

Quality Control for Indigent Defense Contracts

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This Comment examines the difficulties created by implementing low-bid contract systems for indigent defense. The Author concludes that low-bid systems as currently implemented promote underbidding which, in turn, creates unreasonable caseloads, fails to reduce costs, and may deprive indigent defendants of meaningful representation. Accordingly, she proposes statutory requirements for awarding indigent defense contracts and maximum caseloads requirements for each contract attorney. She advocates that in the absence of a clear judicial standard for what constitutes meaningful representation, legislatures should require the contract systems to be based upon factors other than mere bid costs. The proposed statute requires an inquiry into other factors, such as counsel's experience and resources, in awarding indigent defense contracts.

INTRODUCTION

The administration of a modern indigent defense program requires a balanced concern for competent representation and affordability. Budgetary constraints have prompted the emergence of a low-bid contract system to provide counsel for indigents. Although the low-bid contract system is widely believed to be less expensive than other indigent defense systems, in reality, this may not be true. In fact, its implementation may cost more in the long term and may diminish the quality of representation afforded to indigent defendants.

In the low-bid contract system, the county government receives bids from private law firms to handle all or a portion of the county's indigent criminal cases. Often firms bid on only one area of indigent defense. For example, one firm may bid on the contract for felony assaults while another firm bids on the contract for misdemeanor arraignments. The county awards the contract to the firm or firms that submit the lowest bid, without taking into account the relative qualifications, competency, or resources of the bidding firms.¹

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1. See, e.g., *State v. Smith*, 140 Ariz. 355, 360, 681 P.2d 1374, 1379 (1984). Some jurisdictions employ a modified version of the low-bid contract system. These jurisdictions award the contract to a nonprofit defender association, which in turn, hires its own attorneys. Presumably, in these systems the bid price is still relevant, but the county may also rely on the nonprofit

The first Part of this Comment introduces the difficulties inherent in the contract system for indigent defense. Section A examines two empirical studies that compare contract systems with both public and private forms of indigent defense.² These studies conclude that although contract defense attorneys spend less time and resources per case than more traditional indigent defense attorneys, the low-bid contract system may not be cost-effective,³ despite its reputation to the contrary.

A "cost-effective" system, as used in this Comment, provides meaningful representation to indigents at the minimum cost necessary to achieve this level of representation. Other factors, such as counsel's experience and resources, should be considered along with cost to determine the cost-effectiveness of a particular system. Section A demonstrates that the low-bid contract system is not always cost-effective, because it may provide lower quality representation to the individual indigent and cost more in the long run than other systems.

Section B examines the constitutionality of contract systems for indigent defense. This Section analyzes an Arizona Supreme Court case that found that the representation provided by a low-bid contract system presumptively violated an indigent's constitutional rights. The Section then places this case in context with the Supreme Court's decisions concerning the sixth amendment's guarantee of effective assistance of counsel. Finally, Section B looks at other judicial responses to the contract system and suggests possible legal arguments for indigents challenging effective representation under a contract system. This Section concludes that absent a judicial presumption of prejudice based on the system's deficiencies, a constitutional challenge to the contract system may only succeed if a defendant can show that her counsel's specific errors actually prejudiced the result of the case.

Part II of this Comment proposes a legislative response to the

organization to solicit supplemental funds for indigent representation. *See, e.g.,* Repard, *Another Experiment in San Diego*, CAL. LAW., March 1988, at 26; *see also In Re* Articles of Inc. of Defenders Ass'n of Philadelphia, 453 Pa. 353, 360-66, 307 A.2d 906, 910-12 (determining that a nonprofit defenders association was sufficiently independent from city government to avoid any conflict of interest), *cert. denied*, 414 U.S. 1079 (1973). Although these modified versions may gain access to more indigent defense funds, other problems of ineffective representation addressed in this Comment may similarly apply to these systems.

2. There are several varieties of indigent defense systems. For example, many larger jurisdictions maintain a fully staffed public defender office. In others, the local government uses an assigned counsel system, where the court appoints counsel usually from a rotation list comprised of names of local bar members. *See* N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING 7-8 (1982); *see also* Houlden & Balkin, *Quality and Cost Comparisons of Private Bar Indigent Defense Systems: Contract vs. Ordered Assigned Counsel*, 76 J. CRIM. L. & CRIMINOLOGY 176, 177-80 (1985) (presenting model for ranking assigned counsel systems).

3. *See, e.g.,* Houlden and Balkin, *supra* note 2, at 197-200; *see also* N. LEFSTEIN, *supra* note 2, at 50-54 (describing the problems of the contract system used in Clark County, Washington).

problems presented by existing contract systems. It advocates imposing maximum caseload provisions for contract attorneys and replacing the low-bid system with one that awards indigent defense contracts based upon considerations of effectiveness as well as cost. These would include counsel's competence, experience, and resources.

This Comment concludes that alternative systems for providing indigent defense should be encouraged. Innovative systems, however, must be reformed once they display signs of inhibiting meaningful assistance of counsel, either in specific instances or systemically. The contract system, if implemented correctly, may in fact provide better representation for the scarce resources available for indigent defense. The proposals in this Comment address the causes of these systemic defects so the alternative systems can better approach the ideal of meaningful representation at a reasonable cost.

I

THE CONTRACT SYSTEM FOR INDIGENT DEFENSE: AN EMPIRICAL AND CONSTITUTIONAL ANALYSIS

This Part discusses the attributes and the constitutionality of low-bid contract systems. Section A examines two comparative studies, while Section B focuses on the sixth amendment guarantee of effective assistance of counsel.

A. *Low-bid Contract Systems: An Empirical Evaluation*

Contracting out indigent defense work to local attorneys and law firms is not a novel idea. For many years, county governments have farmed out indigent criminal cases to lawyers on a contract basis.⁴ These systems have been operated both in smaller communities and larger municipalities,⁵ either as their sole means of providing representation to indigents⁶ or to supplement an inadequate public defender or assigned counsel program.⁷

It is likely that indigent defense administrators switch to contract systems because, among other things, they hope to avoid the fixed costs

4. See, e.g., *Smith*, 140 Ariz. at 360, 681 P.2d at 1379 (county contract system in effect for past fourteen years); *Defenders Ass'n of Philadelphia*, 453 Pa. at 357, 307 A.2d at 909 (city contracted with nonprofit defenders organization in 1969 for counsel and for other services to indigents in various areas of representation).

5. See, e.g., *Defenders Ass'n of Philadelphia*, 453 Pa. 353, 307 A.2d 906 (Philadelphia); *Repard*, *supra* note 1 (San Diego); sources cited *infra* note 6.

6. See, e.g., *Smith*, 140 Ariz. 355, 681 P.2d 1374 (Mohave County, Arizona); N. LEFSTEIN, *supra* note 2, at F-14 (Ada County, Idaho).

7. See, e.g., N. LEFSTEIN, *supra* note 2, at F-4 (Maricopa County, Arizona); *id.* at F-21 (southeastern Kentucky); Turner, *Tuscon PD Office Clones Itself*, Nat'l L.J., Apr. 11, 1988, at 3, col. 1 (Tuscon public defender creates supplemental contract system).

associated with maintaining a public defender system. Contract attorneys are expected to absorb some of these costs while providing the same level of representation. Administrators therefore assume that these systems will save money. So far, these assumptions have proved to be incorrect,⁸ primarily because contract attorneys submit unrealistically low bids.⁹

Underbidding for indigent defense contracts produces a debilitating chain of events. Because their original bids were unrealistically low, contract attorneys often are not financially able to represent all indigents under the contract. This problem is exacerbated when, for example, a contract attorney agrees to represent all indigents in the region at a particular stage in the proceedings. If the number of cases exceeds the predicted caseload, the attorneys are often expected to absorb the excess cases. Under the terms of many of the contracts, contract attorneys represented these excess cases at the same cost per case.¹⁰ This practice tends to cause firms who lack sufficient attorneys or staff to cut back on their services to all clients while collecting the same average revenues.¹¹ Thus, contract attorneys must either appeal to county administrators for more funds, requiring the administrators to exceed their indigent defense budgets to supply the necessary resources and thereby defeating the purpose of a bid system,¹² or must spend less time representing their indigent clients.¹³

There is also some evidence of a systemic conflict of interest. Specifically, contract attorneys may bid for indigent defense work to pay for their overhead expenses and thus deliberately cut back on services in order to maintain profits.¹⁴ The system encourages this behavior, since

8. See, e.g., N. LEFSTEIN, *supra* note 2, at 50 (contract system in Clark County, Washington experienced cost increases).

9. See *infra* text accompanying notes 47 (discussing the study's caveat that the contract system's cost-efficiency may decrease if contract attorneys submit unrealistically low bids) and 142-143 (discussing the deleterious effects of unrealistically low bids on the contract system).

10. Mayer, *Low Bid, Low Service*, AM. LAW., Apr. 1984, at 33, 34.

11. *Id.* at 35 (firm that received contract to represent 2400 misdemeanor cases actually represented 4200, causing each contract attorney within the firm to represent more cases); *id.* at 106-07 (describing harried schedule of contract attorneys).

