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Issue Brief

A Legislative Approach to Indigent Defense Reform

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I. Introduction

There is no dearth of evidence documenting the national crisis in indigent defense services.[1] The primary symptoms of this crisis include drastic underfunding of indigent defense delivery systems; crushing attorney workloads that force committed defenders to compromise their ethical obligations on a daily basis; a lack of investigative and expert assistance; a chronic inability to develop meaningful attorney-client relationships; and, of course, unnecessary and sometimes unlawful imprisonment.

Despite the persistence of the nation's indigent defense crisis, this is an historic time for indigent defense reform, and reform advocates have reason to be optimistic. Since taking office in 2009, Attorney General Eric Holder has stated several times that indigent defense reform is a top priority for the Administration and that he wants such reform to be a part of his legacy.[2] In the last year, members of Congress have taken an interest in indigent defense reform and have hosted a series of dialogues on the nation's indigent defense crisis.[3] At the Administration's invitation, renowned constitutional law professor Laurence Tribe has taken a leave of absence from Harvard Law School and is spearheading the new Access to Justice Initiative within the

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[1] *See generally* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031 (2006); STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, AM. BAR ASS'N, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf; NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), *available at* http://www.constitutionproject.org/manage/file/139.pdf [hereinafter JUSTICE DENIED]; ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009), *available at* http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf (discussing the way in which the growth in misdemeanor crimes exacerbates the ongoing indigent defense crisis).

[2] *See, e.g.*, Eric Holder, U.S. Att'y Gen., Remarks at the Brennan Legacy Awards Dinner, Brennan Center for Justice (Nov. 17, 2009), *available at* http://www.brennancenter.org/content/resource/attorney_general_eric_holder_on_indigent_defense_reform.

[3] *See, e.g.*, Press Release, The Constitution Project, National Right to Counsel Committee Members Testify on Indigent Defense Crisis and Issue Urgent Call for Reforms (June 4, 2009), *available at*, http://www.constitutionproject.org/newsdetail.asp?id=380 (linking to testimony before the H. Judiciary Subcomm. on Crime, Terrorism, and Homeland Security). Also, on June 15, 2010, Congressman John Conyers (D-MI), chair of the House Judiciary Committee, and Congressman Bobby Scott (D-VA), chair of the House Crime Subcommittee, co-sponsored an event entitled "The Constitutional Right to Counsel Summit" where judges, academics, prosecutors, defense attorneys and an exonerated Florida inmate all spoke on the need for indigent defense reform.

U.S. Department of Justice (DOJ).[4] This spring, the systemic indigent defense reform lawsuits in New York and Michigan, *Hurrell-Harring v. State*[5] and *Duncan v. State*,[6] respectively, survived motions to dismiss before each state's high court.[7] Those cases will now move toward trial. Finally, the nation's economic crisis has prompted inquiry into the cost-effectiveness of our criminal justice system. If the recession has a silver lining, it may be that it has facilitated reform discussions in areas like indigent defense where there were none before.

Historically, the federal government has played little to no role in the states' delivery of indigent defense services, but today the federal government seems more open to providing support to the states and to improving the availability and quality of indigent representation nationwide. The question then becomes: what exactly should the federal government do toward that end?

Both the executive and legislative branches could take steps to improve the state of indigent defense services on a national scale. DOJ could file amicus briefs in ongoing lawsuits designed to generate systemic reform, such as the suits pending today in New York and Michigan. In this way, the Department could bring to state court litigation the gravitas and cachet of the Administration and its legal position. DOJ also can harness its great statistical and data collection resources to provide a repository of indigent defense data. Before states can begin to develop reform goals, they need rigorous empirical assessment of their own systems and the ability to compare their systems to best practices across the nation. DOJ can outsource some of this research – as it has done recently with its call for research proposals to improve indigent defense[8] – and it can generate other research in-house.

Congress, too, can have an enormous impact on the availability and quality of indigent defense services nationwide. Of course, Congress could appropriate conditional funding that would be available to the states upon their compliance with national indigent defense standards.[9] At the same time, Congress can make a more lasting improvement to indigent defense services

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[4] Carrie Johnson, *Prominent Harvard Law Professor Joins Justice Department*, WASH. POST, Feb. 26, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/02/25/AR2010022505697.html.

[5] Class Action Complaint, Hurrell-Harring v. State, No. 8866-07 (N.Y. Sup. Ct. Nov. 8, 2007) [hereinafter *Hurrell-Harring* Complaint].

[6] Complaint, Duncan v. State, No. 07-000242-CZ (Mich. Cir. Ct. Feb. 22, 2007) [hereinafter *Duncan* Complaint], *available at* http://www.clearinghouse.net/chDocs/public/PD-MI-0003-0001.pdf.

