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**NEITHER EQUAL NOR JUST:
THE RATIONING AND DENIAL OF LEGAL SERVICES TO
THE POOR WHEN LIFE AND LIBERTY ARE AT STAKE**

By Stephen B. Bright*

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[Footnotes appear at the end of the document]

The ration of legal services for the poor person accused of a crime has been remarkably thin in most of the United States. Despite the constitutional right to counsel established over thirty-five years ago in *Gideon v. Wainwright*,¹ many states have yet to provide capable lawyers to represent the accused, and the resources necessary to conduct investigations and present a defense. A poor person may be without counsel when bail is set or denied, and during critical times for pretrial investigation. He or she may receive only perfunctory representation--sometimes nothing more than hurried conversations with a court-appointed lawyer outside the courtroom or even in open court-- before entering a guilty plea or going to trial. The poor person who is wrongfully convicted may face years in prison, or even execution, without any legal assistance to pursue avenues of post-conviction review. While in prison, he or she may endure practices and conditions which violate the Constitution, but have no access to a lawyer to seek remedies for those violations.

In contrast, the person with adequate resources may secure a lawyer who will make a case for and perhaps obtain release on bail, work closely with the client in conducting an immediate and thorough investigation, present a vigorous defense at trial, pursue all available avenues of post-conviction relief, and challenge any constitutional violations that occur in prison. Attorney General Janet Reno recently observed that if justice is available only to those who can pay for a lawyer, "that's not justice, and that does not give people confidence in the justice system."² Yet little is being done to remedy this denial of equal justice. Indeed, the situation is deteriorating in many parts of the country.

This article examines the availability and quality of legal services for poor persons accused of crimes at each stage of the criminal justice process--from arrest through trial, appeal, and post-conviction proceedings--and for those convicted of crimes, who languish in prisons and jails in need of access to the courts for protection of their constitutional rights. It will discuss the indifference to injustice on the part of judges, lawyers, legislators, and a public that allows a country with over a million lawyers to leave many of those most in need of legal assistance without counsel at all, and too often with grossly inadequate counsel when any is provided. Finally, it discusses the need for law schools and the legal profession to respond to these grave deficiencies in the system of justice and see that we do not give up on the unfulfilled quest for equal justice.

I
**THE LACK OF LEGAL SERVICES FOR
THOSE IN THE CRIMINAL JUSTICE SYSTEM**

A small minority of jurisdictions in the United States have created and funded good public defender offices and assigned counsel programs which secure capable lawyers and provide training and supervision, adequate compensation, and investigative and expert assistance.³ As a result, some poor people accused of crimes are fortunate to be represented by capable lawyers, whose extraordinary dedication, selflessness, and persistence have provided a glimpse at the realization of the dream of *Gideon v. Wainwright*. In addition, lawyers with public-interest programs and lawyers providing their services pro bono have represented inmates by challenging their convictions or conditions of confinement.

But there are not nearly enough good, adequately funded programs and dedicated lawyers to represent the thousands of people caught up in a criminal justice system which sends more and more people to prison even as crime rates decline.⁴ An American Bar Association report found "long-term neglect and underfunding of indigent defense ha[ve] created a crisis of extraordinary proportions in many states throughout the country."⁵ As a result, many states provide poor defendants only perfunctory representation at trial and on appeal, and make no provision for legal assistance to the poor to challenge their convictions in post-conviction proceedings or to seek remedies for violations of constitutional rights while in prison.

A. Disregard of the Constitutional Right to Counsel at Trial and on Appeal

The Supreme Court held in *Gideon* that a poor person facing felony charges "cannot be assured a fair trial unless counsel is provided for him."⁶ But in the years since, the courts have held that the lawyer need not be aware of the governing law,⁷ sober,⁸ or even awake.⁹ Even though a lawyer's immediate assignment and representation at the initial bail proceeding increase the likelihood that the accused will be judged fairly,¹⁰ most jurisdictions do not provide counsel for bail hearings,¹¹ thereby denying the accused an immediate consultation with counsel, possible release pending trial, and a prompt investigation of the facts.¹² And, although the Supreme Court has held that the state must provide the indigent with transcripts¹³ and counsel for one appeal,¹⁴ a one-page brief may be sufficient, even in a capital case,¹⁵ and counsel need not show up for oral argument.¹⁶

The systems of "indigent defense" that have emerged in many jurisdictions make no pretense of complying with *Gideon's* mandate of supplying counsel to improve the defendant's chances of receiving a fair trial. In these jurisdictions, the poor person facing loss of life or liberty may be assigned a lawyer who lacks the knowledge, skills, and often even the inclination to defend a case properly.¹⁷ Further, state and local governments are unwilling to allocate adequate resources for the representatives of indigent criminal defendants. A lawyer assigned to represent an indigent defendant is paid far less than he or she could make doing any other type of legal work, and is denied the resources necessary for a full investigation and the retention of necessary expert witnesses.¹⁸ Yet it is

the defendant who pays with his or her life or liberty for the lawyer's ignorance of the law or failure to present critical evidence.¹⁹

1. Resistance to *Gideon*

There has long been and continues to be resistance and indifference to fulfilling the constitutional mandate of *Gideon*. Over ten years after the Supreme Court decided *Gideon*, the Georgia District Attorney's Association responded to a bill introduced in 1976 for statewide funding of indigent defense by telling legislators that the bill constituted "the greatest threat to the proper enforcement of the criminal laws of this state ever presented."²⁰ The vehement opposition by Georgia's judges and prosecutors delayed any state funding for years and has prevented to this day the establishment of a comprehensive indigent defense system there.²¹

Even in the absence of such resistance, most state and local governments have been more concerned with keeping costs low than with providing quality defense services or with ensuring fair trials. When they have examined factors other than costs, many evaluate indigent defense programs not from the standpoint of ensuring fair trials, but with an eye to increasing administrative convenience in moving dockets and securing convictions. In the pursuit of saving money, governments increasingly award contracts for representing indigent defendants to the lawyer who submits the lowest bid.²² Many states pay lawyers appointed to defend the poor such low rates that in some cases the attorneys make less than the minimum wage.²³ Many jurisdictions have either refused outright to establish public defender programs, or have established programs but underfunded them, leaving the lawyers in those programs with staggering caseloads.²⁴

Despite the Supreme Court's 1972 decision in *Argersinger v. Hamlin*,²⁵ requiring counsel for poor people jailed for minor offenses, some jurisdictions still do not provide a lawyer for such cases.²⁶ A county in Georgia, which for years did not provide legal representation for indigents facing misdemeanor charges, but instead gave them a form containing a waiver of rights and plea of guilty to sign,²⁷ only recently agreed to advise persons of their right to counsel.²⁸

Many jurisdictions process the maximum number of cases at the lowest possible cost without regard to justice. For example, the county commission in McDuffie County, Georgia, decided in 1993 that the \$46,000 a year it was spending on indigent defense was too much, even though, according to the chairwoman of the commission, the attorneys appointed to indigent cases were being paid "about half of what they would normally receive."²⁹ The commission announced that it would accept bids from any member of the local bar to take indigent cases.³⁰ The commission specified no qualifications and established no mechanism for judging the qualifications of those who submitted bids.

The commission awarded the contract to Bill Wheeler, whose \$25,000 bid was almost \$20,000 lower than the other two bids, \$44,000 and \$42,000.³¹ The contract allowed Wheeler to maintain a private practice as well as defend the county's indigent defendants. The savings of \$21,000

to McDuffie County was not as beneficial for poor people charged with crimes--or for justice--as it was for McDuffie County's treasury. Wheeler often meets people accused of crimes for the first time in open court and enters guilty pleas on their behalf after only a few minutes of whispered discussions.³² Court records disclose that in the first four years that he had the contract, Wheeler tried only three cases to a jury while entering 313 guilty pleas.³³ Most remarkably, during that period, he filed only three motions.³⁴

In jurisdictions where judges appoint lawyers to defend cases, it is no secret that judges do not always appoint capable lawyers to defend the poor. Clarence Darrow made an observation that is as true today as it was when he made it in 1924: "[N]o court ever interferes with a good lawyer's business by calling him in and compelling him to give his time" in defense of an indigent defendant.³⁵ Many judges prefer to appoint lawyers who try cases rapidly, instead of zealously, in order to move their dockets.

In the last forty-five years, judges in Houston, Texas have repeatedly appointed Joe Frank Cannon, known for hurrying through trials like "greased lightning," to defend indigent defendants despite his tendency to doze off during trial.³⁶ Ten of Cannon's clients have been sentenced to death, one of the largest numbers among Texas attorneys.³⁷ While representing Calvin Burdine at a capital trial, Cannon "dozed and actually fell asleep" during trial, "in particular during the guilt-innocence phase when the State's solo prosecutor was questioning witnesses and presenting evidence."³⁸ The clerk of the court testified that "defense counsel was asleep on several occasions on several days over the course of the proceedings."³⁹ Cannon's file on the case contained only three pages of notes.⁴⁰ A law professor who later represented Carl Johnson, a previous Cannon client, in post-conviction proceedings found that Cannon's "ineptitude . . . jumps off the printed page" and that Cannon slept during the proceedings.⁴¹ Nevertheless, the death sentences in both cases were upheld. Carl Johnson has been executed.

Judges in Long Beach, California assigned the representation of numerous indigent defendants to a lawyer who tried cases in very little time, not even obtaining discovery in some of them.⁴² According to a former supervisor at the local public defender's office, judges liked the lawyer, Ron Slick, "because he was always ready to go to trial, even when it seemed he had inadequate time to prepare."⁴³ A substantial number of his clients asked judges to appoint someone else to defend them, but their motions were denied.⁴⁴ At one time, Slick had the distinction of having more of his clients sentenced to death--eight--than any other attorney in California.⁴⁵

A former president of the Arkansas Association of Criminal Defense Lawyers, who was also involved in the defense of many capital cases in Arkansas, has described the plight of lawyers in that state.⁴⁶ Lawyers there are in effect either forced to spend their own money or to perform "a sort of uninformed legal triage," ignoring some issues, lines of investigation, and defenses because of the lack of adequate compensation and resources.⁴⁷ But the attorneys do not bear the greatest costs of this approach: "The lawyer pays some--in reputation, perhaps--but it is his client who may pay with his liberty or his life."⁴⁸

Children pay as well for the failure of the system to provide competent counsel. The quality of legal representation for children facing delinquency proceedings in juvenile courts is a disgrace in many parts of the country.⁴⁹

2. The Consequences For Poor People Accused of Crimes

The lack of representation at early stages and inadequate representation once a lawyer is assigned increase the risk of conviction of the innocent, often result in critical evidence not being presented to a jury or judge, and deprive the poor of the protections of the Bill of Rights.

Supreme Court Justice John Paul Stevens observed that the "recent development of reliable scientific evidentiary methods has made it possible to establish conclusively that a disturbing number of persons who had been sentenced to death were actually innocent."⁵⁰ According to Justice Stevens, this "most dramatically illustrated" the consequences of the failure to provide competent legal counsel to the poor.⁵¹ The United States Department of Justice has also shown concern for the number of people convicted by juries but later exonerated by scientific evidence.⁵² Other observers have documented numerous instances of conviction of innocent people.⁵³

Courts decide many other issues in criminal cases besides guilt or innocence. The integrity of the process by which those decisions are made is important if just results are to be reached. One of the most important decisions courts make in cases in which the defendant is found guilty is how the offender is to be punished. Punishments range from community service, to fines, to days in jail, to years in prison, to life imprisonment without the possibility of parole, to death. Competent legal representation is essential to ensure that such decisions are as well informed as humanly possible.

Judges and juries often make important decisions without critical evidence because lawyers fail to present it. Justice Thurgood Marshall once observed that "[t]he federal reports are filled with stories of counsel [in capital cases] who presented *no* evidence in mitigation of their clients' sentences because they did not know what to offer or how to offer it, or had not read the state's sentencing statute."⁵⁴ An American Bar Association study found that "[i]n Tennessee . . . defense lawyers offered no evidence in mitigation in approximately one-quarter of all the death sentences affirmed by the Tennessee Supreme Court since the Tennessee legislature promulgated its current death penalty statute,"⁵⁵ and observed that "[d]efense representation is not necessarily better in other death penalty states."⁵⁶

The consequences of not presenting such evidence is illustrated by the case of Horace Dunkins. The Alabama jury that sentenced him to death was never told that he was mentally retarded. Upon learning after the trial from newspaper reports that Dunkins was mentally retarded, one juror came forward and said she would not have voted for the death sentence if she had known of his condition.⁵⁷ Nevertheless, Dunkins was executed.

The consequences of a lawyer's ignorance of the law is illustrated by the case of John Eldon Smith, one of many people who have been executed even though they were sentenced to death in

violation of the Constitution. Smith's lawyers were not aware that underrepresentation of women in the jury pools violated the Sixth Amendment's guarantee that juries be composed of a fair cross section of the population.⁵⁸ The lawyers for Smith's codefendant, tried separately in the same county, were aware of the law, raised the issue, and won a new trial.⁵⁹ At the new trial, a jury which fairly represented the community sentenced that codefendant to life imprisonment.⁶⁰ The federal courts refused to consider the identical issue in Smith's case⁶¹ because his lawyers, unaware of the law, had not preserved it.⁶² A switch of the lawyers for the two defendants would have resulted in Smith having his conviction overturned and the codefendant being executed.

While defendants may pay with their lives or liberty for the ineptness of the lawyers assigned to defend them, the lawyers are seldom sanctioned. To the contrary, judges, perhaps resigned to the fact that capable lawyers will not defend cases for the small amounts paid, continue to assign the same lawyers to represent other indigent defendants.

3. The Most Fundamental Right, Unenforceable

The right to counsel is clearly the most fundamental constitutional right for a poor person charged with a crime. An attorney is needed to protect the client's rights and marshal the evidence necessary for a fair and reliable determination of guilt or innocence and, if guilty, a proper sentence. But who enforces the right to counsel?

The lawyer who submits the lowest bid for a county's indigent defense business is not necessarily capable of defending criminal cases. However, the indigent defendant represented by an incapable lawyer may not even know that he or she has a right to something better than the lowest bidder, the lawyer who hurries through cases like "greased lightning," or a lawyer so undercompensated, so overworked, or so incompetent that adequate representation is impossible. Even those who recognize that their lawyers are inadequate may not complain, out of fear that the quality of the representation will deteriorate even further if they offend their lawyers by voicing a complaint, but the judge does not replace the lawyer. There is the equally valid fear that the next lawyer appointed by the same judge may be even worse.

The difficulty of enforcing the right to counsel is illustrated by the plight of, Gregory Wilson, an African-American man who faced the death penalty in Covington, Kentucky. Wilson had no counsel because the state public defender program would not handle the case and the local indigent defense program could not find a lawyer because compensation for defense counsel in capital cases at that time was limited by statute to \$2500.⁶³

When the head of the local indigent defense program urged the judge to order compensation beyond the statutory limit in order to secure a lawyer qualified for such a serious case, 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.⁶⁴ The judge eventually obtained counsel by posting a letter in the courthouse asking any member of the bar to take the case with the plea "PLEASE HELP.

DESPERATE."⁶⁵ The notice said nothing about qualifications to handle a capital case. The judge appointed three lawyers who responded, but one later withdrew.⁶⁶

Not surprisingly, this method of selecting counsel did not produce a "dream team." The lead counsel, William Hagedorn, can charitably be described as well past his prime. He did not have an office or support staff, but practiced out of his home, where a large flashing Budweiser beer sign was prominently displayed.⁶⁷ He had never previously handled a death penalty case.⁶⁸ The other lawyer who responded to the judge's plea for help had never before handled a felony case.⁶⁹ That lawyer found that Hagedorn "manifested all the signs of a burned-out alcoholic. . . . [H]e would ramble and digress. At times he appeared disoriented. He did not make sense. . . . He seemed incapable of having any meaningful discussion about the case."⁷⁰ The attorney who administered the county's indigent defense system strongly objected to the appointments, saying that they were "unworkable" and the two lawyers could not provide "the quality of representation that is needed in this the most serious of all cases."⁷¹

Wilson became concerned. Almost any consumer of legal services, even one who wanted a lawyer only to prepare a will or an uncontested divorce, would be concerned if he or she found that one lawyer who was to provide those services did not have a law office and had never provided the services before.

