

## The Illusory Right to Counsel

Eve Brensike Primus

Follow this and additional works at: [https://digitalcommons.onu.edu/onu\\_law\\_review](https://digitalcommons.onu.edu/onu_law_review)



Part of the [Law Commons](#)

---

### Recommended Citation

Primus, Eve Brensike () "The Illusory Right to Counsel," *Ohio Northern University Law Review*. Vol. 37: Iss. 3, Article 3.

Available at: [https://digitalcommons.onu.edu/onu\\_law\\_review/vol37/iss3/3](https://digitalcommons.onu.edu/onu_law_review/vol37/iss3/3)

This Article is brought to you for free and open access by the ONU Journals and Publications at DigitalCommons@ONU. It has been accepted for inclusion in Ohio Northern University Law Review by an authorized editor of DigitalCommons@ONU. For more information, please contact [digitalcommons@onu.edu](mailto:digitalcommons@onu.edu).

## The Illusory Right to Counsel

EVE BRENSIKE PRIMUS\*

### INTRODUCTION

Imagine a woman wrongly accused of murdering her fiancé. She is arrested and charged with first-degree murder. If convicted, she faces a mandatory sentence of life without the possibility of parole. Her family scrapes together enough money to hire two attorneys to represent her at trial. There is no physical evidence connecting her to the murder, but the prosecution builds its case on circumstantial inferences. Her trial attorneys admit that they were so cocky and confident that she would be acquitted that they did not bother to investigate her case or file a single pre-trial motion. Rather, they waived the right to a jury trial and had a bench trial in front of a judge who, in the past, had been disciplined twice for discriminating against people of the defendant's race. She is convicted and sentenced to life without the possibility of parole.

She appeals and gets new counsel, but her appellate attorney fails to raise the most meritorious legal claim—namely, that her trial attorneys were ineffective for failing to investigate her case. She loses on appeal. She finds a post-conviction attorney who raises the incompetence of her trial attorneys in a post-conviction motion filed in the state courts, but the state courts say that she should have raised that issue on appeal and it is now waived.

Her post-conviction attorney then files a federal habeas corpus petition alleging that she received constitutionally ineffective trial counsel. The federal district judge—a Reagan appointee—has a hearing and finds that she had woefully ineffective assistance of trial counsel and grants her petition, noting her probable innocence, only to have the United States Court of Appeals reverse and reinstate her conviction. Even though she had terrible trial counsel, she cannot get habeas relief, because she failed to raise that claim at the appropriate time—namely, on appeal. If her appellate attorney was constitutionally ineffective, it might excuse her failure to raise the trial attorney ineffectiveness claim properly, but her state post-conviction attorney failed to raise a claim about the incompetence of her

---

\* Professor of Law, University of Michigan Law School. I would like to thank the organizers of the Carhart Symposium at Ohio Northern University Petit College of Law as well as the participants for their valuable contributions to these remarks.

appellate counsel so that claim is now also waived. Absent clemency, she must spend the rest of her life in prison even though everyone acknowledges that she had a sham of a trial.

This is a real story and not just a law school hypothetical,<sup>1</sup> and it is representative of what happens in a shocking number of criminal cases across the country. The United States Supreme Court has described the right to effective counsel as “necessary to insure [the] fundamental human rights of life and liberty[.]”<sup>2</sup> In practice, however, the right to counsel in our criminal justice system is, in many respects, illusory. Not everyone is entitled to the assistance of trial counsel and even those who are often have trial attorneys who are unable or unwilling to provide effective representation. And the picture only gets worse at the appellate and post-conviction review stages as litigants run into increasingly complex procedural barriers that prevent them from having their ineffectiveness claims heard.

No symposium designed to address crises in the legal profession would be complete without a discussion of our systematic failure to provide competent legal representation to criminal defendants. In these remarks, I will analyze each stage of the criminal process from the trial to direct appeal, through the state post-conviction process, and into federal habeas corpus proceedings and explain how, at each stage, criminal defendants routinely face the threat of incarceration (or continued incarceration) without the aid of competent counsel. In addition to failing to provide effective representation, I will demonstrate how the criminal justice system essentially prevents defendants from ever being able to challenge their counsels’ ineffective performance, thus rendering the right to effective counsel a right without a remedy. Finally, I will offer some possible suggestions for ways to reform the criminal justice system so as to restore meaning to the fundamental right to counsel.

#### I. THE RIGHT TO COUNSEL AT TRIAL

In 1963, when the Supreme Court held that Clarence Gideon was entitled to the assistance of appointed counsel at his state criminal trial, it used broad, sweeping language to describe the importance of the

---

1. See *Hargrave-Thomas v. Yukins*, 374 F.3d 383 (6th Cir. 2004). The Governor of Michigan ultimately commuted Ms. Hargrave-Thomas’s sentence and released her from prison. See *Granholtm Frees Woman Who Fatally Stabbed Ex-Fiance*, THE ASSOCIATED PRESS (August 6, 2008, 3:56 AM), available at [http://blog.mlive.com/grpress/2008/08/granholtm\\_frees\\_woman\\_who\\_fatal.html](http://blog.mlive.com/grpress/2008/08/granholtm_frees_woman_who_fatal.html).

2. *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)).

constitutional right to trial counsel.<sup>3</sup> “The Sixth Amendment,” it said “stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.’”<sup>4</sup> Given that the Supreme Court had already stated that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has[,]”<sup>5</sup> many thought that *Gideon* was the start of an expansive and meaningful right to the assistance of appointed counsel in criminal proceedings. Over time, however, it became clear that not everyone was entitled to appointed legal counsel at trial and even those who were entitled to lawyers often did not have counsel appointed until very late in the process and were surprised to learn that their attorneys were unable or unwilling to provide quality representation.

*A. Who has a Sixth Amendment right to trial counsel?*

The Sixth Amendment to the United States Constitution says, “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.”<sup>6</sup> That is certainly true for those who have the money to pay for attorneys. However, an overwhelming majority of criminal defendants are indigent,<sup>7</sup> and the Supreme Court has narrowly construed what a criminal prosecution is for purposes of establishing the contours of the right to appointed trial counsel. Only felons and misdemeanants who are sentenced to a term of imprisonment are entitled to have the assistance of appointed counsel.<sup>8</sup> If a criminal defendant is charged with a misdemeanor that carries a possible jail sentence, but he is ultimately given a sentence that does not include jail time, he is not entitled to the assistance of counsel to fight the charges against him.<sup>9</sup> It does not matter if the sentence includes an exorbitant fine, a long period of probation,<sup>10</sup> or will result in severe collateral consequences.

---

3. *See id.* (quoting *Grosjean v. American Press Co.*, 297 U.S. 233, 243-244 (1936)).

4. *Id.* at 343 (quoting *Johnson*, 304 U.S. at 462).

5. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

6. U.S. CONST. amend. VI.

7. *See* Steven K. Smith & Carol J. DeFrances, *Indigent Defense*, BUREAU OF JUST. STAT., 4 (Feb. 1996), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/id.pdf> (noting that more than eighty percent of criminal defendants nationwide are represented by assigned counsel).

8. *See Gideon*, 372 U.S. at 339 (incorporating the Sixth Amendment against the states and holding that felony defendants are entitled to lawyers); *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (holding that the Sixth Amendment only guarantees a right to counsel to misdemeanants who are actually imprisoned after conviction).

9. *See Scott*, 440 U.S. at 369.

10. If the probation includes a suspended prison sentence, however, that would constitute actual incarceration, which would entitle the defendant to an attorney. *See Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972)).

In a world of three strikes laws<sup>11</sup> and mandatory deportation for many misdemeanor offenses,<sup>12</sup> the consequences of not having counsel for these seemingly minor offenses are often serious.