12. See, e.g., N. LEFSTEIN, *supra* note 2, at 50-51.

13. See generally Houlden & Balkin, *supra* note 2.

14. See, e.g., N. LEFSTEIN, *supra* note 2, at F-14 (in the contract system implemented in Ada County, Idaho, there was "a general feeling expressed by members of the Ada County bar that law firms regard an indigent defense contract with the county as a means to meet overhead while the firm establishes a strong private practice"); *id.* at 51 (describing how an indigent defense contract in essence paid a contract attorney \$18,000 in salary, and furnished him with an office and a secretary, thereby providing him with \$25,000 in either profit or indirect expenses); Mayer, *supra* note 10, at 34 ("[T]he motivation [for bidding on an indigent defense contract with San Diego County] was primarily one of making sure that the firm has enough business to keep going." (quoting William Milloy, senior partner of the firm awarded San Diego's misdemeanor arraignment contract)).

attorneys are paid by the case, not by the hour.¹⁵ Thus, the systems often cost more money, and force contract attorneys to labor under financial disincentives, or conflicts of interest, to represent indigents adequately under the contract.

Two empirical studies compared the quality of representation in contract systems to that in the more traditional public defender or private-assigned counsel systems.¹⁶ Both studies indicate that, in practice, the contract system may provide less effective representation and fewer legal services. The studies also suggest that ultimately contract systems may cost more because of underbidding.

The first study, conducted by Norman Lefstein for the American Bar Association Committee on Legal Aid and Indigent Defendants,¹⁷ compared the quality of representation provided by contract systems in several counties, including Clark County, Washington, to that provided by these counties' previous public defender systems. Although Clark County replaced its public defender program with the contract system in order to conserve funds,¹⁸ indigent defense costs rose, primarily from an unexpected number of felony cases.¹⁹

Clark County budgeted \$416,796 for indigent defense to be divided up as follows:²⁰

- 1) contracts for felony cases in Superior Court: \$223,000
- 2) contracts for juvenile defense in Superior Court: \$52,800
- 3) contracts for misdemeanor defense in District Court: \$38,950
- 4) "professional services:" \$102,046.

The "professional services" funds were paid to noncontract attorneys who represented excess felony cases and conflict of interest cases, and for expert witnesses.²¹ The county exceeded its budget by over \$100,000, largely due to these payments to assigned, noncontract counsel.²²

In Lefstein's opinion, however, the rise in cost did not increase the quality of representation. Instead, he noted a significant decline in the quality of representation in misdemeanor cases.²³ Lefstein cited several

15. Repard, *supra* note 1, at 25 ("Some contracting lawyers [in San Diego] . . . complained that the low-bid system encouraged plea bargaining, since lawyers were paid by the case, not by the hour.").

16. N. LEFSTEIN, *supra* note 2; Houlden & Balkin, *supra* note 2. Unlike these studies, this Comment does not seek to determine whether contract systems operate more or less efficiently than public defender programs or private-assigned counsel systems. Instead, this Comment merely uses these studies to illustrate the characteristics and limitations of contract systems.

17. N. LEFSTEIN, *supra* note 2.

18. *Id.* at 50.

19. *Id.*

20. *See id.* at 50.

21. *Id.*

22. *Id.*

23. *Id.* at 53. Lefstein's study compared the actions of the public defender agency and the contract system within the same time period. *See id.* at 52.

disparities in the level of representation provided by the contract system as compared to the former public defender office in Clark County. First, for example, the previous public defender agency requested more jury trials and *de novo* appeals, filed more motions to suppress, and took more cases to trial than contract counsel.²⁴ Second, the public defender refused to permit its clients to plead guilty at the first court appearance, while clients of contract attorneys frequently pled guilty at the first proceeding, often only a few minutes after meeting with their attorney for the first time.²⁵ Third, although the public defender had access to its own staff investigator, its office requested funds for expert witnesses on several occasions.²⁶ Contract attorneys filed no such requests.²⁷ Finally, the district court received several complaints from defendants represented by contract counsel that they could not get in touch with their attorney or had not yet met with counsel, but received none regarding the public defender.²⁸ Lefstein's study found similar problems, including case overload, in the representation of juveniles in Clark County.²⁹

Although in felony cases, attorneys in Clark County were not overworked,³⁰ they had different perceptions of how much they were compensated per case. One of the attorneys estimated that his compensation per hour on contract cases was \$20 to \$30, but Lefstein noted that this attorney did not perceive lower compensation as a disincentive because the firm's lawyers were "quite interested in criminal defense practice."³¹ Another attorney estimated that he earned "a solid \$50 an hour."³² In Lefstein's opinion, the second attorney's higher valuation of his hourly rate suggested that "the amount of time spent on indigent defense cases

24. During the first five months of 1979, the public defender requested 30 jury trials and took 11 cases to trial, filed seven appeals, and the evidence also suggests, filed several motions to suppress. During the first five months of 1980, contract attorneys requested 11 jury trials, tried two cases, and filed no *de novo* appeals or motions to suppress. *Id.* at 52.

Although Lefstein does not state how many cases the public defender handled during this time, he states that during the first three months of 1980, contract attorneys represented at least 273 misdemeanor cases, *id.* at 51, and estimates that contract attorneys handled a total of 900 misdemeanors in 1980. *Id.* at 50 n.109.

25. *Id.* at 52. The public defender reasoned that their attorneys first had to learn more about the case before they could intelligently advise the defendant on a plea.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 53. The deficiencies of Clark County's juvenile system will not be examined here since juvenile defense raises many issues outside the focus of this Comment.

30. Rather, the problem in Clark County appeared to be that it did not contract for enough felony attorneys, perhaps due to inaccurate felony caseload projections. Lefstein interviewed four felony contract attorneys, none of whom contracted to represent more than 75 felony cases per year. None reported that his pending caseload ever exceeded 15 to 20 cases. *Id.* at 53.

31. *Id.* at 54.

32. *Id.*

was considerably less than the first lawyer.”³³ This assessment is reinforced by the second attorney’s statement that it would not be economically feasible for his firm to continue indigent defense work if the hourly rate dropped below \$40 an hour, and his opinion that when compensation is reduced, there are “a lot of little things you let slide, such as visiting clients and returning phone calls.”³⁴

The more recent study by Pauline Houlden and Steven Balkin compared the quality of representation in a contract jurisdiction to that of an ordered assigned counsel system.³⁵ The ordered assigned counsel system examined in the study used two separate lists of attorneys, one for felony representation and one for misdemeanor representation, and appointed private bar members from each list in rotation.³⁶ An administrator and a clerk, both under contract to the county to recommend counsel to the judges and to provide attorney services at line-ups, probation violation proceedings, and extradition cases, maintained the lists.³⁷ The administrator also filed monthly reports to a “monitoring committee,” consisting of one lower court judge, one appellate judge, two court administrators, and one county commissioner.³⁸

The contract system examined in the study involved two law firms under contract with the county at different times to represent all indigent defendants.³⁹ The county did not solicit bids; in both cases, an attorney with the contract firm approached the county with the bid.⁴⁰ The first firm, consisting of three attorneys, represented indigents from 1971 through 1979. In 1979, the county changed to a different firm that had submitted a substantially lower bid.⁴¹

Within the sample firm, one attorney administered the contract by keeping track of files and accounting for the time spent by each attorney on contract cases.⁴² Five of the firm’s younger, less experienced attorneys spent a substantial percentage of their time on contract cases, while

33. *Id.*

34. *Id.*

35. Houlden & Balkin, *supra* note 2. The study compared two jurisdictions of similar size and demographics. In 1980, the jurisdiction using the ordered assigned counsel system had a population of 228,059, and the contract jurisdiction had a population of 171,276. Other factors determining the degree of similarity included the percentage of Blacks, the percentage of labor force in manufacturing, the percentage growth in population, the per-capita income, the percentage of the population above poverty level, the crime rate, the percentage of county funds spent on indigent defense, and the number of cases filed. *Id.* at 183 n.34.

36. In the event a case required special skills, the administrator skipped over names on the list until she found an experienced attorney. *Id.* at 183.

37. *Id.*

38. *Id.* at 183 & n.36.

39. *Id.* at 184.

40. *Id.*

41. *Id.* The second firm offered to handle all cases in 1980 for \$45,000 less than the first firm.

42. *Id.* at 185.

three more experienced attorneys spent only ten to fifteen percent of their time on contract work.⁴³

This study found that the major difference in the level of performance between contract counsel and the ordered assigned counsel system involved the time and money spent on each case. In general, the study found that the contract system costs less per nontrial case⁴⁴ because contract attorneys spend fewer hours on each case⁴⁵ and make fewer appearances.⁴⁶ The researchers also noted that contract attorneys spend less time on their cases to conform to their own expectations of what their hourly rate should be.⁴⁷

While conceding that the contract system's streamlined representation costs less, the study contained two caveats. The first caveat questions the validity of the finding that the contract system is less expensive; the second warns that the quality of representation in a low-bid contract system may not satisfy constitutional standards.

