, though such a procedure may, under the totality of the circumstances, violate due process).

C. CONFLICT OF INTEREST AS AN ILLUSTRATION

The leading conflict of interest cases, *Holloway* and *Cuyler*, vividly illustrate the divergence between system ineffectiveness and attorney ineffectiveness. In the former, concerns for fairness in the trial process lead to a *per se* rule. In the latter, an interest in the reliability of the result leads to relief only in the individual case.

In *Holloway*, the trial court appointed one public defender to represent three defendants charged with robbery and rape.¹⁴³ Twice before trial, as well as during trial, defense counsel moved to have separate counsel appointed for each defendant because of "a possibility of a conflict of interest."¹⁴⁴ The court denied each request.¹⁴⁵

At trial, all three defendants testified.¹⁴⁶ Counsel then indicated he could not conduct a cross-examination because as counsel for each of them, he could not ask questions of one which would tend to incriminate either of the others.¹⁴⁷ The court responded to defense counsel's plight by instructing him to "just put them on the stand and tell the Court that you have advised them of their rights and they want to testify; then you tell the man to go ahead and relate what he wants to. That's all you need to do."¹⁴⁸ The jury convicted the defendants of all counts.¹⁴⁹ The Arkansas Supreme Court affirmed the convictions,¹⁵⁰ and the United States Supreme Court reversed,¹⁵¹ concluding that the defendants had been denied the effective assistance of counsel.

In its analysis, the Supreme Court initially recognized that joint representation "is not *per se* violative of constitutional guarantees of effective assistance of counsel."¹⁵² Joint representation may in certain cases in fact prove advantageous to the defendant.¹⁵³ On the other hand, the Court recognized that multiple representation in

¹⁴³ *Holloway v. Arkansas*, 435 U.S. 475, 477 (1978).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 477-79.

¹⁴⁶ *Id.* at 478.

¹⁴⁷ *Id.* at 478-80.

¹⁴⁸ *Id.* at 480.

¹⁴⁹ *Id.* at 481.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 491.

¹⁵² *Id.* at 482.

¹⁵³ *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978). The Court did not make clear what advantages could accrue to the defendants in such a case, except to mutter the old saw that "[a] common defense often gives strength against a common attack." *Id.* at 482-83 (quoting *Glasser v. United States*, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting)).

the face of an actual conflict of interest makes an unfair trial a virtual certainty:

Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. For example, in this case it may well have precluded defense counsel . . . from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution Generally speaking, a conflict may also prevent an attorney from challenging the admission of evidence . . . or from arguing at sentencing Examples can be readily multiplied. *The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters.*¹⁵⁴

Thus, the right to counsel is violated because the condition renders the trial unfair. More importantly, the analysis speaks in terms of the effect this condition can have on the integrity of the fact-finding process: "the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible . . . plea negotiations and in the sentencing process."¹⁵⁵ *Holloway*, then, as a sixth amendment case, falls squarely within the class of cases which perceive the sixth amendment as a guarantor of procedural rigor.

Holloway also presented the Court with an interesting dichotomy: recall that some multiple representation rewards the defendant, while multiple representation of conflicting interests silences defense counsel and destroys the adversarial process. The first should be encouraged, while the second violates the sixth amendment. Significantly, the Court decided that defense counsel was "in the best position" to determine whether the representation in a particular case was of the former or latter dimension. Where counsel identifies and informs the trial court that multiple representation could lead to an actual conflict, the court is under a duty to inquire. If the court fails "either to appoint separate counsel or to take adequate steps to ascertain whether the risk [of a conflict] was too remote" the defendant is denied his right to the effective assistance of counsel.¹⁵⁶ Because counsel in *Holloway* made precisely this showing and the trial judge refused to act, the Supreme Court set aside the convictions.

As for the appropriate relief, the Court concluded that the con-

¹⁵⁴ *Id.* at 489-90 (emphasis added).

¹⁵⁵ *Id.* at 489-90 (emphasis in original).

¹⁵⁶ *Id.* at 484. To put the matter in the abstract, if the court fails either to determine that the offending condition in fact poses no risk to the adversarial process, or if it does, fails to remove the condition, the defendant is denied his right to effective assistance of counsel.

flict pervaded the entire proceeding and therefore could never be harmless error.¹⁵⁷ No inquiry into prejudice was required.

"To determine the precise degree of prejudice sustained . . . is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."¹⁵⁸

Holloway is the quintessential system ineffectiveness decision. One source of incompetent counsel is the joint representation of conflicting interests. Its evil is the gag placed on counsel, quite apart from his or her own abilities: In fact, it is the attorney's devotion to one client which inevitably commands that he or she sacrifice another. Because the attorney is in the best position to identify the dangerous conditions, he or she has the right to raise the problem with the trial court. If counsel raises the problem, and if the judge fails to correct the condition, reversal is compelled with no inquiry into prejudice. The remedy is a prophylactic rule allowing for pre-trial correction of the offending condition, such that no trial can go forward in the future with the condition raised but uncorrected.

Cuyler addresses the situation left open in *Holloway*—where counsel fails before trial to alert the trial court of the conflict. In *Cuyler*, the Court held that a defendant who waits until after trial to claim ineffective assistance based on a conflict of interest must prove more than the mere existence of the offending condition.¹⁵⁹ As the Court had noted in *Holloway*, multiple representation is not per se violative of the Constitution. Because *Holloway* also recognized that defense counsel was in the best position to detect potential conflicts, she was charged with bringing the conflict to the court's attention. In the absence of such an alert, a trial court may presume either that a conflict did not exist, or if it did, that the lawyer and his clients considered and rejected whatever risk it posed.¹⁶⁰

¹⁵⁷ *Id.* at 488.

¹⁵⁸ *Holloway v. Arkansas*, 435 U.S. 475, 488 (1978) (quoting *Glasser v. United States*, 315 U.S. 60, 75-76 (1942)); see also *id.* at 489 ("[T]his Court has concluded that the assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,'" (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967))).

¹⁵⁹ *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350 (1980).

¹⁶⁰ *Id.* at 346-47. This is another example of attorney error jurisprudence relieving the trial court of its obligation to ensure the fairness of the process. See *supra* note 135. It also serves to underscore the similarity between *Cuyler* and the other attorney error cases. See *supra* notes 116 through 142 and accompanying text. The conflict can be brought to the trial court in other ways than by an objection by defense counsel. See, e.g., *Wood v. Georgia* 450 U.S. 261, 272 (1981) (conflict raised by state). For whatever reason, when the judge knows of the conflict, he or she has an automatic duty to inquire. *Id.* at n.18.

To win reversal, therefore, the defendant must overcome the presumption that the multiple representation in his or her case was constitutional. To do this, the defendant must demonstrate that the multiple representation "adversely affected his lawyer's performance."¹⁶¹ Furthermore, relief requires that the defendant do more than show the conflict of interest. He or she must also point to specific instances in the record in which counsel's performance was adversely affected by the conflict.¹⁶² The inquiry clearly proceeds on a case-by-case basis; the defendant must show how the conflict affected his or her particular case.

Cuyler thus presaged the analysis in *Strickland*, where the Court clearly held that on review, a case of attorney ineffectiveness has a presumption of legitimacy.¹⁶³ To overcome this, the defendant must demonstrate that the particular failings of counsel prejudiced the outcome. *Cuyler* anticipates this holding. In *Cuyler*, counsel's omission was the failure to alert the trial judge of the possible conflict. A reviewing court is allowed to presume, therefore, that the condition did not exist, and that the multiple representation was consistent with the right to counsel. To overcome this presumption, the defendant must demonstrate that the conflict "adversely affected his lawyer's performance."¹⁶⁴ This is analogous to *Strickland*, where a case likewise comes to a reviewing court with a presumption of legitimacy that the defendant must overcome by showing prejudice in the outcome.¹⁶⁵

¹⁶¹ *Cuyler*, 446 U.S. at 348.