Moreover, the Sixth Amendment right to appointed counsel only applies to true criminal prosecutions and does not extend to parole or probation revocation hearings even if they could result in substantial jail time.<sup>13</sup> This might be particularly surprising to a defendant who faces years in prison if she is found to be in violation of her probation conditions. Nor does it extend to grand jury proceedings that are used to start criminal proceedings<sup>14</sup> or to immigration deportation hearings that happen as a result of criminal proceedings.<sup>15</sup>

Although misdemeanor prosecutions and probation revocation hearings consume much of the state courts' limited resources,<sup>16</sup> many of the defendants in these proceedings are not entitled to the assistance of counsel under the Sixth Amendment. The only way indigents can obtain appointed counsel in these proceedings is by arguing that the Due Process Clause of the Fourteenth Amendment guarantees them an attorney.<sup>17</sup> Such claims are rarely raised and even more rarely granted, in part because the standard for determining when an individual is entitled to an attorney under the Due Process Clause is very state-friendly.<sup>18</sup>

Even when defendants are constitutionally entitled to counsel, their right to counsel is often violated. A report commissioned by a joint

11. See, e.g., *Lockyer v. Andrade*, 538 U.S. 63, 67 (2003) (discussing California's three strikes law).

12. Cf. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010) (explaining the proliferation of immigration consequences for criminal convictions).

13. See *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973).

14. See, e.g., *United States v. Bollin*, 264 F.3d 391, 414 (4th Cir. 2001) (noting that there is no Sixth Amendment right to counsel in grand jury proceedings); *Fuller v. Johnson*, 158 F.3d 903, 907-08 (5th Cir. 1998) (same).

15. See, e.g., *United States v. Campos-Asencio*, 822 F.2d 506, 509 (5th Cir. 1987) (citing *Mantell v. United States Dep't of Justice*, 798 F.2d 124, 127 (5th Cir. 1986)) ("Because deportation is a civil proceeding, potential deportees have no sixth amendment right to counsel."); cf. *also Lassiter v. Dept. of Social Services*, 452 U.S. 18, 31 (1981) (holding that there is no Sixth Amendment right to counsel for termination of parental rights hearings).

16. See, e.g., Robert C. Boruchowitz, *Diverting and Reclassifying Misdemeanors Could Save \$1 Billion per Year: Reducing the Need For and Cost of Appointed Counsel*, AM. CONST. SOC'Y FOR LAW AND POL'Y ISSUE BRIEF 1 (Dec. 2010), available at [http://www.acslaw.org/sites/default/files/Boruchowitz\\_-\\_Misdemeanors.pdf](http://www.acslaw.org/sites/default/files/Boruchowitz_-_Misdemeanors.pdf) (noting that minor, non-violent offenses can make up between 40% and 50% of the caseload in some courts).

17. See *Gagnon*, 411 U.S. at 790 (emphasizing that, even when the Sixth Amendment right to counsel does not apply, a defendant can still argue for a due process right to an attorney).

18. The defendant must prove that there are special circumstances in his case that require the assistance of counsel. See *id.* at 788-90 (endorsing the *Betts v. Brady*, 316 U.S. 455 (1942), special circumstances test and arguing that the question whether someone is entitled to counsel under the due process clause involves a case-by-case analysis).

resolution of the Michigan state legislature documented counties in that state where defendants were charged and pled guilty to crimes that carry jail time without ever speaking to a lawyer.<sup>19</sup> When I was in practice as a public defender in Maryland, I routinely witnessed judges who found that alleged misdemeanants had impliedly waived their rights to counsel, thus forcing individuals to proceed *pro se*.<sup>20</sup> Even though the Sixth Amendment says that defendants in “all” criminal prosecutions shall have counsel, in reality, only a fraction of indigent criminal defendants receive appointed counsel.

*B. When is the right to trial counsel triggered and when is a defendant entitled to have counsel present?*

For those who are entitled to appointed counsel, it is unclear in many jurisdictions when an attorney will be assigned to a case and whether that attorney will meet with her client before trial. According to the Supreme Court, a defendant’s right to counsel attaches at the first formal hearing before a judicial officer, where the defendant learns the charges against him and his liberty is subject to restriction.<sup>21</sup> Often, lawyers are not appointed immediately after the first formal hearing. It can take weeks or even months to appoint counsel in some jurisdictions.<sup>22</sup> One fifty-year-old woman who was arrested for shoplifting spent eleven months in jail waiting for a lawyer to be appointed while another woman charged with stealing from a slot machine spent eight months in jail before getting a lawyer.<sup>23</sup> In many jurisdictions, attorneys routinely meet their clients for the first time on the trial court date. Courts often do not find such delays problematic as long as the defense attorney is present for all “critical stages” of the prosecution.

---

19. See *A Race to the Bottom: Speed & Savings Over Due Process: A Constitutional Crisis*, NAT’L LEGAL AID & DEFENDER ASSOC. ii (June 2008), available at [http://www.ojp.usdoj.gov/BJA/topics/Plenary1/J\\_Wallace-RacetoTheBottom.pdf](http://www.ojp.usdoj.gov/BJA/topics/Plenary1/J_Wallace-RacetoTheBottom.pdf); see also Eric H. Holder, U.S. Att’y Gen., Remarks at the Brennan Legacy Awards Dinner, Brennan Center for Justice (Nov. 17, 2009) available at [http://www.brennancenter.org/content/resource/attorney\\_general\\_eric\\_holder\\_on\\_indigent\\_defense\\_reform](http://www.brennancenter.org/content/resource/attorney_general_eric_holder_on_indigent_defense_reform) [hereinafter Holder Remarks] (summarizing the report).

20. See also Holder Remarks, *supra* note 19 (“In 2005 . . . in one Florida Circuit, *three out of four youth* waived the right to counsel and faced charges without the guidance of counsel. What is more, such waivers sometimes occur without the opportunity to speak to counsel who might help young people understand what they’re giving up.” (emphasis in original)).

21. See *Rothgery v. Gillespie County*, 554 U.S. 191 (2008).

22. See Holder Remarks, *supra* note 19 (describing the problem of delay); see also *Rothgery*, 554 U.S. at 196 (noting that the defendant in that case was not appointed a lawyer until six months after his first formal hearing).

23. See Holder Remarks, *supra* note 19 (describing these cases).

Defendants are constitutionally entitled to have their attorneys present only at “critical stages” of a prosecution.<sup>24</sup> What constitutes a critical stage is debatable.<sup>25</sup> The Court has held that trials, pleas, police interrogations, and corporeal line-ups are critical stages.<sup>26</sup> Most recently, the Supreme Court has stated that critical stages include “proceedings between an individual and agents of the State . . . that amount to ‘trial-like confrontations,’ at which counsel would help the accused ‘in coping with legal problems . . . or in meeting his adversary[.]’”<sup>27</sup> However, in many states, bail review hearings are not considered critical stages even though defendants often make incriminating statements in the course of answering questions about their eligibility to be released on bond.<sup>28</sup> In the end, defendants who are constitutionally entitled to appointed representation at trial often do not receive much in the way of pre-trial assistance from their attorneys. This failure to ensure that counsel is appointed early and is actively preparing a case for trial contributes to the problem of trial attorney ineffectiveness later.

*C. What does it mean to have a right to effective trial counsel?*

Perhaps the biggest failure of our state-level indigent defense delivery systems is the failure to provide those defendants who do get attorneys with effective legal representation. The Supreme Court has held that the Sixth Amendment right to counsel includes a right to *effective* assistance of counsel.<sup>29</sup> The evidence of ineffective trial attorney performance, however, is overwhelming and seemingly universal.

First, there are far too many examples of what I have called “personal” ineffectiveness.<sup>30</sup> Attorneys who sleep through trial,<sup>31</sup> abuse alcohol or drugs during their representation of a client,<sup>32</sup> or are just too lazy or cocky

24. See *Rothgery*, 554 U.S. at 212.

25. See, e.g., *id.* at 213-14 (Alito, J., concurring specially to note that there was no holding regarding whether a Texas magistration hearing was a critical stage; rather there was only a holding that the Sixth Amendment right to counsel attached at that hearing).

