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Assessing Systemic Effectiveness of Right to Counsel Services

Two principal U.S. Supreme Court cases, heard and decided on the same day, describe the tests employed to determine the constitutional effectiveness of right to counsel services. *United States v. Cronic*[1] and *Strickland v. Washington*[2] together describe a continuum of representation. *Strickland* is backward-looking, setting out the two-pronged test of whether the appointed lawyer's actions were unreasonable and prejudiced the outcome of the case, and it is used after a case is final to decide whether the lawyer provided effective assistance of counsel.

Cronic is forward-looking and states that, if certain systemic factors are present (or necessary factors are absent) at the outset of the case, then a court should presume that ineffective assistance of counsel will occur. Hallmarks of a structurally sound indigent defense system under *Cronic* include the early appointment of qualified and trained attorneys with sufficient time to provide competent representation under independent supervision. The absence of any of these factors can show that a system is presumptively providing ineffective assistance of counsel:

Presence of counsel at critical stages: The first factor that triggers a presumption of ineffectiveness is the absence of counsel for the accused at the "critical stages" of a case. Arraignments,[3] plea negotiations,[4] and sentencing hearings,[5] for example, are all critical stages of a case. If counsel is not present at every one of these critical stages, an actual denial of counsel occurs.

Attorney qualifications, training, and resources: Next, the U.S. Supreme Court explains in *Cronic* that there are systemic deficiencies that make any lawyer – even the best attorney – perform in a non-adversarial way. As opposed to the "actual" denial of counsel of *Cronic's* first prong, the Court calls this a "constructive" denial of counsel.[6] The overarching principle in *Cronic* is that the process must be a "fair fight." *Cronic* notes that the "fair fight" standard does not necessitate one-for-one parity between the prosecution and the defense. Ensuring that both functions have the resources they need, at a level their respective roles

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1 466 U.S. 648 (1984).
2 466 U.S. 668 (1984).
3 *Hamilton v. Alabama*, 368 U.S. 52, 53-55 (1961).
4 Lafler v. Cooper, 132 S. Ct. 1376, 1386 (2012); Padilla v. Kentucky, 559 U.S. 356, 373 (2010); McMann v. Richardson, 397 U.S. 759, 771, 771 n.14 (1970).
5 Lafler v. Cooper, 132 S. Ct. 1376, 1386 (2012); Wiggins v. Smith, 539 U.S. 510, 538 (2003); Glover v. United States, 531 U.S. 198, 203-04 (2001); Mempa v. Rhay, 389 U.S. 128, 134, 137 (1967).
6 *Strickland, 466 U.S.* at 683 ("The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused." (citing *Cronic)).*

demand, is what the adversarial process requires. As the U.S. Supreme Court notes: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."[7]

Cronic's necessity of a fair fight requires the defense function to put the prosecution's case to the "crucible of meaningful adversarial testing."[8] If a defense attorney is either incapable of challenging the state's case or barred from doing so because of a structural impediment, a constructive denial of counsel occurs.

In *Cronic*, the Court points to the deficient representation received by the defendants known as the "Scottsboro Boys" and detailed in the U.S. Supreme Court case of *Powell v. Alabama*[9] as demonstrative of constructive denial of counsel. The trial judge overseeing the Scottsboro Boys' case appointed a real estate lawyer from Chattanooga, who was not licensed in Alabama and was admittedly unfamiliar with the state's rules of criminal procedure.[10] The *Powell* Court concluded that defendants require the "guiding hand"[11] of counsel – i.e., attorneys must be qualified and trained to help the defendants advocate for their stated interests.

Sufficient time: Having been assigned unqualified counsel, the Scottsboro Boys' trials proceeded immediately that same day.[12] *Powell* notes that the lack of "sufficient time" to consult with counsel and to prepare an adequate defense was one of the primary reasons for finding that the Scottsboro Boys were constructively denied counsel, commenting that impeding counsel's time "is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob."[13] Insufficient time is, therefore, a hallmark of constructive denial of counsel, and the inadequate time may itself be caused by any number of things, including but not limited to excessive workload or contractual arrangements that produce negative fiscal incentives to lawyers to dispose of cases quickly.

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[7] *Cronic, 466 U.S.* at 657 (quoting *United States ex rel. Williams v. Twomey,* 510 F.2d 634, 640 (7th Cir. 1975)).