Wilson became even more concerned upon learning that the police had recently executed a search warrant and recovered stolen property in garbage bags from beneath Hagedorn's floor;⁷² that Hagedorn had engaged in unethical conduct, including forging a client's name to a check;⁷³ and that Hagedorn was a "heavy drinker," who had appeared in court drunk on occasion, and was consistently to be found at a bar known as "Kelly's Keg." Mr. Hagedorn had even given the name and telephone number of Kelly's Keg as his business address and telephone number.⁷⁴ It is hard to fault Wilson for his concern. Most people would be reluctant to trust even a minor legal matter to such a lawyer.

But, unlike those with resources, Wilson could not afford another lawyer. Wilson repeatedly objected to being represented by the lawyers appointed by the court.⁷⁵ He asked the judge that he be provided with a lawyer who was capable of defending a capital case.⁷⁶ The judge refused and proceeded to conduct a trial that was a travesty of justice. Hagedorn was not even present for parts of the trial.⁷⁷ He cross-examined only a few witnesses, including one witness whose direct testimony he missed because he was out of the courtroom.⁷⁸ Wilson was sentenced to death.

What more could Gregory Wilson have done to enforce his Sixth Amendment right to counsel? He objected. He complained about the lawyers appointed by the judge, who were clearly incapable of defending a capital case. He asked for a real lawyer. Even these efforts were insufficient to enforce the right to counsel. On direct appeal, the Kentucky Supreme Court attributed Hagedorn's performance to Wilson's supposed lack of cooperation.⁷⁹

In theory, the right to counsel can be protected after trial by the defendant's assertion of a claim of ineffective assistance. The Catch-22 for most poor people, however, is that they need a

lawyer to litigate this claim in post-conviction proceedings, but the Supreme Court has held that there is no right to a lawyer at that stage of the process.⁸⁰ Even if the state provides a lawyer to raise a claim of ineffectiveness, there is no guarantee that the new lawyer will be any more competent than trial counsel.

A few states provide inmates with representation in post-conviction proceedings even though this practice is not constitutionally required. Public interest programs and volunteer lawyers provide representation to inmates facing the death penalty in some states. But most poor people convicted of crimes who are not faced with a death sentence, and even some who are, lack any access to lawyers to file post-conviction petitions challenging the effectiveness of the representation they received. For them, there is simply no remedy for the denial of their most fundamental right.

B. The Lack of Legal Assistance to Challenge Convictions in Post-Conviction Proceedings

The rations of legal services run out altogether in many states after one appeal. Post-conviction proceedings -- habeas corpus review -- in the state and federal courts have historically provided an important means of reviewing constitutional claims.⁸¹ The Supreme Court, however, has held that the state is not required to provide counsel to poor people in post-conviction proceedings,⁸² and many states do not. In fact, the Supreme Court concluded in *Murray v. Giarratano* that the states are not required to provide counsel even in capital cases.⁸³ It upheld Virginia's refusal to provide a lawyer for condemned defendants, saying: "Virginia may quite sensibly decide to concentrate the resources it devotes to providing attorneys to capital defendants at the trial and appellate stages of a capital proceeding. Capable lawyering there would mean fewer colorable claims of ineffective assistance of counsel to be litigated in collateral attack."⁸⁴

The Court was apparently unaware that Virginia had decided not to concentrate its resources at either end of the criminal justice system, but instead on highways, parks, and other functions. It was only in the mid-1980s that Virginia removed a limit of \$600 per case for lawyers defending capital cases, the lowest in the nation, and placed the establishment of the fee within the discretion of the trial judge.⁸⁵ Even after this change, the average payment to court-appointed lawyers in capital cases in Virginia in 1985 was only \$784.56 per case.⁸⁶ The Supreme Court has trusted the states to assure legal assistance for the poor, but many states, like Virginia, have betrayed that trust.

The Supreme Court has held that inmates may have access to law libraries instead of counsel to prepare their own post-conviction pleadings or challenges to conditions.⁸⁷ However, the Court gave state legislators and prison administrators "wide discretion" in fulfilling this constitutional mandate.⁸⁸ As previously discussed, state legislators have repeatedly breached the trust the Court has placed in them. Prison officials, who may be the targets of suits brought by inmates, have little incentive to provide access to libraries or other legal assistance.

For example, Georgia's Commissioner of Corrections cut off funding in 1996 to a program at the University of Georgia School of Law, which employed fourteen attorneys to work with law

students to provide legal advice to inmates.⁸⁹ The Commissioner replaced the program, which had provided legal services to prisoners for twenty-four years, by contracting with three recent law school graduates, who were friends of the head of the department of Corrections' legal office, to give legal advice to the state's 34,000 prisoners.⁹⁰ An analysis of the legal work two and a half years later revealed that the lawyers hired by the Department gave "flatly erroneous advice," including advising inmates that a deadline for filing federal habeas corpus petitions adopted in 1996 did not apply to them,⁹¹ "missed viable claims," failed to investigate cases beyond reviewing the record and talking to trial counsel, and accepted "only the simplest and most obviously meritorious cases."⁹²

The Supreme Court added another cruel Catch-22 in *Lewis v. Casey*⁹³ by requiring that in order to enforce the right of access to libraries or legal assistance, inmates must prove "actual injury" from being denied access.⁹⁴ Yet without access to lawyers or libraries, inmates have no way of learning what their rights are and thus have virtually no chance of proving the very injury they must establish to gain access.⁹⁵ The Supreme Court was not unaware of this dilemma. In *Lewis*, it limited an inmate's right to bring "a grievance that the inmate wished to present,"⁹⁶ but expressly disclaimed the notion that inmates have a right "to litigate effectively once in court."⁹⁷ Of course, even if they had access to law libraries, most inmates lack the knowledge necessary to research the law and prepare pleadings under the time constraints of a one-year statute of limitations.⁹⁸ Moreover, it is virtually impossible for an inmate to interview witnesses and litigate claims such as ineffective assistance of counsel from a prison cell.

Inmates under sentences of death have the most desperate need for post-conviction review of their convictions and sentences; these inmates have often prevailed by showing that they were convicted or sentenced to death in violation of the Constitution. Federal courts found constitutional error requiring reversal of convictions or sentences in 40% of the first 361 capital judgements reviewed in habeas corpus proceedings between the restoration of the death penalty in 1976 and mid-1991.⁹⁹ Death penalty resource centers, also known as post-conviction defender organizations, either represented condemned inmates in post-conviction proceedings or recruited lawyers for them.

The lawyers employed by the resource centers, who specialized in capital litigation, proved effective. Walter McMillian, who spent six years on Alabama's death row, is free today because the Alabama Resource Center proved he was innocent of the murder for which he was condemned to die.¹⁰⁰ Lloyd Schlup and Curtis Lee Kyles are alive today because the resource centers in Missouri and Louisiana established that they were sentenced to death in violation of the Constitution and were probably innocent of the crimes for which they were convicted.¹⁰¹ Congress responded to these and other achievements by resource center lawyers not by commending the programs for preventing unlawful executions and upholding the integrity of the system, but by eliminating their funding.

The Attorney General of South Carolina, who ran on a promise to replace the state's electric chair with an electric sofa so that more people could be executed at one time, led a successful effort to eliminate funding for the resource centers in 1995.¹⁰²

The resource centers were more cost-effective than appointing individual lawyers, and the

specialization of the resource center attorneys provided a higher quality of representation.¹⁰³ However, those who want to speed up executions preferred a system of inadequate representation.¹⁰⁴ Without representation, the condemned can be swiftly dispatched to the execution chamber without anyone raising troubling questions of innocence or constitutional violations such as those often raised by the resource center attorneys.

Not long after eliminating funding for the resource centers, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996,¹⁰⁵ which placed new, unprecedented restrictions on habeas corpus review, including a one-year statute of limitations.¹⁰⁶ Thus, people who have been unconstitutionally convicted or sentenced now face a new, complex set of barriers to vindication of their constitutional rights; but those who are poor may not even have lawyers to help them understand the Act or comply with its provisions.

Exzavious Gibson, a man with an I.Q. in the 80s, was condemned to die by Georgia.¹⁰⁷ He had no lawyer in the state post-conviction proceedings and was incapable of challenging the effectiveness of his court-appointed lawyer on his own.¹⁰⁸ Gibson's evidentiary hearing started as follows:

The Court: Okay. Mr. Gibson, do you want to proceed?

Gibson: I don't have an attorney.

The Court: I understand that.

Gibson: I am not waiving my rights.

The Court: I understand that. Do you have any evidence you want to put up?

Gibson: I don't know what to plead.

The Court: Huh?

Gibson: I don't know what to plead.

The Court: I am not asking you to plead anything. I am just asking you if you have anything you want to put up, anything you want to introduce to this Court.

Gibson: But I don't have an attorney.¹⁰⁹

Nevertheless, the court went ahead with the hearing. The state was represented by an Assistant Attorney General who specialized in capital habeas corpus cases.¹¹⁰ After his former attorney had been called as a witness against him, Gibson was asked if he wanted to conduct the

cross-examination:

The Court: Mr. Gibson, would you like to ask Mr. Mullis any questions?

Gibson: I don't have any counsel.

The Court: I understand that, but I am asking, can you tell me yes or no whether you want to ask him any questions or not?

Gibson: I'm not my own counsel.

The Court: I'm sorry, sir, I didn't understand you.

Gibson: I'm not my own counsel.

The Court: I understand, but do you want, do you, individually, want to ask him anything?

Gibson: I don't know.

The Court: Okay, sir. Okay, thank you, Mr. Mullis, you can go down.¹¹¹

Gibson tendered no evidence, examined no witnesses, and made no objections. The judge denied Gibson relief by signing an order prepared by the Attorney General's office without making a single change.¹¹² The Georgia Supreme Court held that Gibson had no right to counsel and affirmed the denial of relief.¹¹³

Some of those condemned to die in Texas could not have done any worse had they represented themselves than they did with the lawyers assigned to them by the Texas Court of Criminal Appeals. The court took over appointing counsel after the Texas Resource Center, which had employed lawyers specializing in capital post-conviction litigation, was closed due to the elimination of federal funding, previously discussed. Many of the lawyers assigned by the Court of Criminal Appeals have lacked experience and expertise in post-conviction litigation. Several have missed deadlines for filing their applications, thereby forfeiting any post-conviction review.¹¹⁴ In refusing to consider one untimely application, the court noted that the "screamingly obvious" intent of the Texas legislature in setting a time limit has been "to speed up the habeas corpus process."¹¹⁵ Judge Charles Baird took issue with the majority's conclusion that "speed should be our only concern when interpreting the statute," and argued in dissent that the court had failed "to accept our statutory responsibility for appointing competent counsel."¹¹⁶ Judge Morris Overstreet, also dissenting, said the court's action "borders on barbarism because such action punishes the applicant for his lawyer's tardiness."¹¹⁷

Two days before the deadline expired, the lawyer assigned to represent Henry Skinner filed a motion with the Court of Criminal Appeals to extend the time for filing his post-conviction application, but the court ruled on the day the application was due that the motion for an extension should be filed in trial court.¹¹⁸ The motion was filed the following day in the trial court, which ultimately held it untimely.¹¹⁹ The Court of Criminal Appeals affirmed. Judge Mansfield, concurring, held that the court had no authority "to clean up after counsel's errors."¹²⁰ Judge Baird pointed out in dissent that dismissal of the application meant no court would review Skinner's claim that he was denied effective assistance of counsel at trial by the lawyer appointed to defend him by trial judge M. Kent Sims:

Counsel [appointed to defend Skinner at trial] was the former district attorney who had prosecuted [Skinner] on at least two prior occasions. . . .

Moreover, when trial counsel [who represented Skinner at his capital trial] served as district attorney, it was well known he had a cocaine problem. Newspaper reports indicated trial counsel, on his way to a fund raiser for Judge Sims, was involved in an accident and later admitted to the hospital for a drug overdose. Because of trial counsel's known drug addiction, there was a substantial investigation by the Attorney General's Office regarding missing funds from the district attorney's office. After leaving office, trial counsel was assessed a \$90,000 bill from the I.R.S. A few months later, trial counsel was appointed to the instant case and ultimately paid almost \$90,000. These facts demand a substantive evidentiary hearing before an impartial tribunal.¹²¹

But by strictly enforcing the deadline against Skinner to prevent review of his habeas corpus action, the court swept any questions regarding Skinner's representation at trial under the rug. The court also denied petitions in several other cases even though the incompetence of the attorney to handle such a case was apparent.

The petition filed by a lawyer appointed by the Court of Criminal Appeals for Johnny Joe Martinez was described by one member of the court as follows:

The instant application is five and one half pages long and raises four challenges to the conviction. The trial record is never quoted. Only three cases are cited in the entire application, and no cases are cited for the remaining two claims for relief. Those claims comprise only 17 lines with three inches of margin.¹²²

The court's records indicated that the lawyer assigned to Martinez spent less than fifty hours preparing the application and did not seek any reimbursement for travel or investigatory expenses or seek funds for expert assistance.¹²³ The court denied the petition over a dissent by Judge Baird which urged the court to remand the case to the trial court to determine whether Martinez was adequately represented.¹²⁴ The court summarily denied what it treated as an "[a]pplication for writ of habeas corpus" filed by the lawyer it assigned to represent Bryan Wolfe,¹²⁵ even though the pleading filed

"appear[ed] to be a motion for discovery."¹²⁶ Again, Judge Baird, in dissent, urged his colleagues to remand the case for a determination of whether the inmate was properly represented.¹²⁷

The court assigned to Ricky Eugene Kerr an attorney who had been in practice for only two years, had never tried or appealed a capital case even as assistant counsel, and had suffered severe health problems that kept him out of his office in the months before he was to file a habeas corpus application on behalf of Kerr.¹²⁸ The lawyer so misunderstood habeas corpus law that, as he later admitted, he thought he was precluded from challenging Kerr's conviction and sentence--the very purpose of a post-conviction petition.¹²⁹ As a result, the lawyer filed a "perfunctory application" that failed to raise any issue attacking the conviction.¹³⁰ After he and his family were unable to contact the lawyer, Kerr wrote a letter to the court complaining about the lawyer and asking the court to appoint another lawyer to prepare a habeas petition.¹³¹ Even though prosecutors did not object to a stay,¹³² the Court of Criminal Appeals denied Kerr's motions for a stay of execution and for the appointment of competent counsel.¹³³ Judge Overstreet, warning that the court would have "blood on its hands" if Kerr was executed, dissented in order to "wash [his] hands of such repugnance,"¹³⁴ saying:

For this Court to approve of such and refuse to stay this scheduled execution is a farce and travesty of applicant's legal right to apply for habeas relief. It appears that the Court, in approving such a charade, is punishing the applicant, rewarding the State, and perhaps even encouraging other attorneys to file perfunctory "non-applications." Such a "non-application" certainly makes it easier on everyone--no need for the attorney, the State, or this Court to consider any potential challenges to anything that happened at trial.¹³⁵

Even the prosecutors who sought Kerr's execution acknowledged that the lawyer assigned to him "failed to comply with the letter and the spirit" of Texas's law allowing for post-conviction review.¹³⁶ The Texas Criminal Defense Lawyers Association noted that the court in *Kerr* had demonstrated its belief "that the duty of defense counsel . . . is discharged by doing absolutely nothing."¹³⁷

Andrew Cantu finally resorted to representing himself after three different lawyers, appointed by the Criminal Court of Appeals to represent him over a period of eighteen months, failed even to file a petition.¹³⁸ The first two lawyers withdrew,¹³⁹ and the third never came to see him. At the hearing held five months after the third lawyer was appointed, that lawyer testified that he had not visited Cantu, claiming that he did not know where Cantu was housed in the prison system, had not contacted any investigator or expert witnesses, was not familiar with and had not read the Antiterrorism and Effective Death Penalty Act, which contains a one-year statute of limitations for filing a federal habeas petition,¹⁴⁰ and was not aware of any ramifications of the Act for Cantu.¹⁴¹ Cantu had no state post-conviction review of his case and was barred from federal review of his case because the statute of limitations expired before any petition was filed.¹⁴² Cantu was executed on February 16, 1999.¹⁴³

The Texas court has created the appearance of providing some process by appointing counsel,

but in fact the poor quality of lawyers it assigns actually hides constitutional error instead of uncovering it.¹⁴⁴

The Court of Criminal Appeals has discouraged lawyers from taking cases and devoting the time necessary to do an adequate job by limiting compensation of the lawyers appointed and denying necessary expert and investigative assistance. Although a state bar committee found handling a capital post-conviction case requires between 400 and 900 hours of attorney time, the Court of Criminal Appeals adopted a limit on fees that compensated counsel for only 150 hours.¹⁴⁵ The Texas Association of Criminal Defense warned lawyers who might be appointed:

[T]he Court's limitations [on fees] will place you in the untenable position of having to choose between competently representing your client and performing about 250-750 hours of uncompensated work or, if your practice precludes such a large number of pro bono hours, not being able to competently represent your client. You should also be aware that the Court has been routinely cutting vouchers without explanation, and seemingly without regard to the necessity of the work performed. Some attorneys have had vouchers reduced by more than \$10,000.¹⁴⁶

Nevertheless, even less money is furnished by Alabama, which provides only \$600 to lawyers for handling a capital case in state post-conviction proceedings,¹⁴⁷ and by Georgia, which pays nothing in either attorney fees or expenses,¹⁴⁸ even in a capital case.