26. See *id.* at 217 (Alito, J., concurring) (discussing what the Supreme Court has held to be a critical stage in a criminal prosecution).

27. *Id.* at 212 n.16.

28. See, e.g., *Fenner v. State*, 846 A.2d 1020 (Md. 2004).

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

30. See Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 686 (2007).

31. See, e.g., *Burdine v. Johnson*, 231 F.3d 950, 952 (5th Cir. 2000), *vacated*, 262 F.3d 336 (5th Cir. 2001) (en banc) (involving allegations that defense counsel slept through substantial portions of the trial).

32. See Paul Duggan, *In Texas, Defense Lapses Fail to Halt Executions: Attorneys' Ineptitude Doesn't Halt Executions*, WASH. POST, May 12, 2000, at A1, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A52193-2000May11&notFound=true>.

to investigate their cases or meet with their clients<sup>33</sup> fall in this category. These attorneys are personally at fault for their ineffectiveness.<sup>34</sup> Although the problem of personal ineffectiveness is quite widespread and has been openly acknowledged by judges for decades,<sup>35</sup> the public typically learns about only the most salient examples of personal ineffectiveness. For example, the Supreme Court in recent years has reversed death penalty sentences because defense attorneys have failed to do such basic things as examine court files,<sup>36</sup> or investigate the defendant's life history to present mitigating evidence at sentencing.<sup>37</sup> If attorneys fail to conduct even minimal investigation when the defendant's life is on the line, one can only imagine how serious the problem of personal ineffectiveness is in cases where the ultimate punishment is not at stake.

In contrast to personal ineffectiveness, there are those attorneys who are rendered ineffective by virtue of the heavy caseloads that they are forced to carry. Overworked and underfunded indigent defense delivery systems lead to what I have called "structural" ineffectiveness.<sup>38</sup> The National Advisory Commission on Criminal Justice Standards and Goals as well as the American Bar Association's Standards for Criminal Justice explain that no defense attorney can effectively handle more than 150 felony cases or 400 misdemeanors in one year.<sup>39</sup> Yet, severe underfunding of indigent defense means that public defenders nationwide are repeatedly forced to handle

33. See, e.g., *Hargrave-Thomas v. Yukins*, 236 F. Supp. 2d 750, 769 (E.D. Mich. 2002) (emphasizing that Ms. Hargrave-Thomas's trial attorney "admitted a complete failure to interview any potential witnesses or conduct an investigation before trial [because] he was 'cocky' . . . and [therefore thought] that it was . . . unnecessary to investigate[.]" ).

34. For an excellent collection of instances in which capital defense attorneys provided deficient representation, see WELSH S. WHITE, *LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES* 3–8 (2006).

35. See, e.g., David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973) ("[A] great many—if not most—indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6th Amendment."); Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 234 (1973) ("[F]rom one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation." ).

36. See *Rompilla v. Beard*, 545 U.S. 374, 377, 379–80 (2005).

37. See *Wiggins v. Smith*, 539 U.S. 510, 516 (2003).

38. See Primus, *supra* note 30, at 687–88.

39. See J. Frank E. Lee, et. al., *Special Issues*, Third Conference Session Before the National Conference of Criminal Justice Standards and Goals (Jan. 25, 1973), in *PROCEEDINGS OF THE NATIONAL CONFERENCE ON CRIMINAL JUSTICE* 186 (1976); *ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES* 72 (3d ed. 1992); see also *Ten Principles of a Public Defense Delivery System*, ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS 5 n.19 (Feb. 2002), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf> (noting the figures of the National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, which provide for a maximum caseload per year of 150 felonies, 400 misdemeanors, 200 juvenile cases, 200 mental health cases, or 25 appeals).



caseloads that far exceed these national standards. When I was a public defender in Maryland, for example, public defenders in Baltimore city averaged over 1,100 misdemeanor cases per year—almost three times the national standard.<sup>40</sup> In Tennessee in 2006, six attorneys handled more than 10,000 misdemeanor cases.<sup>41</sup> That is over 1,600 cases per attorney. In Rhode Island in 2003, “public defender felony caseloads surpass[ed] national standards by 35-40% and misdemeanor caseloads exceed[ed] national standards by 150%.”<sup>42</sup> And in Missouri, the State Public Defender Director acknowledged publicly that lawyers were making mistakes due to their high caseloads.<sup>43</sup> As part of this symposium, the Director of the Ohio Public Defender Office explained that Ohio’s caseloads continue to increase while, at the same time, its funding is decreasing.<sup>44</sup>

The dramatically high caseloads that public defenders are forced to carry are just one example of the structural ineffectiveness problems that plague many of our state criminal justice systems. Seven states in this nation continue to provide nothing for trial level indigent defense funding, which places the entire burden of funding indigent defense on the individual counties.<sup>45</sup> This means that the quality of representation in these states varies dramatically from county to county. For example, some city public defenders’ offices in Louisiana used to be funded solely through parking ticket revenue.<sup>46</sup> When the city of East Baton Rouge ran out of pre-printed traffic tickets in the first half of one year, the indigent defender program’s sole source of income was suspended until more tickets were printed.<sup>47</sup>

Additionally, there are many jurisdictions in which structural ineffectiveness problems exist due to insufficient defender independence. Consider Nebraska, where a statewide survey of judges in 2006 explained that there were judges throughout the state who were refusing to appoint

40. See Bruce A. Myers, *Performance Audit Report*, OFFICE OF LEGISLATIVE AUDITS, DEP’T OF LEGISLATIVE SERVS., MD. GEN. ASSEMBLY, 15 (2001), available at <http://www.ola.state.md.us/Reports/Performance/PubDefen.pdf>.

41. See Holder Remarks, *supra* note 19 (describing this jurisdiction).

42. See *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice, A Report on the American Bar Association’s Hearings on the Right to Counsel in Criminal Cases*, ABA COMM. ON LEGAL AID AND INDIGENT DEFENDERS, 18 (Dec. 2004), available at <http://www.bu.edu/lawlibrary/PDFs/research/portals/probonofiles/righttocounselreport.pdf> [hereinafter *Gideon’s Broken Promise*].

43. See Holder Remarks, *supra* note 19.

44. See Timothy Young, Director of the Office of the Ohio Public Defender, Remarks at the Carhart Symposium, Ohio Northern University Petit College of Law (March 20, 2011) (explaining that the Ohio Public Defender Office has 269,854 cases in 1999 and 424,900 cases projected for 2011, but had less funding in 2011 for those cases).

45. See Holder Remarks, *supra* note 19.

46. See *State v. Peart*, 621 So. 2d 780, 784 (La. 1993).

47. See *id.* at n.10.

lawyers who requested too many trials.<sup>48</sup> Similarly, in one Nevada county, judges were known for punishing attorneys who requested funds to hire experts.<sup>49</sup> And in Michigan, attorneys who apply for higher than normal fees due to the time spent on a case may be removed from the court-appointed list if they continue to apply because they are costing the county too much money.<sup>50</sup>

The problems of personal and structural ineffectiveness have reached such epic proportions that both the federal executive and legislative branches have begun looking for possible reforms.<sup>51</sup> Such reform is necessary because the judicial system, as currently structured, does little to police the problem of ineffective trial attorney performance. As the American Bar Association recently stated after conducting hearings on our indigent defense delivery systems, “thousands of persons are processed through America’s courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation . . . The fundamental right to a lawyer that Americans assume appl[ies] to everyone accused of criminal conduct effectively does not exist in practice for countless people across the United States.”<sup>52</sup>

## II. THE RIGHT TO COUNSEL ON DIRECT APPEAL

The picture does not get much better at the appellate level. Although the Supreme Court has recognized that defendants have a constitutional