[7] *Duncan*, No. 07-000242-CZ, at 2 (Mich. Sup. Ct. Apr. 30, 2010) (order vacating the class certification and remanding for consideration of the plaintiffs' motion for class certification), *available at* http://coa.courts.mi.gov/documents/sct/public/orders/20100430_s139345_106_139345_2010-04-30_or.pdf; Hurrell-Harring v. State, No. 66, slip op. (N.Y. May 6, 2010), *available at* http://www.courts.state.ny.us/CTAPPS/decisions/2010/may10/66opn10.pdf.

[8] *See* Ryan J. Reilly, *Tribe: Endless Opportunities for Access to Justice Initiative*, MAIN JUSTICE, June 14, 2010, http://www.mainjustice.com/2010/06/14/tribe-endless-opportunities-in-access-to-justice-initiative/ (describing Tribe's announcement that his "initiative would be partnering with the NIJ to issue a new grant solicitation for access to justice related research").

[9] For example, states could be required to comply with – or at least set meaningful goals to comply with – the American Bar Association's Ten Principles of a Public Defense Delivery System. *See* STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 8 (2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/resolution107.pdf.

by enacting legislation that will provide a long-term incentive for states to meet and maintain their obligations under the Sixth Amendment. This Issue Brief proposes one possible legislative approach to indigent defense reform: a piece of federal legislation designed to pave the way for systemic Sixth Amendment claims to be heard in federal court. In the next section, I explain the motivation for this particular legislative proposal. In Section III, I describe the contours of the proposed legislation and how it addresses several critical reform goals. By way of conclusion, I briefly address some likely criticisms of the proposal.

II. The Impetus for Legislative Reform

Traditionally, state legislatures have given short shrift to the issue of indigent defense reform, and this is not surprising. As Attorney General Robert Kennedy explained, "the poor man charged with crime has no lobby."[10] Because of legislative inaction at the state level, indigent defense reform advocates have turned to the courts in recent years.

The federal courts have been hostile to systemic Sixth Amendment challenges, especially on a pre-trial basis. These courts have avoided addressing the merits of these claims, citing abstention and federalism.[11] Although federal judges ought to hear these cases despite those doctrines,[12] plaintiffs' counsel in these types of suits are understandably reluctant to take their chances in federal court. Not only are these systemic lawsuits expensive and time-consuming, but also, the last thing attorneys want to do is create additional bad case law.

As I have discussed in prior works, systemic indigent defense litigation in state court has enjoyed relative success in recent years.[13] Lawsuits of this kind in Connecticut and Washington were settled,[14] while a suit in Pennsylvania resulted in a consent decree.[15] Systemic challenges

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[10] Edward M. Kennedy, *What 'Gideon' Promised*, LEGAL TIMES, Mar. 28, 2003 (quoting Robert Kennedy), *available at* http://www.nacdl.org/public.nsf/GideonAnniversary/news10?opendocument.

[11] *See, e.g.*, Luckey v. Miller, 976 F.2d 673, 676–79 (11th Cir. 1992) (holding that abstention in Younger v. Harris, 401 U.S. 37 (1971), barred the federal court from mandating an overhaul of the indigent defense system in Georgia); *see also*, Foster v. Kassulke, 898 F.2d 1144 (6th Cir. 1990) (rejecting an inmate's challenge to Kentucky indigent defense system on abstention grounds); Wallace v. Kern, 499 F.2d 1345 (2d Cir. 1974) (rejecting the right to a speedy trial of a class action by inmates on federalism grounds); Gardner v. Luckey, 500 F.2d 712 (5th Cir. 1974) (rejecting a class action challenging the Florida indigent defense system on abstention grounds).

[12] *See generally*, Cara H. Drinan, *Toward a Federal Forum for Systemic Sixth Amendment Claims*, WASH. U. L. REV., Oct. 22, 2008, *available at* http://lawreview.wustl.edu/slip-opinions/toward-a-federal-forum-for-systemic-sixth-amendment-claims.

[13] *See* Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE, 427, 444–448, 458–462 (2009).

[14] *See* Ken Armstrong, *Grant County Settles Defense Lawsuit*, SEATTLE TIMES, Nov. 8, 2005, *available at* http://seattletimes.nwsource.com/html/localnews/2002610337_grant08m.html; *see also* Press Release, American Civil Liberties Union, Settlement Reached in ACLU's Class-Action Lawsuit Alleging Inadequacy of CT Public Defender System (July 7, 1999), *available at* http://www.aclu.org/racial-justice/settlement-reached-aclus-class-action-lawsuit-alleging-inadequacy-ct-public-defender-.