These pitifully inadequate efforts to provide lawyers in state post-conviction proceedings in Texas, as in most other states, have been limited to capital cases. Poor people sentenced to less than death in Texas, Georgia and many other states have no access to a lawyer for post-conviction proceedings. All, however, are subject to state statutes of limitations in the states that have them, as well as the one-year statute adopted by Congress in the Antiterrorism and Effective Death Penalty Act.¹⁴⁹ Many of those poor people, particularly the illiterate or the mentally retarded, are no more prepared to file and litigate a post-conviction challenge without a lawyer than a passenger can be expected to fly the Concorde to France without a pilot.

The person with means, such as Charles Keating, will retain counsel and may, as Keating did, obtain relief.¹⁵⁰ But in most states the poor have no access to a lawyer to represent them in post-conviction proceedings. Thus, a wrongfully convicted person who cannot afford a lawyer, even if clearly entitled to release, may languish in prison or be executed without ever obtaining legal assistance and meaningful review.

C. Inmates Without Lawyers; Courts Stripped of Power

Once imprisoned, the poor may be subject to physical and sexual assaults,¹⁵¹ denied competent medical or mental health care,¹⁵² denied an adequate diet, denied exercise, or subjected to other conditions and practices that violate their constitutional rights.¹⁵³ But most inmates have no access to

lawyers, which means they have no access to the courts. Congress has prohibited legal-services programs from representing prisoners¹⁵⁴ and limited the attorney fees recoverable in a successful prison suit to discourage lawyers in private practice from taking those cases.¹⁵⁵ In addition, in the Prison Litigation Reform Act, Congress stripped the federal courts of much of their power to remedy unconstitutional conditions or practices in prisons and jails.¹⁵⁶ Among other things, the Act limits the duration of any prospective relief to two years, permits only relief that is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation."¹⁵⁷ The statute also encourages the termination of existing decrees governing conditions and practices in prisons.¹⁵⁸ Even before Congress acted, the Supreme Court had made it very difficult for inmates to challenge cruel and inhumane conditions.¹⁵⁹ As a result, all sorts of abuses and degradation have been found not to violate the Constitution.¹⁶⁰

In stripping the 1.7 million men, women, and children in American prisons of lawyers, access to the courts, and the protections of the Constitution, Congress disregarded the important role that federal courts have played in making the nation's prisons less of a disgrace than they had been previously. For instance, federal court orders ended some of the most cruel and inhumane practices and conditions that had long been common in the "dark and evil world" of Arkansas's prisons,¹⁶¹ such as lashing prisoners for minor infractions with a wooden-handled leather strap five-feet long until their skin was bloody,¹⁶² giving prisoners electrical shocks to sensitive parts of their body from a hand-cranked device known as the "Tucker telephone,"¹⁶³ and crowding prisoners into barracks where "[h]omosexual rape was so common and uncontrolled that some potential victims dared not sleep; instead they would leave their beds and spend the night clinging to the bars nearest the guards' station."¹⁶⁴

Officials at Parchman Farm, the Mississippi State Penitentiary, used a three-foot leather strap, known as "Black Annie," to continue the practice from the era of slavery of whipping inmates,¹⁶⁵ and allowed murders, rapes, beatings, and torture of inmates.¹⁶⁶ Prisoners filed a suit in 1971 before federal Judge William C. Keady challenging conditions and practices at the prison. It is unfortunate that members of Congress did not accompany Judge Keady on his visits to Parchman:

Keady visited Parchman on four occasions, once taking his minister. Wandering through the cages, talking privately to the inmates, he discovered an institution in shambles, marked by violence and neglect. The camps were laced with open ditches, holding raw sewage and medical waste. Rats scurried along the floors. . . . At one camp, Keady found "three wash basins for 80 men which consist of oil drums cut in half." At all camps, he saw filthy bathrooms, rotting mattresses, polluted water supplies, and kitchens overrun with insects, rodents, and the stench of decay.

The convicts told him stories that supported [the claims made in the suit]. Parchman was a dangerous, deadly place. Shootings and beatings were common; murders went unreported; the maximum security unit was a torture chamber. Trustees brutalized inmates, who, in turn, brutalized each other. "One part of me had always suspected such things," the judge recalled. "The rest of me was angry and

ashamed."¹⁶⁷

Judge Keady required prison officials to protect inmates from physical assaults by other inmates, to stop housing them in barracks unfit for human habitation, to end racial discrimination against inmates, to provide medical care, and to end other barbaric and patently unconstitutional practices.¹⁶⁸

Another federal judge, Frank Johnson, brought an end to the "horrendous" overcrowding in Alabama's prisons, where mentally disturbed inmates were "dispersed throughout the prison population without receiving treatment" and robbery, rape, extortion, theft, and assault were "everyday occurrences" among the general inmate population.¹⁶⁹ Yet another federal judge, Judge William Wayne Justice, brought an end to gross overcrowding, denial of medical care, and other unconstitutional practices in the huge Texas prison system.¹⁷⁰

Abuses were not limited to Southern prisons. A federal judge found that inmates at the California State Prison at San Quentin were "regarded and treated as caged animals, not human beings."¹⁷¹ Inmates at prison in Pendleton, Indiana, were shackled spread-eagle to metal bed frames for up to two and a half days at a time and "frequently denied the right to use the toilet and had to lie in their own filth" until a federal court prohibited such treatment.¹⁷² Federal court orders ended barbaric and shameful conditions and brutality in many other prisons as well.¹⁷³

Unfortunately, federal court orders have not ended all abuses in correctional institutions. For example, Gail R. Williams, upon becoming director of mental health services for Alabama's prisons, greatly reduced the number of inmates who received psychotropic medications and discontinued the policy of sending the most severely mentally ill inmates to the state's secure medical facility.¹⁷⁴ Williams was restricted to practicing in Alabama's prisons because he had lost medical licenses in Michigan for engaging in sexual relations with a patient and in Oklahoma for sexually battering and harassing a nurse and other female staff members.¹⁷⁵ Billy Roberts, a psychotic inmate, committed suicide after his anti-psychotic medication was discontinued.¹⁷⁶ Calvin Moore died in Alabama's Kilby Prison at age 19 after serving seven weeks of a two-year sentence for burglary. Although he displayed "severe psychiatric symptoms," lost "about a third of his body weight," and spent the last several days of his life "lying in his own urine, most of the time in a catatonic state," no one took his vital signs until a few hours before his death, and he received no medical treatment other than one injection of haloperidol.¹⁷⁷ A forensic pathologist with Physicians for Human Rights found Moore's death to be a case of negligent homicide.¹⁷⁸ The medical director responsible for Moore's case, Walter F. Mauney, became a prison doctor after being convicted of a "crime against nature" in Tennessee for "having oral sex with and 'sexually penetrating' a 16-year-old 'mentally defective' boy."¹⁷⁹

The political "war on crime" and the competition among politicians to show who can be toughest on crime¹⁸⁰ have encouraged a return to neglect and mistreatment of prisoners and primitive practices, such as the chain gang¹⁸¹ and chaining inmates to metal posts.¹⁸² In this political climate, prisoners desperately need access to legal services and the protection of the Constitution, enforced by the courts.

Georgia is among the states taking the lead in going back to a more primitive era. After barely winning reelection, Governor Zell Miller appointed a political crony, Wayne Garner, an undertaker with no experience in corrections, as the commissioner of the state's Department of Corrections.¹⁸³ Garner's only apparent qualification was his willingness to make provocative and irresponsible statements to show that he and the governor were tough on crime. His tenure demonstrates the importance of access to legal representation and constitutional protections for inmates.

Upon being appointed, Garner announced that "one-third of state prison inmates ain't fit to kill."¹⁸⁴ He then took a number of highly-publicized actions to make prison life in Georgia as harsh and degrading as possible. He fired the system's academic and vocational teachers two weeks before Christmas in 1996.¹⁸⁵ He had previously fired seventy-nine recreation directors and seventy-four counselors.¹⁸⁶ He changed the name of all but one of the department's facilities from "correctional institution" to "state prison."¹⁸⁷ He eliminated hot lunches for prisoners and placed inmates in ninety-day boot camp programs on a diet of sandwiches and water three times a day.¹⁸⁸ He announced he would require inmates to walk four miles a day.¹⁸⁹ The *Atlanta Constitution* pronounced Garner's actions a death sentence for rehabilitation and predicted that "[i]n the next few years, Georgia will have to hire a new head of the state Corrections Department to undo the damage caused by Wayne Garner."¹⁹⁰

But Garner went considerably beyond the mean-spirited political grandstanding that has become common today. After notifying the press, Garner, outfitted in the black uniform of the department's tactical squad, led raids on the prisons to "shakedown" cells in purported searches for drugs and contraband. In a number of those raids, unresisting inmates were beaten and degraded.¹⁹¹ A lieutenant who headed one of the squads participating in one of the raids described the brutal assault on inmates as a "dad-gum shark frenzy."¹⁹² Another correctional officer described seeing an unresisting inmate's face shoved into a wall: "[b]lood went up the wall. Blood went all over the ground, all over the inmate. I heard it. I heard a sickening cracking sound."¹⁹³

The injured inmates would have had no access to lawyers to bring suit about this abuse had it not been for the existence of our office, the Southern Center for Human Rights, in Georgia. The Center receives no government money and is under no restrictions with regard to the clients it represents. The Center's lawyers recovered \$283,500 for prisoners abused during shakedowns led by Commissioner Garner.¹⁹⁴ Department of Corrections employees testified in depositions that they witnessed guards engage in assaults upon unresisting inmates.¹⁹⁵

As a result, the abuse of these particular inmates was brought to national attention and the inmates were compensated.¹⁹⁶ The abuse would never have come to light, however, were it not for attorney Robert Bensing and others at the Southern Center for Human Rights.

Such representation in the courts and such public attention are not the norm. No programs provide representation to prisoners in most states, particularly the states with the greatest need. It is

impossible to know how many other unconstitutional practices and conditions in prisons and jails go unchallenged and unremedied because the inmates have no access to lawyers to protect their constitutional rights.

II INDIFFERENCE TO INJUSTICE

The quality of the counsel provided at trial becomes all the more important given the lack of access to counsel for those seeking to attack their convictions in post-conviction review, the restrictions on habeas corpus adopted as part of the Antiterrorism and Effective Death Penalty Act of 1996, and the absence of constitutional protections for those in prison. For most poor people accused of crimes, trial is not just the "main event;"¹⁹⁷ it is the only event. But, as discussed previously, many poor defendants stand virtually defenseless at trial, accompanied only by what Judge David Bazelon called "walking violations of the Sixth Amendment."¹⁹⁸

Harold Clarke, when he served as Chief Justice of Georgia, aptly described the approach not only of Georgia, but of many states in responding to the call of *Gideon*: "[W]e set our sights on the embarrassing target of mediocrity. I guess that means about halfway. And that raises a question. Are we willing to put up with halfway justice? To my way of thinking, one-half justice must mean one-half injustice, and one-half injustice is no justice at all."¹⁹⁹

Although the need for adequate funding for indigent defense programs is obvious, immense and undeniable, legislators refuse to appropriate sufficient funds. Inadequately funded programs cannot obtain the services of capable lawyers and must handle so many cases that effective representation is difficult or impossible. Moreover, many indigent defense programs are compromised in their ability to provide zealous representation because they are not independent of the executive or judiciary. Courts not only tolerate indefensible representation that results from underfunded systems, but contribute to it by appointing lawyers who are not capable of handling the cases assigned and denying the resources needed to present a defense. In addition, the Supreme Court, instead of enforcing *Gideon*, has been a major culprit in this denial of equal justice. It adopted such a low standard for counsel in *Strickland v. Washington*²⁰⁰ that it makes a mockery of the right to counsel.

A. Inadequate Funding

The most fundamental reason for the poor quality or absence of legal services for the poor in the criminal justice system is the refusal of governments to allocate sufficient funds for indigent defense programs.

Legislatures in many states have failed adequately to fund public defender programs, leaving public defenders with overwhelming caseloads and the immense pressure of being responsible for the lives and liberty of too many fellow human beings.²⁰¹ While public defender offices attract some of

the most dedicated and conscientious young lawyers, those lawyers find it exhausting and enormously difficult to provide adequate representation when saddled with huge caseloads and lacking the necessary investigative assistance.

A public defender in New Orleans represented 418 defendants during the first seven months of 1991.²⁰² During this time, he entered 130 guilty pleas at arraignment and had at least one serious case set for trial on every single trial date during the period.²⁰³ In "routine cases," he received no investigative support because the three investigators in the public defender's office were responsible for more than 7000 cases per year.²⁰⁴ Additionally, no funds were available for expert witnesses.²⁰⁵

Even though funding for indigent defense programs has long been recognized as inadequate, some jurisdictions have reduced funding. In Pittsburgh, for example, the county commission slashed funds and job positions at the public defender office in 1996,²⁰⁶ leaving the office with forty-five lawyers, twelve less than the fifty-seven who were there previously.²⁰⁷ Eight full-time investigators were also fired.²⁰⁸ The attorneys were paid between \$24,000 and \$32,000 and are permitted to have part-time legal practice on the side.²⁰⁹ An independent study the year before had concluded that the public defender's office was in crisis because of chronic under-funding and "years of neglect."²¹⁰ Judge David S. Cercone, head of the court's Criminal Division, had expressed similar concern, saying that, "[w]e do not think there is any fat to be cut from the public defender's office."²¹¹ The county commissioners responded to the study by cutting \$1 million from the \$3.9 million budget.²¹² Nonetheless, the commissioners somehow found a way to move two of their supporters into positions that paid \$50,000 each, which is double the starting salary of a new public defender.²¹³

In Wisconsin, Governor Tommy Thompson proposed cuts to the state public defender's budget,²¹⁴ more flat rate payments to appointed counsel,²¹⁵ increases in public defender caseloads,²¹⁶ and limits on how much public defenders and appointed attorneys can spend on court documents and investigative services.²¹⁷ When the 1995-97 budget ultimately was passed, \$3.85 million was cut from the allocation for indigent defense.²¹⁸

Many jurisdictions have no public defender programs. Cases are assigned to individual lawyers or lawyers who have contracted to handle the cases of indigent defendants.²¹⁹ Many states and localities compensate lawyers so poorly that it is impossible to attract capable lawyers and impossible for the lawyers to survive in practice if they devote the time required to defend cases properly.