---

48. See Holder Remarks, *supra* note 19.

49. See *Gideon’s Broken Promise*, *supra* note 42, at 21.

50. See *Gideon’s Broken Promise*, *supra* note 42, at 21.

51. See, e.g., Carrie Johnson, *Prominent Harvard Law Professor Joins Justice Department*, WASH. POST, Feb. 26, 2010, at A9, available at <http://www.washingtonpost.com/wpdyn/content/article/2010/02/25/AR2010022505697.html> (describing how President Obama has appointed Harvard Law Professor Laurence Tribe to spearhead a new internal working group at the U.S. Department of Justice designed to study and make recommendations about how to improve indigent defense delivery systems). Congress has held numerous hearings on the indigent defense crisis. See *Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States*, Hearing Before the S. Comm. On Crime, Terrorism, and Homeland Sec., 111th Cong. (2009), available at [http://judiciary.house.gov/hearings/printers/111th/111-20\\_48233.PDF](http://judiciary.house.gov/hearings/printers/111th/111-20_48233.PDF); *Indigent Representation: A Growing National Crisis*, Hearing Before the S. Comm. On Crime, Terrorism, and Homeland Sec., 111th Cong. (2009), available at [http://judiciary.house.gov/hearings/printers/111th/111-29\\_50068.PDF](http://judiciary.house.gov/hearings/printers/111th/111-29_50068.PDF); see also Press Release, The Constitution Project, *National Right to Counsel Committee Members Testify on Indigent Defense Crisis and Issue Urgent Call for Reforms* (June 4, 2009), available at <http://www.constitutionproject.org/newsdetail.asp?id=380> (discussing testimony before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security). Senator Patrick Leahy introduced legislation attempting to address some aspects of the problem, but the bill did not make it out of committee. See S.B. 3842, 111th Cong. (2010), available at <http://www.govtrack.us/congress/billtext.xpd?bill=s111-3842>.

52. *Gideon’s Broken Promise*, *supra* note 42, at iv.

right to an effective appellate attorney on their first appeals as of right,<sup>53</sup> that right to counsel is cut off after the initial appeal.<sup>54</sup> Defendants are not constitutionally entitled to counsel when filing certiorari petitions to the highest state court or to the United States Supreme Court. Thus, the first appeal is often a defendant's last opportunity to have the assistance of counsel to argue that his rights were violated.

In practice, however, a majority of jurisdictions limit the issues that appellate attorneys are able to raise on direct review. In most jurisdictions, for example, appellate counsel may only raise errors that appear on the face of the trial court record.<sup>55</sup> This typically means errors by the judges in ruling on motions and objections. Any errors that would require the appellate court to consider evidence outside of the trial record are not cognizable. Notably, claims of ineffective assistance of trial counsel, prosecutorial misconduct for failing to disclose exculpatory evidence, and juror or judge bias often fall into this category. Theoretically, an appellate attorney could raise a constitutional challenge to the effectiveness of her trial attorney's performance (assuming of course that appellate counsel is different from trial counsel, which is not always the case). However, given that ineffective assistance of trial counsel claims are often based on what trial attorneys *failed* to do, extra-record evidence is often necessary to substantiate the claims. As a result, the prohibition on looking beyond the trial court record effectively prevents most appellate counsel from challenging trial attorneys' performance.

Without the ability to challenge trial attorney performance, many appellate defenders are left with few issues to raise on appeal. After all, if trial counsel was inadequate and failed to investigate the case, meet with the client, file a motion, or raise objections, there are no errors "on the record." Consequently, appellate attorneys file a staggering number of motions asking to withdraw from cases, because they are unable to find a single meritorious issue worth briefing.<sup>56</sup> These *Anders* motions—named after the Supreme Court case in which they were first recognized<sup>57</sup>—comprise up to

---

53. See *Douglas v. California*, 372 U.S. 353, 355 (1963) (recognizing a constitutional right to counsel on the first appeal as of right under the Fourteenth Amendment); see also *Evitts v. Lucey*, 469 U.S. 387, 402 (1985) (guaranteeing the right to effective assistance of appellate counsel on that first appeal as of right).

54. See *Ross v. Moffitt*, 417 U.S. 600, 612 (1974) (holding that there is no constitutional right to counsel for direct appeals beyond the first appeal as of right).

55. See, e.g., 5 WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 27.5(c) (2d ed. 1999) ("Perhaps no standard governing the scope of appellate review is more frequently applied than the rule that 'an error not raised and preserved at trial will not be considered on appeal.'") (quoting *State v. Green*, 621 P.2d 67, 68 (Or. Ct. App. 1980)).

56. See *Primus*, *supra* note 30, at 701-06 (describing this problem).

57. *Anders v. California*, 386 U.S. 738 (1967).

a third of the criminal appellate cases in states that allow them.<sup>58</sup> Given the overwhelming and pervasive evidence of structural trial attorney ineffectiveness, it cannot be that a third of the cases are error free. Likely, many of these defendants had constitutionally ineffective trial attorneys, but their appellate attorneys cannot raise that claim.

Not all states allow appellate attorneys to file *Anders* motions.<sup>59</sup> In states where such motions are not permitted, appellate attorneys often have no choice but to research and brief frivolous issues. This is an enormous waste of state resources. States spend millions of dollars each year providing indigent defendants with appellate counsel for their first appeals;<sup>60</sup> yet, appellate counsel is prohibited from raising the most serious constitutional violation that we know infects a large number of indigent criminal cases—namely, ineffective assistance of trial counsel. Thus, direct appellate review as it is currently structured does not meaningfully protect the constitutional right to counsel.<sup>61</sup>

### III. THE RIGHT TO COUNSEL IN STATE POST-CONVICTION PROCEEDINGS

A majority of jurisdictions encourage criminal defendants to wait until state post-conviction review to raise claims of trial or appellate attorney ineffectiveness.<sup>62</sup> In theory, states could use their post-conviction processes to ensure that defendants have meaningful and effective trial representation. In reality, however, there is no meaningful review of trial counsels' performance at the state post-conviction stage.

As an initial matter, in some jurisdictions only those defendants who are still in state custody after concluding direct appellate review are permitted

---

58. See Martha C. Warner, *Anders in the Fifty States: Some Appellants' Equal Protection is More Equal than Others'*, 23 FLA. ST. U.L. REV. 625, 642-43, 668-87 (1996) (noting that appellate briefs seeking to withdraw from frivolous appeals constitute more than thirty percent of the appellate caseload in some jurisdictions); see also Roger J. Miner, Lecture, *Professional Responsibility in Appellate Practice: A View From the Bench*, 19 PACE L. REV. 323, 325 (1999) ("Of the 850 criminal appeals filed in the Second Circuit Court of Appeals in 1997, eighty-two were accompanied by *Anders* briefs." (citation omitted)); Christopher Stogel, Note, *Smith v. Robbins: Appointed Criminal Appellate Counsel Should Watch for the Wende in their Hair*, 31 SW. U. L. REV. 281 (2002) ("Sixteen hundred criminal appeals are filed by indigent defendants every year in California. Twenty to twenty-five percent of those appeals are considered meritless by the attorney appointed to represent the defendant." (citation omitted)).

59. See Warner, *supra* note 58, at 642 (noting that ten states have rejected the *Anders* procedure).

60. See, e.g., OFFICE OF THE STATE APPELLATE DEFENDER, ANNUAL REPORT: FISCAL YEAR 2004 (2004), available at <http://www.state.il.us/DEFENDER/ar04.html> (stating that the operating budget approved for fiscal year 2004 was \$22,481,263).