¹⁶² See, e.g., *Danner v. United States*, 820 F.2d 1166, 1169 (11th Cir. 1987), cert. denied, 484 U.S. 1012 (1988); *Oliver v. Wainwright*, 782 F.2d 1521, 1524-25 (11th Cir. 1986), cert. denied, 479 U.S. 914 (1986).

¹⁶³ *United States v. Strickland*, 466 U.S. 648, 694 (1984).

¹⁶⁴ *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).

¹⁶⁵ Speaking for the majority, Justice Powell tried to advance the view that a performance "adversely affected" by a conflict of interest and "prejudice in the outcome" were two different things. "[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Id.* at 349-50. The Court offers no suggestion as to how a defendant could successfully show an adverse affect without also showing prejudice.

The Court felt compelled to make this claim in order to suggest that *Cuyler* did not change *Holloway*. That is, in *Holloway*, the Court went to great lengths to insist that the right to the assistance of counsel is "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice . . ." *Holloway v. Arkansas*, 435 U.S. 475, 488 (1978) (quoting *Glasser v. United States*, 315 U.S. 60, 75-76). Yet *Cuyler* seemed to be indulging in precisely that sort of "nice" calculation. Justice Powell's response was to suggest that "actual affect" is different than "prejudice."

The point in the text, however, is that *Cuyler* is fundamentally different from *Holloway*. The latter is a system ineffectiveness case, where prejudice in the outcome is never a part of the inquiry (harmless error excepted). The former is an attorney ineffectiveness case, where, rightly or wrongly, prejudice is always part of the inquiry. The Court's

Significantly, in *Cuyler*, unlike in *Holloway*, the analysis did not focus on the adversarial process. The Court instead focused on the reliability of the result, and relief is contingent upon a showing that the conflict "adversely affected" the lawyers' performance. Absent "special circumstances," the process is presumed to have operated correctly.¹⁶⁶ If the multiple representation were evil, *Holloway* gave counsel a right to object. Having failed to do so, defense counsel cannot now blame the state, because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that

verbal gymnastics, therefore, were quite unnecessary: prejudice belonged in *Cuyler* and not in *Holloway*.

Not surprisingly, a review of lower court decisions demonstrates that, while the courts regularly intone the admonition that a defendant with a *Cuyler* claim need not show prejudice, in practice they require that very showing. Sometimes the requirement is distressingly explicit. See, e.g., *Kirby v. Dutton*, 831 F.2d 1280, 1283 (6th Cir. 1987) (court finds actual conflict of interest, but affirms conviction because "there was no prejudice to petitioner resulting from this conflict"); *United States v. Abner*, 825 F.2d 835, 844-45 (5th Cir. 1987) (reversal unwarranted because defendant could not show that conflict caused an adverse affect on *him*, and not merely on counsel's performance); *United States v. Burney*, 756 F.2d 787, 792 (10th Cir. 1985) (in *Cuyler* context, reversal usually the result of failure to present outcome-determinative evidence); *United States ex rel. Hanrahan v. Thieret*, 695 F. Supp. 372, 388-89 (N.D. Ill. 1988) (even assuming conflict existed, reversal unwarranted because claim was without merit); *Ruiz v. State*, 275 Ark. 410, 415, 630 S.W.2d 44, 47-48, *cert. denied sub nom.*, *Ruiz v. Arkansas*, 459 U.S. 882 (1982) (counsel representing multiple defendants is presumptively effective, and defendant must show prejudice in the outcome to secure reversal); *Dean v. State*, 433 N.E.2d 1172, 1176 (Ind. 1982) (conflict, but no prejudice shown because defendants would have suffered the same flaw in their cases when represented by separate counsel, reversal unwarranted).

The California Supreme Court is one of the few courts bold enough to try to unravel the purported distinction between "adverse affect" on representation and prejudice in the outcome—a distinction it admitted "is not entirely clear." *People v. Mroczko*, 35 Cal. 3d 86, 104 n.16, 197 Cal. Rptr. 52, 62, 672 P.2d 835, 845 n.16 (1983). Upon reviewing some of the approaches taken by other courts, the court in *Mroczko* concluded, "[a]s a practical matter, the Supreme Court's formulation seems to envision an analysis of whether there has been some identifiable prejudice to the right of effective representation, but not an analysis of whether that prejudice affected the outcome of the case." *Id.* at 108-09, 197 Cal. Rptr. at 66-67, 672 P.2d at 845 n.16. While this may be what the Supreme Court "envision[s]," expecting a court to differentiate between "prejudice" and "prejudice affecting the outcome" expects entirely too much, as the cases noted above indicate. Indeed, even the Court in *Mroczko* examined the record for prejudice in the outcome, and not merely prejudice to the attorney's performance. *Id.* at 108-09, 197 Cal. Rptr. at 66-67, 672 P.2d at 848-49.

One escape from this conundrum would be to collapse *Cuyler* into *Holloway* and presume prejudice. This, however, invites sandbagging and ignores the distinction between system and attorney error. Consequently, the way to treat *Cuyler* consistent with other right to counsel cases, and the approach which avoids the hair-splitting suggested by *Mroczko*, is to collapse *Cuyler* into *Strickland*. And this, in practice, is what courts have done.

¹⁶⁶ *Cuyler*, 446 U.S. at 346-47. The Court does not indicate what it would consider such a "special circumstance."

will result in reversal of a conviction"¹⁶⁷

D. RESOURCE DEPRIVATION

This Article began with an inquiry into the proper way to analyze the impact of resource deprivation in indigent defense cases. The answer should now be apparent. Resource deprivation is an example of system ineffectiveness. Like every system case, resource deprivation critically impairs the ability of the accused to subject the state's case to the rigors of adversarial testing. As with every case of system ineffectiveness, it operates quite independent of the conduct, or competence, of individual counsel. Indeed, like the attorney in *Holloway*, the evil of impoverished defense counsel "is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process."¹⁶⁸ This evil also includes the neglect of pretrial investigations, legal research, and consultation with clients. Thus, whenever the accused requires the "guiding hand of counsel," it will be lacking. "The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters."¹⁶⁹ When the crush of cases reduces the attorney to a "mere physical presence," the defense counsel's lips could be no more effectively sealed than if the state forbade him or her to speak.

There can be no risk of sandbagging in a claim of resource deprivation, because the defect does not turn on the performance of individual counsel. The evil—"it bears repeating"—is not in what the attorney by his or her own delinquency fails to do, but rather in what the system, by its failure to respect the right to the "assistance of counsel," does to the accused. Nor is there risk that frivolous claims of resource deprivation will inundate the courts. Analogizing to *Holloway*, the defendant must have a right to raise resource deprivation at the pretrial stage. The defendant, therefore, must demonstrate to the trial court the condition of which he complains. This provides a threshold below which relief will not be granted. It also provides a safeguard against abuses by the trial court because, as in *Holloway*, a failure to correct the condition is reversible error.¹⁷⁰ A

¹⁶⁷ *Strickland*, 466 U.S. at 693.

¹⁶⁸ *Holloway*, 435 U.S. at 490 (emphasis in original).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 488. This approach also returns to the trial court some responsibility for ensuring the fairness of the process. By vesting the court with a duty to inquire, and making a failure of that duty reversible error, the rule guarantees that the trial court will not be a party to slipshod representation caused by overburdened defense counsel.

reviewing court will not inquire whether the outcome of the case is "just," because inquiries into the reliability of the outcome have no place in a claim of system error.

This, in turn, leads to the appropriate relief. In system cases, the remedy is prophylactic, extending to all defendants subject to the debilitating condition. Most importantly, relief in system cases is not predicated on a showing of prejudice in the outcome—something reserved only for attorney error cases. Accordingly, relief from resource deprivation should be systemic. Because the system producing the conviction has broken down, there can be no presumption of legitimacy in the outcome. There can be, therefore, no requirement that a defendant demonstrate prejudice in the result.