In Virginia, for example, attorneys for indigent defendants are limited to \$100 for defending someone in a misdemeanor case in district court, \$132 for defending a misdemeanor case in circuit court, \$305 for defending a felony case where the punishment is less than 20 years, and \$845 where the punishment is more than 20 years.²²⁰ When one attorney challenged the limit in felony cases, arguing that once the attorney exceeds the limit and is forced to work uncompensated, it creates a conflict between the lawyer's pecuniary interests and zealous representation of the client, the circuit judge removed him from the case.²²¹ One circuit judge announced at calendar call that any attorney raising the conflict of interest issue would be removed from the list of appointed counsel.²²² As each

case was called, the judge asked the attorney whether he or she intended to raise the issue.²²³

In Alabama, lawyers representing indigent defendants are paid \$20 an hour for out-of-court preparation up to a limit of \$1,000 to defend a non-capital case; for a capital case, the fees are limited to \$1,000 for the out- of-court work plus an additional \$20 an hour for all in-court work.²²⁴ In some rural areas in Texas, lawyers receive no more than \$800 to handle a capital case.²²⁵ Generally, the hourly rate is \$50 or less.²²⁶ In Mississippi, lawyers are paid \$1,000 dollars and reimbursed for their overhead expenses for defending a capital case.²²⁷ In Louisiana, some indigent defense counsel are not paid at all.²²⁸

The result is that these lawyers often earn less than the minimum wage for defending someone in a serious felony case or even a capital case. For example, an Alabama lawyer who spends 500 hours preparing for a death penalty trial will be paid \$4 an hour. Imagine what kind of legal representation a poor person accused of a capital crime gets for \$4 an hour. Unfortunately, the old adage, "you get what you pay for," applies with special force in the law. Most good lawyers do not work for \$4 an hour or even \$20, \$50 or \$100 an hour. Lawyers paid so little cannot afford to spend the time required to conduct interviews, investigations and negotiations, and defend cases at trials. As one Virginia prosecutor observed:

What it boils down to is, you get what you pay for. Look who's on a court-appointed list anywhere. Very few experienced attorneys are on those lists, and the reason is, they can't afford to be on them.

So you either have very inexperienced attorneys right out of law school for whom any money is better than no money. Or you have people who are really bad lawyers who can't make a living except off the court appointed list.²²⁹

The prosecutor said that such a system "doesn't give me any satisfaction as a prosecutor, and I don't think it serves justice."²³⁰

In addition, lawyers appointed to defend indigent defendants are often not paid for months or years after they provide the representation.²³¹ Often, their applications for compensation are arbitrarily reduced by judges and bureaucrats.²³² This discourages lawyers from taking the cases of indigent defendants.

Frequently, lawyers are denied the investigative and expert assistance essential to providing adequate representation. Here, again, the courts have constructed yet another Catch-22 by requiring the lawyer to demonstrate an extensive need for expert or investigative assistance, a showing that frequently cannot be made without the very expert assistance that is sought.²³³

The burdens on already overtaxed and inadequate indigent defense systems are growing. With the passage of each new crime bill, Congress and state legislatures create scores of new crimes, increase penalties for existing crimes, and appropriate millions of dollars to law enforcement and

prosecution.²³⁴ These measures increase the number of arrests and prosecutions and the severity of the sentences that may be imposed. Despite the fact that the legislation creates a greater need for adequate defense counsel, such legislation usually does not include a single dollar for indigent defense.

B. The Lack of Independence of Indigent Defense Programs

Many indigent defense programs are not independent of the people trying to imprison or execute the clients served by those programs. In some states, governors who sign death warrants also appoint the state defenders who are to defend the very people the governor has ordered killed. Legislatures have reduced or eliminated funding of programs that have been effective in the past or have restructured them. Judges control the appointment and compensation of defense counsel in many states and often assign cases to lawyers clearly incapable of providing competent representation. The lack of independence in many cases has a substantial adverse impact on the quality of legal services provided. Indeed, when judges and executives control programs which continually provide deficient representation to the accused, it can fairly be said that lawyers are being provided to the poor only to create an appearance of legitimacy to a system that lacks fairness.

Politicians who compete with one another to show who is the toughest on crime²³⁵ often control funding and even the appointment of personnel for indigent defense programs. For example, Paul Patton, upon becoming the new governor of Kentucky, signed five execution warrants his second day in office to show that he was tough on crime.²³⁶ The Public Advocate, Allison Connelly, noted the inappropriateness of signing the warrants because the cases of all five of the condemned were pending before courts.²³⁷ Lawyers from her office secured stays of execution.

But the same governor who signed the death warrants appoints the public defender.²³⁸ When the time came to renew Connelly's appointment, Patton refused to reappoint her,²³⁹ even though the Public Advocacy Commission had unanimously recommended her reappointment and judges and lawyers had praised the job she had done.²⁴⁰ Regardless of why Patton refused to reappoint Connelly, there was an appearance that it may have been related to the discharge of her duties in defending indigent clients.

In Florida, legislators attacked the Office of the Capital Collateral Representative (CCR) for its representation of condemned inmates in that state, saying that it needlessly delayed executions.²⁴¹ Stephen Hanlon, who oversees Holland & Knight law firm's pro bono division and has worked with CCR attorneys, responded that, "I am firmly convinced that the criticism CCR received was not because it was frivolous but because it was effective."²⁴²

The legislature split CCR into three separate offices and provided that the governor, who signs the death warrants setting executions, would appoint the director of each new office.²⁴³ The legislature also provided that the Judicial Nominating Commission would now submit nominees for the positions to the governor, instead of the state's public defenders, who had previously recommended three nominees to the governor for the position of Capital Collateral Representative.²⁴⁴

The Judicial Nominating Commission gave the governor eight nominees: four lawyers who had experience in representing persons facing the death penalty and four with no such experience. Governor Lawton Chiles appointed only from the second group, choosing a lawyer in private practice and two former prosecutors,²⁴⁵ one of whom had worked in the governor's office for twelve years,²⁴⁶ and before that, represented the state in twelve capital cases during five and a half years as an assistant attorney general.²⁴⁷ It is neither unusual nor undesirable for a lawyer with prosecution experience to become a defense lawyer. A new convert, however, is usually not made Pope on the same day of the conversion. These circumstances put together--the governor's role in signing death warrants, the enormous political benefits that Florida governors have reaped from signing death warrants,²⁴⁸ and the appointment of two prosecutors with no defense experience over nominees with experience in defending capital cases--would cause any objective observer to question whether the goal of the appointments was to frustrate zealous representation instead of ensuring it.

The representation provided by the offices created raises even graver questions. The most experienced attorney assigned to defend Judi Buenoano when the governor signed a warrant for her execution was not qualified to work in federal court.²⁴⁹ Experienced attorneys were fired or left the new agencies.²⁵⁰ The office in Tampa, run by a former prosecutor and unsuccessful candidate for State Attorney, hired lawyers with no experience in capital litigation, including one lawyer who had spent three years managing Hogtown Bar-B-Q restaurants.²⁵¹ A circuit judge described the office as a "disorganized, chaotic place where, at times, interns/trainees file motions and pleadings in cases carrying society's most severe penalty;" the judge found the attorneys for one death row inmate "incompetent," and replaced them with a private lawyer.²⁵² The office in Tallahassee could not find lead attorneys for half of its cases.²⁵³

Ohio Attorney General Betty Montgomery attacked the state public defender's office, saying its death penalty attorneys were "gaming the system and making it a mockery" by maneuvering for delays to stop executions.²⁵⁴ She introduced a proposal to prohibit public defenders from receiving tax funds for representing condemned inmates if they win appeals alleging ineffective assistance of counsel.²⁵⁵ In February 1996, following Montgomery's statement and proposal, Ohio Public Defender David Bodiker fired two top staff members, including a twelve-year veteran. Bodiker stated "there's always been widespread optimism that we could prevent executions. I don't share that."²⁵⁶

Bodiker claimed his actions were unrelated to the Attorney General's criticism. The fired attorneys filed a complaint with the Ohio Public Defender Commission, claiming Bodiker prevents attorneys from zealously defending death-row clients and that he "has politicized the office to reflect the pro-death penalty views of" Governor George Voinovich and Attorney General Montgomery.²⁵⁷

The problem is not limited to the state courts. The appointment of public defenders in many judicial districts by federal judges "creates a serious problem of perception and provides the opportunity for occasional abuse," a committee of judges and lawyers appointed by Chief Justice Rehnquist reported.²⁵⁸ One example is the refusal in 1992 by the United States Court of Appeals for the Fourth Circuit to renew the appointment of highly respected federal defender Fred Bennett, after

eleven years in office.²⁵⁹ The judges apparently did not like the aggressive advocacy of Bennett and his assistants, but it may be fairly questioned whether this action promoted the best interests of the clients served by the federal defender or whether the judges disagreed with the zealous representation of poor people.

Judges' participation in assigning the cases of indigent defendants to lawyers and in deciding whether to allow funds for experts and investigators improperly involves the judiciary in the management of the defense. Judges not only tolerate attorney incompetence, but they very often continue to appoint the same lawyers to case after case. Judges in Houston have been appointing Joe Frank Cannon, who tries cases like "greased lightning" and falls asleep during capital trials, to defend cases for 45 years.²⁶⁰ Their motivation was clearly not the provision of zealous representation to the accused.

Many judges may be more interested in docket control or avoiding reversal than in ensuring an earnest defense for poor defendants. Judges also use appointments as a patronage system for lawyers who need the business because they cannot get other legal work. A study of homicide cases in Philadelphia revealed that judges there appointed attorneys to defend cases based on political connections, not on legal ability.²⁶¹ The study disclosed that "Philadelphia's poor defendants often find themselves being represented by ward leaders, ward committeemen, failed politicians, the sons of judges and party leaders, and contributors to the judges' election campaigns."²⁶² As might be expected, treating the assignment of criminal cases as part of a judicial patronage system does not always result in the best legal representation. The study found that "even officials in charge of the system say they wouldn't want to be represented in Traffic Court by some of the people appointed to defend poor people accused of murder."²⁶³ There is the appearance--and in many cases the reality--that many of the lawyers who depend upon appointments from judges are reluctant to provide zealous representation for fear of alienating the judge and jeopardizing future business.²⁶⁴ An experienced criminal defense lawyer in Houston described the attitude of many lawyers there who get appointed to defend indigents:

The mindset of a lot of court-appointed lawyers is to please the judge, to curry favor with the judge by getting a quick guilty plea from the client. Then everybody's happy. The judge has the case off the docket. The prosecutor doesn't have to mess with it. The defendant is off to wherever he's going. And the lawyer has made a relatively decent fee: about \$150 for basically an hour of his time. That's much more economical for a lawyer who's earning a living off of court appointments than to reset the case, go out and investigate, probably not get paid for his time, have to do a bunch of work, and maybe aggravate the judge by keeping the case on the docket.²⁶⁵

The appointed lawyers also stay in the good graces of the judges by contributing to their campaigns for office.²⁶⁶

Once the resource center employing capital litigation specialists to represent or recruit counsel for the condemned in Texas post-conviction proceedings ceased to exist, the Court of Criminal

Appeals began assigning attorneys to represent death-sentenced inmates in post-conviction proceedings. The appointment of lawyers by the Court of Criminal Appeals can only be described as a disaster. The court's lack of concern about the quality of representation to be provided was apparent from the outset when the court, in suddenly conscripting forty-eight attorneys to handle capital post-conviction cases, appointed a longtime federal prosecutor to represent one of the condemned.²⁶⁷

The court was not even aware that the prosecutor was still employed with the U.S. Attorney's office and was on special assignment to the Justice Department and thus could not represent a death-sentenced inmate. The court later appointed two of its former law clerks to fourteen capital post-conviction cases and paid them \$265,000.²⁶⁸ The two former clerks had no experience as attorneys in representing such defendants.²⁶⁹ But, it would be impossible for even the most experienced lawyers to take on so many cases and provide adequate representation in all of them.

The court appointed lawyers who missed deadlines and filed petitions that did not raise a single issue,²⁷⁰ and so limited compensation that lawyers assigned cases are required to choose between working hundreds of hours without compensation or not providing competent representation.²⁷¹ Moreover, the court has been unwilling to allow untimely petitions to be filed or to assign competent lawyers even when it was apparent beyond peradventure that the lawyer handling the case was totally inept.²⁷² The Texas Association of Criminal Defense Attorneys passed a resolution finding that the Court of Criminal Appeals had "made it clear . . . that it will not afford a citizen sentenced to death any meaningful review, and further that it will often refuse to pay necessary investigative and other expenses, forcing the appointed counsel, in effect, to finance the proceedings themselves."²⁷³ The actions of the Texas Court of Criminal Appeals can fairly be said to go beyond indifference to injustice, to outright hostility to justice.²⁷⁴

Indigent defense programs' lack of independence is a serious, but seldom discussed, problem that compromises their ability to provide zealous representation of clients. As observed by Justice Blackmun:

The county's control over the size of and funding for the public defender's office, as well as over the number of potential clients, effectively dictates the size of an individual attorney's caseload and influences substantially the amount of time the attorney is able to devote to each case. The public defender's discretion in handling individual cases and therefore his ability to provide effective assistance to clients is circumscribed to an extent not experienced by privately retained attorneys.²⁷⁵

A state's chief law enforcement officer who has responsibility for obtaining convictions should not be appointing the person responsible for the defense. Management of the defense is not a proper judicial function. Judges should be fair and impartial, and independent of both prosecution and defense. Instead, independent boards should operate indigent defense programs. Those programs should assign lawyers to cases based upon the lawyer's ability to provide effective representation, not speed, administrative convenience, political connections or other factors unrelated to the lawyer's ability to represent the accused.

C. A Standard of Effective Assistance That Denies Equal Justice

The Supreme Court correctly observed in 1942 that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial."²⁷⁶ In 1984, however, the Court decided that prejudice to a defendant could be based on a rough calculation of whether counsel's deficient performance affected the outcome. In *Strickland v. Washington*,²⁷⁷ the Court not only adopted this standard of prejudice; it went one step further in putting the burden of proof on the defendant to make the showing.²⁷⁸ The Court also required that, in order to prevail on a claim of ineffective assistance, a defendant must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,"²⁷⁹ and show that the attorney's representation "fell below an objective standard of reasonableness."²⁸⁰ This standard has proven to be so malleable that the mere presence of a lawyer at counsel table is often found to be sufficient representation.²⁸¹

Judge Alvin Rubin of the Fifth Circuit put it bluntly:

The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel. . . . Consequently, accused persons who are represented by "not-legally-ineffective" lawyers may be condemned to die when the same accused, if represented by *effective* counsel, would receive at least the clemency of a life sentence.²⁸²

There is ample support for this frank admission that, under the standard established in *Strickland*, the courts do not deliver on the promise of equal justice for rich and poor.²⁸³ Stark examples of just how bad a lawyer can be and still be found effective under *Strickland* are provided by three Texas capital cases in which defense lawyers slept during trial. The *Houston Chronicle* described the following spectacle in one of the cases:

Seated beside his client – a convicted capital murderer – defense attorney John Benn spent much of Thursday afternoon's trial in apparent deep sleep.

His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again.

Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the Nov. 19, 1991, arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan.

