THE RIGHT TO COUNSEL AND THE INDIGENT DEFENSE SYSTEM

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INTRODUCTION

In *Cooper v. Fitzharris*[1] the Ninth Circuit reversed the defendant's conviction on the grounds that he had received incompetent representation. The court noted the following facts, developed in the evidentiary hearing in the district court, about the representation provided to the defendant by his attorney, a deputy in a public defender office:

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

The attorney in *Cooper* appears to have been minimally competent in the sense that she was aware of the legal issues relevant to the case. There is no suggestion that she was inadequately versed in criminal law and procedure, that she lacked relevant experience, or lacked the commitment to represent her clients. Yet a staggering workload prevented her from taking the minimum steps necessary to ensure that her client received competent representation. The situation revealed in *Cooper* illustrates the premise of this article: the sixth amendment guarantee of competent representation cannot be fulfilled if fundamental defects in the systems which provide counsel are ignored. No attorney, no matter how skilled, trained, and committed, can provide competent representation under working conditions which do not allow such skill, training, and commitment to be practiced.

The focus of this article is on the systems used to provide counsel. There are three main systems in use: the public defender system, the assigned counsel system, and the contract defense system.[3] Regardless of which system is

1. 551 F.2d 1162 (9th Cir. 1977), *modified* 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979).

2. 551 F.2d at 1163 n.1.

3. The public defender system is generally characterized by salaried attorneys working full or part-time for a public or private, non-profit agency. In the assigned counsel system, the court appoints attorneys as needed for specific cases from a list of available attorneys. Under the

used, there have been and will continue to be pressures applied on the system to provide defense services without adequate resources.[4] Such pressures, as in *Cooper*, often result in the sixth amendment being complied with in form only. The right to counsel is more than the right to have a "live body" by one's side.

In order to avoid "form only" compliance with the sixth amendment, the courts must examine the system which provides counsel to the defendant. First, this article considers the "system approach" to the right to counsel as an appellate issue, arguing that if the defendant establishes that the system which provided her counsel was fundamentally defective, the burden shifts to the government to prove that the system defects did not affect the representation defendant received. The article then focuses on the trial level and discusses the obligation of counsel to raise defects in the defense system, both to obtain pre-trial relief, if possible, and to preserve the record for appeal, should that become necessary.

I
COMPETENCE OF COUNSEL CLAIMS AND THE DEFENSE SYSTEM

In considering a defendant's right to counsel, courts have focused almost exclusively on the representation provided by the individual attorney, with no consideration of the system which provides that attorney. It is not immediately apparent that this traditional approach is inadequate. For example, it could be argued that if an attorney in an underfunded defense system has a very high caseload and is not able to do all that is required to provide competent representation in her cases, whether she actually provided adequate representation in a specific case should be determined by looking at her performance in that case without an examination of the system which provides the attorney. There is a certain logical appeal to this argument. However, there are several practical reasons why the traditional approach does not adequately guarantee that each defendant receives her constitutionally guaranteed right to effective representation.

First, to the extent that defects in the representation stem from a substandard defense system, the defects may be difficult to discern. Where the attorney's incompetence results from overwork, the defects in representation are more likely to be in what *is not* done rather than what *is* done. The effect of such omissions is often very difficult to determine.[5]

Second, the traditional approach does little to remedy the broad problem of defective defense systems. If a court considers the defense system as a whole and finds that it is fundamentally flawed, it creates some incentive for

contract system, individual attorneys, bar associations, or law firms contract to provide the defense services for a specified dollar amount.

4. *See* Mounts & Wilson, *Systems for Providing Indigent Defense: An Introduction*, 14 N.Y.U. REV. L. & SOC. CHANGE 193, 197-201 (1986); *see also* Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 475.

5. *See infra* text accompanying notes 60-62.

funding agencies to ensure that the defense system is adequately supported so that it can comply with constitutional mandates.[6]

This prophylactic effect is particularly important to ensure competent representation in those cases which result in guilty pleas. Overworked defense systems often resolve a very high percentage of the cases by plea bargains. Negotiating a plea takes far less time and effort than preparing for and taking a case to trial. It is tempting to plead a case without the investigation and research necessary to determine if the case could be successfully tried. Once a guilty plea is entered, there is little chance that the attorney's representation leading to the decision that the case should be pled will be scrutinized.

The author is aware of the difficulty of attempting to solve a system-wide problem on a case-by-case basis. Serious logistical problems are inevitable if counsel's ability to provide adequate representation within a given system is separately considered in each individual case. Ideally, the defects in the system should be dealt with as a whole through affirmative litigation.[7] The author believes, however, that courts will be able to translate individual challenges into a broad consideration of the system, and that in the absence of a system-wide challenge, an attorney's only alternative is to raise the objection in the individual case.[8]

A. A Post-Conviction System Challenge: Shifting the Burden

This section considers the viability of a post-conviction sixth amendment challenge based on system defects, particularly in light of recent Supreme Court right to counsel decisions, *United States v. Cronic*[9] and *Strickland v. Washington*.[10] This discussion presumes that either no record or an inadequate record regarding defects in the defense system was made at the trial level. Objections based on excessive workload, inadequate compensation, and other factors which undermine a defense system's ability to provide adequate representation will not be made in a substantial proportion of the cases in which they are appropriate.[11] As long as problems relating to the system for providing counsel are not remedied before trial, a post-conviction analysis of competence of counsel which is specially tailored to include consideration of the system used to provide counsel will be needed.

Normally, when a defendant makes a post-conviction challenge to the representation she receives at trial, she must establish two things: first, that counsel failed to provide adequate representation at trial, and second, that the

6. *See infra* text accompanying notes 25 and 59.

7. See Wilson, *Litigative Approaches to Enforcing the Right of Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 203 (1986) for discussion of the use of affirmative litigation to attack defective defense systems.

8. *See infra* text accompanying notes 68-70.

9. 466 U.S. 648 (1984).

10. 466 U.S. 668 (1984).

11. *See infra* text accompanying notes 65-67.

failure prejudiced her case.[12] The defendant should be allowed to challenge the representation she received based on the system used to provide representation. Rather than having to first prove that her counsel did not provide adequate representation, the defendant would instead be required to prove a fundamental defect[13] in the system used to provide her counsel.[14] This would most often involve proof regarding workload and related problems, but could include any defect in the system which substantially impaired the ability of the defense system to provide adequate representation.