First, the study noted that

a firm will greatly underbid to obtain a contract to encourage the initiation of this type of system and to end the public defender or ordered assigned counsel system that has been in use. After a period of time, the bidding process results in bids that cost the county more than its previous system of representation. Therefore, one should look at costs over time to judge which system costs less.⁴⁸

The study also cautioned that indigent clients "deserve adequate attorney services such as attorney time spent on a case, client interviews and case

43. *Id.* Three of these five younger attorneys were paid on a straight salary basis, while the other two were paid on a percentage basis according to how much money they earned for the firm. In computing this amount, the attorney received credit at his or her established hourly rate for time spent on contract cases. *Id.*

44. The ordered assigned counsel jurisdiction spent 2.5% of its county funds on indigent defense, while the contract system spent only 1.1% of its county funds on indigent defense. *Id.* at 183 n.34. The contract jurisdiction reported 7,025 cases filed compared to 4,974 cases filed in the ordered assigned counsel system. *Id.*

The contract system in nontrial felony cases spent \$91 per case while the ordered assigned counsel system spent \$292 per case. *Id.* at 198.

45. *Id.* at 196.

46. *Id.*

47. *Id.* at 181-82, 198. One indication that contract counsel spends less time on cases is the difference between contract counsel's and ordered assigned counsel's average number of days to sentencing in felony cases. For contract counsel in assault cases, the average time until sentencing was 42.1 days, while in the ordered assigned counsel system, the figure reached 160 days. *Id.* at 196. For drug cases, defendants reached sentencing in an average of 20.7 days in the contract jurisdiction, but in the assigned counsel system, defendants reached sentencing within 117.9 days. *Id.* For all nontrial felonies, contract counsel on average spent 2.80 hours on each case while ordered assigned counsel spent 7.18 hours. *Id.* at 198-99. In terms of court appearances, on average, contract counsel made 1.6 court appearances in felony assault cases, while ordered assigned counsel made 2.4 appearances. *Id.* at 196. For felony drug cases, contract counsel appeared an average of 2.0 times while ordered assigned counsel appeared 2.3 times. *Id.*

48. *Id.* at 199 n.52.

investigation. . . . Within this conceptual framework, the contract system may not be more cost-effective. [It] may be providing services at a lower cost, but it may be offering lower quality services."⁴⁹

The two studies reveal differences in the level and extent of representation in the low-bid contract system as compared to the more traditional public defender and assigned counsel systems. As Lefstein pointed out, contract systems are usually implemented to cut down on costs.⁵⁰ As these studies concluded, however, the contract system does not always prove to be less expensive. Both studies acknowledged that contract attorneys often submit unrealistically low bids that cannot meet the cost of representing the contract limit.⁵¹ In these cases, the county still must provide counsel for the cases that contract attorneys could not represent. Thus the systems frequently do not reduce costs, particularly if the county must hire new attorneys at a rate higher than the contract rate.

Cost alone, however, is not the sole criterion for providing effective assistance of counsel. Counties must provide meaningful representation to indigents, appropriate to the particular offense and circumstances involved in the case. The Lefstein study concluded that even where the county paid contract attorneys a higher rate to handle excess cases, the extra money spent did not increase the quality of representation. In fact, the study noted that the overall level of representation declined.⁵² Both the Lefstein study and the Houlden & Balkin study noted a disparity in the perceived hourly rate of different contract attorneys, finding that some attorneys spend less time and money on cases to conform to their own idea of what their hourly rate should be.⁵³ Moreover, the Houlden & Balkin study flatly stated that contract attorneys spend less time and money on each case than ordered assigned counsel.⁵⁴

The deficiencies in low-bid contract systems highlighted in these studies have had real consequences in the courts. The facts of the following case, *State v. Smith*,⁵⁵ are a striking illustration of the conclusions drawn by the studies concerning the quality of representation in a low-bid contract system.

B. Judicial Response to Systemic Inefficiencies

The primary vehicle for postconviction review of low-bid contract systems by indigent defendants is the claim that demonstrated systemic

49. *Id.* at 200.

50. N. LEFSTEIN, *supra* note 2, at 50.

51. *See id.* at 50 (Clark County's indigent defense budget exceeded contract bid amounts); Houlden & Balkin, *supra* note 2, at 199 n.52.

52. *See, e.g.,* N. LEFSTEIN, *supra* note 2, at 51-52.

53. *See id.* at 54; Houlden & Balkin, *supra* note 2, at 181-82, 198.

54. Houlden & Balkin, *supra* note 2, at 198-99.

55. 140 Ariz. 355, 681 P.2d 1374 (1984).

deficiencies violate the defendant's sixth amendment right to effective assistance of counsel. This Section first examines the opinion of the Arizona Supreme Court in *State v. Smith*, which found that one county's procedure for awarding indigent defense contracts was so inadequate that it created an inference that each indigent defendant represented under the system received ineffective assistance of counsel.⁵⁶ The Section then places *Smith* in context by surveying the U.S. Supreme Court's recent pronouncements on the sixth amendment right to effective assistance of counsel. Finally, this Section concludes with a discussion of several potential judicial responses to an indigent defendant's charge of ineffective assistance in a low-bid contract system.

1. State v. Smith: The Low-bid Contract System and Effective Assistance of Counsel

Mohave County, Arizona operated a low-bid contract system to handle all of its indigent defense representation.⁵⁷ Each May, the presiding judge invited all attorneys within the county to submit sealed bids for a share of the indigent defense work.⁵⁸ The county set no limitations on caseload or hours, did not evaluate a prospective attorney's ability or experience, and did not distinguish between the types of cases each contract attorney was expected to handle.⁵⁹

Although the bid letter stated that contract attorneys could receive additional compensation for unusually complex or time-consuming cases, it added that in the past fourteen years, there had never been a case that warranted extra funds.⁶⁰ In addition, bidders had to provide their own office space, equipment, clerical staff, and investigators.⁶¹

Once bids were submitted, the presiding judge prepared a cover letter summarizing the bid amount and the percentage of the contract work each attorney offered to accept and transferred the bids and letters to the county.⁶² The judge made no recommendation to the county, and did not provide any information on the prospective attorneys' experience or ability to handle the contract cases.⁶³

The county was then free to award the contract to any bidder it desired. In all cases except one, however, the county awarded the contract to the lowest bidders.⁶⁴ Once awarded the contract, each attorney

56. *Id.* at 362, 681 P.2d at 1381.

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

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* The only low bid ever rejected was submitted by an attorney who had once been held

was expected to handle the percentage of the caseload stipulated in the contract, regardless of the actual number of cases.⁶⁵

In 1981, Joe Smith was convicted of burglary, aggravated assault, and sexual assault, and was sentenced to thirty-six years in prison.⁶⁶ On appeal, Smith argued that Mohave County's low-bid contract system denied him effective assistance of counsel,⁶⁷ alleging that his contract attorney spent only two to three hours interviewing him and six to eight hours outside work on the case, due to an excessive caseload.⁶⁸

In *State v. Smith*,⁶⁹ the Arizona Supreme Court ordered the record expanded, and invited amicus curiae to comment on the constitutionality of Mohave County's contract system.⁷⁰ The court first addressed the propriety of Mohave County's use of the low-bid system to provide defense services to the indigent.⁷¹ The court found that the system as implemented violated the federal constitutional rights to due process and assistance of counsel.⁷² Two factors influenced the court's conclusion. First, attorneys, by handling excessive caseloads, could not consistently provide quality representation to their indigent clients. Although some defendants received adequate representation, others did not.⁷³

Second, as implemented, Mohave County's system violated ABA standards of criminal justice and NLADA guidelines on awarding indigent defense contracts. For example, Mohave County failed to consider the time each attorney must spend per case under her share of the indigent defense contract,⁷⁴ and did not provide support costs for investiga-

in contempt for failing to file a brief in an appeal, and had been the subject of repeated complaints. *Id.*

65. *Id.*

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

67. *Id.* at 359, 681 P.2d at 1378.

68. *Id.* at 359-60, 681 P.2d at 1378-79. Smith's attorney handled all indigent cases in the City of Kingman on a part-time basis, while maintaining a private civil practice. *Id.* at 361, 681 P.2d at 1380.

69. 140 Ariz. 355, 681 P.2d 1374 (1984).

70. *Id.* at 357, 681 P.2d at 1378-79.

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

72. The court did not find, however, that Mohave County's contract system violated the federal equal protection clause. Although the court noted that in comparison to defender programs in other Arizona counties, the contract system "is the least desirable and can result in inadequate representation," it nevertheless held that equal protection does not require territorial uniformity. *Id.* at 364, 681 P.2d at 1383 (citing *Griffin v. School Bd.*, 377 U.S. 218, 230 (1964); see *McGowan v. Maryland*, 366 U.S. 420, 427 (1961); *State v. Bryant*, 324 So. 2d 389, 393 (La. 1975)).

73. *Smith*, 140 Ariz. at 362, 681 P.2d at 1381.

74. *Id.* at 360-61, 681 P.2d at 1379-80. Both the ABA standards for criminal justice and the NLADA guidelines cited by the court provide that fees should be determined by the time and effort required in a case, complexity of issues, requisite skill, likelihood that other employment would be precluded, customary fees in the area for similar services, and defendant's ability to pay the fee. *Id.* at 360-61, 681 P.2d at 1379-8; see STANDARDS FOR CRIM. JUST. Standard 4-3.3 (2d ed. Supp. 1986); GUIDELINES FOR NEGOTIATING AND AWARDED INDIGENT DEFENSE CONTRACTS Guideline III-

tors, paralegals, and law clerks.⁷⁵ The county also failed to consider the competency of attorneys and the overall complexity of each case.⁷⁶ The court concluded that Mohave County's system "militates against adequate assistance of counsel for indigent defendants."⁷⁷

These circumstances, the court found, created a presumption that the system adversely affected the adequacy of representation in Mohave County.⁷⁸ Although the court concluded that the record in this case adequately rebutted the presumption,⁷⁹ it neglected to explain how the record demonstrated that Smith in fact received effective assistance. One commentator has suggested that the court simply wanted to put legislators and judges on notice concerning the deficiencies of low-bid contract systems, and to warn defense attorneys that their participation in the

9(b) (National Legal Aid and Defender Association Tent. Draft 1982) [hereinafter NLADA GUIDELINES].

The Arizona Supreme Court also cited with approval NLADA Guidelines establishing a maximum caseload for contract attorneys that would allow for sufficient time to provide effective representation to each client. *Smith*, 140 Ariz. at 361, 681 P.2d at 1380; NLADA GUIDELINES, *supra*, Guideline III-6 (caseloads should be apportioned with regard to whether an attorney is employed full-time, and to the mix of cases she is handling). The court noted that the defendant's attorney had handled a caseload far in excess of the maximum recommended by the NLADA. *Smith*, 140 Ariz. at 361, 681 P.2d at 1380-81; *see also infra* note 149 and text accompanying notes 142-49 (proposing the use of maximum caseload provisions in awarding indigent defense contracts).

The Arizona Supreme Court cautioned that handling excessive caseloads can result in both reversal on sixth amendment grounds and disciplinary action for violations of the Code of Professional Responsibility. *Smith*, 140 Ariz. at 363, 681 P.2d at 1382 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101 (Refusing Employment When Interests of the Lawyer May Impair His Independent Professional Judgment); 6-101 (Failing to Act Competently); 7-101 (Representing a Client Zealously); and 5-105 (Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer) (1980)); *see also* STANDARDS FOR CRIM. JUST. Standards 4-1.2(d) (2d ed. Supp. 1986) (an attorney should not accept more cases if doing so will limit her ability to provide each client with effective representation); 5-4.3 (neither defender organizations nor assigned counsel should accept workloads of such excessive size that quality representation suffers; the organizations or assigned counsel must take steps to reduce excessive caseloads).

75. *Smith*, 140 Ariz. at 362, 681 P.2d at 1381; *see also* STANDARDS FOR CRIM. JUST. Standard 4-4.1 (2d ed. Supp. 1986) (a lawyer has a duty to investigate; failure to make adequate pretrial investigation and preparation may be grounds for finding ineffective assistance of counsel).

76. *Smith*, 140 Ariz. at 362, 681 P.2d at 1381; *see* NLADA GUIDELINES, *supra* note 74, Guideline III-9(b).

77. *Smith*, 140 Ariz. at 362, 681 P.2d at 1381.

78. *Id.* at 362, 681 P.2d at 1381 ("so long as the County of Mohave fails to take into account the items listed above, there will be an inference that the adequacy of representation is adversely affected by the system").

The Arizona Supreme Court uses the term "inference" as if it were synonymous with "presumption," although the former should have a lesser evidentiary effect. Rather than lowering the defendant's burden of proof, however, the Arizona Supreme Court's "inference" shifts the burden of proof to the prosecution. *Id.* at 364-65, 681 P.2d at 1383-84. Thus, the court's "inference" of ineffectiveness is, in effect, a presumption.

79. *Id.* at 364, 681 P.2d at 1383. The court granted defendant a new trial, however, because the trial court erroneously excluded testimony of a crucial alibi witness. *Id.* at 359, 681 P.2d at 1378.

system could place them in violation of their ethical duties.⁸⁰

Smith was decided in 1984, the same year that the U. S. Supreme Court issued its two leading cases on effective assistance of counsel. In order to determine the vitality of *Smith* in light of these cases, the next subsection discusses the Supreme Court's jurisprudence concerning effective assistance of counsel.

2. Sixth Amendment Guarantee of Effective Assistance of Counsel

The sixth amendment to the Constitution guarantees each criminal defendant the right to counsel.⁸¹ Although the ancillary right to effective counsel⁸² was originally based in the due process clause,⁸³ the U.S. Supreme Court held in 1942 that the right stemmed directly from the sixth amendment.⁸⁴ The right to effective assistance of counsel is held equally by those criminal defendants who retain private counsel and by indigents for whom the court appoints counsel.⁸⁵ Although the Supreme Court readily found a right to effective assistance of counsel, it has had difficulty articulating meaningful standards to evaluate this right. In its most recent pronouncements on the right to effective counsel, the Court in *United States v. Cronin*⁸⁶ and *Strickland v. Washington*⁸⁷ set forth two requirements for successfully asserting ineffective assistance of counsel. First, defendants must show that counsel's advice fell below an objective level of reasonable competence demanded of attorneys⁸⁸ and then must demonstrate that counsel's performance actually prejudiced the defendant.⁸⁹

80. Mounts, *The Right to Counsel and the Indigent Defense System*, 14 N.Y.U. REV. L. & SOC. CHANGE 221, 226-27 & nn.25-26 (1986).

81. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The U.S. Supreme Court further extended the right to appointed counsel to any indigent charged with a crime that could result in his imprisonment in *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

82. In general, the right to effective counsel extends to all proceedings where the defendant has a right to have counsel appointed under any constitutional provision. W. LAFAYE & J. ISRAEL, CRIMINAL PROCEDURE, § 11.7(a), at 506 (1985); see *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982) (no right to effective counsel at second level of appeal since there is no right to appointed counsel at this stage); *Anders v. California*, 386 U.S. 738, 744 (1967) (where indigent defendant has a constitutional right to appointed counsel on appeal, attorney must support client's appeal to the best of her ability).

83. See *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (trial court's failure to appoint counsel for defendants in hostile environment denied them due process of law).

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

85. *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980) ("A proper respect for the Sixth Amendment disarms petitioner's contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel. . . . [W]e see no basis for drawing a distinction between retained and appointed counsel.").

86. 466 U.S. 648 (1984).

87. 466 U.S. 668 (1984). The two cases were decided on the same day.

88. *Strickland*, 466 U.S. at 687-88.

89. *Id.* at 687; *Cronin*, 466 U.S. at 658.

Although the Court will not presume an active conflict, it will presume prejudice from such conflicts when there has been a "breakdown in the adversarial process."⁹⁰ Following this theory, courts have presumed prejudice against a defendant where she is denied representation altogether,⁹¹ or at least during a substantial portion of the proceedings;⁹² where counsel entirely fails to challenge the prosecution's case;⁹³ where counsel is appointed under such circumstances that even fully competent counsel could not provide effective assistance;⁹⁴ and where counsel actively represents conflicting interests.⁹⁵ In these cases, the burden shifts to the prosecution to prove that defendant, in fact, received effective assistance of counsel.

If a defendant fails to demonstrate a breakdown in the adversary process, she must show not only that counsel made "specific errors,"⁹⁶ but also a "reasonable probability that, but for [these] errors, the result of the proceeding would have been different."⁹⁷ That is, a defendant must show actual prejudice to her case.

The standard for reasonably competent counsel is similarly strict. In *Strickland v. Washington*,⁹⁸ the defendant sought habeas corpus relief from the death penalty, arguing that his appointed counsel's failure to request a psychiatric report, investigate the case, present character witnesses, and request a presentence report denied him effective assistance of

90. *Cronic*, 466 U.S. at 662.

91. *Id.* at 659.

92. *Id.*; see *Javor v. United States*, 724 F.2d 831, 834 (9th Cir. 1984) (prejudice is inherent and defendant is denied legal assistance where counsel slept during a substantial portion of the trial)

93. *Cronic*, 466 U.S. at 659.

94. *Id.* at 659-60 (discussing *Powell v. Alabama*, 287 U.S. 45 (1932) (black defendants charged with rape of white woman denied effective assistance of counsel)).

95. *Cronic*, 466 U.S. at 661 n.28; see, e.g., *Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978) (prejudice is presumed in cases of conflict of interest because the impact of conflict on the attorney's representation may be difficult to determine); *Glasser v. United States*, 315 U.S. 60, 75-76 (1942) (defendant's wish to have the undivided assistance of counsel should be respected); cf. *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980) (defendant must show that the conflict of interest actually affected the adequacy of representation before prejudice is presumed).

96. *Cronic*, 466 U.S. at 666. The Tenth Circuit reasoned that the effectiveness of counsel's assistance could be inferred from five criteria: the time afforded to counsel for preparation and investigation; counsel's experience; the gravity of the charge; the complexity of possible defenses; and the accessibility of witnesses. *Id.* at 665. The Supreme Court reversed, holding that use of the "inferential approach" was error because it did not demonstrate that "counsel failed to function in any meaningful sense as the government's adversary." *Id.* at 666. Absent such severe circumstances, the defendant must identify specific errors made by trial counsel. *Id.*

97. *Strickland*, 466 U.S. at 694; see also *Cooper v. Fitzharris*, 586 F.2d 1325, 1332-33 (9th Cir. 1978) (en banc) (defendant must show prejudice where he alleges specific errors by counsel); *McQueen v. Swenson*, 498 F.2d 207, 219-20 (8th Cir. 1974) (where defendant alleges failure of counsel to exercise normal competence, defendant bears burden of proving prejudice); *United States ex rel. Green v. Rundle*, 434 F.2d 1112, 1115 (3d Cir. 1970) (same).

98. 466 U.S. 668 (1984).

counsel.⁹⁹ The majority held that counsel's conduct had not been unreasonable.¹⁰⁰ In so holding, Justice O'Connor wrote that the sixth amendment "refers simply to 'counsel,' not specifying particular requirements of effective assistance."¹⁰¹

Declining to equate reasonable representation with mere conformance to professional norms and standards,¹⁰² the Court concluded that counsel's actions could only be considered unreasonable if "in light of all the circumstances, [counsel's] acts or omissions were outside the wide range of professionally competent assistance."¹⁰³ Counsel has a duty to conduct reasonable investigations or reasonably decide that a particular investigation is unnecessary.¹⁰⁴ Finally, counsel is presumed to be reasonably competent,¹⁰⁵ and judicial scrutiny of counsel's acts or omissions should be "highly deferential."¹⁰⁶

Under *Cronic* and *Strickland*, a defendant bears the heavy burden of proving that counsel's acts or omissions were not within the realm of reasonable competence and that they actually prejudiced her case. Unless the surrounding circumstances prevent the adversarial system from functioning properly, this burden is especially difficult to meet since counsel's actions will be judged by "highly deferential" standards. Thus, only the most blatant demonstration of incompetence by counsel will constitute a violation of the defendant's sixth amendment rights and, even then, only if the defendant shows actual prejudice.

3. Appellate Review of Contract Systems

This Section examines the potential bases for constitutional challenges to the contract system. It presents alternative means of bringing defendants represented under low-bid contract systems within the Court's existing framework for ineffective assistance challenges, and supports either shifting or lessening the defendant's burden of proof upon evidence of systemic deficiencies. This Section concludes that despite the viability of these approaches, the difficulties of presenting ineffective assistance claims against low-bid contract systems and the inadequacy of

99. *Id.* at 672-73.

100. *Id.* at 698-99.

101. *Id.* at 688.

102. Justice O'Connor stated that American Bar Association standards should be used merely as guidelines to determine what is reasonable conduct. No particular set of rules should interfere with counsel's independence and restrict the wide latitude that counsel should have in making tactical decisions. *Id.* at 688-89.

103. *Id.* at 690.

104. *Id.* at 691.

105. *Id.* at 688-89; see also *Michel v. Louisiana*, 350 U.S. 91, 100-01 (1955); *Matthews v. United States*, 518 F.2d 1245, 1246 (7th Cir. 1975).

106. *Strickland*, 466 U.S. at 689.

the ineffective assistance remedy, require the formulation of an additional legislative response to the problems of low-bid contract systems.

a. Individual Challenges under Sullivan and Cronic: Actual Conflicts of Interest

The most difficult aspect of the *Cronic-Strickland* test for indigent defendants to overcome in challenging the low-bid contract system is the requirement of actual prejudice. In the contract system, it may be extremely difficult for courts to ascertain whether a particular attorney's conduct in any given case amounts to actual prejudice, especially where the attorney is in compliance with the terms of the contract.

The most obvious constitutional challenge to the low-bid contract system is that it results in a breakdown of the adversarial process. If the alleged defect falls within one of the categories set forth in *Cronic*, courts will presume actual prejudice and shift the burden to the prosecution to show effective assistance. As implemented, the low-bid contract system inherently undermines the adversary process by fostering conflicts of interest.

In *Cronic*, the Court stated that prejudice is presumed in the defendant's case where her attorney held an actual, not potential, conflict of interest.¹⁰⁷ Although some of the cases where courts have found actual conflicts of interest involved case-specific pecuniary conflicts,¹⁰⁸ more often the cases involved counsel's multiple representation of codefendants.¹⁰⁹ Courts recognize that it is difficult for counsel to represent one

107. *United States v. Cronin*, 466 U.S. 648, 661 n.28 (1984) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980)); see *supra* text accompanying notes 96-106.

108. These conflicts were sometimes blatant attempts by appointed defense counsel to extort more money from the indigent than what was already provided by the county system. See, e.g., *White v. Ragen*, 324 U.S. 760 (1945) (defendant proved prima facie case for habeas corpus relief when he alleged that appointed counsel would not confer with him until the day of trial and refused to represent defendant unless defendant paid him in advance); see also *Messelt v. Ala.*, 595 F.2d 247, 251 (5th Cir. 1979) (granting habeas corpus relief where retained counsel asked prosecutor to charge defendant with a more serious offense to get greater leverage in collecting his fees). Other conflicts concerned counsel's more remote investment interests in entities opposed to a defendant's cause. See, e.g., *United States v. Hurt*, 543 F.2d 162, 168 (D.C. Cir. 1976) (where appointed appellate counsel was ordered to proceed with appeal despite perceived conflict arising from trial counsel's institution of \$2 million libel suit against appellate counsel, for alleging trial counsel's ineffectiveness, court could not say that pecuniary conflicts of interest did not cause prejudice); *Wilson v. Phend*, 417 F.2d 1197, 1200 (7th Cir. 1969) (evidentiary hearing required to determine effectiveness of retained counsel who also owned a local newspaper that gave defendant's case extensive prejudicial publicity before trial).

109. Although holding that joint representation of co-defendants is not a per se violation of the sixth amendment, the Supreme Court found that where the trial court ignored counsel's request for separate representation, reversal was automatic. *Holloway v. Arkansas*, 435 U.S. 475, 482, 488 (1978); see also *Glasser v. United States*, 315 U.S. 60, 75 (1942) (a defendant's wish for conflict-free counsel should be respected). The Court appeared to retreat somewhat from its strong position against multiple representation in *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980), by finding that the

client effectively if he is representing another defendant involved in the same crime. One client's exoneration may be the other's incrimination. Providing conflict-free counsel in these situations is even more problematic because the adverse effects of the conflict are often latent. The latency prevents counsel from withdrawing from either or both cases conveniently, because the attorneys themselves may not recognize its existence or may be too fully invested in the case by the time it appears to feel comfortable removing themselves.¹¹⁰

Due to these inherent difficulties, the Supreme Court has refused "to indulge in nice calculations as to the amount of prejudice attributable to the conflict."¹¹¹ The conflict itself is therefore construed as a denial of the right to effective assistance of counsel.¹¹² Where defendant alleges that an actual conflict of interest adversely affected her lawyer's performance, courts invoke an irrebuttable presumption of prejudice.¹¹³

The most forceful element of the *Sullivan* test is the requirement of an actual conflict where counsel actively represented conflicting interests. The adverse effect element is of lesser importance, primarily because once an actual conflict exists, the deleterious effect on a defendant's case is inferred. Therefore, in order for an indigent represented under a low-bid system to succeed in a conflicts of interest challenge, she must present adequate evidence of an actual conflict between the contract attorney's duty to the client, and her duty to fulfill the terms of the contract.

For example, in a 1984 injunctive action brought by a nonprofit defenders organization (Defenders) against the City and County of San Diego,¹¹⁴ Defenders alleged that certain conflict-related deficiencies inhered in San Diego's system for awarding indigent defense contracts.¹¹⁵

trial court should only conduct a *sua sponte* inquiry where it knows or reasonably should know that a particular conflict exists.

110. For these reasons, appellate courts place fairly stringent requirements on the trial court and counsel to prevent conflicts of interest in multiple representation through enforcement of Federal Rule of Criminal Procedure 44(c). The rule requires the trial court to inquire promptly about the circumstances surrounding any multiple representation and to advise the defendant of her right to effective assistance of counsel, including separate representation. Based upon this inquiry, the trial court must appoint separate counsel unless it has good cause to believe that there is no actual conflict. FED. R. CRIM. P. 44(c); see *Wood v. Georgia*, 450 U.S. 261 (1981) (trial court had a duty to inquire about a possible conflict of interest where the record indicated an apparent conflict between counsel's representation of both employer and employee and where the prosecutor raised the issue); see also *Mounts*, *supra* note 80, at 235 (discussing institutional deterrents to counsel raising the issue of excessive caseload to the trial court).

111. *Sullivan*, 446 U.S. at 349 (quoting *Glasser*, 315 U.S. at 76); see *Holloway*, 435 U.S. at 489-91; see also *Cronic*, 466 U.S. at 661 n.28; *Strickland*, 466 U.S. at 692.

112. *Sullivan*, 446 U.S. at 349.

113. *Id.* at 349-50 (reversal in these instances is automatic).

114. Defenders Program of San Diego, Inc. v. Melvin Nitz, No. 000964, 4 Civ. No. 31141 (Super. Ct. No. BE504826 1984), at 686. See generally *Mayer*, *supra* note 10, at 109.

115. See *Mayer*, *supra* note 10, at 34. Since this suit, San Diego has contracted all of its indigent defense work to a nonprofit defender organization. See *Repard*, *supra* note 1, at 26.

Since the contract provided by its terms for a lump-sum payment to contract attorneys, Defenders claimed, the attorneys faced several financial disincentives which made the interests of the client incompatible with the firm's economic well-being.¹¹⁶

First, the contract did not provide separate payment for investigation. Contract attorneys were not, therefore, financially encouraged to take cases to trial or to investigate them adequately.¹¹⁷ Similarly, Defenders alleged that the low-bid system promoted "case dumping" against a defendant's interest because the contract did not provide for separate counseling of indigents before arraignment.¹¹⁸

The Superior Court denied the injunction because Defenders failed to demonstrate a substantial likelihood that indigent defendants would suffer immediate harm.¹¹⁹ Since Defenders attempted to enjoin the future performance of San Diego's low-bid contracts, the court also stated that the conflicts were potential, not actual.¹²⁰ If the defendants represented under the low-bid system could prove the allegations of Defenders, however, the conflict would appear to be actual and hence enjoinable as an ongoing harm.

The conflicts presented by the low-bid contract system are the same actual conflicts of interest contemplated in *Cronic* and *Sullivan* that invidiously undermine the adversary process. Even beyond the specific conflicts of interest alleged by Defenders, the low-bid system in general will always create conflict. While other indigent defense systems usually seek more operating funds, a firm bidding for an indigent defense contract bargains for *less*, creating an inversion of goals between the public defender systems and the private contract systems. Further, the conflicts of interest presented by the low-bid contract system exist before representation of a defendant begins, and thus it is difficult for an individual indigent to detect their development or their impact upon his representation.

Finally, the conflicts offend notions of fairness embodied in the due process guarantee of a fair trial. The interests of the accused in meaningful representation are in direct conflict with the economic interests of both contract attorneys and county administrators in performing the contract. Thus, the system not only pits the indigent defendant against the overwhelming resources of the state in an adversarial context, but also puts their interests in conflict with the state's interest in inexpensive indigent defense administration.

Courts may not decide to use a conclusive presumption to reverse

116. *Defenders Program*, at 686.

117. *Id.* at 686. See generally Mayer, *supra* note 10, at 109.

118. *Defenders Program*, at 686.

119. *Id.* at 690.

120. *Id.* at 687.

every conviction obtained against defendants represented by contract attorneys with active conflicts of interest. Rather than an irrebuttable presumption, courts may, as *Cronic* required for the other presumptively prejudicial categories, merely shift the burden of proof to the prosecution to prove effective assistance when faced with a conflict of interest question in these cases.

b. Burden-Shifting and Burden-Lessening Devices

The preceding discussion suggests that the low-bid contract system implicates many of the same concerns addressed in the Court's categories of presumptively prejudicial circumstances. For example, evidence that counsel neglected a defendant's case due to her excessive caseload may demonstrate a constructive denial of counsel.¹²¹ By the terms of the contracts, the attorneys are often expected to represent so many clients that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance of counsel is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."¹²²

The problem of severely overworked attorneys results in a breakdown of the adversarial process. This breakdown is the cornerstone of the Court's jurisprudence for presuming prejudice.¹²³ Regardless of the category of prejudice in which a defendant casts his particular case, the low-bid system implicates the same fundamental concern for the integrity of the adversarial system. For this reason, the Court would be justified in including systemic defects within its existing framework, or finding that the cumulative effects of the systemic deficiencies support a presumption of prejudice, thereby creating a new category of prejudicial circumstances.

Professor Suzanne Mounts has proposed shifting the burden of proof to the prosecution in cases where an indigent defendant proves sys-

121. See *United States v. Cronic*, 466 U.S. 648, 659 (1984) ("[A] trial is unfair if the accused is denied counsel at a critical stage of his trial."). This argument is somewhat tenuous alone, because *Cronic* indicates that a complete denial of counsel occurs when counsel is either absent entirely, or fails to assist the defendant at a critical stage of the proceeding. *Id.* at 659 n.25. Although presumably contract attorneys are not physically absent from the proceedings, a defendant might successfully assert that the low-bid contract system promoted her counsel's inattention to her case, thus denying her, at least partially, effective assistance of counsel. Since *Cronic* does not categorize a partial denial of counsel as presumptively prejudicial, this argument should be used merely to augment the claim that low-bid contract systems diminish the adversarial process. See also Mounts, *supra* note, 80, at 229-30 (discussing how systemic deficiencies may give rise to a constructive denial of counsel).

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

123. *Cronic*, 466 U.S. at 656 (The sixth amendment "is meant to assure fairness in the adversary criminal process."); see also *supra* text accompanying notes 90-95.

temic defects in any indigent defense system.¹²⁴ Because she construes sixth amendment challenges as falling on a continuum rather than polarized extremes, she advocates shifting the burden where there is evidence of systemic defects. She proposes this as a "middle ground" for cases that fall between the instances of extreme circumstances, like those presented in *Powell v. Alabama*,¹²⁵ and cases like *Strickland*, where the quality of representation was not so egregious.¹²⁶

As Mounts points out, where the defendant demonstrates systemic defects,¹²⁷ the risk of error should lie with the party that is responsible for selecting and administering the indigent defense system—the government.¹²⁸ Moreover, if the burden shifts to the prosecution upon evidence of systemic defects, the government will have more incentive to improve the system.¹²⁹ Otherwise, "the responsible parties would face the specter of a substantial number of criminal convictions being reversed unless they took some action."¹³⁰

Mounts also justifies shifting the burden to combat the insidious nature of systemic defects, which typically involve less detectable omission rather than commissive errors by counsel.¹³¹ Mounts adds that showing defects in the system will often actually constitute a showing of conflicts of interest, particularly where "the defect in the system is the fact that it builds in express conflicts of interest."¹³²

124. Mounts, *supra* note 80, at 232 ("[G]iven 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.").

125. 287 U.S. 45 (1932).

126. Mounts, *supra* note 80, at 230-31 ("If [sixth amendment] cases are really better conceived of as appearing on a continuum rather than in two separate categories, then it may make sense to allow a middle ground approach for cases which fall between the extremes.").

127. It is not clear whether all indigents convicted under a particular system could challenge its constitutionality in a class action. Class actions in tort challenging representation of public defenders are precluded under 42 U.S.C. § 1983 because public defenders do not "act under color of law." *Polk County v. Dodson*, 454 U.S. 312 (1981); see Note, *Civil Rights—Attorney Malpractice—Public Defenders Not Liable Under 42 U.S.C. Section 1983*, 65 MARQ. L. REV. 709 (1982) (authored by Jay Michael Barber); Note, *Polk County v. Dobson: The Supreme Court Formulates a New Test*, 34 MERCER L. REV. 1147-71 (1983) (discussing the legal status of public defenders under *Dodson*) (authored by Randy S. Parlee); see also Recent Case, *Indigents and Their Right to Sue for Legal Malpractice: A Review of the Liability Exposure of Court-Appointed Counsel in Missouri*, 45 MO. L. REV. 759 (1980) (authored by Alexander D. Tomaszczuk).

Since the Court precluded § 1983 tort actions against public defenders who were actually employees of the government, it presumably would also preclude such actions against contract attorneys, whose status is more private in nature.

128. Mounts, *supra* note 80, at 233.

129. *Id.*

130. *Id.*

131. *Id.* at 234.

132. *Id.* Mounts also finds that where an indigent defense system promotes excessive workloads for attorneys, this creates a "fundamental conflict of interest." *Id.*

By requiring the Court to shift the burden of proof to the prosecution to prove that a defendant received effective assistance, Mounts' proposal directly addresses the proof problems faced by indigent defendants represented by systematically overworked attorneys. Her fairness justification for shifting the burden directly addresses the element of human dignity that the sixth amendment and due process standards sought to protect. As in *Powell*, where the defendants were prosecuted under a system that denied them a fair trial, a low-bid contract system also offends the principle of ensuring a fair trial. Mounts' proposal seeks to retain this principle for indigents.

Although Mounts' proposal advances these interests in the clearest and most direct manner, its bright-line nature may not be compatible with the Court's conservative stand on the rights of the accused. Another alternative that may be more palatable, or at least more familiar, to the Court is use of the conflicts of interest analysis it presented in *Sullivan*.¹³³ Once a defendant demonstrated substantial evidence of serious systemic defects, the Court might require in an effective assistance claim that a defendant show merely that the representation adversely affected her case, rather than actual prejudice.¹³⁴

While lessening an indigent defendant's burden of proof, the inferential standard would ferret out those cases where systemic difficulties have rendered a defendant's representation inadequate, but not reaching the extreme violations required by *Cronic*. The inference also promotes the same goals of fairness, proper incentives, and detection of system defects.

If the Court's purpose is to ensure meaningful representation, then its actual prejudice standard is simply too harsh for those defendants represented by a severely understaffed or poorly implemented indigent defense system. Depending on the gravity of the charges and the evidence against a defendant, the burden of proving actual prejudice under *Strickland* will likely defeat an indigent's challenge that the system was operated in a manner that denied him effective assistance of counsel.¹³⁵ By requiring actual prejudice, *Strickland* does not address the absence of meaningful representation. The actual prejudice requirement, therefore, does not adequately distinguish between cases where a defendant was actually denied meaningful representation and those cases where she was not.¹³⁶ Absent some sort of presumption against systemic deficiencies, particularly those raised by a low-bid contract system, an indigent

133. *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

134. See Mounts, *supra* note 80, at 231 (also characterizing the Court's opinion in *Sullivan* as a "middle ground" for effectiveness of counsel doctrine because it lowered defendant's burden of proof without shifting it to the prosecution).

135. See *Strickland v. Wash.*, 466 U.S. 668, 694 (1984).

136. *Id.* at 698-99 (where no prejudice can be found, an ineffectiveness claim can be rejected, whether or not counsel's conduct was unreasonable).

defendant's challenge will be denied for want of prejudice, no matter how glaring the error or how blatant the omission.

c. *Conclusion*

Although the indigent defendant has a variety of approaches to postconviction review of the effectiveness of her representation, the success of these arguments remains untested. The Supreme Court has not yet evaluated an individual's representation under low-bid contract systems or an individual's challenge to her representation on systemic grounds. Nevertheless, given the trend in recent Court decisions towards paring back procedural protections for criminal defendants, most indigent defendants will probably fall short of *Cronic's* extremes, and thus will have to meet the burden of proving actual prejudice. The most practical solution, therefore, is to prevent systemic deficiencies, rather than to rely on the uncertain fate of postconviction challenges. This implies the need for a legislative response to cure the defects of low-bid contract systems.

Finally, even assuming that the Court embraces ineffective assistance challenges to indigent defense contract systems, the underlying problems still would be redressed, if at all, only slowly and haphazardly. This is the nature of a postconviction remedy. If the Court begins to reverse convictions, counties would be forced to modify these systems, but only to the extent required by each case. As shown in Part III, however, a comprehensive legislative response to these systemic defects can address all the issues in a unified fashion.

II

LEGISLATIVE RESPONSE: QUALITY CONTROL

Attorneys representing indigent defendants traditionally have been overworked and underpaid.¹³⁷ It is particularly difficult for state and local governments to provide adequate representation for indigent defendants in times of budgetary cutbacks.¹³⁸ Yet due to systemic defi-

137. See, e.g., *Wallace v. Kern*, 392 F. Supp. 834, 836 (E.D.N.Y. 1973) (noting that Legal Aid Society attorneys had caseloads at least twice the amount that many attorneys believed could be represented competently), *rev'd on jurisdictional grounds*, 481 F.2d 621 (2d Cir. 1973); *State ex rel. Escambia County v. Behr*, 354 So.2d 974, 975-76 (Fla. Dist. Ct. App. 1978) (upholding the trial court's decision to allow a public defender to withdraw from six noncapital felony cases due to his excessive caseload). See generally N. LEFSTEIN, *supra* note 2, at 1-2 (arguing that indigent defense services are underfunded); Wice & Suwak, *Current Realities of Public Defender Programs: A National Survey and Analysis*, 10 CRIM. L. BULL. 161, 182-83 (1974) (advocating hiring more investigators and attorneys to promote more workable caseloads and suggesting that society make new sources of funds available to public defenders); Green, *Weak Defense? Right to Free Lawyer Often Proves Shaky for Indigent Suspects*, *Wall St. J.*, June 9, 1975, at 1, col. 1 (discussing problems and dissatisfaction with public defender system).

138. For example, California's Proposition 13 reduced the tax on real property to one percent of

ciencies in its operation and administration, contract defense systems are unlikely to reduce costs.¹³⁹ The system's inadequacies, however, can be addressed by changing the way it is implemented, without eliminating the system entirely.

The Arizona Supreme Court held that Mohave County's low-bid contract system created a presumption of ineffective assistance of counsel primarily because the county did not assess the competency or caseload capacity of the bidding attorneys in awarding the contract.¹⁴⁰ This problem, however, is not inherent in the contract system;¹⁴¹ it is primarily a problem of administration. Indeed, neither study demonstrated that a contract system is fundamentally unsound; rather, both suggested that a contract system could be implemented so as to avoid the financial disincentives they identified in existing contract systems.

A. *Implementing the System*

Prospective firms and attorneys seeking indigent defense contracts know that they must submit the lowest bid in order to win the contract. Unfortunately, this criteria encourages firms and attorneys to submit unrealistically low bids.¹⁴² Rarely will these attorneys consider their capacity to absorb all the cases contemplated by the contract.¹⁴³ In this way, underbidding is endemic to the county's administration of a contract system of indigent defense.

Systematic underbidding and the county's failure to consider the competency of counsel in awarding its contracts undermines the system. To function effectively and efficiently, the contract system should assess each counsel's ability to handle her caseload in a manner that provides indigents with meaningful assistance of counsel.

To promote realistic bidding, the county administrative board must comply with statutory mandates for negotiating and awarding indigent

the property's full value. This drastically reduced funds available to local governments in general and for public defenders in particular. CALIF. CONST. art. XIII A § 1 (West Supp. 1988); see Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WISC. L. REV. 473, 488.

139. See *supra* text accompanying notes 16-54.

140. *State v. Smith*, 140 Ariz. 355, 362, 681 P.2d 1374, 1381 (1984).

141. The contract system, in fact, has several appealing aspects, including simple appointment procedures. See Houlden & Balkin, *supra* note 2, at 185. For a favorable discussion on the perceived benefits of contract systems, see Cox, *Ponoma Project: Fuel for Advocates of Contract PDs; Defending Indigents*, 93 L.A. Daily J., at 1, col. 2 (July 22, 1980).

142. See N. LEFSTEIN, *supra* note 2, at 50-51; see also Houlden & Balkin, *supra* note 2, at 181-82, 198.

143. Many indigent defense contracts specifically provide a per-case amount to be paid to contract counsel for each case exceeding the contract maximum but do not set a limit on these cases. See Mayer, *supra* note 10, at 34 (noting that San Diego pays \$62.50 for each excess traffic and misdemeanor case); see also *supra* notes 116-20 and accompanying text; *supra* text accompanying notes 51-53.

defense contracts. The statute in turn should contain maximum caseload provisions and identify the factors most relevant to effective representation. If the projected caseload figures prove to be too low, modest adjustments should be permitted. Beyond a specified range of adjustment, however, the county must be required to hire a new attorney.

To ensure competent representation, the low-bid criterion for awarding contracts must be replaced by an inquiry into other factors relevant to counsel's competence, including counsel's years of experience, areas of expertise, resources, capacity, and the complexity of the cases she is expected to handle.¹⁴⁴ Thus, instead of merely submitting a bid, counsel should provide a full prospectus outlining the terms for the contract. In addition to the bid, the prospectus should include proposed budgets, with cost allocations per case, projected caseloads, the number of attorneys employed, the firm's outside commitments to private clients,¹⁴⁵ and the availability of extra-judicial resources such as investigators, law clerks, paralegals, and clerical support staff. In addition, each attorney, whether a member of a firm or a sole practitioner, should submit a resume, listing previous experience, qualifications, and expertise.¹⁴⁶

Once the firms or attorneys submit their bid application form to the county administrative board, the statute should require the board to award the contract to the firm whose bid safeguards meaningful representation in the most cost-effective manner.

I have proposed the following statute to meet these goals:

Negotiating and Awarding Indigent Defense Contracts

§ 1. Any attorney, law firm, or organization bidding for an indigent defense contract shall submit:

- (a) proposed cost allocation per case for each listed percentage of the indigent defense contract work it has the resources to represent, pursuant to maximum caseload allowances established in Section 3 below;¹⁴⁷
- (b) proposed caseload, subject to the provisions of Section 1(a);
- (c) number of attorneys designated to perform contract work;
- (d) number of attorneys available to perform contract work;

144. See *State v. Smith*, 140 Ariz. 355, 362, 681 P.2d 1374, 1381 (1984) (noting that the Mohave County system fails to take these factors into account).