III. THE CASELAW

The recent Supreme Court decisions in *United States v. Monsanto*¹⁷¹ and *Caplin & Drysdale v. United States*¹⁷² raised, albeit indirectly, the problem of resource deprivation in indigent defense. The opinions declined to reach the issue of resource deprivation, however, and unfortunately cannot be taken to support or refute the doctrinal foundations of this Article. Both cases presented constitutional and statutory challenges to the federal drug forfeiture statute.¹⁷³ This statute authorizes forfeiture to the government of "property constituting, or derived from . . . proceeds . . . obtained" from drug-law violations,¹⁷⁴ including, the Court held, "assets that an accused intends to use to pay his attorneys."¹⁷⁵ The inevitable result of this interpretation is that "there will be cases where a defendant will be unable to retain the attorney of his choice, when that defendant would have been able to hire that lawyer if he had access to forfeitable assets"¹⁷⁶ It was this interpretation which the criminal defendants, petitioner in *Caplin & Drysdale* and respondent in *Monsanto*, challenged under the sixth amendment.

These cases are in some respects similar to the problem of resource deprivation in indigent defense: the forfeiture is a state-created condition which threatens to undermine the adversarial process, or so defendants alleged. Indeed, some of the circuit courts of appeal to consider the sixth amendment claim had ana-

¹⁷¹ 109 S. Ct. 2657 (1989).

¹⁷² 109 S. Ct. 2646 (1989).

¹⁷³ 21 U.S.C. § 853(a) (1982 & Supp. V. 1987).

¹⁷⁴ *Id.*

¹⁷⁵ *Monsanto*, 109 S. Ct. at 2662.

¹⁷⁶ *Caplin & Drysdale*, 109 S. Ct. at 2652.

lyzed it from this perspective.¹⁷⁷ The Supreme Court, however, expressly declined to do so, analyzing the statute from the more limited perspective of an alleged infringement on the right to counsel of choice. From the outset, the Court assumed away the entire problem of resource deprivation in indigent defense:

The [Sixth] amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint *so long as they are adequately represented by attorneys appointed by the courts*. . . . Nor does the Government deny that the Sixth Amendment guarantees a defendant the right to be represented by *an otherwise qualified attorney* whom that defendant can afford to hire, or who is willing to represent the defendant¹⁷⁸

This passage is nothing more than a declaration that appointed counsel are presumptively capable of representing a defendant in a forfeiture case. The Court made this presumption more explicit later in the opinion when it rejected a suggestion that the forfeiture statute would lead to "a type of *per se* ineffective assistance of counsel" because of the "particular complexity of RICO or drug-enterprise cases."¹⁷⁹ In other words, the fact that counsel is court-

¹⁷⁷ Judge Oakes, for instance, of the Second Circuit, believed the statute was unconstitutional. *United States v. Monsanto*, 836 F.2d 74, 85-87 (2d Cir. 1987) (Oakes, J., dissenting), *rev'd*, 852 F.2d 1400 (2d Cir. 1988) (en banc), *rev'd*, *United States v. Monsanto*, 109 S. Ct. 2657 (1989). He wrote:

The Sixth Amendment is implicated not only on the individual level of the particular defendant, but also on the institutional level of the criminal justice system as a whole. . . . I . . . would not limit the analysis, as does the majority, to weighing the Government's interest in forfeiture against the defendant's interest in using his property to employ counsel of his choice. Rather, I would also consider the systemic interest of permitting defense counsel to perform their proper role in our adversary system of justice. As the Supreme Court said in *Cronic* . . . "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. . . . *The process itself is worthy of protection*. . . .

. . . .

. . . .By failing to credit the institutional interests in a fair adversarial system, the majority opinion provides the Government with a negative, indeed an unwholesome, power over the defendant's choice of counsel in the very type of complex cases where astute, experienced counsel is most needed. . . . Can we seriously contend that a proper balance would be effected in such cases by giving a defendant, made "indigent" by the Government's assertion of a potential forfeiture claim, a young attorney from an underfunded, overworked public defender's office for the ensuing 6-15 month trial?

Id. at 86 (emphasis added) (citations omitted).

¹⁷⁸ *Caplin & Drysdale v. United States*, 109 S. Ct. 2646, 2652 (1989) (emphasis added).

¹⁷⁹ *Id.* at 2655 n.7; see also *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d 637, 646-47 (4th Cir. 1988) (en banc) ("We . . . reject the contention that appointed counsel are presumptively unqualified to handle Continuing Criminal Enterprise cases."), *aff'd*, 109 S. Ct. 2646 (1989).

appointed does not, by itself, amount to a finding of prospective ineffective assistance.

There is nothing extraordinary in this proposition, nor is it contrary to the premise of this Article. It merely rejects a presumption of ineffectiveness absent a showing that the defect at issue had, or will have, some tangible effect on the fairness of the proceeding. The Court has done this on a number of occasions.¹⁸⁰

Thus, the essential function of the sixth amendment right to counsel is to guarantee a fair trial, but if the defendant cannot demonstrate how the forfeiture will jeopardize that right, then he or she has stated no sixth amendment violation. In reaching this conclusion, however, the Court did not resolve the question of whether a particular defendant states a sixth amendment violation when he or she successfully makes that demonstration. That is, a defendant cannot argue that appointed counsel, merely because he or she is appointed, will be ineffective. That, however, does not resolve the issue of whether the defendant can argue that appointed counsel is incompetent because he or she is subject to enumerated disadvantages caused by resource deprivation, and therefore cannot put the state's case to its proof. Neither *Monsanto* nor *Caplin & Drysdale* addresses this question.¹⁸¹

¹⁸⁰ See, e.g., *United States v. Morrison*, 449 U.S. 361, 365 (1981). This is also consistent with the approach taken by cases analyzing the absence of expert assistance to indigent defendants as a due process violation. See *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985) (defendant cannot rely on "undeveloped assertions" that expert assistance would help his case; he must make some showing of how the resources contribute to his right to a fair trial). Or, alternatively, how the absence of these experts detracts from that right. See *Little v. Armontrout*, 835 F.2d 1240, 1243-44 (8th Cir. 1987) (en banc), cert. denied, 108 S. Ct. 2857 (1988); *Moore v. Kemp*, 809 F.2d 702, 710-12 (11th Cir.) (en banc), cert. denied, 481 U.S. 1054 (1987).

Another analogy can be made to the conflict of interest cases, *Cuyler* and *Holloway*, discussed *supra*. The Court in these cases rejected the suggestion that multiple representation of defendants by a single counsel creates a presumption of ineffectiveness. To secure relief without a showing of actual affect on the outcome, counsel must raise the matter pre-trial and demonstrate how the conflict jeopardizes the defendants' right to a fair trial. Similarly, in the forfeiture cases, the Court rejected the notion that court-appointed counsel is presumptively ineffective. By analogy to *Holloway* and *Cuyler*, to secure relief pretrial, the defendant who has had his assets forfeited must raise the matter pretrial and demonstrate how the seizure imperils his right to a fair trial. *Monsanto* and *Caplin & Drysdale* do not foreclose this avenue.

¹⁸¹ And then there is this interesting footnote in *United States v. Cronin*, 466 U.S. 648, 662 n.31 (1984) (citations omitted):

The Government suggests that a presumption of prejudice is justified when counsel is subject to "external constraints" on his performance. In this case the Court of Appeals identified an "external" constraint—the District Court's decision to give counsel only 25 days to prepare for trial. The fact that the accused can attribute a deficiency in his representation to a source external to trial counsel does not make it any more or less likely that he received the type of trial envisioned by the Sixth Amendment, nor does it justify reversal of his conviction absent an actual effect on

While the Supreme Court has been silent, other courts have considered the problem of ineffective assistance as a result of re-

the trial process or the likelihood of such an effect That is made clear by *Chambers* and *Avery*. Both cases involved "external constraints" on counsel in the form of court-imposed limitations on the length of pretrial preparation, yet in neither did the Court presume that the "constraint" had an effect on the fairness of the trial. . . . Conversely, we have presumed prejudice when counsel labors under an actual conflict of interest, despite the fact that the constraints on counsel in that context are entirely self-imposed.