[15] *See* Vidhya K. Reddy, *Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing the* Gideon *Right to Counsel* 24–30 (Wash. Univ. Sch. of Law, Working Paper No. 1279185, 2008), *available at* http://ssrn.com/abstract=1279185.

to indigent defense services in Massachusetts and Montana actually created new law.[16] Today, the systemic suits in Michigan and New York are moving toward trial, having survived motions to dismiss before the states' high courts. The New York Court of Appeals opinion in *Hurrell-Harring* generated powerful precedent for suits of this kind going forward. Rejecting the argument that individual defendants may only raise a Sixth Amendment challenge in the habeas setting, the court held that the post-conviction approach "is expressly premised on the supposition that the fundamental underlying right to representation under *Gideon* has been enabled by the State."[17] Where plaintiffs allege, as they did in the New York complaint, that there has been a total breakdown of the defense system, the court held that the post-conviction approach is not appropriate.[18] Furthermore, the court explained that it need not defer wholesale to the legislative branch simply because the plaintiffs' claims potentially implicated the public treasury: "It is, of course, possible that a remedy in this action would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities. But this does not amount to an argument upon which a court might be relieved of its essential obligation to provide a remedy for violation of a fundamental constitutional right."[19] In sum, systemic Sixth Amendment challenges enjoy more success today than they ever have before in state court.

And yet, the future of these state court suits remains unclear. To begin, the New York and Michigan lawsuits have been in court for three years, and they are only now moving toward trial. It is unclear whether meaningful remedies can be obtained in these suits, and if so, whether such remedies can be sustained in the long-run. Furthermore, it is equally unclear whether the success of these two suits can be replicated elsewhere on a widespread basis. Thirty-nine states elect some or all of their judges,[20] and "[b]etween 2000 and 2007, state Supreme Court contests raised 168 million dollars, more than twice the amount raised in the 1990s."[21] Elected judges are subject to the same majoritarian pressures as elected lawmakers, including the pressure to be tough on crime.[22] Moreover, in many of the worst-off jurisdictions, state court judges are overseeing deficient indigent defense systems and may not be inclined to reform the status quo. Thus, state court judges as a group may not be inclined to take up the cause of indigent defense reform.

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[16] Lavallee v. Justices in Hampden Super. Ct., 812 N.E.2d 895 (Mass. 2004); MONT. CODE ANN. §47-1-201-216 (2005) (outlining state's obligation to create public defender, as well as appellate defender; authorizing public defender to hire deputy public defenders, support staff, and training coordinator).

[17] Hurrell-Harring v. State, No. 66, slip op., at 7 (N.Y. May 6, 2010), *available at* http://www.courts.state.ny.us/CTAPPS/decisions/2010/may10/66opn10.pdf.

[18] *Id.*

[19] *Id*. at 20 (citation omitted).

[20] AM. BAR ASS'N, FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES, http://www.abanet.org/leadership/fact_sheet.pdf.

[21] *Not for Sale, Limiting Money in America's Courts*, ECONOMIST, June 11, 2009, *available at* http://www.economist.com/world/unitedstates/displaystory.cfm?story_id=13832427.

[22] Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. REV. 1101, 1103–09 (2006); *see also* Caperton v. Massey Coal Co., 129 S. Ct. 2252 (2009) (holding that an elected judge should have recused himself in a case where the defendant had donated three million dollars to the judge's campaign).

Indigent defense reform advocates need an opportunity to bring systemic indigent defense challenges like *Hurrell-Harring* and *Duncan* in the federal courts – courts that have traditionally been a refuge for victims of state constitutional violations. The legislation I propose here would make that possible.

III. A Proposed Legislative Solution

Any legislation designed to generate nationwide indigent defense reform needs to incorporate several critical elements: (1) it must confirm that the burden of providing indigent defendants with counsel rests with the states; (2) it needs to give some weight to the notion of ineffective assistance of counsel without running afoul of Supreme Court precedent; (3) it must address who will be appropriate parties to a suit brought under the statute; and (4) it needs to address the question of appropriate remedies. In this Section, I set forth the text of the proposed statute and then discuss briefly how the statutory language addresses each of these four goals.

A. The Proposed Statutory Text

As I have argued elsewhere, Congress has the authority to enact national indigent defense reform legislation pursuant to its civil rights enforcement authority.[23] The proposed text of this legislation is as follows:

> An Act to enforce the constitutional right to the assistance of effective counsel at all stages of the adversarial process, to confer jurisdiction upon the district courts of the United States to provide declaratory and injunctive relief against systemic violations of this right, and for other purposes.
>
> Section 1
>
> (a) All indigent persons facing criminal charges in state court shall be entitled to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments,[24] at the state's expense.[25]
> (b) The assistance of counsel is considered ineffective when a person can demonstrate one of the following:
> (1) the actual denial of appointed counsel after the state's commencement of adversarial proceedings,[26] or

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[23] Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARV. J. LEG. (forthcoming 2010) (draft at 35–41), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1448058.

[24] While the statutory language sets forth some, but not all, of the factual scenarios that may constitute a cognizable claim of ineffective assistance of counsel, the statute does not attempt to redefine or add to those rights embodied in the Sixth and Fourteenth Amendments as articulated by the Supreme Court. In fact, the statute specifically tracks the Supreme Court's precedent on right-to-counsel claims so as to avoid a separation of powers problem.

[25] Gideon v. Wainwright, 372 U.S. 335 (1963).

[26] *See* Rothgery v. Gillespie County, 128 S. Ct. 2578 (2008) (confirming that the right to counsel attaches as soon as the defendant learns of the charges against him and his liberty is subject to restriction).