[8] *Id.* at 656-57 ("The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.").

[9] In 1931, nine young men of color stood accused in Alabama of the capital crime of rape. Their trial made national headlines, and quickly they became known as the "Scottsboro Boys."

[10] A retired local attorney who had not practiced in years was also appointed to assist in the representation of all nine co-defendants.

[11] *Powell*, 287 U.S. at 68-69 ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.")

[12] Over the course of the next three days, four separate all-white juries, trying the defendants in groups of two or three at a time, found all nine of the Scottsboro Boys guilty, and all but one was sentenced to death. The youngest – only 13 years old – was instead sentenced to life in prison.

[13] 287 U.S. at 56-59.

Independence of the defense function: Perhaps the most noted critique of the Scottsboro Boys' defense was that it lacked independence from governmental interference, specifically from the judge presiding over the case. As noted in *Strickland*, "independence of counsel" is "constitutionally protected," and "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."[14] In specific relation to judicial interference, the *Powell* Court stated:

> [H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.[15]

In other words, it is *never* possible for a judge presiding over a case to properly assess the quality of a defense lawyer's representation, because the judge can never, for example, read the case file, question the defendant as to his stated interests, follow the attorney to the crime scene, or sit in on witness interviews. That is not to say a judge cannot provide sound feedback on an attorney's in-court performance – the appropriate defender supervisors indeed should actively seek to learn a judge's opinion on attorney performance. And, in some extreme circumstances, a judge can determine that counsel is ineffective, for example, if the lawyer is sleeping through the proceedings. It is just that the judge's in-court observations of a defense attorney cannot comprise the totality of supervision.

While *Cronic* and *Powell* focus on independence of counsel from judicial interference, other U.S. Supreme Court decisions extend the independence standard to political interference as well. In the 1979 case, *Ferri v. Ackerman*,[16] the United States Supreme Court stated that "independence" of appointed counsel to act as an adversary is an "indispensible element" of "effective representation." Two years later, the Court observed in *Polk County v. Dodson*[17] that states have a "constitutional obligation to respect the professional independence of the public defenders whom it engages." Commenting that "a defense lawyer best serves the public not by acting on the State's behalf or in concert with it, but rather by advancing the undivided interests of the client," the Court notes in *Polk County* that a "public defender is not amenable to administrative direction in the same sense as other state employees."[18] The *Cronic* Court clearly advises that governmental interference that infringes on a lawyer's independence to act in the stated interests of defendants or places the lawyer in a conflict of interest causes a constructive denial of counsel.

Cronic determined that, when a public lawyer works within a system where factors are present that constructively deny the right to counsel, then the public lawyer is

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[14] *Strickland v. Washington, 466 U.S. 668, 686 (1984).*
[15] *Powell, 287 U.S. at 61.*
[16] 444 U.S. 193, 204 (1979).
[17] 454 U.S. 312, 321-22 (1981).
[18] *Id.*

presumptively ineffective. The government bears the burden of overcoming that presumption. The government may argue that, despite such conflicts, the defense lawyer in a specific case was not ineffective, but it is the government's burden to establish this. As the Seventh Circuit Court of Appeals noted in *Wahlberg v. Israel*, "if the state is not a passive spectator of an inept defense, but a cause of the inept defense, the burden of showing prejudice [under *Strickland*] is lifted. It is not right that the state should be able to say, 'sure we impeded your defense – now prove it made a difference.'"[19] Only after the system within which public attorneys work is found to be structurally sound, as defined and prospectively determined by a *Cronic* and *Powell* analysis, can *Strickland*'s two-prong test be used to retrospectively measure the effectiveness of specific attorneys who work within those structurally sound indigent defense systems.

Six state court decisions have allowed systemic class action lawsuits to proceed under this Cronic analysis:

1. Duncan v. Michigan[20] (2009)

The national and state American Civil Liberties Union (ACLU), along with two law firms, filed a class action lawsuit in February 2007 on behalf of all current and future indigent defendants charged with felonies in three Michigan counties, suing the counties as well as the State of Michigan.[21] The complaint alleged that the state had done "nothing to ensure that any county has the funding or the policies, programs, guidelines, and other essential resources in place to enable the attorneys it hires to provide constitutionally adequate legal representation."[22] Though the three counties were the focus of the complaint, the ACLU acknowledged that the types of harms suffered by indigent defendants were "by no means limited or unique" to just the three named counties.