The premise of this footnote is that "external constraints" are no more inherently likely to produce an unfair trial than are "self-imposed" constraints. Certainly this is true: we can easily envision any number of "constraints," of whatever origin, which have no effect on the trial. By the same token, we can just as easily posit constraints which reduce the trial to a sham. But this observation does no more than reinforce the point made earlier: all right to counsel jurisprudence protects the right to a fair trial, and that right can be imperiled by system no less than attorney ineffectiveness.

Having said that, however, the question remains whether a trial made unfair because of external constraints is the same, for sixth amendment purposes, as a trial made unfair because of attorney incompetence. Here, the answer is clearly no. In the latter, the system is by definition presumed to have operated correctly. The defect lies exclusively in the conduct of individual counsel. "The government is not responsible for, and hence not able to prevent, attorney errors that will result in a reversal of a conviction or sentence." *Strickland v. Washington*, 466 U.S. 648, 693 (1984). Accordingly, it is at least rational to expect the defendant who challenges this conviction to show that the errors so undermined the otherwise adequate process as to lead to an unreliable result. Prejudice, in other words, is arguably an appropriate part of the inquiry. *But see supra* note 135. And contrary to the language in *Cronic*, the Court did not presume prejudice in *Cuyler*. Indeed, the Court expressly held that the burden is on the defendant to show how counsel's errors actually affected the lawyer's performance. In practice, as noted earlier, this requires a showing of prejudice. *See supra* notes 159 through 170 and accompanying text.

On the other side of the equation, as long ago as 1940 when the Court decided *Avery*, and as recently as last term, with the decision in *Perry v. Leeke*, the Court has refused to extend the protections of the sixth amendment to *de minimis* infringements of the right to counsel. *See also Morrison*, 449 U.S. at 361. The point at which a particular infringement becomes something more than *de minimis* will of course be subject to dispute. Once that point is reached, however, the cases are abundantly clear that prejudice is presumed and reversal is automatic. The only qualification to this rule, as explained in the text, is the harmless error doctrine, where prejudice is presumed; but the state is given an opportunity to rebut this presumption by showing that the violation had no effect on the outcome. However, the harmless error rule is likely to have no application to the problem described in this Article, because systemic resource deprivation pervades and undermines the entire trial process. *See the discussion infra*, notes 182 through 200 of *State v. Smith*, 140 Ariz. 355, 362, 681 P.2d 1374, 1381 (1984) ("The insidiousness of overburdening defense counsel is that it can result in concealing from the courts, and particularly the appellate courts, the nature and extent of damage that is done to defendants by their attorneys' excessive caseloads."). Where the impact of the violation cannot be isolated and considered apart from the rest of the case, the error cannot be harmless. *See, e.g., Satterwhite v. Texas*, 486 U.S. 249, 256 (1988).

The thesis of this Article is not that external constraints alone warrant reversal, but that external constraints must be analyzed under the framework appropriate to them. This framework is fundamentally different from that which is employed to analyze the effect of "self-imposed" limitations caused by attorney incompetence.

source deprivation, with interesting results. In *State v. Smith*,¹⁸² the Supreme Court of Arizona held that the indigent defense system in one Arizona county was so pervasively and profoundly flawed that any defendant convicted under the system was presumptively denied the right to effective assistance of counsel.¹⁸³ Prejudice was presumed, and the burden fell to the state to rebut the presumption.¹⁸⁴ In addition, in *Luckey v. Harris*,¹⁸⁵ the Eleventh Circuit recently held that allegations of prospective ineffective assistance caused by systemic defects in the representation of indigents in Georgia states a claim under the sixth amendment.¹⁸⁶

Smith involved the following practice:

In May of each year a bid letter goes out from the presiding judge of Mohave County to all attorneys in the county. It calls for sealed bids No limitation is suggested on caseload or hours, nor is there any criteria for evaluating ability or experience of potential applicants. The successful bidders are assigned all indigent criminal cases in the superior courts, justice of the peace courts, juvenile courts, all appeals in Mohave County, and all mental evaluations. . . .

. . . .
. . . No suggestion is made [in the bid letter] that counsel may expect assistance in any way for support personnel. Any investigator, paralegal, secretary, or similar personnel must be provided by the individual bidder who must also provide his own office space, equipment, and supplies.¹⁸⁷

With one exception in the four years prior to the decision, the contract had gone to the lowest bidders, who divided equally the caseload for the entire county. In 1982-83, the four low bids were \$24,000, \$26,200, \$34,300, and \$34,400.¹⁸⁸ In addition, representation could be part time, so that successful bidders could maintain a private practice over and above their contract commitments.¹⁸⁹ In *Smith*, defense counsel in eleven months had handled 149 felonies, 160 misdemeanors, 21 juvenile cases, and 33 other proceedings. He also maintained a private civil practice, and handled all appointment cases of a local municipality.¹⁹⁰

The Arizona Supreme Court compared this system with one proposed by the NLADA and, not surprisingly, found it inadequate.

¹⁸² 140 Ariz. 355, 681 P.2d 1374 (1984).

¹⁸³ *Id.* at 362, 681 P.2d at 1381.

¹⁸⁴ *Id.* at 364, 681 P.2d at 1383.

¹⁸⁵ 860 F.2d 1012 (11th Cir. 1988).

¹⁸⁶ *Id.* at 1018.

¹⁸⁷ *Smith*, 140 Ariz. at 360, 681 P.2d at 1379.

¹⁸⁸ *Id.* at 360, 681 P.2d at 1379.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 361, 681 P.2d at 1380.

It was lacking in four respects: it failed to take into account the complexity of individual cases; it failed to provide support services, such as investigators and law clerks; it failed to consider the competency of attorneys who submitted bids; and it failed to reflect the time an attorney should be expected to spend representing the indigent. In studied understatement, the court concluded that this system "militates against adequate assistance" to such a degree that it violated the sixth amendment.¹⁹¹

This conclusion, given the record before the court, was hardly surprising. Of particular interest, however, was the fact that the court reached this conclusion despite its determination that counsel in *Smith* had been minimally effective.

The fact that one felony defendant out of 149 felony defendants was given minimum adequate representation does not mean that others were properly represented. *The insidiousness of overburdening defense counsel is that it can result in concealing from the courts, and particularly the appellate courts, the nature and extent of damage that is done to defendants by their attorneys' excessive caseloads.*¹⁹²

In other words, the fact that a defendant cannot predict with certainty before trial that his attorney will be ineffective does not validate the system, nor does it require that a reviewing court wait until a verdict is reached in an individual case before granting relief. By extension, the system would be no less flawed if the defendant in any particular case were acquitted, as some no doubt are. Systemic conditions, wholly apart from the competence of individual counsel, render the proceedings sufficiently suspect to justify a presumption that a conviction is unconstitutional. Without regard to particular cases, the presumption of correctness has been replaced with a presumption of incorrectness.

Doctrinally, *Smith* is without question incorrect. The error, however, is not that it goes too far by creating a presumption of illegitimacy, but that it does not go far enough. The discussion in *Smith*, if it revealed anything, documented the pervasive defects in the defense of indigents in Mohave County, Arizona. The danger, as the Arizona Supreme Court correctly observed, is not what happens in a particular case as a result of resource deprivation; in any given case counsel may somehow manage to be minimally effective, despite the burdens under which he or she operates. Rather, the danger is what resource deprivation prevents defense counsel from accomplishing in any number of other cases.¹⁹³ From that perspec-

¹⁹¹ *Id.* at 362, 681 P.2d at 1381.

¹⁹² *State v. Smith*, 140 Ariz. 355, 362, 681 P.2d 1374, 1381 (1984) (emphasis added).