If the defendant showed that there were fundamental defects in the system, her burden of proof as to prejudice would be altered. In theory, the defendant's burden could be altered in a number of ways, including: 1) relieving her of the burden altogether through automatic reversal; 2) creating a presumption that the defendant had not received adequate representation and shifting the burden to the government to prove the contrary; and 3) lessening the defendant's burden of showing prejudice. It is the author's position that an adequate showing of defects in the defense system should create a presumption of prejudice.

1. The Smith *Decision*

The first case to fully consider defense system defects in evaluating a defendant's challenge to the competence of her counsel is *State v. Smith*.[15] This case merits discussion at some length, because it is a vivid illustration both of problems in a defense system and of a potential response to those problems.

Smith was convicted in Mohave County, Arizona, of burglary, sexual assualt, and aggravated assault. He was sentenced to a total of thirty-six years in prison.[16] On appeal he argued that he had not been provided adequate

12. The Supreme Court recently defined the standards for adequate representation by counsel and for prejudice. *Strickland*, 466 U.S. 668. *See infra* text accompanying notes 32-37.

13. The author defines a fundamental defect as one which raises a serious question as to the attorney's ability to deliver competent representation. The author is aware that this is a vague standard. Further research to develop objective measures of the characteristics of an adequate defense system is essential.

Workload is generally the most crucial measure. The state of knowledge concerning standards for acceptable workload levels is remarkably primitive considering how crucial this is to ensuring adequate representation. The standards which are available seem to have gained acceptance, to the extent that they have, primarily on a bootstrap basis. For example, a 1966 "Conference on Legal Manpower Needs of Criminal Law" settled on 150 cases per year as an acceptable felony caseload based on a "crude survey of present practice." 41 F.R.D. 389, 393 (1966). This estimate was then used by the President's Commission on Law Enforcement and the Administration of Criminal Justice. *See* TASK FORCE ON ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 156 (1967). Both these documents are then cited to justify a similar standard proposed by National Legal Aid and Defenders Association. None of these reports or studies reflects any documentation or analysis to support the standards.

14. This section assumes that trial counsel has failed to raise the issue of system defects. Therefore, at most, the issue will be barely apparent in the record on appeal. This means that appellate counsel will have to use some form of collateral proceeding—habeas or other post-conviction relief—to make a record which includes details regarding the system defects.

15. 140 Ariz. 355, 681 P.2d 1374 (1984).

16. *Id.* at 357, 681 P.2d at 1376.

representation by counsel, alleging specifically that his attorney spent only "two to three hours interviewing [him] and 'possibly' six to eight hours studying the case because of the attorney's 'shocking, staggering, and unworkable' caseload."[17] Smith further alleged that the caseload was a product of the county's system for providing defense counsel for indigents. In response to these allegations, the Arizona Supreme Court ordered expansion of the record and considered that system in some detail.[18]

Mohave County used a low-bid contract defense system. Each year, the presiding county judge sent out a letter to all attorneys in the county, inviting each to submit a bid to handle some portion of the indigent defense for the coming year. The letter called for sealed bids which were to be opened on a specified date and hour. The letter did not suggest any limit on the caseload or hours, nor did it set out any criteria in terms of the ability or experience bidding attorneys should possess. The successful bidder then handled her proportional share of all the indigent criminal cases in the superior courts, justice of the peace courts, juvenile courts, all appeals, and all mental evaluations in Mohave County.

The letter stated that additional compensation might be available for especially difficult or time-consuming cases, but that over the last fourteen years, such additional compensation had never been ordered. There was no suggestion that counsel might expect assistance in any way for support personnel. Any investigator, paralegal, secretary, or similar support personnel were to be provided by the individual bidder who was also to provide her own office space, equipment, and supplies. A few special expenses such as "unusual" xerox charges, long distance phone charges, and mileage were reimbursable.

Bids returned to the presiding judge were simply sent to the Mohave County Board of Supervisors with a cover letter indicating the dollar amounts of the bids. Neither the presiding judge nor anyone else made any kind of recommendation to the Board, nor was any information provided concerning the background, experience, or capabilities of any bidding attorney. With only one exception in the past four years, the Board accepted the lowest bids.[19] The only low bid ever rejected was one submitted by an attorney who had been held in contempt by the Arizona Supreme Court for failing to file a required brief in an appeal and who had been the subject of other repeated complaints.[20]

The court could have resolved Smith's incompetence claim without this extended consideration of the contract defense system used to provide counsel. The court could have simply examined the actual representation provided by counsel and determined whether it met the standards of competence set forth

17. *Id.* at 359-60, 681 P.2d at 1378-79.

18. *Id.* at 357, 681 P.2d at 1376.

19. In 1982-83 the four low bids were $24,000, $26,200, $34,300, and $34,400. Each attorney was expected to handle one-fourth of the total caseload in the county regardless of the number of cases. *Id.* at 360, 681 P.2d at 1379.

20. *Id.* at 360, 681 P.2d at 1379.

by the United States Supreme Court and the Arizona courts.[21] Instead, the court held that the system itself violated the constitutional rights of criminal defendants in Mohave County and cited four features of the system in reaching this conclusion:

> 1. The system does not take into account the time that the attorney is expected to spend in representing his share of indigent defendants.
> 2. The system does not provide for support costs for the attorney, such as investigators, paralegals, and law clerks.
> 3. The system fails to take into account the competency of the attorney. An attorney, especially one newly admitted to the bar, for example, could bid low in order to obtain a contract, but would not be able to adequately represent all of the clients assigned . . . .
> 4. The system does not take into account the complexity of each case.[22]

Smith declared that the system used by Mohave County was unconstitutional—that it violated due process and the right to counsel guaranteed by the Arizona and United States Constitutions. However, the court did not hold that convictions which result from this system must be reversed automatically. Instead, the court took the position that the constitutional infirmities of the Mohave County system create an inference that in any given case the defendant received inadequate representation.[23] Then the court apparently considered the record in Smith's case to determine whether the presumption of inadequate representation had been rebutted. While the details of this anaylsis are not included in the opinion, the court ultimately concluded that Smith had received a constitutionally adequate defense.[24]

The court did not explicitly state its reasons for declaring the system unconstitutional; rather it confined itself to a consideration of whether Smith received competent representation. Given the court's ultimate conclusion that Smith received competent representation, it could have avoided all pronouncements regarding the system. It seems that the court was trying to provide some incentive to the executive and judicial authorities in Mohave County to

21. In Arizona the standard used for judging competence of counsel at the time *Smith* was decided was "whether under the circumstances the attorney showed at least minimal competence in representing the criminal defendant." The focus was on the quality of counsel's performance and not on the effect on the outcome of the proceeding. State v. Watson, 134 Ariz. 1, 4, 653 P.2d 351, 354 (1982). The *Smith* case was decided at nearly the same time as *Strickland*, 466 U.S. 668, which clarified the Supreme Court's position on the standard for judging competence of counsel. *See infra* text accompanying notes 32-37.