The state and counties made a wide variety of claims in a lengthy effort to get the suit dismissed, including lack of standing, governmental immunity, and separation of powers. The trial court denied the state and counties' motion, and the governments appealed. In a detailed 53-page ruling, the Michigan Court of Appeals affirmed the trial court's decision that the case could go forward, stating:

> We cannot accept the proposition that the constitutional rights of our citizens, even those accused of crimes and too poor to afford counsel, are not deserving and worthy of any protection by the judiciary in a situation where the executive and legislative branches fail to comply with constitutional mandates and abdicate their constitutional responsibilities, either intentionally or neglectfully. If not the courts, then whom . . . , concerns about costs and fiscal impact, concerns regarding which governmental entity or entities should bear the costs, and concerns about which governmental body

[19] 766 F.2d 1071, No. 84-2435, ¶27 (7th Cir. 1985).
[20] Duncan v. Michigan, No. 278652 (Mich. Ct. App. June 11, 2009).
[21] Complaint, Duncan v. Michigan, No. 07-000242-CZ (Mich. Cir. Ct. filed Feb. 22, 2007), *available at* https://www.clearinghouse.net/chDocs/public/PD-MI-0003-0001.pdf.
[22] *Id*. at 3.

> or bodies should operate an indigent defense system cannot be allowed to trump constitutional compliance, despite any visceral reaction to the contrary.[23]

The Michigan Supreme Court affirmed as well.[24] After more than six years of litigation, the Michigan legislature passed comprehensive reform legislation in July 2013, and the ACLU dismissed the lawsuit as moot. The statutory changes created the Michigan Indigent Defense Commission; a state agency with authority to promulgate and enforce right to counsel standards – including compensation standards - across the state.

2. Hurrell-Harring v. New York[25] (2010)

In 2007, the New York Civil Liberties Union Foundation (NYCLU) and a private law firm filed a class action lawsuit on behalf of all indigent criminal defendants in five counties who were being or would be represented by publicly provided attorneys, suing the state and the five counties.[26] The suit argued that public defense counsel did not "have the resources and the tools" necessary to provide the meaningful and effective assistance of counsel required by the constitution, in part because the state had "abdicated it responsibility" and left the counties with the responsibility "to establish, fund and administer their own public defense programs."[27] As a result, according to the lawsuit, many public defense providers failed to:

> [P]rovide representation for indigent defendants at all critical stages of the criminal justice process, especially arraignments where bail determinations are made; meet or consult with clients prior to critical stages in their criminal proceedings; investigate adequately the charges against their clients or obtain investigators who can assist with case preparation and testify at trial; employ and consult with experts when necessary; file necessary pre-trial motions; or provide meaningful representation at trial and at sentencing.[28]

As the complaint explained, "the failings in [the five sued counties] and the types of harms suffered by the named plaintiffs [were] by no means limited or unique" to those counties, but were instead statewide problems.[29] The trial court denied a motion to dismiss the lawsuit, but an intermediate court granted the dismissal.

In 2010, the New York Court of Appeals[30] reinstated the lawsuit.[31] The court found that the complaint alleged claims of both outright denial of the right to counsel and constructive

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23 Duncan v. Michigan, No. 278652, at 3 (Mich. Ct. App., June 11, 2009).
24 Duncan v. Michigan, 780 N.W.2d 843 (Mich. 2010), *vacated*, No. 139345-7(108)(109) (July 16, 2010), *and reinstated*, No. 139345-7(113) (Nov. 30, 2010).
25 Hurrell-Harring v. New York, 930 N.E.2d 217 (N.Y. 2010).
26 Class Action Complaint, Hurrell-Harring v. New York , No. 8866-07 (N.Y. Sup. Ct. Albany Cty., filed Nov. 8, 2007), *available at* https://www.clearinghouse.net/chDocs/public/PD-NY-0002-0001.pdf.
27 *Id*. at 4.
28 *Id*. at 4-5.
29 *Id*. at 5.
30 The Court of Appeals is the highest court in New York.
31 Hurrell-Harring v. New York, 930 N.E.2d 217 (N.Y. 2010).

denial of counsel where attorneys were appointed in name only but were unavailable to assist their clients, thus "stat[ing] cognizable Sixth Amendment claims."

> These allegations state a claim, not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*.
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> Similarly, while variously interpretable, the numerous allegations to the effect that counsel, although appointed, were uncommunicative, made virtually no efforts on their nominal clients' behalf during the very critical period subsequent to arraignment, and, indeed, waived important rights without authorization from their clients, may be reasonably understood to allege non-representation rather than ineffective representation. Actual representation assumes a certain basic representational relationship. . . . It is very basic that "if no actual 'Assistance' for' the accused's 'defence' is provided, then the constitutional guarantee has been violated. . . ."
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> Collateral preconviction claims seeking prospective relief for absolute, core denials of the right to the assistance of counsel cannot be understood to be incompatible with *Strickland*. These are not the sort of contextually sensitive claims that are typically involved when ineffectiveness is alleged. The basic unadorned question presented by such claims whereas here the defendant-claimants are poor, is whether the State has met it obligation to provide counsel, not whether under all the circumstances counsel's performance was inadequate or prejudicial.[32]

Quoting *Strickland*, the court went on to note that "'[i]n certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.'"[33] The court held that the allegations contained in the class action lawsuit "state claims falling precisely within this described category. . . . Given the simplicity and autonomy of a claim for non-representation, as opposed to one truly involving the adequacy of an attorney's performance, there is no reason . . . why such a claim can not or should not be brought without the context of a completed prosecution."[34] Further, the court observed: "the right that plaintiffs would enforce—that of a poor person accused of a crime to have counsel provided for his or her defense—is the very same right that *Gideon* has already commanded the States to honor as a matter of fundamental constitutional necessity. There is no argument that what was justiciable in *Gideon* is now beyond the power of a court to decide."[35]

After seven years of litigation, the lawsuit settled by agreement in October 2014[36] and was approved by the trial court on March 11, 2015. Under the settlement, the state was required to: (1) pay 100% of the cost for indigent representation in the five named

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32 *Id*. at 224-25.
33 *Id*. at 225.
34 *Id*. at 225-26.
35 *Id*. at 227.
36 *See* Stipulation and Order of Settlement, Hurrell-Harring v. New York, No. 8866-07 (N.Y. Sup. Ct. Albany Cty., filed Oct. 21, 2014, *available at* https://www.nyclu.org/sites/default/files/releases/10.21.14_hurrellharring_settlement.PDF.

counties; (2) ensure that all indigent defendants are represented by counsel at their arraignment; (3) establish and implement caseload standards for all attorneys; and (4) assure the availability of adequate support services and resources. In 2017, the state agreed to extend the settlement to apply to all counties.

3. Heckman v. Williamson County, Texas[37] (2012)

Five indigent defendants facing misdemeanor charges in Texas that could lead to up to a year's incarceration brought a civil class action lawsuit in 2006 claiming they had been or would be denied their right to counsel. The complaint alleged that the county failed to "inform accused persons of crime of their right to counsel," provided "inaccurate and misleading information about the right to appointed counsel in order to discourage requests for counsel," encouraged defendants "to waive their right to counsel and speak directly to prosecutors," and threatened defendants who asserted the right to counsel with financial sanctions, while delaying or denying appointment of counsel to individuals who were "eligible for court-appointed counsel under Texas and federal law."[38] The indigent defendants sued the county and several of its judges, seeking injunctive and declaratory relief to stop the violations of their right to counsel and of the rights of all similarly situated indigent misdemeanor defendants. The trial court denied a motion to dismiss the lawsuit, but a court of appeals reversed and granted the dismissal.

On review in 2012, the Texas Supreme Court reinstated the lawsuit.[39] First, the court held that the indigent defendants had standing to bring their claims in a civil lawsuit because they had pled facts demonstrating that they were being denied their right to counsel, that the denial of their right to counsel was fairly traceable to the county and its judges, and that the requested relief would remedy the denial. By the time the Texas high court considered the case, all of the named individuals had been appointed counsel and all of their criminal cases had ended. The court did not find the case to be moot however, because the denial of the right to counsel was "inherently transitory"—that is, it is of short duration and it was likely that other people would also be denied their right to counsel. Importantly, the court said:

> The U.S. Supreme Court has described the right to counsel as 'indispensable to the fair administration of our adversary system of criminal justice.' In the words of one learned commentator, '[t]here is no more important protection provided by the Constitution to an accused than the right to counsel.' Like all participants in our judicial system, and indeed all members of our society, we take seriously an allegation that any person or entity is systematically depriving others of such a fundamental right.[40]

The Texas Supreme Court remanded the case back to the trial court to determine whether

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37 No. 10-0671 (Tex. June 8, 2012).
38 Plaintiff's Second Amended Class Action Petition at 2-3, Heckman v. Williamson County, No. 10-0671 (Tex. filed July 21, 2006) (on file with the Sixth Amendment Center).
39 Heckman v. Williamson County, No. 10-0671 (Tex. June 8, 2012).
40 *Id*.

changes in the practices of appointing counsel in Williamson County guaranteed that future indigent misdemeanor defendants would not be deprived of their right to counsel. The lawsuit subsequently settled in 2013 when Williamson County agreed to put in place procedures ensuring defendants will not be encouraged to waive the right to counsel or communicate with prosecutors prior to the court ruling on their requests for appointed counsel.[41] The committing magistrate must report all requests for counsel to the county court of law within twenty-four hours, and provide every defendant with written information on how to contact the indigent defense office to obtain information about their request for counsel. Attorneys representing defendants must now be provided with a defendant's contact information so that the attorney may make every reasonable effort to contact the defendant no later than the end of the first working day after the date the attorney is appointed.

4. Phillips v. California[42] (2016)

Represented by various branches of the ACLU and a private law firm, in 2015, a Fresno County attorney, a family member of two indigent defendants, and a former indigent defendant filed a class action lawsuit against the state and county seeking to protect the right to counsel of all indigent persons charged with crimes in the county.[43] The complaint alleged that the state is responsible for providing indigent defendants with meaningful and effective assistance of counsel, but that "California has delegated its constitutional duty to run indigent defense systems to individual counties" and does not provide any oversight to ensure those county systems actually provide constitutionally required representation.[44] In particular, because the state requires the counties to bear the cost of providing representation to indigent people and at the same time "places strict limits on the ability of cities and counties to raise revenue, . . .
indigent defense services vary widely across the state, and some counties with the highest percentages of indigent defendants–like Fresno County–also have the lowest levels of per capita funding due to an impoverished tax base."[45] The lack of oversight and funding, according to the lawsuit, has resulted in a severe shortage of attorneys and support to provide representation to the poor, meaning that attorneys do not "have adequate time and resources to meet with and counsel their clients, investigate, conduct legal research, file and litigate appropriate motions, and take cases to trial when their clients wish to contest the charges."[46]

In denying a motion to dismiss, the trial court declared that "[t]he State cannot disclaim its constitutional responsibilities merely because it has delegated such responsibilities to its

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41 *See* Joint Motion to Dismiss, Heckman v. Williamson County, No. 06-453-C277 (Tex. 277th J.D.C. filed Jan. 14, 2013), *available at* http://sixthamendment.org/wp-content/uploads/2013/01/Joint-Motion-to-Dismiss-Heckman-et-al-v.-Williamson-County-et-al-.pdf.

42 No. 15-CE-CG-02201 (Cal. Super. Ct. Apr. 13, 2016), *available at* https://www.aclu.org/sites/default/files/field_document/phillipsvcalifrulinginstatemotiondismiss.pdf.

43 Verified Petition, Phillips v. California, No. 15-CE-CG-02201 (Cal. Super. Ct. filed July 14, 2015), *available at* https://www.aclu.org/sites/default/files/field_document/file_stamped_phillips_v_state_of_california_complaint.pdf.

44 *Id*. at 6.

45 *Id*. at 6-7.

46 *Id*. at 10-11.

municipalities . . . [n]or can the State evade its constitutional obligation by passing statutes. . . . The State remains responsible, even if it delegated this responsibility to political subdivisions."[47] Then, the court held that "[s]ystemic violations of the right to counsel can be remedied through prospective relief," noting that the lawsuit does not challenge individual convictions, but instead "claim[s] that the State systematically deprives Fresno County indigent defendants of the right to counsel," and that "mere token appointment of counsel does not satisfy the Sixth Amendment."[48] Therefore, "plaintiffs need not plead and prove the elements of ineffective assistance as to specific individuals in order to state a cause of action" for prospective relief.[49]

5. Kuren v. Luzerne County, Pennsylvania[50] (2016)

In 2012, the chief public defender for Luzerne County and three indigent defendants facing incarceration in criminal prosecutions but who were denied representation by the public defender office filed a class action lawsuit against the county.[51] The complaint alleged that the county "failed to allocate sufficient resources to provide constitutionally adequate representation for indigent adult criminal defendants
. . . resulting in the provision of sub-constitutional representation to many indigent criminal defendants and the complete deprivation of representation to many others."[52] In particular, lack of funding by the county meant there were not enough attorneys to represent everyone who was entitled to public counsel. And for those who did receive an attorney, that attorney did not always have knowledge of the relevant law, was not always provided in a timely fashion and was not always present at all critical stages of a case, was often unable to investigate the facts, frequently failed to consult with clients to ensure the ability to make informed decisions, and was often unable to provide representation with reasonable diligence and promptness. The lawsuit asked the court to compel the county to provide adequate funding. After the trial court dismissed the case and an intermediate court affirmed that dismissal, the case went to the Pennsylvania Supreme Court on appeal.

In 2016, Pennsylvania's high court reversed the dismissal and ruled that indigent defendants have the right to prospectively challenge "systemic violations of the right to counsel due to underfunding, and to seek and obtain an injunction forcing a county to provide adequate funding to a public defender's office,"[53] at the outset of a case before having to suffer from denial of counsel. The court said it was "obvious" that "the mere existence of a public defender's office and the assignment of attorneys by that office" was not sufficient to satisfy the right to counsel, because "[i]t is the defense itself, not the

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47 Phillips v. California, No. 15-CE-CG-02201, at 3-4 (Cal. Super. Ct. Apr. 13, 2016), *available at* https://www.aclu.org/sites/default/files/field_document/phillipsvcalifrulinginstatemotiondismiss.pdf.

48 *Id*. at 4-5.

49 *Id*. at 6.

50 146 A.3d 715 (Pa. 2016), *available at* http://www.pacourts.us/assets/opinions/Supreme/out/J-47A-2016mo%20-%2010282709712025453.pdf?cb=1.

51 Class Action Complaint, Flora v. Luzerne County, No 04517 (Pa. Ct. Com. Pl. filed Apr. 10, 2012), *available at* https://www.clearinghouse.net/chDocs/public/PD-PA-0002-0001.pdf, *appealed sub nom*. Kuren v. Luzerne County, 146 A.3d 715 (Pa. 2016).

52 *Id*. at 1-2.

53 Kuren v. Luzerne County, 146 A.3d 715, 178 (Pa. 2016), *available at* http://www.pacourts.us/assets/opinions/Supreme/out/J-47A-2016mo%20-%2010282709712025453.pdf?cb=1.

lawyers as such, that animates *Gideon's* mandate."[54] If the appointed lawyers cannot provide a defense, "the promise of the Sixth Amendment is broken." The court observed that "*Strickland* does not limit claims asserting *Sixth Amendment* violations to the post-conviction context," and it found that the *Strickland* test of ineffective assistance of counsel should be used by courts in evaluating post-conviction claims, but that "[a]pplying the *Strickland* test to the category of claims at bar would be illogical."[55] Prospective relief "is available, because the denial of the right to counsel,
whether actual, or as here, constructive, poses a significant, and tangible threat to the fairness of criminal trials, and to the reliability of the entire criminal justice system."[56] The court concluded:

> The right to counsel is the lifeblood of our system of criminal justice, and nothing in our legal tradition or precedents requires a person seeking to vindicate that right to wait until he or she has been convicted and sentenced. To so hold would undermine the essentiality of the right during the pretrial process. It would render irrelevant all deprivations of the right at the earliest stages of a criminal process so long as they do not clearly affect the substantive outcome of a trial. If the right to counsel is to mean what the Supreme Court has consistently said it means, this view cannot prevail. A person has the same right to counsel at a preliminary hearing as he or she does at a sentencing hearing. It would confound logic to hold that the person can only seek redress for the latter stages of the criminal process.[57]

6. Tucker v. Idaho[58] (2017)

In 2015, the ACLU of Idaho and a private law firm filed a complaint on behalf of four indigent people who were each assigned a public defender but nonetheless were not receiving actual representation at various critical stages of their cases.[59] The complaint, suing the state and its Public Defense Commission, alleged that Idaho's indigent defense systems lacked structural safeguards to protect the independence of defenders, made widespread use of flat-fee contracts, had extraordinarily high attorney caseloads, and lacked standards, training, and supervision, among other things. The complaint stated:

> Despite amendments to Idaho's public-defender statutes that were passed in 2014 through a bill enacted as the "Idaho Public Defense Act," the current, patchwork public-defense arrangement in Idaho remains riddled with constitutional deficiencies and fails, at all stages of the prosecution and adjudication processes, to ensure adequate representation for indigent defendants in both criminal and juvenile proceedings in Idaho.[60]

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54 *Id*. at 735.
55 *Id*. at 746.
56 *Id*. at 744.
57 *Id*. at 747.
58 No. 43922 (Idaho, Apr. 28, 2017), *available at* https://isc.idaho.gov/opinions/43922.pdf.
59 Class Action Complaint, Tucker v. Idaho, No. CV-OC-2015-1024 (Idaho 4th J.D.C. filed June 17, 2015), *available at* https://www.aclu.org/sites/default/files/field_document/acluidahopubdefensecomplaintfilestamp-sm.pdf.
60 *Id*. at 7-8.

The class action sought declaratory and injunctive relief on behalf of all indigent persons charged with an offense that carries jail time, and who cannot afford an attorney and the necessary expenses of a defense, to remedy the state's systemic failure to provide effective legal representation. The trial court dismissed the lawsuit and the plaintiffs appealed to the Idaho Supreme Court.

On April 28, 2017, the Idaho Supreme Court reinstated the lawsuit against the state and the PDC and remanded the case back to the trial court.[61] The court found that indigent defendants "suffered ascertainable injuries by being actually and constructively denied counsel at critical stages of the prosecution, which they allege are the result of deficiencies in Idaho's public defense system."[62] The alleged injuries are "fairly traceable" to the state and the public defense commission, since the state "has ultimate responsibility to ensure that the public defense system passes constitutional muster."[63] The court also found that the public defense commission is responsible for, among other things, promulgating rules governing training, caseload, and workload requirements for public defenders that would bind the counties. The courts, according to the opinion, are capable of providing relief to address the injuries alleged in the lawsuit. "[T]he State has the power–and indeed the responsibility–to ensure public defense is constitutionally adequate. . . . Given that the counties have no practical ability to effect statewide change, the State must implement the remedy."[64] And, particularly under the expanded authority and duty given to the public defense commission by 2016 legislation, "the PDC can promulgate rules to ensure public defense is constitutionally adequate and, moreover, can intervene at the county level."[65] Lastly, the court held that the "requested relief does not implicate the separation of powers doctrine. The right to counsel . . . is not entrusted to a particular branch of government."[66]

Importantly, the court explained that the two-pronged ineffective assistance of counsel test of *Strickland* "is inapplicable when systemic deficiencies in the provision of public defense are at issue. The issues raised in this case do not implicate *Strickland*."[67] Instead, the claims "alleged systemic, statewide deficiencies plaguing Idaho's public defense system. Appellants seek to vindicate their fundamental right to constitutionally adequate public defense at the State's expense," as required by the federal and state constitutions.[68] "They have not asked for any relief in their individual criminal cases. Rather, they seek to effect systemic reform."[69] Therefore, the lower court wrongly applied the *Strickland v. Washington* standard to the lawsuit, because *Strickland* is inapplicable when systemic deficiencies in the provision of public defense are at issue. Instead, the court held the appropriate standard is that of *United States v. Cronic*: "[a] criminal defendant who is

61 Tucker v. Idaho, No. 43922 (Idaho Apr. 28, 2017), *available at* https://isc.idaho.gov/opinions/43922.pdf.
62 *Id*. at 18.
63 *Id*. at 9.
64 *Id*. at 15.
65 *Id*. at 16.
66 *Id*. at 21.
67 *Id*. at 7.
68 *Id*.
69 *Id*.

entitled to counsel but goes unrepresented at a critical stage of prosecution suffers an actual denial of counsel and is entitled to a *presumption of prejudice*."[70]

[70] *Id.*