61. For a more detailed discussion of this problem, see Primus, *supra* note 30, at 701-06.

62. See *Commonwealth v. Grant*, 813 A.2d 726, 734-36 (Pa. 2002) (summarizing jurisdictions).

to file state post-conviction petitions.<sup>63</sup> Given that the direct appellate process can take years to complete,<sup>64</sup> the vast majority of criminal defendants will have completed their sentences before they even get to state post-conviction. In many states, given inmates' ability to earn good time credits to shorten the length of their sentences,<sup>65</sup> only defendants with long prison sentences are still in custody by the time they get to the post-conviction review stage.<sup>66</sup> Once they are released from custody, they are no longer permitted to file post-conviction petitions. Even if a defendant is in a jurisdiction that does not have a strict custody requirement for filing post-conviction petitions, once the defendant has completed her sentence, she has little incentive to continue to challenge the underlying conviction.<sup>67</sup>

Those defendants who are able and willing to file state post-conviction motions will often have to represent themselves, because they have no constitutional right to counsel in state post-conviction proceedings (even in capital cases).<sup>68</sup> Collecting the extra-record evidence to show that your trial attorney was constitutionally ineffective is particularly difficult if you are in custody and do not have the assistance of a lawyer. How are you supposed to supplement the trial court record from inside a prison cell?<sup>69</sup>

---

63. See, e.g., *id.* at 741 (Saylor, J., concurring) (describing 42 PA. CONS. STAT. ANN. § 9543(a)(1) (1998), which provides that in order to be eligible for post-conviction relief, “a petitioner must at the time relief is granted: be currently serving a sentence of imprisonment or [be on] probation or on parole; [be] awaiting execution; or [be] serving a sentence which must expire before the person may commence serving the disputed sentence.”).

64. See, e.g., Marc M. Arkin, *Speedy Criminal Appeal: A Right Without a Remedy*, 74 MINN. L. REV. 437, 437-38 (1990) (explaining that, because of the docket backlog in appellate courts, “[d]elays of six years, while ‘shocking,’ are not ‘unusual’” (quoting *Mathis v. Hood*, 851 F.2d 612, 614 (2d Cir. 1988))); see also *Commonwealth v. O’Berg*, 880 A.2d 597, 602 (Pa. 2005) (explaining that direct appeals in Pennsylvania may take “more than four years to be completed”); *Preliminary Proceedings*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 203, 360 n.1210 (2006) (collecting cases involving delays ranging from two to thirteen years).

65. See, e.g., TEX. GOV’T CODE ANN. § 498.002 (2010) (allowing inmates to earn up to thirty days of good conduct time for each thirty days actually served); see also Sharon M. Bunzel, Note, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933, 937 n.19 (1995) (explaining that “good time” laws under which inmates can work off up to a third of their original sentence are routine in most states).

66. See Primus, *supra* note 30, at 693.

67. See, e.g., Paul H. Robinson, *Proposal and Analysis of a Unitary System for Review of Criminal Judgments*, 54 B.U. L. REV. 485, 495 n.32 (1974) (noting that released defendants are unlikely to file for post-conviction relief “given the absence of the motivation generated by incarceration.”).

68. See *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (holding that there is no constitutional right to counsel in post-conviction proceedings); see also *Murray v. Giarratano*, 492 U.S. 1 (1989) (extending *Finley* to capital cases).

69. See, e.g., Donald A. Dripps, *Ineffective Litigation of Ineffective Assistance Claims: Some Uncomfortable Reflections on Massaro v. United States*, 42 BRANDEIS L.J. 793, 799 (2004) (noting that an incarcerated prisoner cannot interview trial counsel or find witnesses and therefore does not have a “‘full and fair’ opportunity to litigate the issue [of ineffective assistance of counsel] in state court”); cf. *Halbert v. Michigan*, 545 U.S. 605, 621 (2005) (emphasizing the fact that “[s]even out of ten inmates fall in the lowest two out of five levels of literacy” and that many inmates “have learning disabilities and

Even if a criminal defendant manages to raise the ineffective assistance of trial counsel claim properly at the state post-conviction stage, the *Strickland v. Washington*<sup>70</sup> standard that is currently used to assess a trial attorney's effectiveness makes it incredibly difficult for the defendant to prevail. Under the current standard, a trial attorney is constitutionally ineffective if (1) the attorney's performance is deficient, meaning that the attorney performed unreasonably given prevailing norms of practice, and (2) this deficient performance prejudiced the defense, meaning that counsel's errors were serious enough to undermine confidence in the outcome of the trial.<sup>71</sup> The *Strickland* standard is intentionally open-ended in order to give a great deal of latitude to defense counsel.<sup>72</sup> Although the Supreme Court has said that American Bar Association standards can be "guides," a defense attorney's failure to comply with these standards is not dispositive.<sup>73</sup> Moreover, courts routinely presume that defense attorneys' decisions to raise or not raise issues are tactical decisions that are entitled to deference, which makes it very difficult for a defendant to show deficient performance.<sup>74</sup> And the prejudice component requires the defendant to show that the trial attorney's deficient performance affected the outcome. In order to do that, however, the defendant has to show what effective counsel could have done but did not. That is very hard for a prison inmate to do without the assistance of counsel or someone on the outside. For all of these reasons, the *Strickland* standard has been repeatedly criticized for providing too little protection to criminal defendants.<sup>75</sup>

In short, in the majority of jurisdictions where trial attorney ineffectiveness challenges must be raised at the state post-conviction review stage, the right to effective trial counsel is essentially a right without a remedy. Many criminal defendants are never permitted to raise the claim,

---

mental impairments" that make it nearly impossible for them to navigate the legal process without assistance (citation omitted)).

70. *Strickland*, 466 U.S. 668.

71. *See id.* at 687-88.

72. *See id.* at 689 (describing "the wide latitude counsel must have in making tactical decisions.").

73. *See id.* at 688-89.

74. *See, e.g.,* United States v. Taglia, 922 F.2d 413, 417-18 (7th Cir. 1991) ("[E]very indulgence will be given to the possibility that a seeming lapse or error by defense counsel was in fact a tactical move, flawed only in hindsight.").

75. *See, e.g.,* William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 94 (1995); Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59 (1986); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 20 (1997); Russell L. Weaver, *The Perils of Being Poor: Indigent Defense and Effective Assistance*, 42 BRANDEIS L.J. 435, 440-46 (2003-04); *see also* McFarland v. Scott, 512 U.S. 1256, 1259-61 (1994) (Blackmun, J., dissenting from denial of certiorari).

and those who are able to raise the claim are not given the means to raise it effectively. Moreover, even if a criminal defendant is able to raise a trial attorney ineffectiveness claim, the current standard for reviewing trial attorneys' performance is highly deferential and does very little to ensure that criminal defendants have meaningful trial representation.

#### IV. THE RIGHT TO COUNSEL IN FEDERAL HABEAS CORPUS PROCEEDINGS

Prisoners who hope that the federal courts will be more receptive to their constitutional claims of attorney ineffectiveness are often surprised to learn of the myriad substantive and procedural obstacles to obtaining federal habeas corpus relief. Just as there is no constitutional right to counsel for state post-conviction review, there is no constitutional right to federal habeas counsel.<sup>76</sup> As a result, approximately ninety-two percent of non-capital habeas petitioners do not have attorneys to represent them.<sup>77</sup> Once again, these defendants have to figure out how to supplement their trial records from within their prison cells in order to provide the federal courts with extra-record evidence of their trial attorneys' ineffectiveness.<sup>78</sup>

These *pro se* petitioners also have to maneuver through a maze of substantive and procedural obstacles before they can obtain relief in federal court. Substantively, only some claims of attorney ineffectiveness are cognizable in federal habeas. According to 28 U.S.C. section 2254(i), "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a [habeas corpus] proceeding[.]"<sup>79</sup> Additionally, the Supreme Court has held that, because there is no constitutional right to counsel beyond the first appeal as of right, there is no remedy if you have a direct appellate lawyer who turns out to be ineffective beyond the first appeal.<sup>80</sup> Thus, the only

---

76. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 756-57 (1991) (noting that prisoners have no constitutional right to counsel in the post-conviction context).

77. See Nancy J. King et al., *Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996*, 23 (Aug. 2007) [hereinafter King Report], available at <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>.

78. All of these individuals are still in custody when they file their habeas corpus petitions because custody is a jurisdictional prerequisite to filing a federal habeas petition. See 28 U.S.C. § 2254(a) (Lexis Nexis 2006).

79. 28 U.S.C. § 2254(i).