22. The court noted that in an eleven-month period in the year in which the defendant was tried, the attorney who represented Smith handled a caseload in Mohave County of 149 felonies, 160 misdemeanors, 21 juvenile cases and 33 other types of cases. He also represented all of the appointments out of Kingman City (outside of Mohave County) and had a private civil practice as well. 140 Ariz. at 361, 681 P.2d at 1380.

23. *Id.* at 365, 681 P.2d at 1384.

24. The court reversed his conviction on other grounds. *Id.* at 364-65, 681 P.2d at 1383-84.

improve the defense system[25] and to encourage individual attorneys to refuse to cooperate in a system which compromised the constitutional rights of their clients.[26]

2. Cronic *and* Strickland

The *Smith* holding regarding the unconstitutionality of the defense system was based on both state and federal constitutional provisions.[27] However, since *Smith* was decided at nearly the same time as *Cronic*,[28] the court did not have an opportunity to consider *Cronic* in its interpretation of the federal constitutional provisions. *Cronic* included reference to some features of the system used to provide counsel; therefore, it is important to assess the impact of that case on an approach such as that taken in *Smith*.

Cronic was indicted on thirteen counts of mail fraud involving the transfer of over $9,400,000 of checks between two banks, one in Florida and the other in Oklahoma. Shortly before trial the defendant's retained lawyer withdrew. The trial court appointed a young attorney who practiced primarily real estate law to represent the defendant, and allowed him only twenty-five days to prepare for trial, despite the fact that it had taken the government over four and a half years to investigate the case.

The Tenth Circuit Court of Appeals reversed Cronic's conviction, concluding that the defendant did not have the assistance of counsel required by the sixth amendment. That conclusion was not based on a determination by the court that the attorney had made any specific errors, nor that his representation fell below an objective standard of reasonableness or had in any way prejudiced the defendant's case. Rather, the Court of Appeals based its holding on the premise that such a showing is not required where "circumstances hamper a given lawyer's preparation of a defendant's case."[29] The circumstances the Court of Appeals found relevant were: 1) the time afforded for investigation and preparation; 2) the experience of counsel; 3) the gravity of the charge; 4) the complexity of the possible defenses; and 5) the accessibility of witnesses to counsel.[30]

The Supreme Court reversed, concluding that the factors considered by

25. The assertion that the court's motive was to provide incentives to the County and to deter them from continuing to rely on this low-bid contract defense system is supported by the fact that the court applied the case prospectively, requiring those who were tried prior to the issuance of the decision to establish that they were, in fact, denied adequate assistance of counsel. *Id.* at 365, 681 P.2d at 1384.

26. The court was quite explicit in faulting not only the system used, but the attorneys as well, and pointed to specific provisions in the Arizona Rules of Professional Responsibility which were arguably being violated by counsels' participation in the system. *Id.* at 362-63, 681 P.2d at 1381-82. *See infra* text accompanying notes 68-70.

27. The court relied on the fifth and sixth amendments to the United States Constitution and article 2, sections 4 and 24 of the Arizona Constitution. 140 Ariz. at 362, 681 P.2d at 1381.

28. 466 U.S. 648.

29. United States v. Cronic, 675 F.2d 1126, 1128 (10th Cir. 1982).

30. *Id.* at 1129.

the court of appeals were relevant to a claim of inadequate representation, but did not, either separately or in combination, support a conclusion that the defendant was denied adequate representation. The Court held that generally a defendant can make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel.[31]

Strickland,[32] decided the same day as *Cronic*, addressed the constitutional standards for a challenge to counsel's competence based on specific errors—a claim of "actual ineffectiveness."[33] The Court clarified both the standard of competence and the burden of proof involved. The Court adopted a sixth amendment standard, holding that the proper measure of attorney performance is reasonableness under prevailing professional norms.[34] The Court held further that the defendant has the burden of proving both that her attorney's performance fell below this reasonableness standard and that it prejudiced her case.[35] In order to carry this burden, the defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A reasonable probability is defined as one which is "sufficient to undermine confidence in the outcome."[36]

3. *Challenges to the System After* Cronic *and* Strickland

Strickland held that the focus of a competence inquiry should be on the fairness of the result and not on the fairness of the process.[37] *Cronic* holds that a competence challenge generally requires a showing of specific errors. *Strickland* holds that those errors must result in prejudice in the individual case. Together these cases seem to make a competence of counsel challenge based on proof of defects in the defense system such as that approved in *Smith* very difficult. However, on closer inspection they may not have foreclosed the possibility.

Initially, it is important to note that in *Cronic* the court of appeals reversed without any inquiry into prejudice. The Supreme Court noted this specifically, saying, "[u]nder the test employed by the Court of Appeals, reversal is required even if the lawyer's actual performance was flawless. By utilizing this inferential approach, the Court of Appeals erred."[38] In rejecting this ap-

31. 466 U.S. at 666.

32. 466 U.S. 668.

33. The Court contrasts sixth amendment claims alleging "actual ineffectiveness claims alleging a deficiency in attorney performance" with claims based on "actual or constructive denial" of counsel, and "state interference with counsel's performance," such as the claim made in *Cronic*. 466 U.S. at 692, 693. *See infra* text accompanying notes 38-43.

34. 466 U.S. at 688.

35. *Id.* at 691-92.

36. *Id.* at 694.

37. Justice Marshall argues in dissent that the result of *Strickland* is to deny the right to competent counsel to all but the innocent. 466 U.S. at 711. See also Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181 (1984) for a more complete analysis of *Strickland*.