(2) the constructive denial of counsel after the state's commencement of adversarial proceedings,[27] which shall include, but not be limited to, the following:

(A) representation by a lawyer who is operating under an actual conflict of interest;[28]

(B) representation by a lawyer whose workload is so excessive that effective representation is not possible;[29] or

(C) representation by a lawyer who lacks the requisite training, ability, and experience.[30]

(c) Where the state delegates fiscal and/or administrative authority over the indigent defense function to one of its political subdivisions, the state retains ultimate responsibility for securing the constitutional right to counsel.[31]

Section 2

(a) Whenever a state or one of its political subdivisions fails on a systemic basis to guarantee the right to the assistance of effective counsel as guaranteed by the Sixth and Fourteenth Amendments, aggrieved persons may commence a civil class action in the district courts of the United States to seek declaratory, injunctive, and other equitable relief as the court sees fit.

(b) A state shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in federal or state court of competent jurisdiction for a violation of this statute.

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

[28] *See* Cuyler v. Sullivan, 446 U.S. 335, 350 (1980) (holding that "[i]n order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance").

[29] *See* United States v. Cronic, 466 U.S. 648, 659 (1984) ("[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."); *see also* Powell v. Alabama, 287 U.S. 45, 58 (1932) (holding that the defendants were "not accorded the right of counsel in any substantive sense" because of the state supreme court's findings that defendants' counsel's appearance was "pro forma" rather than "zealous and active"); STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS (2009), *available at* http://www.abanet.org/legalservices/sclaid/defender/downloads/eight_guidelines_of_public_defense.pdf.

[30] *See* McMann v. Richardson, 397 U.S. 759, 771 (1970) ("[D]efendants facing felony charges are entitled to the effective assistance of competent counsel. . . . [I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." (footnote omitted)).

[31] *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963) (imposing upon states the obligation to provide representation to poor defendants).

(c) A federal court entertaining a petition for relief filed under this statute shall not be subject to the abstention restrictions articulated in *Younger v. Harris*.[32]
(d) Where an action pursuant to this statute is filed on a pre-trial basis, members of the class shall have the burden of establishing that the constitutional right to counsel is being violated on an ongoing basis and that there is a likelihood of imminent and irreparable injury from that violation.[33]
(e) In any action or proceeding brought under Section 2, the court, in its discretion, may allow the prevailing party, other than a state or a named state official, a reasonable attorney's fee as part of the costs. In awarding an attorney's fee under this section, the court, in its discretion, may include expert fees as part of the attorney's fee.
(f) Nothing in this section shall restrict any rights that any person may have under any other statute or under common law to seek redress for a violation of the right to counsel.

B. The Statute in Practice

1. The Proposed Legislation Confirms that Indigent Defense is a State Obligation

In 1963, the Supreme Court held in *Gideon v. Wainwright* that when a criminal defendant cannot afford an attorney, the state must provide him with counsel.[34] Yet, in 16 states, more than half of indigent defense costs are paid for by the county; and in two states, Pennsylvania and Utah, there is no state funding at all.[35] These states abdicate their constitutional obligations under *Gideon* when they require counties to fund indigent defense services.[36] Sections 1(a) and (c) of this proposed legislation confirm that the states are required to fund indigent defense. Moreover, these sections make clear that even where political subdivisions are involved in the *delivery* of indigent defense services, the state is ultimately responsible for the availability and quality of such services.

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[32] Younger v. Harris, 401 U.S. 37, 43–45 (1971) (explaining the federalism principles underlying the federal courts' abstention from cases that involve ongoing state criminal proceedings); *see also infra* notes 62–67 and accompanying text.
[33] *See* Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988); *see also* Nicholson v. Williams, 203 F. Supp. 2d 153, 240 (E.D.N.Y. 2002) ("Ordinarily, claims of ineffective representation are dealt with on an individualized basis after the fact, because a person must show deficient performance by counsel and actual prejudice arising from that deficiency. . . . But where the state imposes systemic barriers to effective representation, prospective injunctive relief without individualized proof of injury is necessary and appropriate." (citations omitted)).
[34] *Gideon*, 372 U.S. at 344; see also Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323, 328 (2009) (discussing the state's obligation to provide counsel).
[35] JUSTICE DENIED, *supra* note 1, at 54.
[36] *Gideon*, 372 U.S. at 342 (describing the Sixth Amendment right to counsel as "made obligatory upon the *states* by the Fourteenth Amendment" (emphasis added)); *Hurrell-Harring* Complaint, *supra* note 5, at 4.

2. The Proposed Legislation Gives Bite to the Notion of Ineffective Assistance without Running Afoul of Supreme Court Precedent

In *Strickland v. Washington*,[37] the Supreme Court held that criminal defendants who claim ineffective assistance of counsel must demonstrate both that their attorney's performance "fell below an objective standard of reasonableness"[38] and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[39] As scholars have documented extensively, the *Strickland* standard for ineffective assistance of counsel has failed to protect the right to the effective assistance of counsel.[40] Moreover, as described below in further detail, the standard is simply inapposite for criminal defendants seeking prospective relief.