When state District Judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial.

"It's boring," the 72-year-old longtime Houston lawyer explained. . . .

Court observers said Benn seems to have slept his way through virtually the entire trial.²⁸⁴

Attorney Benn's sleeping did not offend the Sixth Amendment, the trial judge explained, because, "[t]he Constitution doesn't say the lawyer has to be awake."²⁸⁵ The Texas Court of Criminal Appeals apparently agreed. It rejected McFarland's claim of ineffective assistance of counsel,²⁸⁶ applying the standard established in *Strickland*; the dissent, however, argued that "[a] sleeping counsel is unprepared to present evidence, to cross-examine witnesses, and to present any coordinated effort to evaluate evidence and present a defense."²⁸⁷

The Texas Court of Criminal Appeals also found that a sleeping attorney was sufficient "counsel" under *Strickland* in the case of Calvin Burdine.²⁸⁸ And both the Texas Court of Criminal Appeals and the United States Court of Appeals for the Fifth Circuit held Carl Johnson did not satisfy *Strickland* even though his attorney slept during parts of the trial.²⁸⁹ Neither court published its opinion.²⁹⁰ Carl Johnson was executed on September 19, 1995.

Wallace Fugate was sentenced to death after a two-day trial in Georgia, in which he was represented by a lawyer who had never heard of *Gregg v. Georgia*,²⁹¹ the case that upheld the current death penalty law in Georgia, *Furman v. Georgia*,²⁹² the decision that declared the death penalty unconstitutional in 1972, or any other relevant case.²⁹³ Not surprisingly given his complete ignorance of the law, the lawyer did not make a single objection during the entire two-day capital trial.²⁹⁴

Being defended by such a lawyer is much like being treated by a doctor who has never heard of penicillin. Such a doctor likely never heard of tetracycline or of heart bypass surgery, either. If a doctor failed to treat a patient properly due to such a gross lack of knowledge, courts would not hesitate to find malpractice. But under *Strickland*, such ignorance on the part of a lawyer does not violate the Sixth Amendment. The following question was presented to the Georgia Supreme Court in seeking review of the representation provided to Wallace Fugate:

Whether the standard of "counsel" is now so low in capital trials in this state that it is satisfied by the mere presence of individuals with bar cards at counsel table with the accused, who act primarily as spectators and are completely ignorant of the law--even to the point of being unaware of the Supreme Court's opinion in the seminal capital case of *Gregg v. Georgia*, 428 U.S. 153 (1976), make no objections, give closing arguments which contradict each other, and fail completely to make the trial an adversarial testing process?²⁹⁵

The court denied a certificate of probable cause even to review the case.²⁹⁶

The Supreme Court has adopted strict procedural default doctrines that bar review of any issue not properly raised and preserved by counsel.²⁹⁷ *Strickland*, however, allows defendants to be represented by lawyers who are ignorant of the law, who do no investigation, and who are thus

completely incapable of complying with the strict procedural requirements the Court has adopted. As a result, states have no incentive to provide adequate representation to poor people. By assigning the indigent accused inadequate counsel, the state increases its chances of obtaining a conviction and reduces the scope of appellate and post-conviction review. So long as the lawyer's performance meets the *Strickland* standard, those cases in which the accused received the poorest legal representation will receive the least scrutiny on appeal and in postconviction review because of the lawyer's failure to preserve issues,²⁹⁸ assert the right legal grounds for objections,²⁹⁹ and put on evidence to provide a factual basis for relief.³⁰⁰

The Supreme Court stated as one basis for requiring the defendant to prove prejudice, "[t]he government is not responsible for, and hence not able to prevent, attorney errors."³⁰¹ That is simply not true in cases involving poor people who have court-appointed lawyers. A poor person accused of a crime does not choose an attorney; a judge or some other government official assigns a lawyer to represent the defendant. Thus, the government *is* responsible for deficient representation when it provides a lawyer who lacks the experience and skill to handle the case, or when it denies the lawyer the resources necessary to investigate the case and present a defense. *Strickland* allows the government to get away with it.

III THE CHALLENGE TO THE LEGAL PROFESSION AND THE LAW SCHOOLS

What has been the response of the legal profession, of the silk stocking lawyers with six- or seven-figure incomes at the prosperous law firms, to the sleeping lawyers in Houston, the defiance of *Gideon*, the defiance of *Argensinger*, and the denial of access to courts for those most in need? A small percentage have been concerned about these shocking injustices. But most lawyers simply ask, "Did we have a good year? What's my draw?" The plight of the poor is out of sight and out of mind.

Bar associations once provided leadership in urging the creation and funding of indigent defense programs, but many appear to have conceded defeat after writing numerous unheeded reports on the sad state of indigent defense. Bar associations and individual lawyers, however, must renew their efforts to build good indigent defense programs in one community after another. Lawyers have a monopoly on the practice of law. They are trustees of justice. They have a responsibility to see that justice is available not only to the wealthy, but to all. We do not have equal justice in this country and are not even near achieving it. In many parts of the country, the situation, already inadequate, is deteriorating.

New and more aggressive efforts are needed. Rick Teissier, a public defender in New Orleans, challenged the excessive caseloads and lack of investigative assistance in his office. The Louisiana Supreme Court held that the clients were "not provided with the effective assistance of counsel the constitution requires," required pretrial hearings on whether lawyers could effectively handle cases, and prohibited prosecutions from going forward in cases where effective assistance could not be provided due to a lawyer's workload and lack of resources.³⁰² A lawsuit challenging inadequacies in Connecticut's public defender system has been filed.³⁰³ Other similar suits should be

filed as well.

But the legal profession should do more. State and local bar associations could establish and fund model indigent defense programs. The Georgia bar recently announced that it would assess each of its members fifty dollars a year over several years so that the bar could buy a building.³⁰⁴ This is a classic example of the misplaced priorities of bar associations. The bar association should assess its members to fund adequate, independent indigent defense programs before it makes assessments to buy a building.

Regardless of the success of bar associations in bringing about systemic changes and increased funding, more lawyers must put the quest for justice before the pursuit of money and come forward to represent those who cannot afford a lawyer. They must join those already litigating the rights to adequate compensation, to the funds necessary to investigate, and to the experts needed to prepare and present a proper defense.

Law schools and law students must respond to the lack of legal services for those accused of crimes or in prison because the courts and legislatures have been indifferent for so long. Because so many states will not establish public defender systems to recruit, train and supervise law graduates, the law schools must send their graduates out with the skills necessary to represent criminal defendants in places where there is the greatest need. For the most part, law schools are not currently doing this.

Many law schools put little emphasis on criminal law. They are turning out graduates who are only fit to be associates at law firms, not lawyers capable of defending poor people accused of crimes. Placement offices at many schools encourage students to pursue the money and prestige of the law firms, and do not even make students aware of the public defender programs that desperately need young, dedicated and talented lawyers.

Some law schools prefer to hire professors who have never practiced law. While many of these professors are brilliant scholars who make immeasurable contributions to the law, some publish virtually incomprehensible articles that have little relation to reality. Law schools should also have a place on their faculties for lawyers with practical experience in the trenches. A professor who has never been in the courtroom can no more prepare a student to be a trial lawyer than a person who has never changed a tire can teach someone to be a mechanic.

More law schools should follow the example of New York University, which has outstanding clinical programs educating students and serving the poor in many areas. New York University students have been involved in efforts to ensure adequate representation to those facing the death penalty in Alabama and in New York. Another model is Harvard Law School's Criminal Justice Institute, which provides an outstanding educational experience for students, gives quality representation to poor people in the local courts, and sends Harvard graduates into public defender offices. Northeastern University Law School also provides an outstanding example with a cooperative program that places students in public interest programs all over the country, where they

make immense contributions while learning how to represent those most in need. More law schools should create graduate programs like the E. Barrett Prettyman Fellowships at the criminal justice and juvenile justice clinics at the Georgetown University Law Center.

These programs not only teach students how to defend people accused of crimes, but they also educate students about the desperate need for legal services of those whose lives or liberty is at stake in the legal system. They teach students that those accused of crimes are neither "animals" nor "subhuman," but human beings who are more than the worst thing they did in their lives. Too many law school graduates are simply unaware of the lack of legal services for those facing criminal charges or in prison. With awareness, the many graduates who become leaders can, as Robert Kennedy did when he was Attorney General, provide leadership in renewing the quest for equal justice for all.

CONCLUSION

Although the Supreme Court stated in *Gideon v. Wainwright* that lawyers are "necessities, not luxuries,"³⁰⁵ the reality in the United States today is that representation by a capable attorney is a luxury, one few of those accused of a crime or in prison can afford. There is a temptation to give up hope that the poor person who faces the loss of life or liberty or languishes in prison will ever receive adequate representation. Legislatures will not pay for it, most courts will not order it, and most members of the bar are unwilling or financially unable to represent a poor person in a criminal case without adequate compensation.

There has never been equal justice in the courts of the United States, state or federal, but equal justice has been the most fundamental aspiration of our legal system. It represents the kind of legal system we would like to have and the kind of society we aspire to be. It has been an important goal that has challenged the legal system, the bar and society. Those responsible, however, appear to have given up on the quest for equal justice for rich and poor. Many, including members of the Supreme Court,³⁰⁶ appear ready to sandblast the words "Equal Justice Under Law" off the front of the Supreme Court building and acknowledge that our courts and our system of justice, like our country clubs, are open and available only for those who can afford them. But this simply demonstrates that the challenge is as immense as it is important. Bar associations, law schools, individuals, and law students must lead new efforts for adequate funding, structure and independence for indigent defense programs. Lawyers should not be silent about the failure to provide equal justice; they must bear witness to the deficiencies of the system in the hope of prompting legislatures and courts to take their eyes off the embarrassing target of mediocrity and to take aim at a full measure of justice for all citizens.

Individual lawyers can and must provide zealous representation to some poor people, even if the government fails in its larger responsibility of providing legal services to everyone. As a result of the efforts of some dedicated lawyers, some innocent people will avoid wrongful conviction; some troubled youths will be diverted to drug, alcohol, mental health, job training and other programs instead of prisons; some who were wrongfully convicted will obtain their release; some will live

instead of being put to death by the government, and others will receive professional advice and zealous advocacy through what is to them the strange and foreign land of the criminal justice system.

These efforts by individual lawyers in the quest for equal justice are not insignificant. They are, of course, fundamentally important to those individuals whose lives and liberty are at stake. They also demonstrate a recognition of the preciousness of life, liberty, fairness and adherence to the Bill of Rights in a time and a culture of misplaced values and indifference to injustice. They set an example that reminds us that achieving equal justice for all is not beyond the grasp of this wealthy society. We need only the will to reach out and deliver on constitutional promises made long ago.

Footnotes

* Director, Southern Center for Human Rights, Atlanta, Georgia; Visiting Lecturer, Yale and Harvard Law Schools; Senior Lecturer, Emory Law School; B.A. 1971, J.D. 1974, University of Kentucky. The author is most grateful to his research assistants at Yale Law School, Fiona Doherty and Jean Giles, for their assistance in preparing this article.

1. 372 U.S. 335 (1963); *see also* ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964).

2. Janet Reno, Address to the American Bar Association Criminal Justice Section 6 (Aug. 2, 1997)(transcript on file with *Annual Survey of American Law*).

3. *See, e.g.*, Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 *LAW & COMTEMP. PROBS.* 81, 90-93 (1995) (describing training of lawyers and investigation of cases by the District of Columbia Public Defender Service); DAVID C. ANDERSON, NATIONAL INST. OF JUSTICE, *PUBLIC DEFENDERS IN THE NEIGHBORHOOD: A HARLEM LAW OFFICE STRESSES TEAMWORK, EARLY INVESTIGATION* (1997) (describing how early, aggressive investigations distinguish the Neighborhood Defender Service in Harlem from other indigent defense programs).

4. *See* Fox Butterfield, *Defying Gravity, Inmate Population Climbs*, *N.Y. TIMES*, Jan. 19, 1998, at A8 (reporting that despite the decline in the crime rate over the past five years, the number of inmates has continued to rise each year; that over 1,700,000 are in prisons and jails; and that the national incarceration rate of 645 per 100,000 people is more than double the rate in 1985).

5. RICHARD KLEIN & ROBERT SPANGENBERG, *THE INDIGENT DEFENSE CRISIS* 25 (1993) (prepared for the American Bar Association Section of Criminal Justice Ad Hoc Committee on the Indigent Defense Crisis).

6. 372 U.S. at 344.

7. *See, e.g.*, *Frey v. Fulcomer*, 974 F.2d 348, 359 (3d Cir. 1992) (lawyer in a Pennsylvania case tailored his presentation of evidence and argument around a death penalty statute that had been

declared unconstitutional three years earlier); Trial Record at 1875-76, *State v. Smith*, 581 So. 2d 497 (Ala. Crim. App. 1990) (No. 5 Div. 458) (defense lawyer asked for time between the guilt and penalty phases so that he could read the state's death penalty statute); 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, 1839 (1994) (when asked to name the criminal law decisions with which he was familiar, defense counsel could name only "*Miranda* and *Dred Scott*;" *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), was not a criminal case); Transcript of Habeas Corpus Hearing of Jan. 10-11, 1996, at 396-97, *Fugate v. Thomas*, Civ. No. 94-V-195 (Super. Ct. Butts Co. Ga.) (parts of which are reprinted in *A Lawyer Without Precedent*, HARPER'S, June 1997, at 24, 26) (lawyer unaware of any case). For a further discussion see *infra* notes 58-62, 291-99 and accompanying text.

8. See Jeffrey L. Kirshmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 455-60 (1996) (citing cases in which convictions were upheld even though defense lawyers were intoxicated, abusing drugs, or mentally ill); *People v. Garrison*, 765 P.2d 419, 440-41 (1989) (upholding conviction even though counsel, an alcoholic, was arrested en route to court one morning and found to have a blood alcohol level of 0.27); Bright, *supra* note 7, at 1835-36 (describing the case of Judy Haney, whose capital trial had to be suspended for a day because her lawyer was intoxicated).

9. See *McFarland v. Texas*, 928 S.W.2d 482 (Tex. Crim. App. 1996) (upholding death sentence even though lead defense counsel slept during trial); *Ex parte Burdine*, 901 S.W.2d 456 (Tex. Crim. App. 1995) (upholding death sentence even though defense counsel slept during trial); David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691, 694-95 (1996) (describing the case of Carl Johnson, who was executed even though his defense counsel slept during portions of the trial).

10. See Douglas C. Colbert, *Thirty-five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 16 (1998).

11. See *id.* at 9-10 (1998) (finding that failure to provide counsel for bail proceedings is "commonplace throughout the nation").

12. See *id.* at 14-19.

13. See *Griffin v. Illinois*, 351 U.S. 12 (1956).

14. See *Douglas v. California*, 372 U.S. 353 (1963).

15. See Bright, *supra* note 7, at 1860-61 n.154 (setting out in full the one-page brief filed in the case of Larry Gene Heath, whose death sentence was affirmed by the Alabama Supreme Court on the basis of the brief; Heath was executed); see also *id.* at 1843 n.55 (describing other grossly deficient briefs filed in capital cases).

16. *See id.* at 1860-61.

17. *See Poor Man's Justice*, AM. LAW., Jan.-Feb. 1993, at 45-87 (13 articles describing the inadequacy of representation for indigent defendants in various parts of the country); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986); William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL OF RTS. J. 91 (1995); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995); Bright, *supra* note 7, at 1835; Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993); American Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 16 (1990) (finding after an exhaustive study that "the inadequacy and inadequate compensation of counsel at trial" constituted one of the "principal failings of the capital punishment systems in the states today").

18. *See infra* notes 202-34 and accompanying text.

19. *See* Stephen B. Bright, *Death by Lottery--Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W.V. L. REV. 679 (1990); Vick, *supra* note 17, at 337- 38.

20. MIKE MEARS, A BRIEF HISTORY OF THE GEORGIA INDIGENT DEFENSE ACT 24 (1996).

21. *See id.*

22. *See* notes 29-34 and accompanying text; *see also* Klein, *supra* note 17, at 679.

23. *See infra* Section II.A.

24. *See* Klein, *supra* note 17, at 658-63.

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

26. *See* Klein, *supra* note 17, at 659 (collecting studies showing that defense systems throughout the country are violating *Argensinger*).

27. *See* Ann Woolner, *Guilty in Americus? Forget Lawyers, Just Plead Guilty*, FULTON COUNTY DAILY REP., Sept. 23, 1996, at 1.

28. *See* Consent Order entered Sept. 30, 1998, *Parks v. Fennessy*, Civil Action No. 1:96-CV-182-3 (WLS) (M.D. Ga.); Ann Woolner, *Sumter to Tell Accused of Rights Before Asking for Plea*, FULTON COUNTY DAILY REP., Oct. 5, 1998, at 1.

29. Clay Hall, *Public Defender is Hired*, THOMPSON (GA.) TIMES, Feb. 24, 1993, at 3A.
30. See Clay Hall, *Attorney for Hire*, THOMPSON (GA.) TIMES, Jan. 27, 1993, at 1A (reporting that the county was considering changing the way it provides indigent defense in order to lower the cost to the county).
31. See Hall, *supra* note 29, at 3A.
32. See Bill Rankin, 'This is Fast-food Justice, and it's No Justice at All,' ATLANTA J.-CONST., Jan. 25, 1998, at A9 (reporting that on January 12, 1998, Wheeler met several clients for the first time in court and consulted with some for less than 10 minutes before entering a guilty plea).
33. See Memorandum from Patrick Keenan (May 18, 1997) (on file with author) (summarizing compilation of records of cases handled by William Wheeler in 1993, 1994, 1995, and 1996).
34. See *id.*
35. CLARENCE DARROW ON CAPITAL PUNISHMENT 34 (Chicago Historical Bookworks 1991) (1924).
36. See Paul M. Barrett, *Lawyer's Fast Work on Death Cases Raises Doubts About System*, WALL ST. J., Sept. 7, 1994, at A1.
37. See *id.*
38. *Ex parte* Burdine, 901 S.W.2d 456, 457 (Tex. Crim. App. 1995) (Maloney, J., dissenting).
39. *Id.* The clerk testified that counsel "fell asleep and was asleep for long periods of time during the questioning of witnesses." *Id.* at 457 n.1.
40. See Barrett, *supra* note 36, at A1.
41. Dow, *supra* note 9, at 694-95.
42. See Ted Rohrlick, *The Case of the Speedy Attorney*, L.A. TIMES, Sept. 26, 1991, at A1.
43. *Id.*
44. See *id.*
45. See *id.*

46. See Jeff Rosenzweig, *The Crisis in Indigent Defense: An Arkansas Commentary*, 44 ARK. L. REV. 409, 413 (1991).

47. *Id.* at 412.

48. *Id.*

49. See ABA JUVENILE JUSTICE PROJECT ET AL., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (1995) (describing the poor quality of representation for children accused in delinquency proceedings); Fox Butterfield, *Few Options or Safeguards in a City's Juvenile Courts*, N.Y. TIMES, July 22, 1997, at A1 (describing the woefully inadequate legal representation provided to children, an overwhelming majority of whom are black, in the juvenile courts in New Orleans).

50. John Paul Stevens, Opening Assembly Address at the American Bar Association Annual Meeting 13 (Aug. 3, 1996).

51. See *id.* at 12.

52. See NATIONAL INST. OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996) (a report by the Department of Justice on persons convicted of crimes, but later exonerated by scientific evidence).

53. See Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Really Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1318-19 nn.6-7 (citations to numerous articles documenting conviction of the innocent).

54. Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 2 (1986).

55. American Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 67 (1990).

56. *Id.*

57. See Peter Applebome, *Two Electric Jolts in Alabama Execution*, N.Y. TIMES, July 15, 1989, at A6.

58. See *Smith v. Kemp*, 715 F.2d 1459, 1470 (11th Cir. 1983) (Smith's lawyers were unaware of the Supreme Court's decision in *Taylor v. Louisiana*, 419 U.S. 522 (1975), decided six days before Smith's trial started).

59. See *Machetti v. Linahan*, 679 F.2d 236, 241 (11th Cir. 1982) (holding that Georgia's "opt-out" provision allowing women to decline jury service resulted in the unconstitutional

under-representation of women contrary to *Duren v. Missouri*, 439 U.S. 357 (1979), and *Taylor v. Louisiana*, 419 U.S. 522 (1975)).

60. *See* Smith, 715 F.2d at 1476 (Hatchett, J., concurring in part and dissenting in part).

61. *See id.* at 1469 (because Smith and his codefendant were tried within a few weeks of each other in the same county, their juries were drawn from the same unconstitutional jury pool).

62. *See id.* at 1469-72; *see also id.* at 1476 (Hatchett, J., concurring in part and dissenting in part).

63. *See* KY. REV. STAT. ANN. § 31.170(4) (Michie 1985).

64. *See* Transcript of July 5, 1988 Hearing, at 15, Commonwealth v. Wilson, No. 87-CR-166 (Kenton Cir. Ct., Ky.).

65. American Bar Ass'n, *supra* note 55, at 76-77 n.196.

66. *See* Wilson v. Commonwealth, 836 S.W.2d 872, 878 (Ky. 1992).

67. *See* Affidavit of Robert Carran on inspection of William Hagedorn's office, Aug. 24, 1988, Record at 580-81 (Vol. 4), Commonwealth v. Wilson, No. 87-CR-166 (Kenton Cir. Ct., Ky.).

68. *See id.* at 580.

69. *See* Transcript of July 5, 1988 Hearing at 18-20, Commonwealth v. Wilson, No. 87-CR-166 (Kenton Cir. Ct., Ky.).

70. Affidavit of John W. Foote, Feb. 3, 1997, at 4, P 7, Wilson v. Commonwealth, No. 87-CR-166 (Kenton Cir. Ct., Ky.) [hereinafter Foote Affidavit] (filed as Defendant's Exhibit 1 in post-conviction proceedings).

71. *See* Transcript of July 5, 1988 Hearing at 19, Commonwealth v. Wilson, No. 87-CR-166 (Kenton Cir. Ct., Ky.).

72. *See* Affidavit of Robert Carran on recovery of stolen property, Aug. 24, 1988, Record at 565-68 (vol. 4), Commonwealth v. Wilson, No. 87-CR- 166 (Kenton Cir. Ct., Ky.).

73. *See id.* at 574-75.

74. *See id.*

75. *See* Wilson v. Commonwealth, 836 S.W.2d 872, 878 (Ky. 1992) (noting that "[a]t many

points during the trial, Wilson repeated his assertion that his court-appointed standby counsel were, to use Wilson's words, 'unprepared, ill-trained, ill-equipped, and lacked the necessary competence and experience").

76. *See id.* at 883 (quoting transcript in which Wilson asks for "competent counsel"); *see also id.* at 884 (noting Wilson's "insistence that the court appoint him an attorney who met Wilson's specifications as a death penalty expert").

77. *See* Foote Affidavit, *supra* note 70, at 6, 10 ("There were times during the trial when Hagedorn was not even present.").

78. *See* Transcript of Evidence and Proceedings at 204-08, (Vol. 2), Commonwealth v. Wilson, No. 87-CR-166 (Kenton Cir. Ct., Ky. filed June 28, 1989) (cross-examination of Dr. Dean Hawley by Mr. Alerding).

79. *See* Wilson, 836 S.W.2d at 879.

80. *See* Murray v. Giarratano 492 U.S. 1 (1989); Pennsylvania v. Finley, 481 U.S. 551 (1987); *see also infra* notes 82-83, 87-88, 93-150 and accompanying text.

81. *See* Fay v. Noia, 372 U.S. 391, 394-426 (1963) (describing the history and role of habeas corpus); Smith v. Bennett, 365 U.S. 703, 712-13 (1961) (describing the writ of habeas corpus as the common law world's "freedom writ" and, quoting Bowen v. Johnson, 306 U.S. 19, 26 (1939), saying "there is no higher duty than to maintain it unimpaired"); Stephen B. Bright, *Is Fairness Irrelevant? The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1 (1997).

82. In *Ross v. Moffitt*, 417 U.S. 600 (1974), the Supreme Court refused to extend the right to counsel to discretionary appeals after an initial appeal. In *Finley*, 481 U.S. at 551, the Court ruled that neither the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of "meaningful access" required the state to provide counsel for indigent prisoners seeking state post-conviction relief.

83. 492 U.S. at 10. The Mississippi Supreme Court has held that those condemned do die have a constitutional right to counsel in state post-conviction proceedings. *See* Jackson v. State, 1999 WL 33904 (Miss. Jan. 28, 1999). However, other courts have held that there is no exception to Murray v. Giarratano for inmates who have no source of representation and have their first opportunity to present certain claims in state post-conviction review. *See* Gibson v. Turpin, 1999 WL 79655 (Ga. Feb. 22, 1999) (denying Gibson's application for certificate of probable cause to appeal); Mackall v. Angelone, 131 F.3d 442, 449 n.13 (4th Cir. 1997). With the comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(q)(4)(B), as amended, 21 U.S.C. § 848(q)(4)(B) (West 1998), Congress created a statutory right to counsel in *federal* habeas corpus proceedings for prisoners sentenced to death. *See* McFarland v. Scott, 512 U.S. 849, 849 (1994). However, counsel's

duties are limited to representation in federal habeas corpus review. The prisoner must first exhaust available state court remedies by seeking state collateral review. *See, e.g., United States ex. rel Whitehead v. Page*, 914 F. Supp. 1541, 1543 (N.D. Ill. 1995).

84. *Id.* at 11.

85. *See* THE SPANGENBERG GROUP, PROJECTING COSTS FOR VARIOUS INDIGENT DEFENSE SYSTEMS IN VIRGINIA FOR FY 1986, at 78 (1985).

86. *See id.*

87. *See* *Bounds v. Smith*, 430 U.S. 817 (1977).

88. *See id.* at 833; *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring).

89. *See* Rhonda Cook, *Cost of Inmates' Legal Advice Cut*, ATLANTA J.-CONST., Mar. 30, 1996, at D3 (reporting that the director of the University of Georgia project, after working for the project for 24 years, received a two-sentence letter informing him of the termination of the department's contract with the project).

90. *See id.*; Ann Woolner, *Coping with a Rollback in Inmates' Right to Legal Help*, FULTON COUNTY DAILY REP., Nov. 23, 1998, at 1.

91. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 101, 110 Stat. 1214, 1217 (1996) (codified as amended at 28 U.S.C. § 2244 (d) (1) (West Supp. 1998)).

92. Woolner, *supra* note 90, at 10, 12-13; *see* Ann Woolner, *Court Shifts Oversight of Georgia Inmates' Legal Help*, FULTON COUNTY DAILY REP., Nov. 12, 1998, at 1, 2; Rhonda Cook, *Inmates' Attorneys Criticized*, ATLANTA J.-CONST., Nov. 11, 1998, at C-1.

93. 518 U.S. 343 (1996).

94. *See id.* at 351.

95. *See id.* at 354.

96. *Id.*

97. *Id.* at 354.

98. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (amending 28 U.S.C. § 2244(d)(1)). This Act established a statute of limitations for federal habeas corpus petitions of one year from the date upon which the conviction becomes final.

The statute is tolled during the time that an inmate exhausts state remedies by seeking state post-conviction relief.

99. See James S. Liebman, *More than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 537, 541 n.15 (1991).

100. See Peter Applebome, *Alabama Releases Man Held on Death Row for Six Years*, N.Y. TIMES, Mar. 3, 1993, at A1.

101. See *Schlup v. Delo*, 513 U.S. 298 (1995); *Schlup v. Bowersox*, No. 4:92CV433 JCH, 1996 U.S. Dist. LEXIS 8887 (E.D. Mo. May 2, 1996)(habeas relief granted based on finding that constitutional violation led to conviction of Schlup even though he was probably innocent); *Kyles v. Whitley*, 514 U.S. 419 (1995) (finding a violation of due process by the prosecution due to failure to turn over exculpatory evidence).

102. See Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 912-15 (1996); see also Marcia Coyle, *Republicans Take Aim at Death Row Lawyers*, NAT'L L.J., Sept. 18, 1995, at A1 (describing the effort of South Carolina's Attorney General and other members of the National Association of Attorneys General to eliminate funding for the post-conviction defender organizations even though the organizations had established the innocence of at least four men condemned to die).

103. See Howard, *supra* note 102, at 915-20.

104. See David Cole, *Too Expensive or Too Effective? The Real Reason the GOP Wants to Cut Capital-Representation Centers*, FULTON COUNTY DAILY REP., Sept. 8, 1995, at 6 (pointing out that eliminating funding for the capital representation centers would increase the cost of providing representation, but decrease the quality).

105. Pub. L. No. 104-132, 110 Stat. 1214 (amending 28 U.S.C. ch. 153).

106. *Id.* §§ 101, 105 (codified as amended at 28 U.S.C. § 2244(d)(1) (West 1998)). The Act also established a statute of limitations of 180 days for states which meet certain standards of providing counsel in capital post-conviction proceedings. See *id.* § 107 (codified as amended at 28 U.S.C. § 2263). It prohibits federal courts from granting habeas corpus relief unless the decision of the state court "was contrary to, or involved an unreasonable application of, clearly established Federal law," *Id.* § 104(3), codified as amended at 28 U.S.C. § 2254(d)(1), severely limits when a federal court may conduct an evidentiary hearing, see *id.* § 104(4), codified as amended at 28 U.S.C. § 2254(e)(2), and prohibits second or "successive" petitions for habeas corpus relief except in very narrow circumstances. See *id.* §§ 105, 106 (codified as amended at 28 U.S.C. §§ 2255, 2244(b)).

107. See *Gibson v. State*, 404 S.E.2d 781 (Ga. 1991); Bill Rankin, *When Death Row Inmates*

Go to Court without Lawyers, ATLANTA J.-CONST., Dec. 29, 1996, at D5 (reporting Gibson's IQ as "in the 80s").

108. *See* Transcript of Sept. 12, 1996 habeas corpus hearing, Gibson v. Turpin, No. 95-V-648 (Ga. Super. Ct. Butts County).

109. *Id.* at 2-3.

110. *See* Rankin, *supra* note 107, at D5 (reporting that counsel opposing Gibson was Paige Whitaker, "one of the top death penalty litigators for the Attorney General's Office").

111. Transcript of Sept. 12, 1996 habeas corpus hearing at 67, Gibson v. Turpin, No. 95-V-648 (Ga. Super. Ct. Butts County).

112. *See* Letter from Paige Whitaker, Assistant Attorney General, to Judge Carlisle Overstreet with enclosed order (Feb. 18, 1997) (on file with author); Order signed Mar. 6, 1997 by Judge Overstreet, Record at 28, Gibson v. Turpin, No. 95-V-648) (Ga. Super. Ct. Butts County).

113. Gibson v. Turpin, 1999 WL 79655 (Ga. Feb. 22, 1999).

114. *See Ex parte* Skinner, No. 20,203-03 (Tex. Crim. App. Dec. 2, 1998) (dismissed because petition filed one day late); *Ex parte* Smith, 977 S.W.2d 589 (Tex. Crim. App. 1998) (petition dismissed because filed nine days late); *Ex parte* Colella, 977 S.W.2d 621 (Tex. Crim. App. 1998) (petition filed because 37 days late).

115. *Ex parte* Smith, 977 S.W.2d at 611.

116. *Id.* at 613, 614 (Baird, J., dissenting).

117. *Id.* at 614 (Overstreet, J., dissenting).