38. 466 U.S. at 652-53.

proach, the Supreme Court appears to have assumed both that, if reversal is not automatic, prejudice must be proved and also that it must be proved by the defendant. The Court seems simply not to have considered an intermediate position, such as that taken in *Smith*, that an adequate showing of defects in the defense system should create a presumption of prejudice and shift the burden of proof to the government to prove the absence of prejudice.[39]

The Court conceded in both *Cronic* and *Strickland* that there are some cases in which the court reversed because of a denial of the right to counsel without any showing of prejudice. Where no counsel is provided at all, the Court has taken the position that the case must be reversed without any inquiry into whether the defendant, in fact, received a fair trial.[40] If the cases in which reversal is automatic had been limited to those in which no counsel was provided at all, a middle ground between automatic reversal and reversal only when the defendant carries the burden of proof in establishing prejudice might be harder to carve out. A clear distinction would exist. Those cases in which the defendant had no counsel would be reversed automatically; those in which the defendant had some kind of assistance of counsel would be reversed only if the defendant proved that the flaws or limitations in that representation had a prejudicial effect on her case.

However, automatic reversal has not been limited to cases in which counsel is totally absent. In some cases although counsel is physically present, the Court treats the case in the same manner as if there had been no counsel provided at all. The Court finds a "constructive denial" of counsel and reverses without any inquiry into prejudice.[41] The Court concludes that in these situations, "the likelihood that any lawyer, even a fully competent one, could provide effective representation is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."[42] The Court also reverses without any showing of prejudice where counsel is in some way prevented from providing representation to the defendant during a criti-

39. Interestingly, there is little discussion in *Cronic* of Cuyler v. Sullivan, 446 U.S. 335 (1979), and its role as precedent for an intermediate position. *See infra* text accompanying notes 48-52. *Strickland* does discuss *Cuyler* in this context. 466 U.S. at 692.

40. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

41. The most famous of such cases is Powell v. Alabama, 287 U.S. 45 (1932). It involved the trial of several young black men charged with raping two white women on a train near Scottsboro, Alabama. The trial court initially appointed "all the members of the bar" to represent the defendants at arraignment. *Id.* at 49. On the day of trial the defendants appeared with a lawyer from Tennessee who was appearing on behalf of persons "interested" in the defendants. Although this lawyer indicated he was unfamiliar with the local procedures and was unwilling to represent the defendants on such short notice, the court decided that the lawyer would represent the defendants with whatever help the local bar could provide. *Id.* at 56. The trial was completed in one day, and the defendants were convicted and sentenced to die. *Id.* at 49-50. The Supreme Court reversed the convictions without considering whether the defense had been prejudiced. Instead the Court concluded that the circumstances justified a conclusive presumption of prejudice. *Id.* at 58.

42. *Cronic*, 466 U.S. at 659-60.

cal stage of the case.[43] In a similar way, the Court seems to be saying that the interference with the right to counsel is so fundamental that it is not worth bothering with an inquiry into prejudice. The Court creates what amounts to a conclusive presumption of prejudice.

Once the Court adopts a concept like "constructive denial" of counsel, the line between the situation in which the defendant is "denied" counsel because, although counsel is present, the defendant has no actual representation, and the situation in which the defendant merely gets incompetent representation by his counsel becomes much less clear. It appears that rather than two separate categories, denial of counsel where reversal is automatic on the one hand and challenges to representation actually provided where the defendant must prove prejudice on the other, there is instead a continuum. On one end of the continuum there are fairly outrageous constitutional violations where the provision of counsel is really in name only. On the other end of the continuum there are cases in which counsel makes some errors, but the defendant still, in most senses, had the assistance of counsel.

There are numerous cases in between the two extremes, and it is not always clear why a case is classified in one category or another. For example, it is not clear why the facts in *Powell v. Alabama*[44] constitute a constructive denial of counsel, but the facts of *Avery v. Alabama*[45] do not constitute such a denial. Nor is it clear why a refusal to allow counsel to make a summation in a bench trial should justify automatic reversal even if it caused absolutely no prejudice to the defendant's case,[46] but a refusal to grant a reasonable continuance to give adequate time to prepare the case should require proving prejudice.[47]

4. *The Proper Judicial Response to Systemic Challenges*

If the cases are really better conceived of as appearing on a continuum

43. *See, e.g.*, Holloway v. Arkansas, 435 U.S. 475 (1977); Geders v. United States, 425 U.S. 80 (1976); Herring v. New York, 422 U.S. 853 (1975); Brooks v. Tennessee, 406 U.S. 605 (1972); Ferguson v. Georgia, 365 U.S. 570 (1961).

44. 287 U.S. 45 (1932); *see supra* note 41.

45. 308 U.S. 444 (1939). *Avery* was also a capital case. The defendant was arraigned on March 21, 1938. Two lawyers were appointed. The case was set for trial on March 23 but did not actually go to trial until March 24. On that date the attorneys filed a motion for a continuance with affidavits establishing that they had virtually no time to prepare. One attorney's affidavit alleged that he had not had time to prepare because he had been engaged in a trial from the time of his appointment at 2 p.m., Monday, until 9 p.m. that evening; his presence had been required in the courtroom on Tuesday, March 22, due to his employment in another case; he had been detained in court on Wednesday, March 23, waiting for defendant's case to be called; he had talked to defendant later on March 23 and had "serious doubts about his sanity." The affidavit by the other attorney alleged that he also had not had any time to prepare because of employment in other cases which were not disposed of until Tuesday at 4:30 p.m. The trial court denied the motion. The trial began that day and the defendant was convicted and sentenced to death the same day. *Id.* at 447-49. *Avery* was cited with approval in *Cronic* as a case which did not involve a constructive denial of counsel. 466 U.S. at 661.