Nonetheless, the *Strickland* decision is critical because it is at the analytical core of the Supreme Court's jurisprudence regarding the right to the effective assistance of counsel.[41] To the extent that Congress drafts statutory language in an area where the Supreme Court has already delineated the scope of a constitutional right, as would be the case here, Congress needs to legislate carefully. Specifically, under Section 5 of the Fourteenth Amendment, Congress may enact legislation that "deters or remedies constitutional violations," but it may not implement a "substantive change in the governing law."[42] If it were to redefine or enlarge the scope of the Sixth Amendment, Congress would violate the separation of powers doctrine by usurping the Supreme Court's power as the final interpreter of the Constitution.[43]

This proposed legislation seeks to avoid this separation of powers problem by defining ineffective assistance of counsel in a way that tracks the Supreme Court's precedent. In Section 1(b), the statute defines ineffective assistance of counsel as the absence of counsel – both actual and constructive – after the initiation of adversarial proceedings. The first claim – that the actual absence of counsel after the initiation of adversarial proceedings violates the Sixth Amendment – is entirely uncontroversial; in fact, the Supreme Court confirmed this principle in 2008.[44]

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[37] Strickland v. Washington, 466 U.S. 668 (1984).
[38] *Id*. at 688.
[39] *Id*. at 694.
[40] *See, e.g.*, Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 19 (2002) (describing why the *Strickland* test is so difficult for a defendant to meet, even when the defendant is actually innocent); 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, 1857–66 (1994) (criticizing the *Strickland* standard).
[41] *See, e.g.*, Porter v. McCollum, 130 S. Ct. 447 (2009); Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362 (2000).
[42] City of Boerne v. Flores, 521 U.S. 507, 518, 519 (1997).
[43] *Id*. ("Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of [the Fourteenth Amendment].'" (alteration in original)).
[44] Rothgery v. Gillespie County, 128 S. Ct. 2578, 2581 (2008); *see also* Michigan v. Jackson, 475 U.S. 625, 629 n.3 (1986); Brewer v. Williams, 430 U.S. 387, 398–99 (1977).

The Supreme Court has also held that the constructive absence of counsel at trial violates the Constitution. For example, in *Avery v. Alabama*, the Court clarified that the constitutional right to counsel required active assistance, rather than mere appointment.[45] The *Avery* Court explained: "[T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel."[46]

However, the Supreme Court has been less explicit with respect to precisely what circumstances constitute constructive absence of counsel. Section 1(b)(2) sets forth three circumstances that may constitute constructive absence of counsel under the statute. The first scenario – where the criminal defense attorney is operating under an actual conflict of interest – is based upon well-established Supreme Court precedent.[47] The two additional circumstances – where defense counsel's workload is so excessive that effective representation is not possible and where the lawyer lacks the requisite training, ability, and expertise – draw upon a broader and more robust line of Supreme Court cases. That is, the Court has recognized that there are some scenarios where structural factors make a fair trial impossible. In *United States v. Cronic*, the Court explained: "[O]n some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."[48] Further, the *Cronic* Court declared that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."[49] Congress may reasonably argue that when an attorney's workload exceeds all recognized standards[50] and when criminal defense attorneys are appointed on the basis of their expedience rather than their skill or experience, this line of cases controls. In sum, even though federal legislation regarding the Sixth Amendment must be drafted delicately so as to avoid a separation of powers violation, this proposed legislation meets that requirement in its delineation of what constitutes actionable ineffective assistance of counsel.

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[45] Avery v. Alabama, 308 U.S. 444 (1940).
[46] *Id.* at 446.
[47] *See* Strickland v. Washington, 466 U.S. 668, 688 (1984) ("Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest."); Cuyler v. Sullivan, 446 U.S. 335, 346 (1980).
[48] United States v. Cronic, 466 U.S. 648, 659–60 (1984).
[49] *Id.* at 659; *see also* Powell v. Alabama, 287 U.S. 45, 58 (1932) ("'The record indicates that the appearance was rather pro forma than zealous and active . . . .' Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities.").
[50] Generally accepted guidelines for annual workload limits provide that no lawyer should handle on an annual basis more than 150 felonies, four hundred misdemeanors, two hundred juvenile cases, two hundred mental health cases, or twenty-five appeals. THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, *supra* note 9, at 5 n.19.

3. The Proposed Legislation Addresses Appropriate Parties to a Suit Under the Statute

First, the history of systemic indigent defense litigation demonstrates that it is important for the state to be a named defendant. This is true both because there is symbolic importance in holding the state accountable for its own constitutional failings and because, if the state itself is a named defendant, reform implementation may follow more smoothly. Of course, a lawsuit could (and likely would) name other defendants, such as relevant state executive officials and perhaps state judges,[51] but naming the state qua state as a defendant is nonetheless still critical.