¹⁹³ In this respect, the analogy to *Holloway* is particularly appropriate: "[I]n a case of

tive, the state has subjected random defendants to the constructive denial of counsel, which of course is no less a violation than had the state actually denied counsel.¹⁹⁴ Any inquiry into prejudice in such a case is unnecessary.¹⁹⁵

Yet the result in *Smith* calls for precisely this inquiry. By grafting a rebuttable presumption of incorrectness onto each case, the Arizona Supreme Court subjects the systemic defects in Mohave County to a harmless error analysis.¹⁹⁶ That is, just as in the harmless error cases, the outcome is presumptively incorrect, subject to rebuttal by the state that the error was harmless beyond a reasonable doubt.¹⁹⁷ Harmless error, however, has no place where the flaw is pervasive or where its effect cannot be isolated from the remainder of the case.¹⁹⁸ Yet this is precisely what happened in Mohave County: "The insidiousness of overburdening defense counsel is that it can result in concealing from the courts, and particularly the appellate courts, the nature and extent of damage that is done to defendants."¹⁹⁹ The flaw in any particular case can neither be identified from the appellate record nor isolated from the larger systemic condition of which it is a product. This necessarily precludes application of the harmless error doctrine.

joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing" *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978) (emphasis in original). Resource deprivation presents precisely the same "evil."

¹⁹⁴ *Perry v. Leeke*, 109 S. Ct. 594, 599 (1989) (" '[a]ctual or constructive denial of the assistance of counsel altogether' . . . is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective") (quoting *Strickland v. Washington*, 466 U.S. 668, 692 (1984)).

¹⁹⁵ *Id.*

¹⁹⁶ The harmless error analysis is essentially an inquiry into prejudice, because it presupposes that a certain measure of constitutional error is tolerable in the trial of a criminally accused, as long as it does not influence the jury's verdict. The difference is in the allocation of burdens: in the *Strickland* prejudice inquiry, the defendant must show prejudice, while in the harmless error analysis, the state must show its absence.

¹⁹⁷ The Arizona Supreme Court unfortunately neglected to indicate what showing by the state would be sufficient to rebut the presumption that the defendant received ineffective assistance of counsel. When the error is of federal constitutional dimension, however, the state must show the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). The Court in *Smith* made it clear that the systemic defects in the Mohave County system of indigent defense violated the sixth amendment. *State v. Smith*, 140 Ariz. 355, 362, 681 P.2d 1372, 1381 (1984); the *Chapman* standard is therefore appropriate.

¹⁹⁸ See e.g., *Satterwhite v. Texas*, 486 U.S. 249, 257 (1988); *Holloway*, 435 U.S. at 490-91 ("In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury.").

¹⁹⁹ *Smith*, 140 Ariz. at 362, 681 P.2d at 1381.

What the Arizona Supreme Court should have done in *Smith*, and what is done whenever a reviewing court identifies a pervasive systemic condition which violates the right to effective assistance of counsel,²⁰⁰ is order prospective, systemic relief from the offending condition. No defendant charged in Mohave County should be prosecuted subject to the disadvantages imposed by these conditions, just as no defendant could be defended by counsel laboring under an actual conflict of interest. What the Court in *Smith* should have done, in other words, is recognize the violation for what it is—an example of system ineffectiveness, requiring the same response as any system ineffectiveness case.

Smith arose in the context of a criminal appeal. In *Luckey*, the plaintiff-appellants were a bilateral class of all indigent persons either presently charged, or who will be charged, with a criminal offense in Georgia, and of all attorneys who represent or who will represent indigent defendants in the state.²⁰¹ Plaintiffs alleged that “systemic deficiencies” in the Georgia defense system, “including inadequate resources, delays in the appointment of counsel, pressure on attorneys to hurry their clients’ case to trial or to enter a guilty plea, and inadequate supervision in the Georgia indigent criminal defense system” deprive criminal defendants of their right to the effective assistance of counsel.²⁰² The trial court had dismissed for failure to state a claim under the sixth amendment, ruling that because plaintiffs could not prove “an across-the-board future inevitably of ineffective assistance,” they could not satisfy *Strickland*, and therefore could not prevail.²⁰³ The Eleventh Circuit reversed.²⁰⁴

Unfortunately, the Eleventh Circuit Court of Appeals, although absolutely correct in its result, was cursory and confused in its analysis. It began with a statement of the rule in *Strickland* and then observed that “[t]his standard is inappropriate for a civil suit seeking prospective relief.”²⁰⁵ Instead, the plaintiff’s burden is to show “the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.”²⁰⁶ But this quote from *O’Shea v.*

²⁰⁰ See, e.g., *Murray v. Giarratano*, 109 S. Ct. 2765, 2771 (1989); *Herring v. New York*, 422 U.S. 853, 868 (1975) (Rehnquist, J., dissenting).

²⁰¹ *Luckey v. Harris*, 860 F.2d 1012, 1013 (11th Cir. 1988).

²⁰² *Id.* Plaintiffs also raised eighth and fourteenth amendment claims, though the Eleventh Circuit considered the case only on sixth amendment grounds. *Id.* at 1016 n.1.

²⁰³ *Id.*

²⁰⁴ *Id.* at 1016-17.

²⁰⁵ *Id.* at 1017.

²⁰⁶ *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988) (citing *O’Shea v. Littleton*, 414 U.S. 488, 502 (1974)).

Littleton applies to the showing necessary for article III standing to seek injunctive relief; it has no application whatever to the claim that systemic deficiencies in indigent defense constitute ineffective assistance. The latter claim is not a matter of article III justiciability, but of sixth amendment jurisprudence.²⁰⁷

This confusion between standing under article III and viability under the sixth amendment echoes the prior confusion by the district court. It too had conflated the sixth amendment claim, erroneously viewing it as a *Strickland* issue, with the likelihood of future injury (standing). Presumably, both courts were struggling with the dual observations that plaintiffs could not state with certainty that defense counsel would be ineffective in any individual case and that ineffective assistance claims (meaning attorney incompetence) are typically raised after trial.

As to the first matter, a certainty of future harm is not an essential part of a system ineffectiveness claim. Rather, the question in any system claim is whether the systemic condition threatens to undermine the adversarial process. This was the plaintiff's allegation. What the court of appeals lacked, and what this Article provides, is the vehicle to distinguish between attorney ineffectiveness and system ineffectiveness. *Strickland* provides the applicable standard for the former, and requires a showing of prejudice in each case. *Powell*, *Wade*, *Herring* and other system cases address the latter and give rise to at least a presumption of prejudice. Plaintiff's allegations were quintessential system ineffectiveness allegations. *Strickland*, therefore, simply had no relevance to the litigation; *Strickland* has no relevance to any system ineffectiveness claim.

As to the second issue—whether the claim can be raised at the pretrial stage—the Eleventh Circuit did cite a number of system ineffectiveness cases for the proposition that “[t]he sixth amendment protects rights that do not affect the outcome of a trial. Thus deficiencies that do not meet the ‘ineffectiveness’ [attorney incompetence] standard may nonetheless violate a defendant’s right under the sixth amendment.”²⁰⁸ With this, the court appeared to recognize the difference between system and attorney ineffectiveness by

²⁰⁷ This is not to suggest that plaintiffs in *Luckey* are without justiciability problems. On the contrary, the problems are considerable, as suggested elsewhere. See *infra* notes 215 through 250 and accompanying text. The point remains, however, that article III justiciability is a distinct concept, raising entirely different concerns from viability under the sixth amendment. Moreover, to conclude that the claim is without merit under the sixth amendment would potentially foreclose litigation in any forum, including a criminal appeal, as in *Smith*. A ruling on article III justiciability, however, affects only access to the federal courts.

²⁰⁸ *Luckey*, 860 F.2d at 1017.

alluding to the competing views of a fair trial—one which observes rigorous adversarial testing on the one hand, and one which produces a reliable result on the other. From these cases, the court concluded that plaintiff's claims could be raised prospectively.²⁰⁹

While correct, this conclusion obscures the reason for the result. It is not, as the court seemed to indicate, because plaintiff sued for prospective relief; plaintiffs are not entitled to prospective relief merely because they sue for it. The reason they were entitled to prospective relief is that they alleged system ineffectiveness, which as *Holloway* makes most clear, may be raised at the pretrial stage.²¹⁰ Unfortunately, the decision shows no indication that the court understood the critical distinction between the two classes of cases; in system claims the defect threatens to undermine the trial process and thus must be raised before trial. Otherwise, the proceeding becomes a mere formality. Even if raised after trial, relief in future cases attaches before the trial takes place to prevent additional defendants from being subject to the unconstitutional condition. In attorney cases, by contrast, the system is presumed to be operating correctly; nothing need be corrected before trial because there has as yet been no defect.