80. See *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982) (noting that, because there is no constitutional right to counsel beyond the first appeal as of right, there is no remedy if you have a lawyer who turns out to be ineffective beyond the first appeal); *Coleman*, 501 U.S. at 757 (1991) (noting that, because there is no constitutional right to counsel in post-conviction appellate proceedings, there is no remedy for ineffective performance by counsel at that stage).

attorneys whose ineffectiveness a habeas petitioner can challenge are the trial attorney and appellate attorney for the first appeal as of right.

Procedurally, before the federal court will address the merits in any habeas petition, the petitioner has to demonstrate that the petition is timely filed in accordance with a statutorily-prescribed one year statute of limitations.<sup>81</sup> According to a recent empirical study, approximately twenty-two percent of non-capital federal habeas corpus petitions are dismissed for failure to comply with this statute of limitations.<sup>82</sup>

If a habeas petitioner manages to file a timely petition, there are still various procedural barriers to having each claim heard. Before the federal court will entertain challenges to trial or appellate counsels' performance, the petitioner has to satisfy the exhaustion and procedural default requirements. Grounded in principles of federalism and finality as well as conservation of resources, the exhaustion principle requires criminal defendants to present all constitutional claims to the state courts before filing them in federal court.<sup>83</sup> States should be given an early opportunity to correct any mistakes before federal resources are expended and state court convictions are disrupted by federal court review.

For similar reasons, the procedural default doctrine requires federal habeas courts to respect adequate and independent state procedural grounds for denying federal constitutional claims.<sup>84</sup> If a defendant fails to comply with an adequate and independent state procedural rule and, as a result, the state court refuses to hear his underlying federal constitutional claims, the federal courts typically will respect that state court ruling and refuse to hear the underlying claim as well.<sup>85</sup>

The exhaustion and procedural default doctrines are serious obstacles to obtaining federal habeas relief for any petitioner, but they create a particular hardship for defendants who want to allege that their trial and/or appellate attorneys' performance was constitutionally deficient. Because a majority of states have procedural rules that require defendants to raise claims about the ineffectiveness of their trial and/or appellate attorneys at the state post-

81. See 28 U.S.C. § 2244(d)(1) (LexisNexis 2006).

82. See King Report, *supra* note 77, at 7.

83. See 28 U.S.C. § 2254(b) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State[.]"); see also *Rose v. Lundy*, 455 U.S. 509, 510, 522 (1982) (requiring state prisoners to exhaust all claims for relief in the state courts before presenting those claims to the federal courts).

84. See, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (holding that a state prisoner whose federal claim is not heard in state court due to his failure to comply with an independent and adequate state procedural rule will typically not have that claim considered in federal court); see also *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (same).

85. See *Wainwright*, 433 U.S. at 87; *Lee*, 534 U.S. at 375.



conviction stage and because those same states typically do not provide defendants with counsel to assist them in raising the claims properly at that stage, many *pro se* defendants screw it up. They either fail to raise one or both ineffectiveness claims (thus running afoul of the exhaustion requirement) or they fail to properly raise the claims in accordance with the state's procedural rules (thus running afoul of the procedural default doctrine).<sup>86</sup> For those who simply failed to raise the claims, by the time they get to federal habeas review, state procedural rules typically preclude them from returning to state court to exhaust the unexhausted claims and they are then deemed to have procedurally defaulted the claims. As a result, many habeas petitioners' claims of trial and appellate counsels' ineffectiveness are procedurally defaulted, and they have to persuade the federal courts that they fall within one of the narrow exceptions to the procedural default doctrine.

There are two exceptions to this procedural barrier to review. First, if the defendant can show cause for failing to comply with the state procedural rule and prejudice to the outcome of her case, the federal court will look past the default and consider the underlying constitutional claim.<sup>87</sup> Alternatively, if the defendant can show that there has been a fundamental miscarriage of justice in his case—meaning that his conviction resulted in the incarceration of someone who is probably innocent—the federal court will consider his constitutional claims.<sup>88</sup>

The existence of cause for a procedural default ordinarily turns on whether the prisoner can show that some objective factor external to the defense impeded the defendant's efforts to comply with the state procedural rules.<sup>89</sup> Examples of such external factors include a change in the law or interference by state officials. Importantly, the Supreme Court has held that only attorney error that rises to the level of a constitutional violation can be cause to excuse a procedural default.<sup>90</sup> So if the reason why a habeas petitioner defaulted his ineffective assistance of trial and/or appellate counsel claim is that his post-conviction lawyer failed to raise it, the incompetence of his post-conviction lawyer cannot be cause to excuse that procedural default because there is no constitutional right to post-conviction counsel. Given that a majority of jurisdictions require defendants to wait until state post-conviction to raise trial and attorney ineffectiveness, the

---

86. See King Report, *supra* note 77, at 6 (noting that, in 24% of non-capital cases, claims were dismissed because the claims were either unexhausted or procedurally defaulted).

87. See *Wainwright*, 433 U.S. at 87.

88. See *Schlup v. Delo*, 513 U.S. 298, 301 (1995).

89. See *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

90. See *Coleman*, 501 U.S. at 755.

failure to raise the claims properly is often attributable to statutorily provided or *pro bono* post-conviction counsel. As a result, many federal habeas petitioners are unable to show cause.

A small number of states allow defendants to raise ineffective assistance of trial counsel claims on direct appeal.<sup>91</sup> In those jurisdictions, if the first appellate attorney fails to properly raise the claim, the appellate attorney's incompetence could be grounds for cause. However, many of these defendants run afoul of another procedural restriction. According to *Edwards v. Carpenter*,<sup>92</sup> a habeas petitioner's grounds for cause must themselves be exhausted in the state courts; otherwise, the petitioner has to show cause and prejudice or a fundamental miscarriage of justice to excuse the failure to present the cause ground to the state court. So before the appellate attorney's incompetence can be used as cause to excuse the procedural default for failing to raise the trial attorney's incompetence, there must be a competent post-conviction attorney who properly raises and exhausts the appellate attorney's incompetence. If the post-conviction attorney screws up and fails to properly exhaust the claim of appellate counsel's ineffectiveness, then the claim of appellate attorney ineffectiveness is itself defaulted, and the post-conviction attorney's error cannot be cause to excuse that default, because defendants have no constitutional right to post-conviction counsel.

So if a defendant has an ineffective trial attorney, an ineffective appellate attorney, *and* an ineffective state post-conviction attorney who fails to raise the ineffectiveness of the prior attorneys, that defendant will likely be barred from having any claim of attorney ineffectiveness considered on federal habeas. Perversely, the more ineffective attorneys you have, the less likely you are to obtain federal habeas review.

Even for those habeas petitioners who manage to successfully navigate through these procedural barriers to review and have their attorney ineffectiveness claims considered on the merits, their chances of obtaining federal habeas corpus relief are limited by the standard of review that federal courts use when entertaining challenges to state court criminal convictions on habeas. According to 28 U.S.C. section 2254(d), "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established

---

91. See Primus, *supra* note 30, at 710-12 (summarizing these states' approaches).

92. 529 U.S. 446, 451, 453 (2000).

Federal law, as determined by the Supreme Court of the United States[.]”<sup>93</sup> In order to be “contrary to” clearly established Federal law, the state court’s statement of the law must directly contradict a statement of the law made by the United States Supreme Court in a holding of one of its cases.<sup>94</sup> To be an “unreasonable application” of clearly established Federal law, the state court’s application of a legal principle must be more than just wrong; it must be unreasonably wrong.<sup>95</sup> The Supreme Court recently explained just how difficult it is for a habeas petitioner to demonstrate that a state court’s decision regarding trial or appellate counsels’ effectiveness is unreasonably wrong. According to the Court, because the standards created by *Strickland v. Washington* and section 2254(d) are both “highly deferential,” when the two apply in tandem the federal court’s review is “doubly” deferential.<sup>96</sup> Specifically, the Court noted that, “[w]hen § 2254(d) applies, the question is not whether counsel’s actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.”<sup>97</sup> Overcoming this double deference is made even more difficult, because most habeas petitioners are not permitted to supplement the state court record on trial attorney ineffectiveness at the federal habeas stage.<sup>98</sup> Without additional evidence, it is often difficult to show that a state court decision on trial or appellate counsels’ effectiveness was unreasonable.