46. Herring v. New York, 422 U.S. 853 (1975).

47. *Cronic*, 466 U.S. 648; Avery v. Alabama, 308 U.S. 444 (1939).

rather than in two separate categories, then it may make sense to allow a middle ground approach for cases which fall between the extremes. In fact, in at least one situation, the Court has taken a middle ground position. In *Cuyler v. Sullivan*[48] the defendant claimed he had been denied the right to counsel because his counsel had a conflict of interest when he represented the defendant. The Court previously dealt with the effect of a conflict of interest on the right to counsel in *Holloway v. Arkansas*.[49] However, in *Holloway* defense counsel made a timely objection and asked the trial court to appoint separate counsel.[50] *Cuyler* differed from *Holloway* in that no objection had been made at trial.[51] The Court held that, in the absence of an objection, in order to successfully prove denial of the right to counsel, the defendant must prove an actual rather than merely a potential conflict of interest and must also show that the conflict of interest "adversely affected" the defendant's case. Importantly, the Court does not require the defendant to prove that the adverse effect of the conflict so prejudiced the case that another outcome was probable in the absence of the conflict. Thus, while the defendant is not entitled to automatic reversal on showing that her counsel was laboring under a conflict of interest, neither does she have to establish prejudice as is required by *Strickland* and *Cronic*.[52]

Cuyler's middle ground position is not precisely the same as that taken by the court in *Smith*. In *Cuyler*, the Court simply lessened the defendant's burden. Once the defendant has met the burden of showing an actual conflict which adversely affected her case, prejudice is then conclusively presumed. Nonetheless, *Cuyler* does serve as precedent for treating some assistance of counsel claims between the extremes of *Powell* on the one hand and *Strickland* and *Cronic* on the other. Neither *Smith* nor *Cuyler* offers any theoretical justification for its approach. *Smith*'s approach seems the more reasonable of the two since it avoids reversal where there is clearly no prejudice, but otherwise leaves the risk of error with the government. The author suggests that an attack based on fundamental defects in the system the government has employed for providing counsel to the indigent belongs at least in this middle ground.

A particularly strong showing regarding the defense system should be treated as a constructive denial of counsel requiring automatic reversal. The appointment of an overburdened defender system or contract defense system is in some ways quite comparable to the appointment in *Powell*.[53] A large

48. 446 U.S. 335 (1980).

49. 435 U.S. 475 (1978).

50. In *Holloway*, the trial court had refused to provide any meaningful hearing with regard to the conflict issue. The Supreme Court did not consider whether the alleged conflict existed, let alone whether it prejudiced the defendant's case. Rather it treated the trial court's refusal as an interference with the right to counsel which required automatic reversal. *Id.* at 487-91.

51. The Court refused to find any sixth amendment violation in the trial court's failure to make an inquiry into the existence of a conflict. 446 U.S. at 346-47.

52. *See supra* text accompanying notes 28-37.

53. *See supra* note 41.

group of lawyers is appointed to the case with no clear individual responsibility or accountability and, because of a competing workload, inadequate time to prepare.[54] Although the Court's opinion in *Cronic* suggests that the Court would be quite unreceptive to the automatic reversal approach, the holding itself does not foreclose it altogether. The Court stated:

> This case is not one in which the surrounding circumstances make it unlikely that the defendant could have received the effective assistance of counsel. The criteria used by the Court of Appeals do not demonstrate that counsel failed to function in any meaningful sense as the Government's adversary. Respondent can therefore make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel.[55]

There may be an implication here that if the defendant could show more extreme circumstances—circumstances showing a system in which counsel generally could not perform as an adversary—then reversal without any consideration of prejudice might be appropriate.

However, given the overall tone of both *Cronic* and *Strickland*, it is undoubtedly more realistic to argue that an adequate showing of defects in the defense system should be dealt with as the court did in *Smith*, i.e., the burden of proof of prejudice should be shifted. In assessing whether *Cronic* foreclosed this possibility, it is important to note that *Cronic* is in only a very limited sense a case involving a systemic challenge. The specific problems involved were certainly possible under the appointed counsel system in that district, but it is hard to see them as a necessary ingredient of the system in the sense that the problems were in the system in *Smith*. In *Cronic*, the effects of the system had the appearance of being peculiar to that particular case. It was, therefore, easier for the Court to ignore the overall effects of the defects in that defense system.[56]

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54. See United States *ex rel.* Thomas v. Zelker, 332 F. Supp. 595, 596-99 (S.D.N.Y. 1971), for a frightening illustration of how a defendant can get lost within an overburdened defense system.

55. 466 U.S. at 666 (footnote omitted).

56. *Cronic* draws a distinction between a consideration of specific errors by counsel and overall performance. *Id.* at 666 n.41. The system approach suggests a somewhat different counterposition by looking at the overall characteristics of a defense system as opposed to the specific performance of an attorney within that system. The defendant should be allowed to show that the system did not allow counsel to function as a meaningful adversary, rather than requiring her to show that her counsel's overall performance was not that of a meaningful adversary.

The only indication that the Court considered the case as one involving system problems is a somewhat puzzling footnote. The Court begins by stating, "The *Government* suggests that a presumption of prejudice is justified when counsel is subject to 'external constraints.' " (emphasis added). *Id.* at 662 n.31. The author presumes that this statement is simply in error since the government, at most, acceded to this position, and it was an argument made on behalf of the defendant.

Assuming the argument was made by defendant, the court's rejection of the distinction between "externally imposed" and "self-imposed" constraints does not foreclose challenges

In the context of an allegation of specific errors by a defendant, the Supreme Court has placed the burden of proving prejudice on the defendant on the theory that the defendant is in a superior position to assume that burden.[57] Some have argued that this conclusion is simply wrong, that once the trial has been held and the defendant has shown attorney error, the state and the defendant are equally able (or unable) to prove that the error did or did not affect the result.[58] One may agree that it makes sense to assign the burden of proof of prejudice to the defendant where specific errors are alleged; nonetheless, where there is a proper showing of defects in the defense system, the burden should be shifted to the state.

First, in a fundamental sense, that allocation of the burden is fair. Since the state is responsible for the decision as to the kind of system which is used to provide counsel, if the defendant shows that the system is fundamentally flawed, the state should then be required to show that the system defects did not harm the defendant's case. It might be argued that the prosecution has little control over the system used by local authorities to provide counsel, and therefore, it should not pay the price for defects in that system. However, between the defendant, who has absolutely no control over the system used, and the prosecution, which is at least a part of the government and can perhaps apply some pressure on those parts of the government more directly responsible, it is more equitable to hold the prosecution responsible if there is any doubt regarding the effect of the defense system.

The second argument in favor of placing the burden on the government is that if there are fundamental problems with the defense system, the government needs some incentive to eliminate those problems. There are few natural pressures on the government to provide an adequate system of counsel for criminal defendants, and numerous counterpressures. Shifting the burden through a presumption of prejudice may be one way of creating some pressure.[59] The responsible parties would face the specter of a substantial number of criminal convictions being reversed unless they took action.