118. *See* Order of Dec. 2, 1998, at 1, *Ex parte* Skinner (No. 20,203- 03).

119. *See id.* at 1-2.

120. *Id.* at 6 (Mansfield, J., concurring).

121. *Id.* at 5 (Baird, J., dissenting).

122. *Ex parte* Martinez, 977 S.W.2d 589, 589 (Tex. Crim. App. 1998) (Baird, J., dissenting).

123. *See id.* at 589 n.2.

124. *See id.*

125. *Ex parte Wolfe*, 977 S.W.2d 603 (Tex. Crim. App. 1998).

126. *Id.* at 603 (Baird, J., dissenting). Judge Baird described the application as follows:

The instant application appears to allege ineffective assistance of trial counsel, but also includes a wish list of discovery, research, and hearings necessary to represent applicant. No cases are cited. No analysis of the law is presented. Indeed, even the State recognizes this 'application' appears to be a motion for discovery.

Id.

127. *See id.*

128. *See Jane Elliott, Habeas System Fails Death Row Appellant*, TEX. LAW., Mar. 9, 1998, at 1.

129. *See Ex parte Kerr*, 977 S.W.2d 585, 585 (Tex. Crim. App. 1998) (Overstreet, J., dissenting).

130. *See id.*; Elliott, *supra* note 128, at 1 (quoting affidavit in which the lawyer admitted that he thought he could not attack conviction, had been advised that he made a "gross error in judgment," and admitted that he may not have been competent to represent Kerr).

131. *See Elliott, supra* note 128, at 1.

132. *See id.*

133. *See Ex parte Kerr*, 977 S.W.2d at 585.

134. *Id.* at 585 (Overstreet, J., dissenting).

135. *Id.*

136. Elliott, *supra* note 128, at 1 (quoting the chief appellate lawyer for the district attorney's office handling the case).

137. *TCDLA Urges Members to Pass on Accepting Habeas Cases*, TEX. LAW., June 22, 1998, at 4 [hereinafter *TCDLA Urges*] (Resolution passed by the Board of Directors of the Texas Criminal Defense Lawyers Association on June 6, 1998).

138. *See Paul Duggan, On Death Row, Not Even Dying is Certain*, WASH. POST, Dec. 20, 1998, at A22.

139. *See Cantu-Tzin v. Johnson*, 162 F.3d 295, 297 (5th Cir. 1998), *stay granted*, 119 S.Ct.

587 (1998), *cert. denied*, 119 S.Ct. 847 (1999) (one lawyer was forced to withdraw due to a conflict of interest; the second was permitted to withdraw after asserting "irreconcilable differences" with Cantu).

140. *See supra* note 106 and accompanying text.

141. *See* Hearing of Aug. 15, 1997, at 26-29, *Cantu v. Johnson*, No. 71, 314 (Tex. Crim. App. 1997).

142. *See Cantu-Tzin v. Johnson*, 162 F.3d at 296, 298-300. Two judges on the Court of Appeals said that Cantu requested discharge of the third lawyer "because Cantu thought for various reasons that [the lawyer] was not representing him effectively," *id.* at 297, without ever mentioning that the lawyer had failed even to visit Cantu and knew nothing about the Antiterrorism Act, in finding that Cantu was "dilatory" and "flouted the state court's procedures." *Id.* at 299. Judge Benivides, dissenting, pointed out that because the federal district court had denied Cantu counsel and an evidentiary hearing, he had no opportunity to present evidence or arguments to show that he had not been dilatory or flouted the state procedures. *See id.* at 301 (Benivides, J., dissenting).

143. *See Man Executed for Murder-for-hire Plot*, DALLAS MORNING NEWS, Feb. 17, 1999, at 21A.

144. The Court no longer faces the dissents of Judges Baird and Overstreet. Judge Baird was defeated in his bid for reelection in 1998, and Judge Overstreet gave up his seat to seek other office. *See* Bruce Nichols, *GOP Candidates Sweep 3 Seats; Appeals Court Will be All-Republican for the First Time*, DALLAS MORNING NEWS, Nov. 4, 1998, at 35A.

145. Elliott, *supra* note 128, at 1.

146. Cynthia Orr & E.G. "Gerry" Morris, *Dear 11.071 Appointed Counsel.*, VOICE FOR THE DEFENSE, Apr. 1998, at 23.

147. *See* ALA. CODE § 15-12-23(d) (1998).

148. *See* *Gibson v. Turpin*, 1999 WL 79655 (Ga. Feb. 22, 1999) (upholding refusal to provide a lawyer for death-sentenced inmate in state post-conviction review); *see also* THE SPANGENBERG GROUP, AN UPDATED ANALYSIS OF THE RIGHT TO COUNSEL AND THE RIGHT TO COMPENSATION AND EXPENSES IN STATE POST- CONVICTION DEATH PENALTY CASES 20 (1996); Rankin, *supra* note 107, at D5 (reporting that Georgia makes no provision for counsel in capital post-conviction proceedings and describing efforts of Georgia's chief justice to get law firms to volunteer to take cases).

149. Pub. L. No. 104-132, 110 Stat. 1214 (1996). The Act is not limited to capital cases.

150. See *Keating v. Hood*, 922 F. Supp. 1482 (C.D. Ca. 1996), *dismissed to allow exhaustion of state remedies*, 133 F.3d 1240 (9th Cir. 1998).

151. See, e.g., *Haley v. Gross*, 86 F.3d 630 (7th Cir. 1996) (holding prison officials were deliberately indifferent to safety and welfare of prisoner who was severely burned when cellmate, who had been acting strangely, set cell on fire after prisoner's pleas to be moved were ignored); *Vosburg v. Solem*, 845 F.2d 763, 766-67 (8th Cir. 1988) (risk of sexual assaults pervasive and prison officials failed to respond reasonably); *Martin v. White*, 742 F.2d 469, 474 (8th Cir. 1984) (describing pervasive risk of sexual assaults in prisons due to inadequate patrols, improper positioning of guards, inadequate inmate classification system, and failure to report assaults and pursue prosecution).

152. See Andrew A. Skolnick, *Prison Deaths Spotlight How Boards Handle Impaired, Disciplined Physicians*, 280 JAMA 1387 (1998) [hereinafter Skolnick, *Prison Deaths*] (describing deaths of prisoners treated by doctors who lost their medical license after criminal convictions or findings of professional misconduct, but were provisionally licensed to practice in prisons); Andrew A. Skolnick, *Critics Denounce Staffing Jails and Prisons With Physicians Convicted of Misconduct*, 280 JAMA 1391, 1391 (1998) (reporting that "inadequate medical staffing in many correctional facilities is compromising the health and safety of inmates"); see also *Cortes-Quinones v. Jiminez-Nettleship*, 842 F.2d 556, 560 (1st Cir. 1988) (mentally ill prisoner dismembered by cellmates; prisoner was not segregated and did not receive treatment); THE OXFORD HISTORY OF THE PRISON 250-51 (Norval Morris & David J. Rothman eds., 1995) (incidence of AIDS is fourteen times higher in state and federal prisons than in the general population; frequency of tuberculosis among prisoners in New Jersey is eleven times higher than in the general population).

153. See NILS CHRISTIE, *CRIME CONTROL AS INDUSTRY: TOWARD GULAGS, WESTERN STYLE?* (1993) (describing failures of the American prison system from the perspective of an eminent Norwegian criminologist); David J. Rothman, *The Crime of Punishment*, N.Y. REV. OF BOOKS, Feb. 17, 1994, at 34 (describing the severe overcrowding in U.S. prisons, pseudo-military "boot camps" for young offenders, and other aspects of the culture of punishment in this country).

154. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(15), 110 Stat. 1321 (1996).

155. See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 803(d), 110 Stat. 1321 (1996) (amending 42 U.S.C. § 1988).

156. See *id.* §§ 802-03 (amending 18 U.S.C.A. § 3626 and other statutes); Kristin L. Burns, *Return to Hard Time: The Prison Litigation Reform Act of 1995*, 31 GA. L. REV. 879 (1997).

157. 18 U.S.C. § 3626(a)(1)(A) (1998).

158. See *id.* § 3626(b); see also *Benjamin v. Jacobson*, 124 F.3d 162 (2d Cir. 1997); *Pylar v. Moore*, 100 F.3d 365, 370-72 (4th Cir. 1996), *cert. denied*, 520 U.S. 1277 (1997); *Garvin v.*

Branstad, 122 F.3d 1081, 1085-87 (8th Cir. 1997).

159. See Hedieh Nasheri, *A Spirit of Meanness: Courts, Prisons and Prisoners*, 27 CUMB. L. REV. 1173, 1188-99 (1996-97).

160. See, e.g., Snipes v. Detella, 95 F.3d 586 (7th Cir. 1996) (holding prison physician did not act with deliberate indifference when he allegedly decided not to administer a local anesthetic before removing inmate's toenail); Hosna v. Goose, 80 F.3d 298 (8th Cir. 1996) (holding that denial of exercise may be constitutional violation only when inmate's muscles atrophy or if inmate's health is threatened); Crowder v. True, 74 F.3d 812 (7th Cir. 1996) (claims of paraplegic inmate that he was denied a wheelchair, physical therapy sessions, exercise, recreation, hygienic care, and medical care rejected because of failure to show deliberate indifference on the part of prison officials); Shakka v. Smith, 71 F.3d 162, (4th Cir. 1995) (holding refusal to allow prisoner to take shower for three days after human excrement and urine were thrown on him by other inmates did not violate Eighth Amendment where inmate was provided with "water and cleaning materials" to clean himself and cell).

161. Hutto v. Finney, 437 U.S. 678, 681 (1978) (quoting Holt v. Sarver, 309 F.Supp. 362, 381 (E.D. Ark. 1970)).

162. See Hutto, 437 U.S. at 682 n.4.

163. See *id.* at 682 n.5.

164. *Id.* at 681 n.3.

165. See DAVID M. OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* 149-51 (1996).

166. See *id.* at 242.

167. *Id.* at 245; see also Gates v. Collier, 349 F. Supp. 881, 881- 905 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974).

168. See *id.*

169. Pugh v. Locke, 406 F. Supp. 318, 322-27 (M.D. Ala. 1976), *aff'd as modified*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds*, 438 U.S. 781 (1978) (per curiam).

170. See Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part and rev'd in part*, 679 F.2d 1115 (5th Cir. 1982), *modified on rehearing*, 688 F.2d 266 (5th Cir. 1982).

171. Toussaint v. McCarthy, 597 F. Supp. 1388, 1400 (N.D. Cal. 1984), *aff'd in relevant part*, 801 F.2d 1080 (9th Cir. 1986).

172. French v. Owens, 777 F.2d 1250, 1253 (7th Cir. 1985).
173. See Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 670-81 (1993) (describing reforms accomplished through corrections litigation).
174. See Skolnick, *Prisoner Deaths*, *supra* note 152, at 1389.
175. See *id.* at 1387.
176. See *id.* at 1389.
177. *Id.* at 1389-90.
178. See *id.* at 1389.
179. *Id.* at 1390.
180. See David C. Anderson, CRIME AND THE POLITICS OF HYSTERIA 206-56 (1995); THE REAL WAR ON CRIME 63-98 (Steven R. Donziger ed., 1996); Stephen B. Bright, *The Politics of Crime and the Death Penalty: Not "Soft on Crime," But Hard on the Bill of Rights*, 39 ST. LOUIS U. L.J. 479 (1995).
181. See Rick Bragg, *Chain Gangs to Return to Roads of Alabama*, N.Y. TIMES, Mar. 26, 1995, at 16 (describing return of chain gangs to Alabama); Brent Staples, *The Chain Gang Show*, N.Y. TIMES MAG., Sept. 17, 1995, at 62.
182. See Adam Nossiter, *Judge Rules Against Alabama's Prison 'Hitching Posts'*, N.Y. TIMES, Jan. 31, 1997 (Alabama inmates chained to metal bar in 90 degree heat for hours at a time and not allowed to use the restroom or have a drink).
183. See Cynthia Tucker, *State's Prisons are Filled With Thugs, All Right*, ATLANTA J.-CONST., July 13, 1997, at H9.
184. Rhonda Cook, *A Tough Chief of Prisons*, ATLANTA J.-CONST., Dec. 15, 1996, at G1.
185. See Rhonda Cook, *235 Prison Teachers Fired to Save \$8 Million*, ATLANTA J.-CONST., Dec. 7, 1996, at A1.
186. See *id.*
187. See Cook, *supra* note 184, at G1.

188. *See id.*
189. *See* Charles Walston, *Inmates Face 4-mile Walks*, ATLANTA J.-CONST., Jan. 3, 1996, at A1.
190. Editorial, *Death Sentence for Rehab*, ATLANTA J.-CONST., Dec. 19, 1996, at A20.
191. *See* Rhonda Cook, *Prison Officials Recall Blood Bath*, ATLANTA J.-CONST., May 17, 1997, at D2 [hereinafter Cook, *Prison Officials*] (reporting on testimony by prison officials in depositions taken in lawsuit filed in connection with the case); Rhonda Cook, *Depositions Detail Abuse of Inmates*, ATLANTA J.-CONST., Sept. 9, 1997, at C1 (reporting that "latest revelations suggest a system-wide belief that beating prisoners is OK").
192. Rhonda Cook, *Guard Recalls Beatings as Payback Time*, ATLANTA J.-CONST., June 29, 1997, at C1.
193. Cook, *Prison Officials*, *supra* note 191 (quoting from deposition of guard Phyllis Tucker).
194. *See* Rhonda Cook, *Federal Judge Approves Settlement in Inmate Lawsuit That Alleged Abuse*, ATLANTA J.-CONST., Apr. 24, 1998, at B2.
195. *See* Rick Bragg, *Prison Chief Encouraged Brutality, Witnesses Report*, N.Y. TIMES, July 1, 1997, at A12; Bob Herbert, *Brutality Behind Bars*, N.Y. TIMES, July 7, 1997, at A15; Nat Hentoff, *Cracking Heads in Georgia*, WASH. POST, June 14, 1997, at A19.
196. *See, e.g.*, Rhonda Cook, *Prison Story Hits Prime Time*, ATLANTA J.-CONST., Sept. 25, 1997, at B1 (discussing a 14-minute report by Sam Donaldson on "Prime Time Live," and that "[s]everal major national news organizations ... have picked up on the story").
197. *See* *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (state trial should be the "main event," not a "tryout on the road" before post-conviction proceedings).
198. David Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973).
199. Chief Justice Harold G. Clarke, Annual State of the Judiciary Address, *reprinted in* FULTON COUNTY DAILY REP., Jan. 14, 1993, at 5.
200. 466 U.S. 668 (1984).
201. *See* Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 658-63 (1986)

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

203. *See id.* A serious case was defined as "one involving an offense necessarily punishable by a jail term which may not be suspended." *Id.* at 784 n.3.

204. *See id.* at 784.

205. *See id.* The Louisiana Supreme Court found that, because of the excessive caseloads and insufficient resources of the public defender office, the clients served by this system are "not provided with the effective assistance of counsel the [C]onstitution requires." *Id.* at 790

206. *See* Jan Ackerman, *Public Defenders Feel Betrayed by Heavy-Handed County Axing*, PITT. POST-GAZETTE, Feb. 27, 1996, at B1.

207. *See id.*

208. *See id.*

209. *See id.*

210. Jan Ackerman, *Justice on a Tight Budget; Commissioners Are Courting Disaster by Cutting Budget of Overworked Public Defenders*, PITT. POST-GAZETTE, Feb. 4, 1996, at A1 (quoting a study done on behalf of the American Bar Association by the Spangenberg Group, a Massachusetts based consulting firm, stating that the Allegheny County public defender's office was in crisis).

211. *Id.*

212. *See* Ackerman, *supra* note 206, at B1.

213. *See id.*

214. *See* Dave Daley, *Defense Attorney Fears Poor Clients Will be Hurt by Cuts*, MILWAUKEE J., Mar. 16, 1995, at A18.

215. *See id.*; *see also* Daniel Bice, *Lawyers May Boycott Public Cases*, MILWAUKEE J., Apr. 7, 1995, at B5.

216. *See* Daley, *supra* note 214, at A18.

217. *See id.*

218. *See* Sharon Theimer, *Are Legal Eagles Flying Out of Orbit?*, CAPITAL TIMES, Nov. 25, 1996, at 1A.

219. *See supra* notes 29-48 and accompanying text.

220. *See* VA. CODE ANN. § 19.2-163 (Michie 1998). The statute provides that after July 1, 1999, lawyers are to receive up to \$882 in felony cases punishable by more than 20 years and \$318 for a felony punishable by less than 20 years, but the other rates remain the same. The statute provides for a "reasonable amount" for the defense of a capital case.

221. *See* Laura LaFay, *Virginia's Poor Receive Justice on the Cheap*, VIRGINIAN-PILOT, Feb. 15, 1998 at A1; *Felony Murder: Soup to Nuts--\$575*, CRIM. PRACTICE REP., Jan. 28, 1998, at 25 [hereinafter *Felony Murder*].

222. *See* LaFay, *supra* note 221, at A1.

223. *See id.* at A10 (reporting that Judge James E. Kulp announced that he would remove from the list of attorneys eligible for court appointments any lawyer who raised the issue); *Felony Murder, supra* note 221, at 27.

224. *See* ALA. CODE § 15-12-21 (Supp. 1992). Lawyers can be reimbursed for their overhead expenses. *See* *May v. State*, 672 So. 2d 1307 (Ala. Crim. App. 1993)(allowing reimbursement for office overhead expenses and upholding \$1000 statutory cap on attorney fees).

225. *See* Marianne Lavelle, *Strong Law Thwarts Lone Star Counsel*, NAT'L L.J., June 11, 1990, at 34.

226. *See* THE SPANGENBERG GROUP, A STUDY OF REPRESENTATION IN CAPITAL CASES IN TEXAS 156-57 (1993) (prepared for the State Bar of Texas).

227. *See* MISS. CODE. ANN. § 99-15-17 (Supp.1990); *see also* *Wilson v. State*, 574 So. 2d 1338 (Miss. 1990).

228. *See* *State v. Wigley*, 624 So. 2d 425 (La. 1993) (holding that fees for a lawyer's services need not be paid, but that lawyers were entitled to recover their reasonable out-of-pocket expenses and overhead costs). Louisiana had previously required the lawyer to pay all expenses and made no provision for overhead costs. *See* *State v. Clifton*, 172 So. 2d 657 (La. 1965).

229. LaFay, *supra* note 221, at A10 (quoting Virginia Beach Commonwealth Attorney Bob Humphreys).

230. *Id.*

231. *See, e.g.* Edward C. Prado, *Process and Progress: Reviewing the Criminal Justice Act*, 58 LAW & CONTEMP. PROBS. 51, 57 (1995) (complaints on reduction of fees and processing delays

"pervasive" among defense attorneys).

232. See, e.g., Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for all Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 94 (1993) (noting that judges or court administrators "often reduce fees, sometimes in a way that the attorneys consider arbitrary"); Orr & Morris, *supra* note 146, at 23 (warning lawyers that the Texas Court of Criminal Appeals "has been routinely cutting vouchers without explanation").

233. Judge Frank Johnson pointed out the impossibility of making such a showing in *Moore v. Kemp*, 809 F.2d 702, 742-43 (11th Cir. 1987) (Johnson, J., concurring in part and dissenting in part). Judge Johnson asked "how could [counsel] know if he needed a microbiologist, an organic chemist, a urologist, a hematologist, or that which the state used, a serologist? How further could he specify the type of testing he needed without first hiring an expert to make that determination?" *Id.* at 743. Judge Johnson noted that the lawyer faces "a proverbial 'Catch 22,' making it impossible for all but the most nimble (and prescient) defendant[s] to obtain expert assistance." *Id.* at 742.

234. See, e.g., Pierre Thomas, *First Fruit of Crime Bill is Marketed; Reno: \$200 Million to Police in October*, WASH. POST, Sept. 9, 1994 at A25 (describing plans of Attorney General Reno to distribute \$200 million for 2,600 police officers as part of implementation of a \$30 billion allocation in crime bill); Melody Petersen, *Before an Election, Prisons are Good. The Bills Come Later*, N.Y. TIMES, Aug. 10, 1997, at 13NJ-6 (New Jersey edition) (describing adoption of a crime bill increasing the sentences for drug dealers).

235. See Anderson, *supra* note 180; THE REAL WAR ON CRIME, *supra* note 180, at 63-98; Bright, *supra* note 180, at 479.

236. See Gil Lawson, *Patton Sets Execution Date in 5 Death-Row Cases; Order Issued to Speed Appeals*, LOUISVILLE COURIER J., Jan. 4, 1996, at 1B.

237. See *id.*

238. See Gil Lawson, *Praise Can't Assure Public Advocate of Keeping Her Job*, LOUISVILLE COURIER J., May 10, 1996, at 1B.

239. See Gil Lawson, *Patton Picks Lewis to Replace Connelly as Public Advocate; Appointee is 20-Year-Veteran of Defender Systems*, LOUISVILLE COURIER J., Sept. 18, 1996, at 1B.

240. See Lawson, *supra* note 238, at 1B.

241. See Robin Blumner, *Killing Agency Won't Speed Up Executions*, ST. PETERSBURG TIMES, Feb. 16, 1997, at 4D.

242. *Inexperience Defines Chiles' Death Row Staff*, FLA. TODAY, Oct. 5, 1997, at 8B [hereinafter Chiles' Death Row Staff].

243. See FLA. STAT. ANN. § 27.701 (West Supp. 1998).

244. See *id.*

245. See *Chiles' Death Row Staff*, *supra* note 242, at 8B; *Key Appointees Lack Death-Row Experience*, TAMPA TRIB., Sept. 30, 1997, at 5; Jackie Hallifax, *New Death Row Lawyers Have No Background in Capital Appeals*, TALLAHASSEE DEMOCRAT, Sept. 30, 1997, at 1B.

246. See Jackie Hallifax, *Chiles Appoints 2 New Death Row Attorneys*, MIAMI HERALD, Aug. 9, 1997, at 6B.

247. See *Chiles' Death Row Staff*, *supra* note 242, at 8B.

248. See DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH ROW* 268 (1995) (describing how Governor Bob Graham's signing of death warrants enabled him to reinvent himself as tough after being initially dubbed "Governor Jello"); *id.* at 200-01 (reporting that Graham increased the number of warrants he signed when running for reelection as governor in 1982 even though he knew they would not be carried out because of a pending court decision); *id.* at 293 (reporting that Graham again stepped up the number of warrants he was signing each month when running for the Senate in 1986, causing one assistant attorney general responsible for representing the state in capital cases to remark that "[n]ine months of Bob Graham running for the Senate nearly killed me"). Graham's successor, Bob Martinez, signed over 90 death warrants in his four years in office and ran television advertisements showing the face of serial killer Ted Bundy, who was executed during his tenure. See Richard Cohen, *Playing Politics With the Death Penalty*, WASH. POST, Mar. 20, 1990, at A19.

249. See Jenny Staletovich, *Office That Defends Death Row Inmates Near Collapse*, PALM BEACH POST, May 4, 1998, at 1A. Buenoano was executed in March, 1998. See *id.*

250. See *id.*

251. See *id.*

252. William R. Levesque, *Death Row Inmate Gets New Attorneys*, ST. PETERSBURG TIMES, Oct. 27, 1998, at 3B; see also Editorial, *A Formula for Failure*, ST. PETERSBURG TIMES, Nov. 7, 1998, at 12A (noting "[r]arely does a judge lash out at attorneys in such a blistering attack in an official ruling, but this one was deserved").

253. See Jackie Hallifax, *One Death Row Appeals Office is Struggling With its Caseload*, TALLAHASSEE DEMOCRAT, Oct. 1, 1998; see also Marcia Coyle, *Suit: Death Defense in a Sham*,

NAT'L L.J., Dec. 21, 1998, at A1.

254. Alan Johnson, *2 Fired Public Defenders Take Fight to Higher Level*, COLUMBUS DISPATCH, Feb. 29, 1996, at 7C.

255. *See Attorney General is Keeping the Death Penalty Argument Alive*, CINCINNATI POST, Apr. 8, 1996, at 6A.

256. Alan Johnson, *Public Defender Signals New Tack on Capital Cases*, COLUMBUS DISPATCH, Feb. 20, 1996, at 1A.

257. Mary Beth Lane, *Lawyers File Job-Loss Actions; Complaints Name Public Defender*, PLAIN DEALER, Feb. 29, 1996, at 6B.

258. Alison Frankel, *Too Independent*, AM. LAW., Jan.-Feb. 1993, at 67, 68; *see also* John J. Cleary, *Federal Defender Services: Serving the System or the Client*, 58 LAW & CONTEMP. PROBS. 65 (Vol. 1 1995).

259. *See id.* at 67.

260. *See supra* notes 36-41 and accompanying text.

261. *See* Frederic N. Tulskey, *Big-Time Trials, Small Time Defenses*, PHILA. INQUIRER, Sept. 14, 1992, at A1.

262. *Id.*

263. *Id.*

264. *See, e.g.*, Andrew Hammel, *Discrimination and Death in Dallas: A Case Study in Systematic Racial Exclusion*, TEX. FORUM ON CIV. LIBERTIES & CIV. RTS., Summer 1998, at 187, 225 (observing "unhealthy cronyism between trial judges, who control the appointments, and private criminal defense attorneys, who need the work"); Andy Court, *Rush to Justice*, AM. LAW., Jan./Feb. 1993, at 58 (reporting that the system of assigning lawyers to defend indigent cases by judges in Detroit "may discourage the lawyers from doing anything that might alienate the judge by impeding his or her efforts to move the docket" and quoting a judge as observing that lawyers are "more interested in presenting to you a situation that accommodates the moving of the docket, as though that's going to endear them to you and cause you, when you are on assignment [duty], to give them more cases").

265. Hammel, *supra* note 264, at 225-26.

266. *See id.* at 226.

267. See Jane Elliott, *Habeas Surprise: Court Orders 48 to Take Death Cases*, TEX. LAW., Dec. 2, 1996, at 1.

268. See Kathy Walt, *Lawyers Who Aid Condemned Paid \$265,000/State Payments by Far Largest to Any Attorneys*, HOUS. CHRON., Oct. 3, 1997, at 33A.

269. *See id.*

270. *See supra* notes 114-37 and accompanying text.

271. *See supra* notes 145-46 and accompanying text.

272. *See supra* notes 122-37 and accompanying text.

273. *TCDLA Urges*, *supra* note 137, at 4 (Resolution passed by the Board of Directors of the Texas Criminal Defense Lawyers Association on June 6, 1998).

274. The *Austin American-Statesman* said in an editorial that "[b] arbarism is an appropriate description" of the court's refusal to hear a post- conviction petition because the lawyer it appointed failed to file within a deadline. Editorial, *A Disgraceful Vote*, AUSTIN AMERICAN-STATESMAN, Apr. 27, 1998 at A1. The paper opined that the "disgraceful vote" would "only heighten the state's deadly reputation and make its judiciary appear to be barbaric." *Id.*

275. *Polk County v. Dodson*, 454 U.S. 312, 332 (1981) (Blackmun, J., dissenting).

276. *Glasser v. United States*, 315 U.S. 60, 76 (1942).

277. 466 U.S. 668 (1984).

278. *See id.* at 694.

279. *Id.* at 689.

280. *Id.* at 688.

281. *See* 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 (1995) (criticizing the Strickland standard and calling for its replacement).

282. *Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

283. *See supra* notes 17, 32-49 and accompanying text.

284. John Makeig, *Asleep on the Job; Slaying Trial Boring, Lawyer Says*, HOUS. CHRON.,

Aug. 14, 1992, at A35.

285. *Id.*

286. *See* *McFarland v. State*, 928 S.W.2d 482 (Tex. Crim. App. 1996).

287. *Id.* at 527 (Baird, J., dissenting).

288. *See Ex parte* *Burdine*, 901 S.W.2d 456 (Tex. Crim. App. 1995).

289. *See* *Dow*, *supra* note 9, at 695, 701, 706 n.44.

290. *See id.* at 701, 706 n.44; *see also* *Johnson v. Scott*, 68 F.3d 470 (5th Cir. 1995).

291. 428 U.S. 153 (1976).

292. 408 U.S. 238 (1972).

293. *See A Lawyer Without Precedent*, HARPER'S MAG., June 1 1997, at 24, 26 (setting out the lawyer's testimony). For a discussion of the examination in question *see* Transcript of Habeas Corpus Hearing of Jan. 10-11, 1996, at 396-97, *Fugate v. Thomas*, Civ. No. 94-V-195 (Super. Ct. Butts County Ga.).

294. Trial transcript in *Fugate v. State*, 431 S.E.2d 104 (Ga. 1993).

295. Dec. 10, 1996 Application for a Certificate of Probable Cause to Appeal at 1, *Fugate v. Thomas*, No. S97R0434 (Ga.).

296. *See* Order of Apr. 24, 1997, *Fugate v. Thomas* No. S97R0434 (Ga.).

297. *See* Timothy J. Foley, *The New Arbitrariness: Procedural Default of Federal Habeas Claims in Capital Cases*, 23 LOY. L.A. L. REV. 193 (1989); Bright, *supra* note 19, at 679.

298. *See, e.g.,* *Wainwright v. Sykes*, 433 U.S. 72 (1977) (where defendant failed to comply with contemporaneous objection rule at trial, court refuses to address issue).

299. *See, e.g.,* *Anderson v. Harless*, 459 U.S. 4 (1982) (holding federal issue not preserved for federal habeas corpus review because counsel argued only the due process clause of the *state* constitution to the state courts, not the due process clause of the *federal* constitution).

300. *See, e.g.,* *Messer v. Kemp*, 831 F.2d 946 (11th Cir. 1987) (en banc), *cert. denied*, 485 U.S. 1029 (1988); *Moore v. Kemp*, 809 F.2d 702 (11th Cir.) (en banc), *cert. denied*, 481 U.S. 1054 (1987); *Stephens v. Kemp*, 846 F.2d 642 (11th Cir. 1988), *cert. denied*, 488 U.S. 872 (1998) (all cases in which funds were denied for critical expert assistance--a mental expert in *Messer*, a forensic

expert in Moore, and a ballistics expert in *Stephens*--and the reviewing court held that counsel had failed to make an adequate showing of need).

301. *Strickland v. Washington*, 466 U.S. 668, 693 (1984).

302. *See State v. Peart*, 621 So. 2d 780, 790 (La. 1993).

303. *See Rivera v. Rowland*, No. CV-95-0545629S (Conn. Super. Ct. filed Jan. 22, 1997).

304. *See Don J. DeBenedictis, Deadbeat Dads Beware; Bar Rules Issued on Child Support, Building Fund*, FULTON CO. DAILY REP., Feb. 6, 1997, at 1.

305. 372 U.S. 335, 344 (1963).

306. *See, e.g., M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (Thomas, J., dissenting) (suggesting that the Supreme Court's decisions in *Griffin v. Illinois*, 351 U.S. 12 (1965), providing for free transcripts to allow appeals by the poor, and *Douglas v. California*, 372 U.S. 353 (1963), requiring counsel for indigent defendants on appeal, were the result of a "fetish for indigency," were wrongly decided and should be overruled); *Lewis v. Casey*, 581 U.S. 343, 365-78 (suggesting that *Bounds v. Smith*, 430 U.S. 817 (1977), requiring legal assistance to prisoners, *Griffin*, and *Douglas* were wrongly decided).