Toward this end, Section 2(b) of the statute expressly abrogates the states' sovereign immunity, thereby allowing states to be sued in federal court. Congress may abrogate the Eleventh Amendment when it does so expressly and pursuant to a valid exercise of its civil rights enforcement authority.[52] The proposed language of the statute makes clear the congressional intent to allow the states to be sued in federal court, and as I have argued elsewhere, this legislation would be a valid exercise of Congress's civil rights enforcement authority.[53]

On the plaintiffs' side of the equation, the proposed legislation makes clear that only a class of plaintiffs may bring suit and that such a class may do so on a pre-trial basis. The statute's class-action nature, as set forth in Sections 2(a) and 2(d), makes sense for several reasons. First, if every criminal defendant with a case pending in state court were able to bring a pretrial claim in federal court alleging ineffective assistance of counsel and seeking prospective relief, this statute would authorize a flood of litigation that could bring state criminal justice systems to a grinding halt and overwhelm the already-burdened federal courts. The class-action provision prevents that outcome. Second, the Supreme Court has been reluctant to support an individual's attempt to collaterally attack a state criminal conviction with a § 1983 suit in federal court.[54] While these earlier cases are factually distinguishable from the cause of action embodied in this proposed legislation in that those cases dealt with suits seeking money damages and/or release from prison, they are nonetheless optically problematic for an individual cause of action. Third, as the most recent systemic indigent defense suits have proven, a class of plaintiffs can provide more robust proof of harm than can an individual. Finally, a class action is procedurally desirable because as the cases of the named plaintiffs are resolved in a state criminal proceeding, the class still represents justiciable claims.[55]

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[51] *See, e.g.*, Amended Complaint, White v. Martz, No. C DV-2002-133 (D. Mont. Apr. 1, 2002) (naming as defendants Governor Martz, the state Supreme Court Administrator, a district court judge in one of the named defendant counties, and several other officials).

[52] Tennessee v. Lane, 541 U.S. 509, 517–518 (2004).

[53] Drinan, *The National Right to Counsel Act*, note 23, at 35–41.

[54] *See* Heck v. Humphrey, 512 U.S. 477 (1994) (rejecting petitioner's civil claim for money damages before termination of criminal proceeding); Preiser v. Rodriguez, 411 U.S. 475 (1973) (rejecting civil suit seeking immediate or speedier release and citing federal habeas relief as the appropriate avenue).

[55] If, for example, a named plaintiff accepts a plea agreement and thus is no longer a suitable representative of the class of similarly situated indigent defendants, a court could allow another class member to replace the now-absent named plaintiff. *See, e.g.*, Phillips v. Ford Motor Co., 435 F.3d 785, 787 (7th Cir. 2006) ("Substitution of unnamed class members for named plaintiffs who fall out of the case because of settlement or other reasons is a common and

The drafting also makes clear in Section 2(d) that the class of plaintiffs bringing suit under this statute may bring a claim in federal court on a pre-trial basis. Historically, federal courts dismissed systemic challenges to defense systems by requiring criminal defendants to exhaust their claim in state court before turning to the federal forum.[56] As a practical matter, this meant that defendants could only challenge the efficacy of their representation under *Strickland* in a post-conviction proceeding.[57] Some state courts have come to the same conclusion under similar circumstances.[58]

These cases err in at least two respects. First, the *Strickland* test is simply inapposite when a defendant (or a class of defendants) is seeking prospective relief to guard against an irreparable injury. By definition, the *Strickland* test is backward-looking and cannot provide prospective relief.[59] Second, when courts dismiss these claims on *Strickland* grounds, they virtually guarantee that a defendant can never vindicate the merits of his claim because by the time his case makes it back to federal court, the very inefficacy he challenged has sealed his fate.[60] As the proposed language of this statute makes clear, criminal defendants bringing suit under this cause of action do not need to demonstrate that the ineffective assistance of counsel had a prejudicial effect on the outcome of their case, as courts traditionally require when considering an ineffective assistance of counsel claim. Instead, under this proposal, a class of plaintiffs seeking prospective relief needs to show that its right to counsel is being violated on an ongoing basis and that there is a likelihood of imminent and irreparable injury from that violation.[61]

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normally an unexceptionable ('routine') feature of class action litigation . . . ." (citations omitted)). The case is somewhat more complex if the case has yet to be certified as a class action when the named plaintiff drops out for one reason or another; at that point, the named plaintiff technically is the only party with a claim before the court. However, courts do not always take such a technical approach. *See, e.g.*, *id.* ("Unless jurisdiction never attached . . . or the attempt to substitute comes long after the claims of the named plaintiffs were dismissed . . . substitution for the named plaintiffs is allowed." (citations omitted)).

[56] *See* Drinan, *The Third Generation of Indigent Defense Litigation*, *supra* note 13, at 440–42, 467–75.