A final argument in favor of shifting the burden draws on arguments made in the conflict cases, *Holloway* and *Cuyler*. In both cases, the Court lessened the defendant's burden of proof.[60] The Court justified its position on

based on the defense system. What the Court has said is that it is not sufficient in itself that a constraint is externally imposed. Either type of constraint—external or self-imposed—could violate sixth amendment protections.

57. *Strickland*, 466 U.S. at 681-82.

58. *See, e.g.*, Genego, *supra* note 37, at 200.

59. As noted above, this appears to have been the reason for the court's approach in *State v. Smith*. *See supra* text accompanying note 25.

60. In *Holloway*, the Court did not require any proof as to the conflict, but rather found the constitutional violation in the trial court's refusal to make an inquiry upon timely objection. In *Cuyler*, the Court did not require proof that the conflict of interest prejudiced the defendant's case, but only required proof that the conflict adversely affected the lawyer's performance. 446 U.S. at 350.

the basis of the difficulty of proving the prejudicial effect of a conflict of interest. In *Holloway*, the court stated,

> [I]n a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests in plea negotiations would be virtually impossible.[61]

An analogous argument can be made regarding the effect of defects in the defense system. When an attorney is representing too many clients overall or cutting corners on a case because she is inadequately compensated in that individual case or is too inexperienced to realize what should be done in a case, the harm will most often come as much from what *is not* done as from what *is* done. When errors are of omission rather than commission, it is often difficult for courts to see the effect. As the court said in *Smith*, "The insidiousness of overburdening defense counsel is that it can result in concealing from the courts, and particularly the appellate courts, the nature and extent of damage that is done to defendants by their attorneys' excessive caseloads."[62]

In fact, in many situations, showing defects in the defense system is not merely analogous to the conflict cases, but actually *constitutes* a showing of conflict of interest. In some cases, the defect in the system is the fact that it builds in express conflicts of interest.[63] In most cases the defects in the system are related to excessive workload, which also creates a fundamental conflict of interest. Inevitably, when an attorney has too many cases, she will choose the interests of one client over another.[64] Fairness, a need for deterrence, and the possiblity of undetected error combine to justify the presumption of prejudice.

B. Raising System Defects in the Trial Court

In theory, the damage done by a defective defense system need not be invisible. Counsel are generally aware of problems and defects in the defense system and also have some sense of when such problems or defects are having

61. 435 U.S. at 490-91.

62. 140 Ariz. at 362, 681 P.2d at 1381. The effect of the error remains invisible even where, as in *Smith*, the record is augmented to include details about the defense system. We are still left with only a hindsight reconstruction of the attorney's situation at trial. Although it may be possible to determine some general information such as approximate caseload and time constraints, it is difficult if not impossible to determine what the attorney could have done if she had not been faced with the system problems, and what would have been the effect of the hypothesized improved representation.

63. *See, e.g.*, People v. Barboza, 29 Cal. 3d 375, 627 P.2d 188, 173 Cal. Rptr. 458 (1981).

64. *See, e.g.*, People v. Johnson, 26 Cal. 3d 557, 606 P.2d 738, 162 Cal. Rptr. 431 (1980).

adverse effects on an individual case. When counsel becomes aware that, because of limits imposed by the system, she is not able to deliver competent representation, she should raise that fact with the trial judge and request appropriate relief.

There is little indication that system problems are often raised by trial counsel.[65] Yet problems in defense systems that compromise counsel's ability to provide competent representation are pervasive. There are a number of reasons why trial counsel do not come forth to make a record of the system's constraints and their effect on individual cases. In a contract defense system, such as that in *Smith*, the attorney may face a direct conflict of interest. The attorney submits a bid requesting some proportion of the appointed cases and agrees to represent those cases for a specified amount. If she later complains that she is not being adequately compensated, the court or the body in charge of selecting from the bids is likely to select another bid. In an appointed counsel system, an attorney may fear that if she objects to the conditions surrounding her appointed cases, a judge will be less cooperative on cases in which she is retained. An attorney may depend on appointed cases for her livelihood, and fear that if she complains about inadequate compensation, she may end up with none at all. The inhibiting factors in a defender program may differ depending on whether one examines the Defender, who is the person in charge of the program, or a deputy defender, an attorney employed in the program. Each is subject to pressures that inhibit raising such objections. The Defender may fear alienating the courts in which the program must operate on a daily basis, or the funding agency, which determines the future budgets of the program and often the future employment of the Defender herself.[66] The deputy defender may fear alienating the courts and the funding agency as well as the Defender.[67]

The pressures which inhibit attorneys from making a record of the defense system problems are not imaginary. Raising such issues will undoubtedly create a hostile response on the part of some judges, funding agencies, and superiors. It is important, however, that attorneys resist these pressures and

65. It is difficult to be certain what goes on at the trial level. It is possible that such objections are being raised, appropriate relief is being granted, and the author is simply unaware. There are several reasons why that seems unlikely. First, if such objections were being raised regularly, presumably they would occasionally appear as an issue on appeal. *See, e.g.*, State *ex rel.* Escambia County v. Behr, 354 So. 2d 974 (Fla. Dist. Ct. App. 1978), *aff'd*, 384 So. 2d 147 (Fla. 1980) (upholding the trial court's order allowing the public defender to withdraw from representation in six felony cases because an excessive caseload resulted in his being unable to represent the defendants effectively); *see also* Hughes v. Superior Court, 106 Cal. App. 3d 1, 164 Cal. Rptr. 721 (1980). However, such cases are extraordinarily rare. Second, even if the issue did not make its way into appellate opinions, if such objections were being raised on a regular or even occasional basis, it is likely that they would be reflected in some way in the literature about defense programs. A survey of the relevant literature revealed no articles regarding the use of such an approach.

66. *See* Mounts, *supra* note 4, at 504-07.