In the end, many habeas petitioners are unable to have their attorney ineffectiveness claims heard on the merits in federal habeas;<sup>99</sup> and even those who are able to obtain actual review of the claims are highly unlikely to succeed given the limits on bringing in new evidence and the “doubly” deferential standard of federal review. As long as procedural and substantive restrictions preclude federal courts from checking state court violations of the right to counsel, the systematic underenforcement of that right in state criminal prosecutions will persist.<sup>100</sup>

---

93. 28 U.S.C. § 2254(d)(1).

94. *See Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) (O’Connor, J., concurring).

95. *See id.* at 407.

96. *See Harrington v. Richter*, 131 S. Ct. 770, 788 (2011).

97. *Id.*

98. *See* 28 U.S.C. § 2254(e)(2) (limiting the circumstances under which habeas petitioners can get evidentiary hearings in federal court); *see also Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (holding that federal habeas review under 28 U.S.C. § 2254(d)(1) is limited to the record before the state court, such that new information provided by a federal evidentiary hearing is not relevant to that analysis).

99. *See King Report*, *supra* note 77, at 9 (noting that, in 42% of non-capital cases, the district court dismissed all claims without reaching the merits).

100. For a more detailed discussion of systemic underenforcement of the right to counsel in state criminal justice systems, *see Eve Brensike Primus, A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 17-21 (2010).

## V. WAYS TO STRENGTHEN THE RIGHT TO COUNSEL

The preceding remarks have demonstrated how, at every stage of the criminal process from trial through direct appeal and state post-conviction review and into federal habeas corpus, the criminal defendant's fundamental right to effective counsel is systematically violated or routinely underenforced. Even though it is politically unpopular to do anything to promote defendants' rights,<sup>101</sup> both the federal executive and legislative branches have come to recognize the severity of the right to counsel crisis and have begun considering possible reforms.<sup>102</sup> There are many potential ways to strengthen and give meaning to the right to counsel in state criminal cases. It can be done through the states, by the federal government, or independent of the judiciary altogether. Some of these options are simple while others are more complex, and some are more politically feasible than others. I do not intend to fully explain the pros and cons of each idea or make an ultimate recommendation about which combination of proposals is best. Rather, the following subsections merely canvas the options and direct readers to the appropriate sources to consider them more in depth.

A. *Through the States*

Many have argued that the states should provide better training for state level public defenders and more funding for indigent defense generally.<sup>103</sup> The Southern Public Defender Training Center, for example, recently began a fellowship program committed to the recruitment, training, and mentoring of a new generation of public defenders.<sup>104</sup> We should have more training programs like these, but training can only be a partial solution. If the caseloads remain the same, even well-trained attorneys will not be able to effectively represent their clients.

---

101. See, e.g., Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 252 (1997) ("Legislatures, responding to voters fearful of crime, have no incentive to devote scarce resources to . . . [criminal] defense[.]").

102. See sources collected *supra* note 51.

103. See, e.g., Jonathan A. Rapping, *National Crisis, National Neglect: Realizing Justice Through Transformative Change*, 13 U. PA. J.L. & SOC. CHANGE 331, 333 (2009-10) (arguing for broader and better training of public defenders); Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 90-92 (1995) (same); Stuntz, *supra* note 75, at 70-71 (arguing for more funding).

104. See Rapping, *supra* note 103 (describing a new initiative called the Public Defender Corps. — a fellowship program committed to the recruitment, training, and mentoring of a new generation of public defenders in the south); see also The Southern Public Defender Training Center, available at <http://www.thespdtc.org/> (last visited July 7, 2011) (describing the Southern Public Defender Training Center and its mission).

In addition to funding for more training, public defender offices nationwide need funding to ensure that caseloads numbers do not exceed national standards. Admittedly, the amount of funding that would be required to make a difference is significant. There are, however, a number of possible ways to get additional funding for indigent defense. Some scholars have argued for a trade-off: more funding up front and fewer criminal procedure rights for defendants later.<sup>105</sup> Alternatively, some have argued that the states could re-direct significant funds to indigent defense by eliminating or decriminalizing a number of petty offenses.<sup>106</sup> “By diverting or reclassifying these offenses as non-criminal violations, local and state governments could save hundreds of millions, perhaps more than \$1 billion per year.”<sup>107</sup> That money could, in turn, be channeled into indigent defense.

More funding will only redress some of the problem. States can and should consider using the state judiciary to better address problems of attorney ineffectiveness. One possible way to ensure that the right to effective trial counsel is meaningful involves a structural modification to criminal appellate practice that would allow defendants to raise ineffective assistance of trial counsel claims on direct appeal and give them a means of supplementing the trial record in order to substantiate these claims. A small number of jurisdictions already do this, either judicially or legislatively, with varying degrees of success.<sup>108</sup>

I have written extensively about this option elsewhere,<sup>109</sup> so I will just sketch out the proposal here. In order for this mechanism of appellate review to serve as a successful means of checking the quality of trial representation, states must first ensure that each criminal defendant is given new appellate counsel for the first appeal as of right. That appellate attorney should then have at least six months to re-investigate the defendant’s case and look through the trial court record to determine whether it is appropriate to seek to supplement the record in order to support an ineffective assistance of trial counsel claim. If it is not appropriate to raise such a claim, the appellate attorney will file an “on the record” brief. However, if it is appropriate to raise a personal and/or structural ineffectiveness challenge, the appellate attorney will file a motion for a new trial in the trial court alleging that there was ineffective trial attorney

---

105. See, e.g., Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 819-21 (2009) (proposing to eliminate federal habeas review entirely for most state prisoners and reallocate the resources currently spent on federal habeas review to improve the quality of defense representation throughout the country).

106. See, e.g., Boruchowitz, *supra* note 16, at 1-2.

107. Boruchowitz, *supra* note 16, at 2.

108. See, e.g., Primus, *supra* note 30, at 710-12 (summarizing these states’ approaches).

109. See Primus, *supra* note 30.

performance and asking for a hearing. The filing of that motion would toll the time for filing the appellate brief until after the trial court has ruled on the new trial motion. If the motion, together with its supporting materials, states a colorable claim of ineffective assistance of trial counsel, the trial judge would be obligated to grant the defendant a hearing to expand the trial record. After that hearing, the trial judge will rule on the motion. If the defendant loses, the appellate attorney can then file an appellate brief, including the ineffective assistance of trial counsel claim, along with any other claims that are clear on the face of the trial record.

This structural modification to criminal appeals would force state appellate court judges to address the structural and personal ineffectiveness problems that are currently swept under the rug in state post-conviction review. Moreover, it would allow more defendants to have a meaningful opportunity to challenge their trial attorneys' performance. Defendants would have the assistance of counsel to raise ineffective assistance of trial counsel challenges, and they would be given the opportunity to do so earlier in the process when they still have an incentive to challenge their convictions.

Another possible way to address structural ineffectiveness in state criminal justice systems is through civil class actions in the state courts.<sup>110</sup> A number of class action lawsuits have been filed throughout the country, and at least some courts have been receptive to these claims. In some cases, these lawsuits have resulted in consent decrees that have resulted in positive changes to indigent defense delivery systems.<sup>111</sup> In other cases, the state courts have been hostile to these lawsuits.<sup>112</sup> Still other courts have taken a middle ground position, allowing some claims but foreclosing others.<sup>113</sup>

### *B. The Federal Government*

There are many ways that the federal government could take significant steps toward improving the provision of indigent defense services in the states. The federal judiciary, for example, could make the right to counsel

110. See Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 444-48 (2009) (describing the proliferation of these class actions).