[57] *Id.*

[58] *See, e.g.*, Hurrell-Harring v. State, 883 N.Y.S.2d 349, 351–52 (N.Y. App. Div. 2009) (emphasizing the individual nature of ineffective assistance of counsel claims and rejecting a suit seeking systemic relief); *see also* Kennedy v. Carlson, 544 N.W.2d 1, 3 (Minn. 1996) (rejecting a systemic Sixth Amendment suit in Minnesota for failure to show individual harm).

[59] *See supra* notes 37–40 and accompanying text.

[60] *See* Laurence A. Benner, *The Presumption of Guilt: Systemic Factors That Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 322–23 (2009) ("As Justice Marshall pointed out in his dissenting opinion in *Strickland*, this standard is unworkable because evidence that may establish the defendant's innocence 'may be missing from the record precisely because of the incompetence of defense counsel.' Documenting ineffective assistance therefore often requires the development of additional evidence at a post-conviction hearing. As a recent study of federal habeas petitions by Professors Nancy J. King and Joseph L. Hoffman points out, however, relief at this stage is largely hypothetical . . . ." (citation omitted)).

[61] *Cf.* Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988); Nicholson v. Williams, 203 F. Supp. 2d 153, 240 (E.D.N.Y. 2002); Duncan v. State, 774 N.W.2d 89, 124 (Mich. Ct. App. 2009).

4. The Proposed Legislation Enables Appropriate Remedies

Historically, the abstention doctrine has been an impediment to systemic Sixth Amendment civil rights actions in federal court.[62] In the few indigent defense civil rights suits that have been brought in federal court, the federal courts have rejected these claims, holding that to hear such suits would constitute an unseemly interference with ongoing state criminal proceedings.[63] Accordingly, Section 2(c) of the proposed statute expressly allows federal courts to provide a prospective remedy by declaring *Younger* abstention inapplicable in these types of suits.

Although this provision of the statute may provoke criticism by states' rights advocates,[64] it is nonetheless defensible. "Federal courts do not abstain on *Younger* grounds because they lack jurisdiction; rather, *Younger* abstention 'reflects a court's prudential decision not to exercise [equity] jurisdiction which it in fact possesses.'"[65] Scholars, too, have recognized the prudential, rather than constitutional, nature of the abstention doctrine and have argued that when applying the prudential abstention doctrine, "courts should be careful to maintain access for those who cannot expect a fair hearing from the political branches."[66] Criminal defendants are precisely the kind of group "who cannot expect a fair hearing from the political branches."[67] Thus, because of its prudential nature, Congress can declare the *Younger* abstention doctrine inapposite in a class of suits without raising a separation of powers concern.

If a federal judge reaches the remedies stage in a lawsuit brought under this statute, Section 2(a) of the proposed legislation grants federal judges wide latitude in crafting appropriate remedies. On one end of the spectrum, the district judge could issue a declaratory judgment confirming the state's obligations under the Sixth Amendment to provide adequate representation and notifying the state that it has not met those obligations. On the other end of the spectrum, a district judge may issue a broad injunction requiring prompt reform from the state or ordering the release of defendants and dismissal of charges if the state fails to appoint counsel for qualifying indigent defendants or if counsel fail to meet with their clients within a certain period of time.[68]

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[62] *See supra* note 11 and accompanying text.
[63] *Id.*
[64] Younger v. Harris, 401 U.S. 37, 44 ("This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.").
[65] Weekly v. Morrow, 204 F.3d 613, 614–15 (5th Cir. 2000) (alteration in original) (citing Benavidez v. Eu, 34 F.3d 825, 829 (9th Cir. 1994)); *see also* Kaufman v. Kaye, 466 F.3d 83, 88 n.1 (2d Cir. 2006); E. Martin Estrada, *Pushing Doctrinal Limits: The Trend Toward Applying Younger Abstention to Claims for Monetary Damages and Raising Younger Abstention Sua Sponte on Appeal*, 81 N.D. L. Rev. 475, 476 (2005) (describing *Younger* abstention as "discretionary").
[66] Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 512 (2008).
[67] *Id.*
[68] *Cf.* Lavallee v. Justices in Hampden Super. Ct., 812 N.E.2d 895 (Mass. 2004) (limiting the time during which indigent defendants could be held without appointment and appearance of counsel before the defendants' release).

The more moderate, and therefore more likely, option for a federal judge overseeing a suit brought under this statute lies somewhere between these two ends of the spectrum. For example, the district judge could hold evidentiary hearings and, if appropriate, declare the state action (or inaction) to be in violation of the Sixth Amendment. At that point, the judge could order the state to develop a remedial plan within a specified time frame. It would then be incumbent upon state legislators and executive officials to make the hard choices related to improving an indigent defense system. A state could choose to increase the number of public defenders and the resources available to them (admittedly at the cost of reducing other public outlays or increasing taxes), or it could reduce the number of defendants who require representation.[69] The district judge would retain jurisdiction over the suit while the state worked to reform its indigent defense system. Presumably only if and when the state failed to cooperate would the judge need to order a more drastic remedy, such as the dismissal of charges for defendants who have not been assigned counsel within a designated period of time.[70]

In sum, this proposed legislation achieves several important goals: (1) it confirms that the burden of *Gideon* is on the states; (2) it gives bite to the notion of ineffective assistance of counsel without running afoul of Supreme Court precedent; (3) it addresses appropriate parties to a lawsuit brought under the statute; and (4) it enables appropriate remedies.