67. *Id.*; *see also* Lefcourt v. Legal Aid Society, 312 F. Supp. 1105 (S.D.N.Y. 1970), *aff'd*, 445 F.2d 1150 (2d Cir. 1971).

make an appropriate objection when the system does not allow them to provide adequate representation. Not only is it crucial in order to protect the rights of their clients, it is demanded by rules of professional conduct. The *Smith* court was very direct in attributing fault to the attorneys involved in that defense system:

> [W]e must fault not only the system used in Mohave County but the attorneys involved as well. It can be expected and understood that a government agency will (and in most cases should) try to obtain services at the lowest possible cost to the taxpayers . . . . We recognize also that the Board of Supervisors is not always able to determine whether adequate services are being provided by counsel. The attorneys involved, however, are in a position to know when a contract will result in inadequate representation of counsel.[68]

The *Smith* court also cited the Arizona Rules of Professional Responsibility, Disciplinary Rules 6-101 and 7-101, which provide that an attorney should not seek or accept employment that cannot be adequately performed,[69] and the American Bar Association Criminal Justice Standards relating to workload of defense attorneys for indigents. Standard 4-1.2(d) states: "A lawyer should not accept more employment than the lawyer can discharge within the spirit of the constitutional mandate for speedy trial and the limits of the lawyer's capacity to give each client effective representation . . . ." Standard 5-4.3 states:

> Neither defender organizations nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Whenever defender organizations or assigned counsel determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organizations or assigned counsel must take such steps as may be appropriate to reduce their pending or projected workloads.[70]

A hearing to establish the system defects should be granted at the trial level, provided counsel raises the issue in a timely fashion and makes an offer of proof sufficient to raise a serious question as to her ability to deliver compe-

68. 140 Ariz. at 362, 681 P.2d at 1381.

69. The American Bar Association Model Code of Professional Responsibility contains similar provisions. Disciplinary Rule (DR) 6-101(A)(2) forbids a lawyer from handling a legal matter "without preparation adequate in the circumstances," and DR 6-101(A)(3) instructs a lawyer not to "neglect a legal matter entrusted to him." Ethical Consideration 2-30 states that "[e]mployment should not be accepted by a lawyer when he is unable to render competent service . . . ."

70. ABA STANDARDS FOR CRIMINAL JUSTICE §§ 4-1.2(d) and 5-4.3 (1982).

tent representation. Refusal to grant a hearing should be grounds for automatic reversal on appeal. This situation raises nearly identical considerations to those presented in *Holloway v. Arkansas*.[71] In *Holloway*, a public defender had been appointed to represent several codefendants. He made a timely motion for appointment of separate counsel based on a conflict of interest. The trial court refused to either appoint separate counsel or to grant any kind of a meaningful hearing on the need for separate counsel. Upon review the Supreme Court first discussed whether the trial counsel's assertion of conflict was itself sufficient to require action on the part of the trial court—either the appointment of separate counsel or an adequate inquiry to determine whether the risk was too remote to warrant separate counsel.[72] The government had argued that requiring such action on the basis of the attorney's assertion was tantamount to transferring the authority of the trial court to the attorney. The Court rejected this argument and concluded, on the basis of three interrelated considerations, that the attorney's assertion was sufficient to require action by the judge:

> An "attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." . . . Second, defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem. . . . Finally, attorneys are officers of the court, and " 'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.' "[73]

A rule which gives the individual attorney the power to require the trial judge to conduct a hearing regarding the ability of a defense system to provide adequate representation is likely to generate more resistance than existed for conflicts of interest. The potential impact on the criminal justice system is of much greater breadth. Yet each of the considerations relied on by the Court in *Holloway* regarding conflicts of interest is equally applicable where an attorney is faced with system constraints which unduly restrict her ability to provide competent representation. Additionally, the judge arguably retains greater control over the determination of system defects since the attorney/client privilege will not restrict the judge's ability to conduct an inquiry to the extent that it does where a conflict of interest is alleged.

The *Holloway* court, after determining that the trial court's failure to respond to counsel's assertion constituted a sixth amendment violation, considered whether the violation required reversal of the defendants' convictions. The Court rejected the government's argument that the defendant should be required to prove prejudice. As discussed above, the Court justified this posi-

71. 435 U.S. 475 (1977).

72. *Id.* at 483-84.

73. *Id.* at 485-86 (citations omitted).

tion on the difficulty of proving prejudice where errors are due to counsel's omissions, rather than counsel's affirmative acts.[74] Again, this justification applies equally to proving prejudice from system constraints.[75]

If the trial court finds a prospective inadequacy of representation based on defects in the defense system, it then becomes necessary to consider what relief might be appropriate. The attorney has alleged that, as the system currently stands, she is not able to provide competent representation. When these problems are raised pretrial, the court has some flexibility in fashioning relief; it can take any action which results in the attorney being in a position to provide competent representation. Where the problem is workload, the most obvious solution is to allow the attorney to withdraw from a particular case and to appoint a less burdened attorney.[76] Occasionally, where a defense system has raised workload problems on a system-wide basis, a trial court has allowed the defense system to withdraw from a large number of cases, providing a remedy which becomes comparable to those available through affirmative litigation.[77] Sometimes it will not be necessary for the attorney to withdraw; the problems can be solved by providing additional resources—either another attorney or some sort of support services or both.[78] In an appointed counsel system where the problem stems from inadequate compensation, the court could order additional compensation.[79]

There may be occasions where none of these alternatives is workable. In an extreme situation the court may be forced to dismiss charges against those defendants for whom adequate counsel cannot be provided.[80] In any event, a remedy must not come at the expense of the attorney's other clients. For that reason, where the attorney alleges insufficient time to prepare because of competing cases, the problem cannot be cured by granting a continuance if that will result in other clients being denied their right to a speedy trial.[81] Nor can excessive caseload be relieved by simply transferring cases to another, equally burdened, attorney either within or outside the defense system.

If the relief granted is sufficient to eliminate the problems in the system, then, presumably, the defendant would be represented by counsel who is in a

74. *Id.* at 489-91.

75. *See supra* text accompanying notes 61-62.

76. *See, e.g.*, State *ex rel.* Escambia County v. Behr, 354 So. 2d 974 (Fla. Dist. Ct. App. 1978), *aff'd*, 384 So. 2d 147 (Fla. 1980).

77. *See* Mounts, *supra* note 4, at 504-05; *see also* Wilson, *supra* note 7.

78. *See, e.g.*, Corenevsky v. Superior Court, 36 Cal. 3d 307, 682 P.2d 360, 204 Cal. Rptr. 165 (1984).

79. This assumes that there are sufficient funds within the overall budget for appointed counsel. There are unresolved issues regarding the court's power to order appropriation of additional funds. *See, e.g., id.*

80. In Cochise County, Arizona, a trial court dismissed charges against 20 defendants facing various assault and rioting charges when, because of inadequate funds, the county could not continue to pay for defense counsel without reducing the level of other county services to unacceptable levels. *See Arizona Judge Calls Off Trial of Twenty Blacks*, N. Y. Times, Feb. 16, 1984, at A18, col. 6.