111. See, e.g., Cara H. Drinan, *A Legislative Approach to Indigent Defense Reform*, AM. CONST. SOC'Y FOR LAW AND POL'Y ISSUE BRIEF 3-4 (July 2010), available at [http://www.acslaw.org/files/ACS%20Issue%20Brief%20-%20Drinan%20Indigent%20Def%20Reform\\_0.pdf](http://www.acslaw.org/files/ACS%20Issue%20Brief%20-%20Drinan%20Indigent%20Def%20Reform_0.pdf) (discussing these cases).

112. See, e.g., *Duncan v. State*, 784 N.W.2d 51 (Mich. 2010) (holding that the plaintiffs' claims were not justiciable).

113. See, e.g., *Hurrell-Harring v. State*, 930 N.E.2d 217, 225-26, 904 N.Y.S.2d 296, 304-05 (2010) (finding cognizable a systemic right-to-counsel claim that alleged actual or constructive denial of counsel altogether, but suggesting that a claim alleging systemic problems in attorney performance would not be cognizable).

meaningful by modifying the *Strickland v. Washington*<sup>114</sup> standard that is currently used to judge trial attorney's effectiveness in order to hold defense counsel to higher standards of performance. This, in turn, might catalyze the states to do more to provide effective trial representation.

Additionally, the Supreme Court could recognize a limited constitutional right to effective post-conviction counsel to raise attorney ineffectiveness claims.<sup>115</sup> That would give state criminal defendants who must wait until state post-conviction review proceedings to raise trial and appellate counsels' ineffectiveness a realistic ability to raise these claims. Moreover, it would ensure that a state post-conviction attorney's failure to properly raise trial and/or appellate counsels' ineffectiveness could be cause to excuse a state procedural default. This would open the doors for at least some defendants to have their claims heard in federal court in habeas proceedings.

Congress could allocate more federal resources to aid states in funding indigent defense. Alternatively, it could enact legislation designed to open the doors of the federal courts to claims of systemic violations of the right to counsel in the states. This legislation could take the form of federal enforcement actions, in which the Department of Justice is tasked with investigating state practices and filing federal lawsuits designed to improve the provision of indigent defense services in states that engage in systematic violations of the right to counsel;<sup>116</sup> an independent private cause of action that would allow individual litigants to obtain damages or injunctive relief when their rights to counsel are violated;<sup>117</sup> or a structural modification to the current scope of federal habeas corpus review so as to permit federal courts to entertain systemic challenges in habeas.<sup>118</sup>

Regardless of what form the federal legislation takes, it is important to ensure that there is access to the federal courts to raise claims of systemic state violations of the right to counsel. Many state judges are elected and

---

114. *Strickland*, 466 U.S. 668.

115. For a more extensive discussion of this option, see Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, 24 CRIM. JUST. 6, 11 (2009). The Supreme Court recently granted certiorari to address this very question. See *Martinez v. Ryan*, 2011 WL 380903 (June 6, 2011).

116. See S.B. 3842, 111th Cong. (2010) (proposing such a federal enforcement action); see also Eve Brensike Primus, *Litigation Strategies for Dealing with the Indigent Defense Crisis*, AM. CONST. SOC'Y FOR LAW AND POL'Y ISSUE BRIEF 5-8 (Sept. 2010), available at <http://www.acslaw.org/files/Primus%20-%20Litigation%20Strategies.pdf> (arguing for a federal enforcement action with a private deputization provision).

117. See Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487, 498 (2010).

118. See Primus, *supra* note 100.

are subject to political pressure to be tough on crime.<sup>119</sup> As a result, they do not have an incentive to protect indigent defendants' rights. Even though there are some state judges who are willing to suffer the political consequences and do what is necessary to improve indigent defense services, they are the exception rather than the norm. The states have had more than 45 years to live up to *Gideon*'s promise, and they have failed. It is now time for the federal government or some independent body to step in to ensure that the right to counsel is meaningful.

### C. Independent of the Government

There are many things that lawyers can do to give more meaning to the right to counsel and to encourage the state and federal governments to do more to address the right-to-counsel crisis. As an initial matter, public defender offices could refuse caseloads that would unduly burden their attorneys. Some state defender offices have refused to take additional cases once they have reached the maximum number of cases that they can handle effectively.<sup>120</sup> State Bar Associations could work with defender offices and support them in these efforts in a number of different ways. They could encourage attorneys throughout the state to donate their time to represent criminal defendants charged with minor violations.<sup>121</sup> They could hire private consulting firms to collect data that documents the right-to-counsel problems in the state, and that data could, in turn, be used to lobby state legislatures for additional funding.<sup>122</sup>

---

119. See Fact Sheet on Judicial Selection Methods in the States, AMERICANBAR.ORG, available at [http://www.abanet.org/leadership/fact\\_sheet.pdf](http://www.abanet.org/leadership/fact_sheet.pdf); see also Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 61 U. CHI. L. REV. 689, 694 (1995).

120. See, e.g., Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, November 9, 2008, at A1, available at <http://www.nytimes.com/2008/11/09/us/09defender.html> ("Public defenders' offices in at least seven states are refusing to take on new cases or have sued to limit them, citing overwhelming workloads that they say undermine the constitutional right to counsel for the poor."); see also Tara Cavanaugh, *Boone County Public Defenders Refuse Cases*, THE MISSOURIAN (October 18, 2008 5:45 PM), available at <http://www.columbiainmissourian.com/stories/2008/10/19/boone-county-public-defenders-refuse-certain-cases>; Scott Michels, *Facing Budget "Crisis," Public Defenders May Refuse Cases*, ABC NEWS, June 13, 2008, available at <http://abcnews.go.com/TheLaw/story?id=5049461&page=1>; Cheryl Miller, *Citing Cuts, Public Defenders Refuse New Cases*, LAW.COM, August 5, 2009, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202432773249>.

121. See, e.g., Tara Cavanaugh, *Timeline of Events for the Missouri Public Defender System*, THE MISSOURIAN (October 19, 2008 6:07 PM), available at <http://www.columbiainmissourian.com/stories/2008/10/19/timeline-strain-public-defender-system-has-led-system-now-refusing-certain-cases> (explaining how the Missouri Bar Association asked private attorneys to donate their time to represent poor people charged with minor traffic violations so as to alleviate the burden on the public defender's office).

122. See, e.g., *id.* (explaining how the Bar Association hired a consulting group to document the right-to-counsel problems in its indigent defense system, the results of which were used to argue for and obtain an increase in funding for the public defenders' office); see also Erica J. Hashimoto, *Assessing the Indigent Defense System*, AM. CONST. SOC'Y FOR LAW AND POL'Y ISSUE BRIEF 1 (Sept. 2010), availa-



The State Bar Associations could also do a better job of ensuring that criminal defense attorneys provide adequate representation.<sup>123</sup> Personal ineffectiveness should be policed by the State Bar Disciplinary Commissions, and attorneys who are too lazy or incompetent to provide effective representation should not be permitted to represent criminal defendants.

#### CONCLUSION

The right to the effective assistance of counsel is the most important right that a criminal defendant has, for it is only through effective counsel that the defendant's other rights are exercised. Consequently, our failure to provide criminal defendants with effective counsel distorts the entire criminal justice system. An adversarial system of criminal justice does not work without effective advocates.

In these remarks, I have attempted both to explain how criminal defendants' rights to counsel are being systematically violated and to canvas possible ways to restore meaning to this fundamental right. As Attorney General Eric Holder recently said, the problems with our provision of indigent defense services "are man made [and] are, therefore, susceptible to man made solutions."<sup>124</sup> We need to do what is necessary to make the right to counsel a reality again. The legitimacy of our justice system and the accuracy of its results both depend on it.

---

ble at <http://www.acslaw.org/files/Hashimoto%20Indigent%20Defense.pdf> (arguing that more data should be collected and used to encourage states to fix their own indigent defense systems).

123. See, e.g., James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2121-122 (2000) ("Bar discipline is almost nonexistent; prosecution for malfeasance is all-but-unheard-of and always unsuccessful in the rare instances in which it occurs.").

124. Holder Remarks, *supra* note 19.