These two cases, *Smith* and *Luckey*, illustrate the two most obvious applications of an ineffective assistance claim based on resource deprivation. *Smith* arises out of a criminal appeal challenging a particular conviction, while *Luckey* is a civil rights action on behalf of an entire class of current and punitive defendants. Both cases, however, raise substantial justiciability hurdles. Unfortunately, neither the Arizona Supreme Court in *Smith* nor the Eleventh Circuit in *Luckey* negotiated these hurdles and they remain stumbling blocks in the path of any future application of the claim. A thorough treatment of the justiciability problems must wait for another article. However, some discussion is appropriate now, at least to describe the difficulties.

In *Smith*, the court *sua sponte* raised the problem of prospective ineffective assistance.²¹¹ There is no indication from the opinion that the defendant ever raised the matter, or even perceived it to be a problem. Assuming other defendants are not inclined to wait until a reviewing court takes it upon itself to address the problem of resource deprivation in indigent defense, the question becomes how a

²⁰⁹ *Id.* at 1018.

²¹⁰ *Id.*; *Holloway v. Arkansas*, 435 U.S. 475, 488 (1978).

²¹¹ *State v. Smith*, 140 Ariz. 355, 360-64, 681 P.2d 1374, 1379-82 (1984).

particular defendant can raise the matter before trial and achieve the same result.

Holloway and *Cuyler* provide only a partial answer. The *Holloway* Court recognized that defense counsel is in the best position to identify the conflict of interest threatening the defendant's right to a fair trial. Counsel, then, must raise the claim before the court. If the judge fails to inquire, or inquires but nonetheless fails to resolve the conflict, reversal is automatic, without regard to the facts of a particular case or the possible absence of prejudice.²¹² The *Cuyler* Court in turn emphasized that multiple representation is not per se unconstitutional; it may in fact be advantageous. Should defense counsel fail to raise the conflict, the reviewing court, as with any claim of attorney ineffectiveness, will presume the system operated as it should and require the defendant prove that the error "affected" the representation.²¹³ In practice, this requires that the defendant prove prejudice.

Likewise, it is defense counsel who can best identify the resource deprivation threatening to undermine the adversarial process. He or she must raise the matter before the trial. As with *Holloway*, defense counsel must show how the systemic condition impairs or threatens to impair his or her ability to put the state to its proof. If the judge fails to inquire, or inquires but fails to resolve the defect, reversal is once again automatic.

The unfortunate limitation to this approach is that it proceeds on a case-by-case basis. Defendant A must attempt to make the equivalent showing before trial as Defendant B. This, in turn, raises two problems. The first problem is an overburdened defense counsel. Any response to this problem which requires an additional hearing in every case is hardly calculated to alleviate that problem. The relief afforded in *Smith* avoids this objection by creating the presumption that each defendant has already made the necessary showing. This once again, however, invites the question of how a particular defendant could secure the same relief. Here *Holloway* and *Cuyler* provide no answer, and this reveals the second limitation to the case-by-case approach.

It is axiomatic that a party cannot, as a rule, assert the claims of others. Thus, while *Holloway* entitles Defendant A to a pretrial hearing, his proofs will be limited to the defect *as it affects him*. Defendant A can assert that he will be prejudiced by an overburdened defense system, but manifestly, he lacks standing to assert Defendant B's

²¹² *Holloway*, 435 U.S. at 489.

²¹³ *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).

claim. Because the problem in Defendant A's case, in its particular expression,²¹⁴ may be different than the problem in Defendant B's case, it is improbable that a particular defendant could raise the issue of resource deprivation in a way that would provide the relief granted in *Smith*. In that respect, *Smith* is an anomalous response to a *sua sponte* decision by a state high court, not likely to be repeated in the context of individual challenges to particular convictions.

Therein lies the appeal of *Luckey*. As a class action, it provides class-wide relief. There is an obvious and satisfactory symmetry and efficiency to attacking a systemic defect with an institutional remedy. Plaintiffs seek precisely that: a declaration that the entire system of indigent criminal defense in Georgia deprives defendants of their guarantee of effective assistance of counsel. But this claim for class-wide relief faces its own justiciability hurdle—the problem of article III standing to sue for injunctive relief after *City of Los Angeles v. Lyons*.²¹⁵

Lyons is the infamous California chokehold case.²¹⁶ For the first time, the United States Supreme Court analyzed standing for injunctive relief entirely apart from standing for damages.²¹⁷ The facts in *Lyons* are outrageous, but straightforward: Los Angeles police stopped Adolph Lyons for a traffic violation. Lyons got out of his car, and the police asked him to put his hands over his head, which he did.²¹⁸ One officer frisked him, and when he was done, Lyons lowered his arms. An officer then grabbed his hands and slammed them into Lyons' head. Lyons complained that he was in pain; the officer responded by applying a chokehold.²¹⁹ The officer choked Lyons to unconsciousness. When Lyons regained consciousness, he was on the ground spitting up blood. He had also urinated and defecated.²²⁰ The police gave him a ticket for driving

²¹⁴ Though the umbrella problem in all cases is resource deprivation, the particular expression of this problem may—and in fact, would be expected to—vary from case to case. Thus, in one case, the problem may be that defense counsel cannot conduct essential fact investigation. In the next case, it may be that counsel cannot conduct legal research, or meet with his client enough to prepare an adequate alibi defense. The variations are virtually infinite, though all relate to and are caused by the fundamental systemic condition of resource deprivation. The point in the text is simply that if the problem in Defendant A's case is that counsel cannot conduct adequate fact investigation, counsel cannot also have the opportunity to show how Defendant B's case requires more legal research. Let Defendant B do that for himself, counsel will be told.

²¹⁵ 461 U.S. 95 (1983).

²¹⁶ For a partial list of the attacks on *Lyons*, see Fisher, *Caging Lyons: The Availability of Injunctive Relief in Section 1983 Actions*, 18 LOY. U. CHI. L.J. 1085, n.3 (1987).

²¹⁷ *Lyons*, 461 U.S. at 122-31 (1983) (Marshall, J., dissenting).

²¹⁸ *Id.* at 114.

²¹⁹ *Id.* at 114-15.

²²⁰ *City of Los Angeles v. Lyons*, 461 U.S. 95, 115 (1983). Between 1975 and 1980,

with a broken taillight and released him.²²¹

The Supreme Court held that Lyons lacked standing to seek injunctive relief.²²² An injunction is a prospective remedy. As such, it is appropriate relief only for those who will encounter the offending condition in the future. Those who have been victims of the unconstitutional conduct may sue for damages, as Lyons did, and there was no dispute he had standing to press his damages claim. However, without the assurance of future injury, Lyons' claim presented only a speculative threat of harm, just as it would be for any person living or traveling in the city. Lyons, therefore, lacked the "live interest" necessary for standing. He was no more entitled to injunctive relief than any other citizen of Los Angeles.²²³

Applied to Lyons, standing to sue for injunctive relief had two components. He had to allege first, that he would again encounter the police, and second, that the police would again subject him to the unconstitutional chokehold. This would establish the necessary connection between the relief sought and the harm suffered.²²⁴ To meet this test, Lyons needed:

not only to allege that he would have another encounter with the police but also to make the incredible assertion either, (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter . . . or (2) that the City ordered or authorized police officers to act in such a manner.²²⁵

With this holding, the Court seemed to require a "virtual certainty" of future injury before a plaintiff had standing to sue for injunctive relief.²²⁶ The Court noted that Lyons had to allege that he "*will be*" stopped by the police again. In addition, the Court required Lyons to show that "strangleholds are applied by the Los Angeles police to *every citizen who is stopped or arrested* . . ."²²⁷ Of course, Lyons could never make this showing, and his case was dismissed.²²⁸

the Los Angeles police had applied chokeholds on at least 975 occasions. At least 16 people had died as a result of the chokeholds. *Id.* at 115-16.