81. *See, e.g.*, People v. Johnson, 26 Cal. 3d 557, 606 P.2d 738, 162 Cal. Rptr. 431 (1980).

position to give competent representation, and the only remaining competence issues which might be presented are those which result from specific errors. These would be considered under the standards and procedures laid out in *Strickland*.[82] If relief were denied or some form of inadequate relief were given, the defendant could raise the system problems on appeal under an approach such as that discussed earlier in this article, arguing that the showing developed in the trial court is sufficient to shift the burden of proof of prejudice.[83]

Even if an appellate court refuses to adopt a presumption of prejudice, the defendant is in a far better position on appeal if an adequate record has been developed in the trial court. She is then better able to prove the constraints faced by her attorney and the effects those constraints had in her specific case—i.e., to carry the burden which *Cronic* and *Strickland* have assigned to her. In *Cronic* the lack of a complete record made it more difficult to make a strong argument regarding the defense system. The record showed only that the system in that district had allowed the appointment of an attorney with little or no experience in criminal law to a thirteen count felony charge, involving thousands of documents, and that that attorney was given twenty-five days to prepare a case that had taken the government four and a half years to develop. Defendant's argument that his counsel did not have enough time to prepare was made more difficult by the fact that his counsel had not requested significantly more time than was granted.[84] This was a substantial showing of inherent inadequacy of representation. Nevertheless, the Supreme Court held it insufficient without proof of specific trial errors and actual prejudice. The showing of inherent inadequacy could have been much stronger had a more complete record been made in the trial court regarding the effects of the defense system. What other obligations did the attorney have to attend to during those twenty-five days? How much time was he actually able to devote to Cronic's case? How many of the documents was he able to review? What witnesses did he interview? What witnesses did he not interview and why? Was there other investigation which, because of limited time or money, he was unable to do? Were there expert witnesses which would have been of assistance in the case? If so, why were they not used? These kinds of questions might have been answered had the attorney raised an objection at the trial level and requested a hearing as to his ability to provide adequate representation.

It is unrealistic to expect that an objection to system constraints will be made in every case where the circumstances might warrant it. Fears about job security, inexperience, or other reasons cause attorneys to be reluctant to raise

82. 466 U.S. at 687-96. *See supra* text accompanying notes 32-37.

83. If an *adequate* pretrial hearing is held, there will be less difficulty determining the effect of system defects or constraints, and therefore arguably less need to presume prejudice. However, there will still be a need to provide incentives to improve the system to those who are responsible for providing defense services. *See supra* text accompanying note 59.

84. Counsel had stated that he needed a minimum of 30 days to prepare. 466 U.S. at 663.

their own inability to provide an adequate defense.[85] Trial courts must be sensitive both to the underlying problems in defense systems and to counsel's reluctance to raise such problems. Because of the tremendous impact of defects in the defense system, courts must accept their responsibility for assuring that defense counsel provided by the state are in a position to provide competent representation. The Supreme Court has noted the importance of the trial court's role in ensuring that the defendant receives the assistance of counsel: "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused . . . . The trial court should protect the right of the accused to have the assistance of counsel . . . ."[86]

Trial courts are often reluctant to intervene in counsel's actual representation at trial, since such intervention can jeopardize the confidential relationship between the attorney and the client and risks impairing the adversary process.[87] Pretrial intervention to ensure that, when counsel is appointed, she faces no structurally imposed impediments to giving competent representation, does not create comparable risks. The inquiry at that point is more objective in character—the time and resources needed for preparation of the case, counsel's experience, and competing demands.[88] If the trial court took seriously the responsibility to make this pretrial assessment, there would be far less need to intervene later at the trial stage.

CONCLUSION

The sixth amendment right to counsel in criminal cases guarantees more than the right to have an attorney at your side at trial. The Scottsboro defendants had counsel but did not have constitutionally adequate representation. Likewise, the defendant in *Cooper v. Fitzharris* was provided with an attorney but was not provided with competent representation.

The line between constitutionally adequate and inadequate representation is difficult to draw. It is not easy to say how many cases are too many for an attorney of greater or lesser experience to handle competently. There is an understandable reluctance on the part of the courts to deal with questions of excessive workload and limited resources unless the defendant demonstrates specific errors and prejudice—i.e., unless the defendant proves that it is reasonably probable that she would not have been convicted but for the errors of counsel.

Unfortunately, that test of adequacy of representation stands the presumption of innocence on its head. Justice Marshall was manifestly correct in stating that the recent decisions of the Supreme Court suggest that the sixth

85. *See supra* text accompanying notes 65-67.

86. Glasser v. United States, 315 U.S. 60, 71 (1942).

87. *See* Schwartzer, *Dealing with Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633, 637-38 (1980).

88. Obviously, these issues are not without an element of subjectivity. Yet they are certainly less sensitive and less potentially intrusive on the attorney client relationship than, for example, an inquiry about trial strategy.

amendment is not violated when a guilty person is convicted by unfair procedures, but only when an innocent person is so convicted. The defendant must establish not only that she received incompetent representation but also that, absent counsel's errors, she probably would have been acquitted.

The Supreme Court's approach makes it particularly important to raise the system problems of public defense. In *Cronic*, the Supreme Court rejected a rule that the systemic problems of the sort demonstrated in that case create a conclusive presumption of prejudice. In *Strickland*, the Supreme Court formally abandoned the "farce and mockery" test and accepted the "reasonably effective assistance" standard followed by the federal circuit courts and most states.

However, *Cronic* and *Strickland* do not foreclose system challenges to effective assistance of counsel. In fact, the Supreme Court has not yet confronted the systemic problems of public defense. It has not dealt with the imbalance of resources between the prosecution and the defense because these issues have not yet been adequately presented in the trial and appellate courts on a sufficient scale to make them "ripe for decision."

Perhaps the most immediate and important task for those concerned with the right to counsel for criminal defendants is to develop measurable standards of professional representation. These standards should include guidelines as to caseloads, budget, and support services relative to the caseloads for both defense systems as well as the prosecutor and private practitioners. Once these guidelines have been established, defense attorneys will be able to build a solid evidentiary case of substantial departures from these professional standards. Courts must then find at least a presumption of prejudice where counsel has been provided through a system which allows substantial departures from the standards of representation.