IV. Conclusion

Given the national crisis in indigent defense services, bold, timely action like the legislation that I propose in this Issue Brief is required and more than justified. Congress should consider enacting this or similar legislation soon, and the Attorney General should push for its passage. By way of conclusion, I address several potential concerns that critics of this proposed legislation may raise, and I explain why they are not fatal to the proposal's long-term success.

First, the most likely criticism is the argument that criminal justice has traditionally been a sphere of state sovereignty and that this legislation threatens the appropriate balance between federal and state grants of power. This criticism is undermined by the fact that the states have had nearly five decades to translate the *Gideon* mandate into practice, and they have failed to do so across the board with rare exceptions. States cannot avoid their obligations under the Sixth Amendment by raising a vague claim of states' rights.

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[69] For example, in some states, the misdemeanor of speeding may carry a potential jail sentence. *See, e.g.*, Johnston v. City of Pine Bluff, 525 S.W.2d 76 (Ark. 1975) (dealing with such an ordinance in Arkansas). The Sixth Amendment right to counsel applies to misdemeanor defendants who face a possible jail sentence. *See* Argersinger v. Hamlin, 407 U.S. 25, 33 (1972). Thus, states could reduce the number of defendants who require representation under the Constitution by eliminating possible jail sentences for some misdemeanor offenses. Moreover, states which retain the death penalty could also generate significant defense savings by replacing the death penalty with life-without-parole. For example, a recent study demonstrated that North Carolina could save eleven million dollars annually if it abolished the death penalty. Philip J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, 11 AM. L. & ECON. REV. 498, 498 (2009).

[70] *Cf.* Coleman v. Schwarzenegger, No. Civ. S-90-0520, 2009 WL 330960 (E.D. Cal. Aug. 4, 2009). In *Coleman*, a three-judge panel ordered the reduction of California's prison population, but only after decades of the state's being on notice of its ongoing Eighth Amendment violations related to prison overcrowding and only after the state's chronic failure to meet narrow remedial orders and timeline objectives. *Id.*

Second, critics may argue that even if this legislation were enacted, federal judges today are not as solicitous toward public law litigation as they once were. According to this criticism, today's conservative federal judges simply would not be willing to issue declaratory judgments and orders for injunctive relief in a suit brought under this statute. As I have pointed out before, the federal bench is neither monolithic nor static, so this criticism – even if true to some degree – should not hinder the proposal.[71] Moreover, there is nothing inconsistent about a federal judge who values state autonomy in the abstract and recognizes an instance where a state has systematically failed to meet its obligations under the Constitution.[72]

Third, critics may argue that, if this legislation came under constitutional attack (as it likely would), the Roberts Court would declare the legislation unconstitutional. As I have described in a prior work, this legislation is on firm constitutional footing, and in fact, if Congress were to enact this legislation under its civil rights enforcement authority, it would do so with greater empirical evidence at its disposal than in prior instances of civil rights enforcement legislation.[73] More importantly, though, indigent defense reform advocates cannot allow suppositions as to how the Court may rule on a piece of legislation to define the reform agenda. If health care reform advocates had taken a similar approach, they never would have pursued the legislation that became law in March 2010.

The legislation proposed in this Issue Brief is not mutually exclusive of other promising reform proposals, but it does provide several tactical advantages to the indigent defense reform community. Because the proposed statute allows defendants to vindicate their Sixth Amendment rights in federal court, it provides a long-term incentive for states to reform and *maintain* their reform, which many states have struggled to do. Moreover, because this legislation creates a cause of action, and therefore achieves its end through an incentive mechanism, it does not require recurring appropriations from Congress. Finally, unlike proposals that set guidelines for the states' delivery of defense services, under this proposed legislation, states are free to serve as "laboratories of democracy"[74] to find whichever system best meets the Constitution's demands. Indigent defense advocates have seen in the *Hurrell-Harring* and *Duncan* suits that systemic litigation can be a powerful mechanism for reform. Lawsuits of this kind should be possible in federal court, and this proposed legislation would make that aspiration a reality.

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[71] Drinan, *Toward a Federal Forum for Systemic Sixth Amendment Claims*, *supra* note 12.

[72] If it is true that there are few federal judges today willing to demand that the states meet their obligations under the Sixth Amendment, then this reality only provides yet another reason why the Obama Administration should be aggressively filling federal judicial vacancies with individuals who are willing to "enforce the capacious guarantees of the Constitution." Pam Karlan, Professor of Public Interest Law, Stanford University, Remarks at the National Convention of the American Constitution Society for Law and Policy (June 19, 2010).

[73] Cara H. Drinan, *The National Right to Counsel Act*, *supra* note 23, at 35–41.

[74] New State Ice Co. v. Leibmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory . . . .").