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EFFECTIVELY INEFFECTIVE: THE FAILURE OF COURTS TO ADDRESS UNDERFUNDED INDIGENT DEFENSE SYSTEMS

I. INTRODUCTION

PLEASE HELP. DESPERATE.[1]

This notice was posted in a Covington, Kentucky, courthouse in the late 1980s, in the hope that a lawyer might be found to defend the pending capital case of Gregory Wilson. In Covington, the statutory limit on funding for defense counsel in capital cases was $2500 and the local indigent defense program could not find a lawyer willing to defend the case for such a paltry sum.[2] When the head of the indigent defense program asked the judge to order additional compensation to secure a defense lawyer, "the judge refused and suggested that the indigent defense program rent a river boat and sponsor a cruise down the Ohio river to raise money for the defense."[3]

Many courts have been hesitant to acknowledge the ways in which the realities of indigent defense affect the assistance a defendant actually receives. Courts have deemed effective lawyers who were unaware of current governing law in the case at hand, lawyers who were intoxicated at the time of trial, and lawyers who were asleep.[4] Perhaps the most pervasive problem affecting indigent defendants, however, is not that their lawyers are incompetent, but that those lawyers lack adequate resources to defend their clients. Today's public defenders are underfunded and overburdened. Their caseloads and workloads have risen to crushing levels in recent years, and caps on funding both for individual cases and for overall compensation levels have effectively rendered many lawyers ineffective. Due to the political unpopularity of criminal defendants and their lack of financial and political capital, state legislatures are unlikely to allocate significant attention or

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[1] Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 794 (quoting Ira P. Robbins, Am. Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 76 (1990) (quoting Letter from Raymond E. Lape, Presiding Judge, First Division, Sixteenth Judicial Circuit, Kenton Circuit Court, Covington, Kentucky, to Members of the Northern Kentucky Bar (May 17, 1988))) (internal quotation marks omitted).

[2] *Id.* 793–94. The lawyer who finally answered the judge's notice was an attorney without an active practice and without any capital experience; the defendant was convicted and sentenced to death. RICHARD KLEIN & ROBERT SPANGENBERG, AM. BAR ASS'N, THE INDIGENT DEFENSE CRISIS 26 n.16 (1993).

[3] Bright, *supra* note 1, at 794.

[4] *See id.* at 785–86 & nn.7–9 (collecting examples).

resources to the problem of indigent defense, leaving courts with the task of creating a constitutionally mandated remedy.

Although scholars and practicing attorneys have acknowledged the effects of this funding shortage,[5] the Supreme Court has yet to address the specific issue of indigent defense funding. The Court's landmark case on effective assistance of counsel, *Strickland v. Washington*,[6] established a two-prong test for ineffective assistance of counsel: a defendant must show that his counsel's performance was deficient and that, but for his counsel's deficient performance, the result of the proceeding would have been different.[7] This standard suffers from two major flaws as far as funding is concerned. First, the *Strickland* standard is not structured to accommodate an argument related to funding. Because the *Strickland* test is ends-oriented — in that it focuses on the lawyer's performance and the ultimate judgment in a case — and because funding is more of a means, funding is unlikely to arise in a discussion confined to the *Strickland* two-prong test. Only when a lack of funding is so severe that it causes a deficient performance as defined by *Strickland* — a threshold that has proven difficult to meet[8] — does the test proceed to its second step; there is no way in which to address the generally detrimental effect that underfunding has on the quality of defense lawyering an attorney is able to provide.[9]

Second, the *Strickland* standard is, by its nature, an ex post analysis; therefore, it cannot be used preemptively to challenge the effectiveness of an attorney, regardless of the limitations on time or resources that may hamper the attorney's ability to provide an adequate defense. Thus, while *Strickland* imposes a high bar once an attorney has failed a defendant, no recourse is available to the defendant ex ante, even when it is apparent that an attorney will inevitably provide an inadequate defense.[10]

Because *Strickland* appears to be the Supreme Court's last word on the issue, discussions about the impact of funding on effectiveness have moved primarily into the state courts. This Note examines three

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[5] *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1852 (1994).

[6] 466 U.S. 668 (1984).

[7] *Id.* at 687.

[8] *See* Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1.

[9] Even if a lack of funding produced legal error fundamental enough to warrant reversal, the *Strickland* analysis still focuses on the lawyer's performance and not on the causes of that performance.

[10] Professor Stephanos Bibas writes that "traditional *Strickland* review has no teeth because the strong presumption of effectiveness and the inevitability [of] hindsight bias cloud case-by-case, post-hoc review." Bibas, *supra* note 8, at 11.

notable and celebrated cases — *State v. Peart*,[11] *State v. Lynch*,[12] and *State v. Smith*[13] — in which courts have been receptive to defendants' allegations that a lack of funding or resources rendered their attorneys' assistance ineffective. While many scholars have lauded these cases as innovative and praised them for their impact on indigent defense,[14] further scrutiny reveals that these decisions have been unable to facilitate long-term, sustainable reform of the indigent defense system. To generate more effective reform, courts must adopt a more aggressive role as enforcers of the right to counsel by tackling the problem of indigent defense on a systemic level, ordering the expenditure of funds necessary to protect the right to counsel, and creating oversight mechanisms to ensure the continued implementation of their remedies.

II. THE PROBLEM: UNDERFUNDING INDIGENT DEFENSE

The landmark decision of *Gideon v. Wainwright*[15] guaranteed all defendants in serious criminal cases the right to an attorney[16] and, in doing so, was perceived as a major step toward realizing the equality of all defendants before the law.[17] That same year, the Supreme Court decided several other cases that seemed to support its commitment in *Gideon*, including *Douglas v. California*,[18] in which the Court held that all states must provide indigent defendants with appointed counsel on their first appeal of a conviction.[19] In 1972, the Supreme Court further expanded the right to counsel by holding that a defendant could not be imprisoned for any offense, whether misdemeanor or felony, unless he had been represented by counsel at trial.[20] In the following decades, however, the Supreme Court significantly undermined the rights afforded to indigent defendants in *Gideon* and *Douglas* by denying them the right to counsel before the critical stage of indictment, by holding that the state need not provide appointed counsel for most ap-

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[11] 621 So. 2d 780 (La. 1993).

[12] 796 P.2d 1150 (Okla. 1990).

[13] 681 P.2d 1374 (Ariz. 1984).

[14] *See, e.g.*, Bibas, *supra* note 8, at 7–10; Rodger Citron, *(Un)*Luckey v. Miller*: The Case for a Structural Injunction To Improve Indigent Defense Services*, 101 YALE L.J. 481, 501–02 (1991); Charles M. Kreamer, Comment, *Adjudicating the* Peart *Motion: A Proposed Standard To Protect the Right to Effective Assistance of Counsel Prospectively*, 39 LOY. L. REV. 635 (1993); *see also* Note, Gideon*'s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2073–74 (2000) [hereinafter Gideon*'s Promise*].

[15] 372 U.S. 335 (1963).

[16] *Id.* at 344.

[17] *See* DAVID COLE, NO EQUAL JUSTICE 63 (1999).

[18] 372 U.S. 353 (1963).

[19] *Id.* at 357–58; *see also* Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 628 (1986).

[20] Argersinger v. Hamlin, 407 U.S. 25, 38 (1972).

peals, and by adopting a standard for effectiveness of counsel that fails to guarantee the appointment of competent attorneys.[21]

Even though the right to counsel still exists doctrinally, the inadequate funding of indigent defense threatens what remains of the right.[22] The lack of funding for indigent defense, combined with the absence of meaningful attorney qualifications and flawed systems for indigent defense appointments,[23] has led to "a system in which indigent defendants are frequently represented by overworked, underpaid, and unqualified lawyers," and in which indigent defendants have little procedural recourse.[24] In 1999, David Cole reported: "Nationwide, we spend more than $97.5 billion annually on criminal justice. More than half of that goes to the police and prosecution . . . . Indigent defense, by contrast, receives only 1.3 percent of annual federal criminal justice expenditures, and only 2 percent of total state and federal criminal justice expenditures."[25] Methods of funding for indigent defense vary from state to state, but some states — such as Louisiana and Alabama — rely on assessments from traffic tickets or filings within the court system, methods that have led to widely varying funding levels and system-wide underfunding.[26] Many states have imposed caps on appointed attorneys' fees, paying some attorneys, even in capital cases, as little as $11.84 per hour.[27] In other states, where flat fees ranging from several hundred dollars to one thousand dollars are imposed per case, a minimal number of hours spent working on a case can easily lower attorneys' hourly rates to below minimum wage,[28] sapping attorneys of

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21 *See* COLE, *supra* note 17, at 71.

22 As scholars have aptly noted, while "courts create constitutional procedural rights, . . . legislative underfunding undercuts these guarantees in practice." Bibas, *supra* note 8, at 11 (citing William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 6–7, 65–67 (1997)).

23 *See* COLE, *supra* note 17, at 86–89.

24 *Id.* at 89.

25 *Id.* at 64 (footnote omitted) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1996 (Kathleen Maguire & Ann L. Pastore eds., 1996), at 2 tbls.1.1 & 1.12; and BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1993 (Kathleen Maguire & Ann L. Pastore eds., 1993), at 2 tbl.1.2).

26 *See* Bright, *supra* note 5, at 1852.

27 *See id.* at 1853 (citing *Martinez-Macias v. Collins*, 979 F.2d 1067, 1067 (5th Cir. 1992)). The *Martinez-Macias* court noted that in that case "the justice system got only what it paid for." *Martinez-Macias*, 979 F.2d at 1067.

28 *See* Bright, *supra* note 5, at 1853. One stark example of what can result from such underfunding comes by way of anecdote. Just over two decades ago, Alabama attorney Richard Bell was appointed to represent an indigent defendant in a highly publicized capital case, without co-counsel, and granted only $500 for expert and investigative expenses. *Id.* at 1847. On the other side, the prosecution consisted of three prosecutors, armed with an "array of law enforcement agencies and expert witnesses." *Id.* Richard Bell later described his feeling of hopelessness: "Without more than $500, there was only one choice, and that [was] to go back to the bank and to finance this litigation, myself . . . . It would have cost probably in excess of thirty to forty thou-

any ability to prepare an adequate defense. Underfunded attorneys may need to take on more clients than they can represent effectively, have insufficient time to prepare adequately for their cases, lack the ability to employ critical expert witnesses, feel pressured into advising some clients to plead guilty, and overlook potential leads because of a shortage of investigative resources.[29] In its most dramatic form, a lack of funding for assigned counsel can result in a shortage of attorneys available for appointment to indigent defendants.[30]

The problem is dramatic not only in substance, but also in scope. Between 1982 and 1986, the Justice Department found that the caseload of the nation's indigent defense programs had grown by 40%,[31] and in 1990, that finding was confirmed by the American Bar Association's conclusion that the caseloads of most public defenders have increased at a startling rate.[32] In the early 1990s, numerous studies found that 80% or more of defendants charged with felonies in state courts received court-appointed counsel[33] and that public defender programs constituted the primary method of legal defense delivery to approximately 65% of Americans.[34] Clearly, a tremendous number of defendants stand to lose or gain from the effectiveness of appointed counsel.

III. *PEART*, *LYNCH*, AND *SMITH*: THREE STATES TACKLE UNDERFUNDING DIRECTLY

Although the Supreme Court has yet to address the issue of inadequate funding for indigent defense, several state courts have tackled the problem directly. Three state cases in particular — *State v. Peart*, *State v. Lynch*, and *State v. Smith* — led to reforms that have been labeled as significant and "far-reaching."[35] Upon further exploration, including an investigation of their long-term impact, however, it is clear that these decisions suffer from several limitations. Whatever their

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sand dollars . . . ." *Id.* (quoting Deposition of Richard Bell at 24–25, Grayson v. State, No. CV 86-193 (Cir. Ct. Shelby County, Ala. Oct. 10, 1991)). As a result, Bell was unable to investigate the case properly, and critical evidence was never found or presented. *Id.* at 1848.

[29] *See* KLEIN & SPANGENBERG, *supra* note 2, at 6; Klein, *supra* note 19, at 658, 662–63.

[30] *See, e.g.*, Lavallee v. Justices in Hampden Superior Court, 812 N.E.2d 895 (Mass. 2004).

[31] KLEIN & SPANGENBERG, *supra* note 2, at 3 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL DEFENSE FOR THE POOR — 1986 (1988)).

[32] *Id.* at 4 (citing STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, AM. BAR ASS'N, INDIGENT DEFENSE INFORMATION (1990)) (internal quotation marks omitted).

[33] *Id.*

[34] *Id.* at 7 (citing STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, AM. BAR ASS'N, AN INTRODUCTION TO DEFENSE SYSTEMS 15 (1986)).

[35] Nicole J. De Sario, *The Quality of Indigent Defense on the 40th Anniversary of* Gideon*: The Hamilton County Experience*, 32 CAP. U. L. REV. 43, 60 (2003).

symbolic contribution may have been, these decisions have ultimately had less of a practical, sustainable impact than many had hoped.

A. State v. Peart

In 1991, Rick Teissier, a public defender in New Orleans, was appointed to defend indigent defendant Leonard Peart against charges of armed robbery, aggravated rape, aggravated burglary, and attempted armed robbery.[36] Due to his heavy caseload, Teissier's clients were "routinely incarcerated 30 to 70 days" before he was able to meet with them initially.[37] The Orleans Indigent Defender Program (OIDP), which employed Teissier, was severely underfunded. OIDP only had enough funding to hire three investigators, yet its attorneys were responsible for representing defendants in more than 7000 cases each year in criminal court alone, in addition to juvenile court, traffic court, and magistrate court cases.[38] OIDP was unable to provide its attorneys with any funds for expert witnesses, and its library was woefully inadequate.[39]

Aware of his own position, and feeling completely overwhelmed, Teissier petitioned the trial court "for support services, explaining that he was handling far too many cases and unable to provide adequate assistance to any of his clients."[40] The trial court agreed with Teissier and further ruled that the statute governing New Orleans's public defense system was unconstitutional as applied because it did not provide adequate funding for indigent defense.[41] The trial court therefore ordered both short- and long-term remedies. In the short term, the trial court judge "ordered Teissier's case load reduced; ordered the legislature to provide funding for an improved library and for an investigator for Teissier; and announced his intention to appoint members of the bar to represent indigents in his court."[42] As a long-term remedy, the judge ordered the legislature to provide funds to OIDP with which it could hire additional attorneys, support staff, investigators, and expert witnesses.[43]

The state appealed the trial court's ruling.[44] In its decision, the Louisiana Supreme Court reversed the trial court's decision that New

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[36] State v. Peart, 621 So. 2d 780, 784 (La. 1993).

[37] *Id.* In the seven month period between January 1 and August 1, 1991, Teissier represented 418 defendants; of these, he entered guilty pleas at arraignment for 130. *Id.*

[38] *Id.*

[39] *Id.*

[40] Adele Bernhard, *Take Courage: What the Courts Can Do To Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 324 (2002).

[41] *Peart*, 621 So. 2d at 784.

[42] *Id.* at 784–85.

[43] *Id.* at 785.

[44] *Id.*

Orleans's indigent defense system was unconstitutional; however, it affirmed the trial court's finding that indigent defendants in the New Orleans system were not receiving effective assistance of counsel.[45] It then remanded the case to the trial court with instructions to the judge hearing Peart's case and other cases in which similar pretrial claims (so-called "*Peart* motions") were made to hold individual hearings for each defendant. In such hearings, trial courts were instructed to apply a rebuttable presumption that defendants were not receiving constitutionally mandated effective assistance of counsel; if the State was unable to overcome that presumption, the trial judge was instructed not to permit the case to proceed to trial.[46]

Louisiana cases following *Peart* reveal that the *Peart* motion has been an ineffective mechanism for criminal defendants to obtain relief; the following two cases are emblematic of that ineffectiveness in other Louisiana cases. In *State v. Hughes*,[47] defendant Joseph Hughes claimed that his trial attorney was ineffective because he was overworked and lacked sufficient resources; Hughes therefore contended that *Peart* provided him with a "rebuttable presumption" of ineffective assistance of counsel.[48] The Louisiana Court of Appeals disagreed, emphasizing *Peart*'s holding that "each claim of ineffectiveness must be evaluated on an individual basis."[49] In the more recent case of *State v. Jeff*,[50] the defendant alleged that there were no funds available to pay for his court-appointed attorneys or for other defense expenses.[51] In its opinion, the Louisiana Court of Appeals cited *Peart*, but again found that the evidence neither proved that the defendant's counsel had been ineffective nor "support[ed] application of a rebuttable presumption of ineffective assistance of counsel."[52]

Unfortunately, *Peart* had a similarly unsustained effect on the Louisiana legislature's commitment to improving the state's system of indigent defense. Just prior to the *Peart* decision, the Louisiana legislature refused to authorize additional funding for indigent defense.[53] Within two years of *Peart*, the Louisiana legislature increased funding

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[45] *Id.* at 783. "Ironically," as the Louisiana Supreme Court's opinion noted, the trial court had already found that Peart himself did receive effective assistance from Teissier. *Id.* at 785 n.4.

[46] *Id.* at 783.

[47] 653 So. 2d 748 (La. Ct. App. 1995).

[48] *Id.* at 751.

[49] *Id.* (holding that "no general finding by the trial court regarding the given lawyer's handling of other cases, or workload generally, can answer that very specific question as to an individual defendant and the defense being furnished him" (quoting *Peart*, 621 So. 2d at 788) (internal quotation marks omitted)).

[50] 761 So. 2d 574 (La. Ct. App. 1999).

[51] *Id.* at 576.

[52] *Id.*

[53] Bibas, *supra* note 8, at 8 (citing Lee Hargrave, *Ruminations: Mandates in the Louisiana Constitution of 1974; How Did They Fare?*, 58 LA. L. REV. 389, 398 n.45 (1998)).

for indigent defense by $5 million, and just two years later appropriated $7.5 million for the Louisiana Indigent Defender Assistance Board.[54] Over time, however, the funding failed to keep up with inflation and with increasing caseloads, which remain heavy today.[55] Although *Peart* was able to generate a temporary legislative fix, it failed to provide a long-term cure for the system's ills because it did not address the more fundamental financing and structural issues underlying the problem.

B. State v. Lynch

Like Louisiana after *Peart*, the state of Oklahoma began, yet failed to complete, systemic indigent defense reform after *State v. Lynch* was decided in 1990. In that case, two lawyers from Seminole County — Jack Mattingly and Rob Pyron — were appointed to represent Delbert Lynch, an indigent charged with first degree murder.[56] Lynch was eventually convicted following a "complicated trial," and although the State had sought the death penalty, Lynch was sentenced to life imprisonment.[57] Despite a state statutory restriction of $3200 on attorney fees, Mattingly and Pyron requested reimbursement for their total fees of $17,073.03 and $10,995.00, respectively.[58]

The trial court approved the fees requested by Mattingly and Pyron, finding the $3200 statutory cap unconstitutional, and the Oklahoma Supreme Court affirmed that judgment.[59] Flexing its judicial muscle, the court then stated that although it "invite[d] legislative attention to this problem," it saw that more immediate action had to be taken to remedy the unconstitutional infirmities of the present system, and therefore established an interim set of guidelines that would govern attorneys' fees until the legislature took further action.[60] The court adopted a principle of parity between prosecutors and defense attorneys, setting a statewide hourly rate for appointed indigent defense attorneys that was tied to that of local prosecutors.[61] The court also required reimbursement, within reasonable limits, for defense counsel's overhead and out-of-pocket expenses, to place the defense on "equal footing with counsel for the prosecution," for whom the state

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[54] *Id.* (citing Hargrave, *supra* note 53, at 398 n.45).

[55] *Id.* (citing Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 250–51 (2004)); *see also id.* at 10 ("*Peart*'s solution is a temporary one, as one-time funding increases will not transform a system.").

[56] State v. Lynch, 796 P.2d 1150, 1153 (Okla. 1990).

[57] *Id.*

[58] *Id.* at 1153–54.

[59] *Id.* at 1152–54.

[60] *Id.* at 1161.

[61] *Id.*

furnished such expenses.[62] The court stopped short, however, of dictating absolute salary levels or mandating any minimum level of support resources.[63]

As *Peart* had done in Louisiana, *Lynch* initially spurred the Oklahoma legislature to action. Prior to *Lynch*, Oklahoma was "ranked one of the worst [states] in level of funding for indigent defense."[64] The next year, however, the Oklahoma legislature created a statewide indigent defender board to oversee appointments — the Oklahoma Indigent Defense System (OIDS) — and substantially raised fee caps for appointed defense attorneys.[65] In May 1992, due primarily to budget constraints, the OIDS "adopted a contract system as the primary method for providing noncapital trial counsel."[66] Under this system, attorneys submitted bids each year to a board of directors statutorily directed until 1995 to award contracts to the lowest bidders.[67]

According to OIDS's 2002 annual report, the agency has faced repeated financial crises since its creation in 1991 and has repeatedly sought supplemental appropriations from the state legislature.[68] In 1992, shortly after the agency was born, OIDS was nearly forced to shut down completely when its original funding mechanism (based on statutory court costs from traffic violations) failed to generate enough revenue for OIDS's payroll.[69] In several subsequent fiscal years, the legislature failed to provide sufficient additional funding for OIDS.[70] As a result of these funding issues, OIDS attorneys have, unsurprisingly, historically been paid far less than prosecutors in Oklahoma.[71]

In 1999, OIDS sought appropriations from the legislature to "achieve salary parity with assistant district attorneys." Although the agency's efforts did result in some additional funds for fiscal years 2000 and 2001, in fiscal year 2001, district attorneys still received double the funds received by OIDS.[72] Unfortunately, while the *Lynch* decision may have inspired "sweeping reform of the State's delivery of criminal defense services,"[73] its effects were only temporary — as evidenced by OIDS's almost immediate fate. The *Lynch* decision was a

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62 *Id.*

63 Bibas, *supra* note 8, at 9.

64 BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 7 (2000).

65 Bibas, *supra* note 8, at 9.

66 BUREAU OF JUSTICE ASSISTANCE, *supra* note 64, at 7.

67 *Id.*

68 BENJAMIN CURTIS ET AL., OKLA. INDIGENT DEF. SYS., 2002 ANNUAL REPORT 2.

69 *Id.*

70 *Id.* at 3.

71 *Id.* at 4.

72 *Id.*

73 *Id.* at 1.

symbolic victory, but it failed in practice to establish an effective and stable system of indigent defense due to its lack of effective enforcement; while the decision inspired change, it was unable to sustain it.

C. State v. Smith

In the 1980s, Arizona's Mohave County provided criminal defense services to indigent defendants not through an indigent defense board but through a contract system.[74] Under Mohave County's system, there was no limit to the number of cases that might be assigned to a contract attorney and, as a result, contract attorneys faced crushing caseloads.[75] These circumstances led defendant Joe Smith to file a lawsuit alleging that Mohave County's contract defense system had violated his constitutional right to effective assistance of counsel.[76]

In his complaint, Smith, who faced charges of burglary, sexual assault, and aggravated assault,[77] claimed that his attorney had spent only two or three hours interviewing him and, because of an overwhelming caseload, only six to eight hours studying the case.[78] The Arizona Supreme Court concluded that the procedure Mohave County used to appoint attorneys to indigent defendants violated those defendants' rights to due process and counsel as guaranteed by both the United States and Arizona constitutions.[79] As a result, the *Smith* court held that, to maintain its existing contract system, the county had to follow specific guidelines, based primarily on recommendations from the National Legal Aid and Defender Association and the ABA Standards for Criminal Justice.[80] Until the county adhered to such guidelines, the court stated that it would infer "that the adequacy of representation [was] adversely affected by the system."[81] Furthermore, the failure to follow such guidelines would result in the "reversal of any conviction obtained under the system and appealed by the defendant, unless the state could demonstrate that the error was harmless."[82]

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[74] *See* Bernhard, *supra* note 40, at 323.

[75] State v. Smith, 681 P.2d 1374, 1382 (Ariz. 1984). In addition, there was no limit placed on the number of private, paying clients that a contracting attorney could represent while under contract. *Id.* Contract attorneys were expected to expend their own funds to pay for investigators or expert witnesses. *Id.*

[76] *Id.* at 1376.

[77] *Id.*

[78] *Id.* at 1378–79.

[79] *Id.* at 1381.

[80] These guidelines included, for example, setting maximum caseload levels, considering certain criteria in determining criminal case fees, and requiring adequate investigative and support services for defense attorneys. *See id.* at 1379–80.

[81] *Id.* at 1381.

[82] Citron, *supra* note 14, at 501. Ironically, while the opinion created an "inference of inadequate representation" powerful enough to end the use of low-bid contracts in Mohave County, the

By shifting the burden onto the state and imposing a harmless-error standard, *Smith* arguably did a better job than *Peart* or *Lynch* of holding the legislature's feet to the fire. Like *Peart* and *Lynch*, *Smith* forced legislative action — shortly after the decision, Mohave County adopted a new system for compensating appointed indigent defense counsel and began paying them on an hourly basis. This change more than doubled the cost of the previous low-bid contract system.[83] By 1992, however, the system was again under tremendous strain. In November 1992, Dean Trebesch noted that, in Arizona, "funding is scarce, and while an attorney in the office may be able to competently represent 200 defendants annually, instead of a [*Smith*] standard of 150, surely an attorney will not be able to represent 300 or 400, as the future implies."[84] Trebesch went on to state that "successive recent budget cuts now threaten office paralysis and quality assurance. As a consequence, all hiring, even for attrition, has stopped and vital promotions have ceased. Turnover and caseloads are increasing."[85]

Of this small wave of funding-related cases in the 1980s and 1990s, *Smith* likely sets the best precedent in terms of specificity in guidance to the legislature and willingness to impose concrete penalties for the denial of effective assistance of counsel. Even *Smith*, however, failed to have a real systemic impact because of the judiciary's limited ability to enforce its recommended legislative solutions. When focusing on individual cases, it may be difficult for courts to fashion a systemic remedy, due to their perceived lack of expertise and enforcement powers.[86] Budgetary realities may also inevitably limit such reform proposals, as evidenced by *Smith*. But how then can a court implement systemic reform when faced with a problem as daunting as the underfunding of indigent defense?

IV. WHY *PEART*, *LYNCH*, AND *SMITH* WERE EFFECTIVELY INEFFECTIVE

The three cases discussed above — *Peart*, *Lynch*, and *Smith* — suffer from several critical flaws, all stemming from judicial reluctance to undertake sustainable systemic indigent defense reform. First, cases

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court found Smith's individual representation adequate and therefore refused to reverse his conviction (as was also the case in Louisiana for Leonard Peart). *See Smith*, 681 P.2d at 1383.

83 Caroline A. Pilch, State v. Smith*: Placing a Limit on Lawyers' Caseloads*, 27 ARIZ. L. REV. 759, 767 (1985). Pilch noted at the time that "[w]hether the decision will achieve its purpose of improving representation for indigent defendants or only end up a superficial attempt toward better representation is not yet clear." *Id.* at 768.

84 Dean Trebesch, *New Challenges in Indigent Defense*, ARIZ. ATT'Y, Nov. 1992, at 25, 26.

85 *Id.*

86 In imposing remedies, the judiciary is also limited by its institutional nature; courts can react only to those cases that come before them.

like *Peart* and *Smith* focus retrospectively on individual cases rather than looking prospectively to demand reform of the system as a whole. Second, all three cases discussed above stopped short of directly ordering the expenditure of funds by the legislature, even if they did suggest specific guidelines or standards for effectiveness of counsel or for attorney fee structuring. Third, all three opinions failed to put into place oversight or enforcement mechanisms that would have ensured long-term, sustainable solutions. These three cases demonstrate the ways in which courts have shied away from responsibility for the institutional problems of the indigent defense system and shirked a stronger, more affirmative role in systemic reform. State courts should recognize that, especially when state constitutions afford them more robust interpretations of the right to counsel, they have more latitude than federal courts to assume an active role in reforming the indigent defense system.

The concurring and dissenting opinions in the above cases indicate the power these courts could have exercised. In his *Peart* dissent, Judge Dennis criticized the majority for limiting itself to the one criminal district section at issue when the conditions affecting indigent defense services were clearly not limited to that area.[87] Judge Dennis's primary issue with the majority opinion, however, was that it failed to specify how the legislature might fashion a solution.[88] In his dissent, Judge Lemmon argued that the *Peart* majority should have required the legislature to "enact supplemental funding, within a specified reasonable time, for compensating indigent defender attorneys according to uniform standards and guidelines" to guarantee the operation of programs that are "minimally adequate."[89] In *Lynch*, the majority opinion adopted a fee structure but stopped short of ordering the legislature to provide enough funding to satisfy that fee structure.[90] This reluctance may have, at least in part, led one concurring opinion to

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[87] State v. Peart, 621 So. 2d 780, 792 (La. 1993) (Dennis, J., dissenting).

[88] *Id.* at 793 ("[W]ithout a clear explanation by this court of the controlling constitutional principles and standards, the legislature cannot know exactly what is required to bring the indigent defender system into constitutional alignment; and it is unlikely that the legislature will be inspired or impelled to take satisfactory action without adequate guidance from this court."). Judge Dennis invoked the holding in *State v. Smith* and argued that the *Peart* majority failed by putting forth a *Smith*-like standard without giving the legislature more specific guidelines to direct it toward a more effective system. *Id.* at 795.

[89] *Id.* at 792 (Lemmon, J., dissenting).

[90] Similarly, while *Smith* set forth a very specific set of standards and guidelines, it also stopped short of ordering the legislature to provide funding to meet those guidelines, stating instead only that until such guidelines are implemented the court would infer "that the adequacy of representation is adversely affected by the system." State v. Smith, 681 P.2d 1374, 1381 (Ariz. 1984).

deem this remedy a mere "stopgap measure."[91] Thus, judges from the *Peart*, *Lynch*, and *Smith* courts suggest ways in which those decisions stopped short; further exploration not only supports their conclusions, but may also provide guidance to future courts.

One failing of these cases, most obvious in *Peart*, is that they tend to focus on the particular defendant or relevant jurisdiction rather than looking at the larger picture. This tendency to enact an individual remedy that will be applied on a case-by-case basis — in the form of an inference (*Smith*) or a presumption (*Peart*) — has two flaws. First, it leads to fact-specific analyses that may work like *Strickland* analyses: even though the test or presumption is designed to ferret out ineffectiveness, courts using the test often conclude that the lawyering involved was in fact effective.[92] Second, individualized remedies fail to address the systemic factors that lead to ineffective assistance of counsel.[93] Instead of focusing so much on individual cases, courts should focus on the underlying reasons for ineffectiveness of counsel within a given system — particularly when a specific entity is already in place to coordinate the provision of appointed lawyers (like OIDS). Such an emphasis will likely lead not to a reactionary approach to ineffective assistance challenges based on a lack of funding, but instead to the creation of a mechanism to ensure adequate representation within the entire state system. Courts must force legislatures to reexamine their indigent systems as a whole — how they are funded, how they are structured, and how they enable (or fail to enable) defense attorneys to provide adequate representation.

Beyond providing crucial guidance with a set of guidelines for what constitutes effective representation, courts must be willing to order the legislature to expend funds to support the implementation of those guidelines.[94] Legislatures are by nature majoritarian institutions

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[91] State v. Lynch, 796 P.2d 1150, 1164 (Okla. 1990) (Hodges, J., concurring). However, while Judge Hodges's concurrence recognized that the legislature must adopt some other solution, he did not go so far as to suggest ordering one.

[92] For examples of post-*Peart* Louisiana cases in which the lawyers were found effective, see *supra* p. 1737.

[93] Additionally, an approach that focuses on identifying ineffectiveness on a case-by-case basis places another burden on attorneys who are already overburdened by the system: the same attorneys who are already overworked and underresourced will be the ones who have to bring suit.

[94] Judicial power was exercised in an arguably parallel manner in a series of desegregation and institutional reform cases, and the Supreme Court has struck down some such injunctive remedies. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70 (1995). There have, however, been many other cases — particularly in the context of prison and mental health facility litigation — where lower federal court orders have been upheld and have consequently entailed that large portions of state budgets be committed to specified program or facilities improvements. *See* Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 715–16 (1978); *see also* Hutto v. Finney, 437 U.S. 678 (1978).

populated by politically self-interested actors, whereas the beneficiaries of indigent defense programs are typically numerical, economic, and ethnic minorities.[95] Therefore, legislatures are unlikely to initiate such programs and require additional prompting or incentives to effectuate such reforms.

Many courts, however, would view such an order as infringing upon legislative prerogatives. Unlike the federal Constitution, which "contains no express articulation of the separation of powers doctrine"[96] and instead leaves the definition of that doctrine primarily to the courts, many state constitutions do include a more explicit statement of the doctrine, forbidding any branch invested with either legislative, executive, or judicial power to exercise another's power except as the constitution allows.[97] In the realm of indigent defense, a conflict may appear to exist between the legislative and judicial powers, since the legislature is often the entity charged with the responsibility of crafting a system of indigent defense. One recognized exception to the "judiciary's inability to interfere with the legislative spending and taxing powers,"[98] however, is the courts' power "to determine and

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Additionally, indigent defense claims can be distinguished from those that have been rejected by the Court. In cases such as *Missouri v. Jenkins*, in which the lower court had ordered not just program improvements but also an increase in taxes to pay for the remedy, the Court has emphasized that the remedy be proportional to the constitutional violation and that the remedy address directly whatever is deemed to have caused the constitutional violation. *See Jenkins*, 515 U.S. at 84–102; *see also id.* at 111 (O'Connor, J., concurring) ("[T]he District Court cannot order remedies seeking to rectify regional demographic trends that go beyond the nature and scope of the constitutional violation."). In the context of inadequately funded indigent defense systems that result in ineffective lawyering, ordering the expenditure of funds as a remedy would be directly related to the constitutional violation.

Lastly, even if cases in the context of indigent defense are distinguishable, such distinctions may be unnecessary in the state court context. *Missouri v. Jenkins* and other similar cases were argued and decided in federal court; state courts may not be bound by such restrictions. Whether federal courts can order state legislatures to raise funds for the purpose of bringing the state's services in line with the Constitution is less certain, but may be debatable as well. *See* Citron, *supra* note 14, at 496–97 (citing Robert A. Schapiro, Note, *The Legislative Injunction: A Remedy for Unconstitutional Legislative Inaction*, 99 YALE L.J. 231 (1989) (arguing that a federal court order requiring the legislature to raise funds is consistent with judicial review)).

95 *See* Citron, *supra* note 14, at 498.

96 Richard M. Frank, *The Scorpions' Dance: Judicially Mandated Attorney's Fees — The Legislative Response and Separation-of-Powers Implications*, 1 EMERGING ISSUES ST. CONST. L. 73, 74 (1988).

97 *See id.* at 74–75. *But see* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1090 (2004) ("Neither the federal Constitution nor state constitutions specifically delineate the spheres of the branches of government, and they do not appear to intend any rigid segregation of activities among them. Separation of powers is an implied constraint, and it has to be given meaning in terms of traditional governmental practice or some principled understanding of democracy." (footnote omitted) (citing THE FEDERALIST Nos. 45–46, at 308–23 (James Madison) (Jacob E. Cooke ed., 1961))).

98 Frank, *supra* note 96, at 75.

compel payment of those sums of money which are reasonable and necessary to carry out their mandated responsibilities, and powers and duties to administer justice."[99] Under that principle, and with the understanding that there "exists no 'bright line' separating the respective powers of the three branches of government in general or the relationship between the legislature and judiciary in particular,"[100] several courts have justified fiscal intervention in the form of orders directed to the legislature to ensure that the judiciary is able to fulfill its responsibilities for administering the courts and upholding the defendant's constitutional right to effective assistance of counsel.

One way in which courts have justified ordering legislatures to expend funds is by asserting that the provision of indigent defense, and therefore the compensation of attorneys providing that service, is a judicial function; it then follows that by underfunding indigent defense, the legislature infringes upon the judiciary's powers, which flips the separation of powers argument entirely. In *Smith v. State*,[101] the New Hampshire Supreme Court adopted the view that for the legislature to statutorily limit the compensation for court-appointed defense counsel actually infringed on the judiciary's own power: "Since the obligation to represent indigent defendants is an obligation springing from judicial authority, so too is the determination of reasonable compensation for court-appointed attorneys a matter for judicial determination."[102]

In another state case utilizing similar reasoning, *State ex rel. Metropolitan Public Defender Services, Inc. v. Courtney*,[103] the relator alleged that "the legislative branch . . . failed to provide [adequate] levels of funding and that, as a result, the judicial branch [was] being prevented from performing its core functions (including trying criminal cases involving indigent accused defendants)."[104] The relator also alleged that "as a result of defendants' budget actions," the judiciary had been forced to limit the types of cases in which appointed counsel

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[99] 20 AM. JUR. 2D *Courts* § 44 (1995); *see also* Gary D. Spivey, Annotation, *Inherent Power of Court To Compel Appropriation of Expenditure of Funds for Judicial Purposes*, 59 A.L.R.3D 569, 617–25 (1974).

[100] Frank, *supra* note 96, at 76.

[101] 394 A.2d 834 (N.H. 1978).

[102] *Id.* at 839; *see also id.* ("The power to regulate officers of the court is a power inherent in the judicial branch. Implicit in that power is the authority to fix reasonable compensation rates for court-appointed attorneys."). Richard Frank notes that other states such as Illinois and Indiana have followed suit in ordering legislatures to award attorneys fees based on similar principles. *See* Frank, *supra* note 96, at 93.

[103] 64 P.3d 1138 (Or. 2003).

[104] *Id.* at 1139.

would be available.[105] Because its budget had been cut so deeply, the Judicial Department would not be able to compensate appointed attorneys in such cases, thereby "rendering the judicial branch incapable of performing its constitutionally mandated function of adjudicating whole categories of criminal cases."[106] The *Courtney* court's more general reasoning resembled that of the *Smith v. State* court; both viewed such legislative inaction as potentially infringing on the judiciary's ability to operate as an independent branch of government.

While potentially effective, this view of the separation of powers doctrine remains a minority view in many states.[107] Even in these states, however, one could argue that funding for indigent defense is so critical to the provision of the right to counsel that it is necessary under either the state or federal constitution — based on such a view, courts could proactively assert that the legislature must spend additional funds to meet the constitutional threshold. In the consolidated cases of *State v. Craig* and *State v. Harris*,[108] the Louisiana Supreme Court took such an approach. The court held that the district court could order the local government to provide funds to pay for investigators and expert witnesses in the capital cases of two indigent defendants.[109] In its decision, the court first noted its reluctance to interfere with the financial decisions that are primarily viewed as within the legislature's province.[110] The court acknowledged, however, that the indigent defense system needed "some overhaul" and that "the first step in dealing with this not-insurmountable problem involves some entity clearly determining who, under the current legal regime, is responsible for these expenses and to what extent. Given that this involves an interpretation of both the law and the constitution, this is clearly a judicial responsibility."[111] The court stated that while it was not attempting to set the legislature's budgetary priorities, it would require that local governments comply with the legislatively imposed re-

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105 *Id.* Defendants were the presiding officers of Oregon's Legislative Assembly and their legislative colleagues; the relator was the "principal provider of legal defense services to indigent persons accused of crimes" in several Oregon counties. *Id.*

106 *Id.* at 1140. In this case, the court concluded that because of the specific circumstances involved, the judiciary did not need to exercise the inherent power referenced above; however, the court did explicitly state that no party seemed to contest the fact that such power does exist under certain conditions, and therefore the court assumed for the purposes of its opinion that "this court's power includes the authority to order the legislature to provide certain minimum levels of funding to sustain the core functions of the judicial branch." *Id.* at 1139.

107 *See* Frank, *supra* note 96, at 94.

108 637 So. 2d 437 (La. 1994).

109 *Id.* at 448.

110 *Id.* at 447–48. The court also noted that the Louisiana Constitution specifies that the legislature must provide for an indigent defense system. *Id.* at 448.

111 *Id.*

sponsibility for covering such costs on a case-by-case basis.[112] These cases support the idea that the judiciary has an important role to play in ensuring state compliance with judicial interpretations of constitutional protections, even to the extent of directing legislative action. By relying on case-by-case determinations, however, the Louisiana Supreme Court's approach will continue to dissuade challenges by overburdened attorneys (or, alternatively, to further crowd dockets) as well as reinforce an ex post approach.

The case of *State v. Quitman County*[113] provides an example of a court carving out a more powerful role for itself in this context, particularly vis-à-vis the legislature, by acknowledging the judiciary's need to trump the legislature in the shadow of a constitutional violation. In its complaint, Mississippi's Quitman County alleged that by "requiring counties to fund the representation of indigent defendants, the State . . . violated its duty under . . . the Mississippi Constitution to provide effective assistance of counsel to indigent criminal defendants."[114] In response, the State of Mississippi asserted that the county had failed to state a claim for which the court could provide relief and that "because there exist[ed] no constitutional restriction on the ability of the State to allocate the costs of indigent defense between the State and counties, the system of indigent defense [was] a public policy decision solely within the purview of the Legislature."[115] While the Mississippi Supreme Court recognized that controlling the expenditure of funds for indigent defense was typically a legislative matter, it also acknowledged that "where the Legislature fails to act, the courts have the authority and the duty to intervene,"[116] and therefore held that the County did have a valid claim on which to seek judicial relief.[117]

Elaborating further on the point, the court distinguished such judicial action from those actions that infringe on the separation of powers: "[W]here the Legislature, in its allocation of funds to the judicial branch, 'fails to fulfill a constitutional obligation to enable the judicial branch to operate independently and effectively, then it has violated its Constitutional mandate, and the Judicial branch has the authority to see that courts do not atrophy.'"[118] Critically, the court drew a distinc-

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[112] *Id.*

[113] 807 So. 2d 401 (Miss. 2001). Although *Quitman County* was decided on state constitutional grounds, it should be acknowledged that because the right to counsel in state constitutions may be broader than that provided for in the federal Constitution, other state courts may also be capable of similar reasoning.

[114] *Id.* at 406.

[115] *Id.* at 409.

[116] *Id.*

[117] *Id.* at 410. The court also concluded that the county had pleaded facts that, if taken as true, were sufficient to demonstrate a breach by the State of its constitutional duty. *Id.* at 409.

[118] *Id.* at 409–10 (quoting *Hosford v. State*, 525 So. 2d 789, 798 (Miss. 1988)).

tion between the appropriateness of deference to the state legislature's authority in matters of funding and the need to intervene when legislative funding decisions have unconstitutional consequences: "The breach of duty, alleges the County, occurred not when the State required the counties to fund indigent criminal defenses, but when that requirement resulted in systemic ineffective assistance of counsel that has gone unchecked and unremedied by the State."[119]

It is important to remember that in making these decisions, courts are enforcing the constitutional right to counsel, and they should not shy away from their position as the primary enforcer of that right.[120] For courts to label indigent defense funding a purely legislative task is not only an abdication of constitutional responsibility, it is also a failure to take advantage of the judiciary's relative strengths and expertise in this unique field. Courts have an institutional advantage in advancing politically unpopular ideas, particularly when they raise important constitutional concerns, and should therefore capitalize on their expertise in the realm of indigent defense.[121] When courts do eventually delegate the execution of certain decisions, they cannot expect the legislature to act effectively based on broad, vague commands. While legislatures may be capable of independently reacting in the short term to judicial proclamations, to effect structural reform, courts

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[119] *Id.* at 408. In *Hosford v. State*, the same court used similar reasoning to "flip" the separation of powers challenge. 525 So. 2d at 789. Responding to a request by a circuit court judge for assistance in obtaining adequate courtroom facilities, *see Quitman County*, 807 So. 2d at 409 (citing *Hosford*, 525 So. 2d at 795), the Mississippi Supreme Court ruled that the legislature's failure to provide the funds necessary for an effective and independently functioning court required judicial intervention. *Hosford*, 525 So. 2d at 797–98. The *Quitman County* court saw its holding as a logical extension of *Hosford*: "Certainly, if adequate facilities are essential to the administration of justice, so is effective representation." *Quitman County*, 807 So. 2d at 410.

[120] Cases involving the enforcement of adequate funding to ensure effective assistance of counsel can be distinguished from other cases in which a court attempts to direct legislative spending specifically without similar grounding in a fundamental constitutional right. *Cf.* Frank, *supra* note 96, at 79–84 (discussing *Mandel v. Meyers*, 629 P.2d 935 (Cal. 1981), which presented a judicial and legislative separation of powers dilemma, but in which the disputed funding was not similarly related to a constitutional right).

[121] While some commentators have argued that courts lack expertise in the realm of budgetary legislation, others have argued that they possess expertise in the context of indigent defense and, therefore, in promulgating certain guidelines with respect to that field. *See, e.g.*, Gideon's *Promise*, *supra* note 14, at 2072–73 ("[J]udges are intimately acquainted with the functions of attorneys and the practical implications of caseloads, support services, research facilities, and other resources for effective representation. . . . [W]hatever doubts might exist about judicial supervision of other institutions, as a practical matter, judges are well suited to oversee indigent defense systems." (footnote omitted)). The Arizona Supreme Court cited its own expertise in this area when handing down its decision in *Smith* — "we do not base our opinion on the standards alone, but also on our own experience as attorneys," State v. Smith, 681 P.2d 1374, 1380 (Ariz. 1984) — as did the Oklahoma Supreme Court in *Lynch*, which premised its authority on the "inherent power of this court to define and regulate the practice of law," State v. Lynch, 796 P.2d 1150, 1163 (Okla. 1990).

must offer additional guidance by laying out a road map for the legislature to follow.[122]

A brief submitted in the recent case of *Arianna S. v. Commonwealth*[123] recommends the adoption of such an approach. In *Arianna S.*, the petitioners alleged an impending crisis in indigent defense, citing as proof a shortage of "willing, qualified, and experienced attorneys" and "a payment structure that makes the discharge of their obligations economically difficult and, at times, impossible."[124] The petitioners asked, among other measures, that the court "[d]eclare a presumption of ineffective assistance of counsel until such time as the Commonwealth provides adequate rates of compensation," "[d]irect the Commonwealth to increase compensation to attorneys appointed to represent indigent criminal defendants and children to specified hourly amounts," and "[i]ssue an injunction setting new rates at a level sufficient to ensure that qualified private counsel are available and able to provide children and indigent persons" in Massachusetts with adequate representation.[125] As a further enforcement mechanism, the petitioners suggested that "if adequate rates of compensation are not established" within a certain time frame, the Commonwealth's trial courts should be "directed to entertain motions for writs of habeas corpus from indigent criminal defendants, and upon finding merit to those petitions, . . . order the immediate release of criminal defendants."[126]

Regardless of the remedies that courts are willing to impose, there remains a need for oversight during their implementation and for mechanisms to ensure their sustainability. While specificity has been important to decisions in this context, specificity alone will not suffice; even dramatic steps by a court acting on its own can only achieve limited results.[127] The most extreme measures may force the legislature

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[122] If it appears that the legislature is obligated to act pursuant to a judicial mandate, this may also alleviate political pressures on individual legislators.

[123] No. SJ 2004-0282 (Mass. filed June 28, 2004).

[124] Petition for Relief at 3, *Arianna S.* (No. SJ 2004-0282).

[125] *Id.* at 57.

[126] *Id.* In *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004), the Massachusetts Supreme Judicial Court ruled on a similar allegation that chronic underfunding had resulted in a shortage of qualified attorneys. *Id.* at 900. The *Lavallee* court held that it was inappropriate for courts to empower trial judges to authorize compensation for appointed attorneys in excess of what the state legislature had already appropriated, *see id.* at 907–08, but the petitioner's request in *Arianna S.* can be distinguished. Whereas the *Lavallee* court would not authorize *other judges* to bypass the legislature in individual cases, the petitioner's brief in *Arianna S.* instead asks the court to force the legislature itself to act so that legislatively dictated compensation rates would conform to constitutional requirements.

[127] In *Lavallee*, for example, the court ultimately held that "on a showing that no counsel is available to represent a particular indigent defendant despite good faith efforts, such a defendant may not be held more than seven days and the criminal case against such a defendant may not

into a reactionary, short-term fix, but will likely fail to produce a more affirmative, proactive solution that has staying power.[128] One strategy to achieve more durable reform might be for state courts to appoint a special master with any or all of the following powers: the power to order expenditures, to review budgets and caseloads for indigent criminal defense lawyers in the relevant jurisdiction, and to order appropriate corrections — in other words, the power to ensure compliance with court orders.[129] In so doing, the courts would create a mechanism through which more detailed, context-specific guidelines could be formulated and through which well-informed, thorough recommendations might eventually be made to the legislature, thus increasing the likelihood of adoption. Additionally, the use of special masters might resolve, to some extent, concerns about the court's lack of expertise, while also evading the most direct form of separation of powers concerns by avoiding the appearance of judicial legislation. Such a mechanism could remain in place until the point at which the legislature establishes an alternative mechanism or entity to ensure oversight and compliance — perhaps in the form of an independent commission. This arrangement would fulfill the judiciary's responsi-

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continue beyond forty-five days." *Lavallee*, 812 N.E.2d at 901. In *In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130 (Fla. 1990), the Florida Supreme Court concluded that it could not infringe on the legislative function by ordering the appropriation of funds and instead advised the legislature that "if sufficient funds are not appropriated within sixty days from the filing of this opinion, and counsel hired and appearances filed within 120 days from the filing of this opinion," the Florida courts would entertain habeas petitions from indigent appellants with delinquent appellate briefs of over sixty days and, in response to meritorious petitions, would order immediate release of the petitioners. *Id.* at 1139. While both of these cases provide rather dramatic responses to the absence of counsel due to chronic underfunding, they still fail to reach the broader problem of how to reform the system and to provide adequate counsel. Rather than enforcing the right to counsel, these courts appear to be enforcing the right to freedom given the absence of counsel — perhaps just as satisfying an end for the defendant at issue, but hardly the intended nature of the right.

128 A strategy contemplated by courts in cases such as *Lynch* and *Lavallee* is the implementation of a temporary solution while allowing the legislature time to respond. *See, e.g.*, *Lavallee*, 812 N.E.2d at 908 ("In other circumstances State courts . . . have granted preliminary relief in the form of increased compensation rates, but have simultaneously directed their Legislatures to amend permanently the compensation rates for indigent representation."). While it may be appropriate for courts to place some time limit on their judicially created remedies, these limits should not exempt them from factoring sustainability and a systemic approach into both short- and long-term remedies demanded from the legislature as eventual replacements.

129 In *Peart*, the majority opinion directly acknowledged this suggestion, stating that one indigent defense board recommended that "this Court mandate that the criminal violation assessment be raised compulsorily to $25 in every parish; that the funds raised be used statewide; that this court appoint a special master to oversee use of these funds; and that this special master reduce public defenders' caseloads." State v. Peart, 621 So. 2d 780, 790 (La. 1993). The *Peart* court refused to adopt such a suggestion — along with others, including a recommendation to create a statewide indigent defender board — based on the belief that the judiciary should tread lightly in the affairs of other governmental branches and that the issue fell within the legislature's province. *Id.* at 790–91.

bility to enforce fully the constitutional right to counsel while also ultimately allowing the legislature to retain its authority in the realm of budgetary allocation and the administration of indigent defense programs.

One hope for the implementation of this solution lies in the recent *Arianna S.* case, in which the petitioners' amici have requested that the court appoint a special master who, as a means of fashioning an appropriate remedy, would oversee a process that identifies the standards of competency associated with the right to counsel in Massachusetts, review the current procedures for appointing counsel, and design revised standards (including pre-appointment standards for attorney competency and fitness).[130] In addition, the special master would offer all interested parties an opportunity to present facts and proposals for a process that would ensure competent counsel, eventually adopt a comprehensive plan to meet the representation needs of the indigent and the reasonable demands of the judiciary and state bar, and determine the quantity and source of resources necessary to meet constitutional representation requirements.[131]

V. CONCLUSION

The problem of underfunding for indigent defense is vast and complex — a solution will require cooperation from multiple parties, and it is likely that a truly effective, long-term solution cannot come from the courts alone.[132] However, courts can contribute to a solution by combining a pragmatic approach with a more active judicial role. It must be recognized that enforcing the right to effective assistance of counsel falls squarely within the province of the judiciary; to stop short of vigorously enforcing that right — even in cases in which that right is intertwined with legislative funding issues — is to abdicate constitutional responsibility and ignore the practicalities of what is required for representation to be "effective."

Because *Strickland* remains the dominant Supreme Court standard for effective assistance of counsel, more pragmatic innovations are therefore left primarily to state courts. As long as that remains the case, the judiciary has a critical role to play at the state level. While *Peart*, *Lynch*, and *Smith* have created a bold theoretical legacy, it is important to learn from their flaws and from their failure to create sustainable results. In all three cases, courts succeeded in spurring legislatures into action to provide additional funding in the short term,

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130 Brief of Amici Curiae in Support of Petitioners at 41–42, *Arianna S.* (No. SJ 2004-0282).

131 *Id.*

132 *See* Frank, *supra* note 96, at 100 ("The success of our tripartite system ultimately depends on comity between the branches of government.").

but were unable to sustain real structural or fundamental change to indigent defense systems in the long term.[133]

Ultimately, courts must assume the higher level of responsibility bestowed upon them, and expected of them, by the Constitution and specifically by the Sixth Amendment, as well as by their state constitutions. A stronger, more definitive role for the courts in enforcing the right to effective assistance of counsel would involve specific recommendations designed to guide the legislature in formulating standards for effectiveness and would also require court-ordered expenditures of funds to make the implementation of those standards feasible. However, even if the judiciary is able to deliver adequate guidance in the form of specific recommendations and provide for increased funding, there may still be a danger that whatever solution does arise will not survive. Courts therefore must also establish some mechanism for ensuring that their recommendations are not in vain — for example, a special master who will oversee the appointment and compensation process unless or until the legislature steps up to create its own mechanism. Until courts alter their approach to indigent defense reform, it is unlikely that their decisions will have anything other than a short-term or symbolic impact, and the right to effective counsel will remain a dream deferred.

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[133] In addition to any entity the courts construct to assess and monitor the progress of the legislature in the long term, extrajudicial parties will likely be needed to help enforce and maintain what the courts begin. The state bar, advocacy groups, legislators, and the media can and should play a major role in contributing to the reform process. *See, e.g.*, Marion Chartoff, *Indigent Defense: The Georgia Indigent Defense Act of 2003*, CHAMPION, Aug. 2003, at 61, 61 (relating the history of the Georgia Indigent Defense Act of 2003, which created a statewide indigent defense system in Georgia, and demonstrating how the Act's passage "was the result of a concerted effort by members of the judiciary, the state bar, advocacy groups, and legislators from across the political spectrum").