²²¹ *Id.* at 115.

²²² *Id.* at 100-01. Only the decision to issue the injunction was litigated on appeal. The damages claim was not before the Court.

²²³ *Id.* at 111.

²²⁴ *Id.* at 105-06.

²²⁵ *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983) (emphasis in original).

²²⁶ See Fisher, *supra* note 216, at 1092, 1097, n.108.

²²⁷ *Lyons*, 461 U.S. at 107 n.7, 108. On the other hand, other parts of the opinion suggest a more tolerant approach: "Lyons would have to credibly allege that he faced a realistic threat . . . Lyons' standing . . . depended on whether he was likely to suffer future injury . . ." *Id.* at 105.

²²⁸ *Id.* at 100.

Clearly, *Lyons* has the potential to change the entire legal landscape regarding injunctive relief. Professor Tribe demonstrates that if applied strictly, *Lyons* leads to the conclusion that the plaintiffs in both *Regents of the Univ. of Cal. v. Bakke*²²⁹ and *Roe v. Wade*²³⁰ lacked standing.²³¹ He might well have added *Gerstein v. Pugh*,²³² and every condition of confinement case. As applied to system ineffectiveness, no plaintiff would have standing to challenge systemic conditions of representation because none could demonstrate they would again be a defendant, nor could they guarantee that in their case counsel would be ineffective.²³³

Luckey made no mention of *Lyons*. In fact, the entire discussion of standing in *Luckey* was contained in a single sentence.²³⁴ But *Lyons* cannot be easily ignored. If applied as written, *Lyons* virtually assures that the plaintiffs in *Luckey* lack standing. That, however, is the problem with *Lyons*—the case proves too much. Without so much as a word, the Court would have rewritten vast bodies of substantive law by disallowing standing to challenge unconstitutional conditions of relatively brief duration. Fortunately, an examination of other Supreme Court cases suggests that in all likelihood, the Court did not intend so strict a reading.

The decision most closely related is *Gerstein*. In *Gerstein*, the plaintiff-respondents were three defendants arrested and charged in Dade County, Florida.²³⁵ Under the procedures in place, criminal

²²⁹ 438 U.S. 265 (1978).

²³⁰ 410 U.S. 113 (1973).

²³¹ L. TRIBE, CONSTITUTIONAL CHOICES 114-17 (1985). Bakke could not demonstrate that he would be admitted to a subsequent class, and the plaintiff in *Roe v. Wade* could not demonstrate that she would again become pregnant and again want an abortion.

²³² 420 U.S. 103 (1975). Jail and prison condition litigation necessarily presumes some prior "encounter" with the police. If the plaintiff in *Lyons* could not predict with certainty another encounter, then by implication neither can any inmate. See also *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974) ("We assume that respondents will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners.").

²³³ In some respects, the jail condition litigation remains a better case for injunctive relief than the claim of prospective ineffective assistance, since in the jail suits, plaintiffs can guarantee that certain unconstitutional conditions, for example overcrowding, will affect every inmate. The same cannot be said here, for as noted at the outset of this Article, it may well be that despite the systemic lack of resources, some defendants will receive minimally adequate representation.

²³⁴ [W]e conclude that appellants' allegations that they are presently being denied constitutional rights as a direct result of the failure of appellees to furnish counsel in a manner that meets minimum constitutional standards is sufficient to satisfy the Article III requirement of an allegation that they have sustained or are immediately in danger of sustaining some "real and immediate injury" resulting from challenged official conduct. *Luckey v. Harris*, 860 F.2d 1012, 1016 (11th Cir. 1988) (citations omitted).

²³⁵ *Gerstein*, 420 U.S. at 105.

defendants could be charged and detained for substantial periods, often over a month, without a judicial determination of probable cause.²³⁶ The respondents brought a class action in federal district court, alleging that the extended detention without a judicial hearing on probable cause constituted a violation of their rights under the sixth and fourth amendments.²³⁷ Their complaint sought declaratory and injunctive relief.²³⁸

Neither party in *Gerstein* raised the standing issue. At oral argument, however, the Court learned that the named respondents had been convicted, and that their pretrial detention had ended.²³⁹ Because the plaintiffs sought injunctive relief, *Lyons* suggests that standing depended on whether an injunction would be effective *for them*. To make the necessary showing, they would have to allege the following: 1) that they would again be arrested, charged, and detained; and 2) that again there would be a delay in the judicial determination of probable cause.²⁴⁰ Because the plaintiffs could not make that showing, *Lyons* would require dismissal.

The Court did not dismiss the claim, nor did it require any certainty of recurrence. "Pretrial detention," the Court wrote,

is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. *The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures.*²⁴¹

Apparently, at least at the time of *Gerstein*, the prospect that the plaintiff "could . . . suffer repeated deprivations" was enough to grant standing to sue for injunctive relief.²⁴² And if *Lyons* means what it says, the procedural portion of *Gerstein* must be bad law.

²³⁶ *Id.* at 106.

²³⁷ *Gerstein v. Pugh*, 420 U.S. 103, 106-07 (1975).

²³⁸ *Id.* at 106-07.

²³⁹ *Id.* at 110 n.11.

²⁴⁰ See *City of Los Angeles v. Lyons*, 461 U.S. 95, 106 (1983).

²⁴¹ *Gerstein*, 420 U.S. at 110 n.11 (emphasis added).

²⁴² The fact that *Gerstein* was a class action does not change this conclusion. In a class action, a named plaintiff must have standing both at the time the complaint is filed, and, in most cases, when the class is certified. See *Sosna v. Iowa*, 419 U.S. 393, 402 (1975); *Lynch v. Baxley*, 744 F.2d 1452, 1456 (11th Cir. 1984). In *Gerstein*, the Court acknowledged that the record did not indicate whether the named plaintiffs had standing when the district court certified the class, thus throwing the second requirement of *Sosna* in doubt. *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975). Ordinarily, this would render the case moot. *Id.*

But this case is a suitable exception to that requirement. . . . The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. . . . Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is

But if *Gerstein* is bad law, then the Court cannot explain *Schall v. Martin*.²⁴³ *Schall* was decided the term after *Lyons* and relied on *Gerstein* in reaching the merits of another pretrial detention claim.²⁴⁴ In *Schall*, plaintiff-appellees brought a class action on behalf of all juveniles detained pursuant to a New York statute authorizing pretrial detention in a certain class of cases.²⁴⁵ The district court struck down the statute, the Second Circuit affirmed, and the Supreme Court reversed.²⁴⁶

At the start of the opinion, now-Chief Justice Rehnquist noted in a footnote that "the pretrial detention of the class representatives has long since ended"²⁴⁷ The case was not moot, however, because "[p]retrial detention is by nature temporary The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures."²⁴⁸

Apparently, the risk that an individual "could . . . suffer" future injury remains the standard, at least in pretrial detention litigation.

a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.

Id. (emphasis added).

Accordingly, under the class of cases "capable of repetition, yet evading review," the Court relaxed the usual requirement that a plaintiff have standing at the time of class certification. *Id.* This has obvious implications for the claim discussed in this case, since the quoted portion describes the plaintiffs in our hypothetical public defender office to perfection.

However, the Court did not relax the first requirement in *Sosna*: the plaintiff must have standing at the time the complaint was filed. Therefore, the point in the text remains valid since, under *Lyons*, the plaintiffs in *Gerstein* simply would not have had standing for injunctive relief.

²⁴³ 467 U.S. 253 (1984).

²⁴⁴ *Id.* at 256 n.3. The plaintiffs in *Schall* did not seek an injunction. They did, however, seek declaratory relief, as did *Lyons*. To the extent both injunctive and declaratory relief are prospective, the connection between the risk of future injury and the relief sought remains the same. If a plaintiff must show he will again be subject to the unconstitutional conduct before he can argue for injunctive relief, he should have to make the equivalent showing before he can argue for declaratory relief. The Seventh Circuit recently relied on *Lyons* to dismiss two claims, one for injunctive and one for declaratory relief. *Robinson v. City of Chicago*, 868 F.2d 959, 966, n.5 (7th Cir. 1989); see also *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) (*per curiam*); *Golden v. Zwickler*, 394 U.S. 103, 108-10 (1969); *Smith v. City of Fontana*, 818 F.2d 1411, 1421-23 (9th Cir.), *cert. denied* 484 U.S. 935 (1987).

²⁴⁵ *Schall*, 467 U.S. at 255-56. Pretrial detention was authorized if the court found there was a "serious risk" that the juvenile "may before the return date commit an act which if committed by an adult would constitute a crime." *Id.* at 255 (citing N.Y. Juv. LAW § 320.5(3)(b) (McKinney 1983)).

²⁴⁶ *Id.* at 256.

²⁴⁷ *Id.* at 256 n.3.

²⁴⁸ *Id.* (quoting *Gerstein v. Pugh*, 420 U.S. 103, 110, n.11 (1975)).

Notably, the Court in *Schall* never mentioned *Lyons*.²⁴⁹ Under this more relaxed standard, article III standing in *Luckey* is considerably less problematic.

Thus, while the issue of standing has not yet surfaced in the

²⁴⁹ *Schall v. Martin*, 467 U.S. 253, 256 (1984). See also *Kolender v. Lawson*, 461 U.S. 352 (1983) (decided the same day as *Lyons*). In *Kolender*, the Court struck down a statute which required a suspect to identify himself with "credible and reliable" identification when stopped and questioned by the police. The plaintiff, who had been stopped approximately 15 times under the statute, sought declaratory and injunctive relief. *Id.* at 354, 356.

In a footnote, the Court dispensed with the standing issue: "We note that Lawson has been stopped on approximately 15 occasions . . . and that these 15 stops occurred in a period of less than two years. Thus, there is a 'credible threat' that Lawson might be detained again under [the statute]." *Id.* at 355 n.3 (emphasis added).

Kolender simply cannot be reconciled with *Lyons*. Under *Lyons*, Lawson would have to allege "not only . . . that he would have another encounter with the police but also to make the incredible assertion either, (1) that all police officers in [the geographic area] . . . always [demand 'credible and reliable' identification] . . . or (2) that the City ordered or authorized police officers to act in such manner." *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983) (emphasis in original).

Yet Lawson was not required to make this showing. Rather, because he alleged a "credible threat" that he would suffer future injury, he had standing to challenge the statute. Again, the Court in *Kolender* made no mention of *Lyons*.

Other post-*Lyons* decisions confirm that the Court could not have intended a strict reading of the decision. In *INS v. Delgado*, 446 U.S. 210 (1984), plaintiffs sought to enjoin the INS practice of entering factories to question workers and search for illegal aliens. The complaint alleged the existence of a policy which violated the fourth amendment, and which would be applied to them in their workplace in the future. However, the plaintiffs had no evidence to substantiate the claim that they were at risk for future injury. *Id.* at 217 n.4. Under *Lyons*, this clearly did not provide standing for injunctive relief, yet the Court found standing, and decided the case on the merits. *Id.*

Press-Enterprise Co. v. Superior Court of Cal., 478 U.S. 1 (1986), likewise demonstrates the reluctance to apply *Lyons* with rigor. In *Press-Enterprise*, the Court considered the first amendment claim of a newspaper to the transcripts of a preliminary hearing in a criminal prosecution. The trial court had sealed the transcript, and the newspaper challenged the ruling. While the case was being litigated, the criminal defendant waived his right to a jury trial and the trial court released the transcript. *Id.* at 5. In his opinion for the majority, Chief Justice Burger acknowledged that since the transcript had been released, the petitioner had already won the relief it sought. *Id.* at 6. A rule restricting a trial court from sealing preliminary hearing transcripts, therefore, at least under *Lyons*, would be effective for the petitioner only if it could show that: 1) it would again seek a preliminary hearing transcript; and 2) that a judge would again determine that the defendant's right to a fair trial outweighed the public's right of access.

The Court required no such showing. On the contrary, "[i]t can reasonably be assumed that petitioner will be subjected to a similar closure order and, because criminal proceedings are typically of short duration, such an order will likely evade review." *Id.* (emphasis added). On this basis, the Court proceeded to the merits. *Id.* See also Fisher, *supra* note 216, at 103-04, for a discussion of other first amendment cases where the Court found standing despite the absence of certainty of future injury. As Professor Fisher recognizes, the Court is particularly quick to protect free speech, which makes a lesser standard appropriate. *Id.* But a more relaxed approach to the threat of future injury is not limited to first amendment cases, as *Delgado*, *Kolender*, and *Schall* demonstrate.

court opinions in *Luckey*, the question of standing clearly is raised by a case like *Luckey*. Focusing on *Lyons*, moreover, should not be interpreted as suggesting that standing to secure injunctive relief is the only justiciability problem raised by litigation similar to *Luckey*. Another possible obstacle is federal court abstention based on *Younger v. Harris*.²⁵⁰ These problems are not fatal to a *Luckey*-type claim; a discussion explicating why these justiciability problems are surmountable, however, is beyond the scope of this Article.

IV. CONCLUSION

This Article has attempted to address the simple, but troubling and important inquiry into the proper response to systemic resource deprivation in indigent defense. The answer requires a proper understanding of the right to the effective assistance of counsel. It is clear that the interest protected is the right to a fair trial.

The complicating factor in this simple observation is the failure by the Supreme Court to distinguish clearly between two distinct types of ineffective assistance. All ineffective assistance jurisprudence divides into two sets of cases: system ineffectiveness and attorney ineffectiveness. In the latter, ineffective assistance is the result of the failings of individual counsel.²⁵¹ In system ineffectiveness, by contrast, ineffective assistance is the result of systemic conditions, quite apart from the conduct of individual counsel.²⁵²

Because each condition produces the same constitutional defect—an unfair trial—the Court describes them both as ineffective assistance. This is what causes the confusion, because the two are fundamentally distinct. Attorney ineffectiveness is caused by mistakes on the part of individual counsel. The system which produced the conviction is otherwise presumed to have operated correctly. It is presumed, in other words, to have produced a reliable result. The defendant who raises this claim must overcome this presumption by demonstrating that the errors of counsel undermine the reliability of the result. He or she must prove prejudice. Relief extends no further than the case before the court and leads to no systemic changes in the trial process because by definition the trial process was not at fault.

System ineffectiveness, on the other hand, is definitionally separate from the performance of individual counsel. It is caused not by

²⁵⁰ 401 U.S. 37 (1971).

²⁵¹ See *Strickland v. Washington*, 466 U.S. 668 (1984); *Kimmelman v. Morrison*, 477 U.S. 365 (1981); *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

²⁵² See *Herring v. New York*, 422 U.S. 853 (1975); *United States v. Wade*, 388 U.S. 218 (1967); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

the conduct of counsel, but by systemic conditions that pervade and undermine the trial process. A failure to appoint counsel at a critical stage of the proceeding, for instance, threatens to reduce the trial itself to a mere formality, irrespective of the competence of counsel. Because the system is under attack, the presumption of correctness has no application.

Seen from this vantage, it is apparent that resource deprivation, like any other systemic defect, is a state created condition operating wholly independently of the competence of individual counsel. Like any other systemic defect, it prevents defense counsel from subjecting the state's case to the crucible of adversarial testing. The attorney's appointment is reduced to a mere sham, destroying the integrity of the process. Relief, as in every system ineffectiveness case, must be prospective and systemic. The state simply cannot, consistent with the sixth amendment, subject defendants to these crisis conditions. The law would not tolerate positive prohibitions on the defendant's right to "the guiding hand of counsel." The law cannot allow indirectly what it would never tolerate directly.