145. Of course, to preserve the confidentiality of both attorneys and their clients, this inquiry is restricted only to the percentage of work performed for private clients, not the names of clients or the nature of their cases.

146. To expedite the application process, the county may create a bid application form listing all of these criteria. Through this standardized process, the county can ensure that counsel provides all of the information relevant to awarding its contract. At the same time, counsel, by providing the information requested on the form, can be sure that she has complied with the statutory requirements for bid submissions.

147. The county could specify in its bid whether the cost allocation per case should be the cost per case based on the total contract bid or whether it should be broken down into percentages actually spent on contract representation and amounts that will be absorbed as salary, overhead, or profit to the firm or attorney.

- (e) *nature and extent of outside commitments to private clients;*
 - (f) *availability of extra-judicial resources, including:*
 - (i) *investigators, either in-house or on retainer;*
 - (ii) *law clerks;*
 - (iii) *paralegals; and*
 - (iv) *clerical support staff;*
 - (g) *resume, with references, listing prior experience, qualifications, and expertise of each participating attorney.*
- § 2. *In awarding indigent defense contracts, state or county administrative bodies shall:*

- (a) *review all information provided by prospective contract attorneys, pursuant to Section 1 of this Act;*
- (b) *contract with a sufficient number of attorneys to comply with the maximum caseload provisions listed in Section 3 of this Act by:*
 - (i) *obtaining a good faith projection of the number of cases expected within each area of indigent defense for the contract term;*¹⁴⁸
 - (ii) *dividing the projected number of cases within each area of indigent defense by the maximum caseload specified in Section 3 of this Act for that area of indigent defense; and*
 - (iii) *dividing indigent defense contracts by per-attorney percentages, according to the number of attorneys required to represent each area of indigent defense, as set forth in the maximum caseload provisions specified in Section 3 of this Act.*
- (c) *determine, in light of all the information provided by the attorneys, law firms, or organizations pursuant to Section 1 of this Act, which attorney, firm, organization, or combination thereof has submitted the bid or bids that provides the most cost-effective representation.*
 - (i) *for purposes of this Section, "cost-effective" representation is determined by a balance of quality or effectiveness of representation and cost-efficiency.*
 - (ii) *factors from the bid's prospectus that indicate quality of representation include, but are not limited to, the following:*
 - (A) *level of counsel's experience in the particular area of indigent defense, pursuant to Section 1(g) of this Act;*
 - (B) *availability of extra-judicial resources, pursuant to Section 1(f) of this Act; and*
 - (C) *the nature and extent of outside commitments to private clients, pursuant to Section 1(e) of this Act.*
 - (iii) *factors from the bid's prospectus that indicate cost-efficiency include, but are not limited to, the following:*
 - (A) *projected cost allocation per case pursuant to Section 1(a) of this Act;*

148. This calculation, if not already available to county officials, could be determined by examining the number of cases handled in previous years within each area of defense, and the rate of increase or decline in caseload over a period of, for example, five years.

- (B) *proposed caseload, pursuant to Section 1(b) of this Act;*
- (C) *number of attorneys designated to perform contract work, pursuant to Section 1(c) of this Act;*
- (D) *number of attorneys available to perform contract work, pursuant to Section 1(d) of this Act; and*

(d) *award the contract on the basis of the determination in Section 2(c).*

§ 3. *Maximum caseloads for the purposes of complying with Section 2(b) of this Act shall be.*¹⁴⁹

- (a) *misdemeanor arraignment contracts: 300 cases per attorney per year;*
 - (b) *felony contracts: 150 cases per attorney per year;*
 - (c) *juvenile contracts: 200 cases per attorney per year;*
 - (d) *mental commitment contracts: 200 cases per attorney per year;*
- and*
- (e) *appellate contracts: 25 cases per attorney per year.*

To illustrate the operation of this statute, suppose Jurisdiction *X* is subject to the statute's provisions. Relying on projections obtained pursuant to Section 2(b)(i), it predicts that it will be responsible for 2400 indigent misdemeanors in one year. According to Section 3, the annual limit on caseloads for misdemeanor arraignments in Jurisdiction *X* is 300 cases per attorney per year. Jurisdiction *X* must, pursuant to Section 2(b)(ii), contract for eight attorneys to handle this area of indigent defense.

Firm *A* submits a bid for \$200,000 to handle all 2400 misdemeanor arraignments for one year, and includes with its bid the information required in Section 1. Firm *A* employs ten attorneys, five secretaries, and one in-house investigator, and estimates that it earns fifteen percent of its income from outside commitments to private clients. Firm *A*'s resume indicates that three of its four partners have significant experience in mis-

149. The maximum caseload figures set forth here are adopted from NLADA GUIDELINES Guideline III-6, *supra* note 74, and are merely intended as an illustration. This Section suggests only that counties should adopt maximum caseload provisions. The actual limitations would depend upon the complexity of the contract cases and other factors particular to each jurisdiction.

This requirement may differ in its application depending on whether it is implemented at the state or federal level. If the statute's scope is statewide, each state would presumably set out its own requirements, varying the attorney-to-case ratio between states or counties. If the statute is implemented at the federal level, all states will face the same regulation. Although the latter method promotes uniformity, the former may be responsive to factors unique to the individual state or county.

I do not recommend implementing maximum caseload provisions at the county level. County administration should be governed by a less regional body, such as the state or federal legislature, to ensure that the system is accountable to a government body distinct from the one that it serves. This avoids situations where the county cuts corners in its indigent defense budget by setting an excessively high attorney-to-case ratio.

demeanor arraignments, and that only three of its six associates have been admitted to the bar for two years or less.

Firm *B* also bids to represent all 2400 misdemeanor arraignments, but at a lower cost: \$175,000. Firm *B* employs eight attorneys, four secretaries, and has neither an in-house investigator nor a regular investigator on retainer. It earns an estimated twenty-five percent of its income from private clients. Two of its four partners have significant experience in misdemeanor arraignments, and three of its four associates have been admitted to the bar for two years or less.

Under the low-bid systems implemented in Mohave County and San Diego, the county administrative board would almost certainly award the misdemeanor arraignment contract to Firm *B*, solely because it submitted the lowest bid.¹⁵⁰ Yet by limiting its selection process solely to bid cost, the county might have distributed its limited indigent defense funds inefficiently.

Under the proposed statutory scheme, the county would award the contract to Firm *A*. Firm *A* employs two more attorneys, one more secretary, and, unlike Firm *B*, employs an in-house investigator.¹⁵¹ Firm *A* devotes less time to outside commitments, and, overall, has more experienced attorneys. Although Firm *A* will assign only eight of its ten attorneys to contract work, the two noncontract attorneys are available to provide assistance when necessary. In light of these factors, Firm *A* is better equipped to fulfill the requirements of the contract and to promote more reasonable attorney caseloads.

The selection of Firm *A* may be economically efficient as well. The marginal increase of \$25,000 in Firm *A*'s bid provides the county with extra personnel resources should the actual misdemeanor caseload exceed the projected amount. Thus, if the number of misdemeanor cases unexpectedly increases, Firm *A*, with its greater resources, will be able to absorb the excess more readily. If the county needs to hire more attorneys to represent the extra cases, it may amend its contract with Firm *A* to include the services of the noncontract lawyers in the firm, provided

150. See *State v. Smith*, 140 Ariz. 355, 360, 681 P.2d 1374, 1379 (1984). Mayer, *supra* note 10, at 34.

151. In awarding misdemeanor arraignment contracts and, more particularly, felony contracts, the jurisdiction must consider a prospective bidder's access to an investigator, either in-house or on retainer, as a substantial factor, given the need for these services in order to provide effective representation. As one attorney in Clark County noted, representing misdemeanor offenders is a package service, requiring counsel to provide investigation and rehabilitation referrals. The attorney felt that Clark County's contract attorneys, unlike the previous public defender agency, failed to satisfy these requirements. N. LEFSTEIN, *supra* note 2, at 51; see *Corenevsky v. Superior Court*, 36 Cal. 3d 307, 319-20 & n.9, 682 P.2d 360, 366-67 & n.9, 204 Cal. Rptr. 165, 171-72 & n.9 (1984) (inferring that an indigent defendant has a right to court-ordered expenses for investigators in a noncapital felony case); see also *supra* text accompanying note 26 (noting that Clark County's former public defender had access to staff investigators).

that Firm *A* is willing and able to make the extra attorneys available for contract work.¹⁵²

Under a low-bid contract system, if the annual caseload exceeds predictions, Firm *B* is unable to adjust its caseload as readily. Consequently, the county must reopen the bidding process and negotiate a new contract with another firm or attorney to handle the excess cases. This procedure is time-consuming and economically unsound, particularly if the cost per case in the new contract is significantly higher.¹⁵³

A potential shortcoming of the proposed statutory scheme is that it may promote a systemic preference for larger firms over smaller firms or sole practitioners. To minimize the incidence of this effect, counties should accept bids for percentages of the total projected caseload in each area of indigent defense.¹⁵⁴ Firms and attorneys then bid for the percentage of indigent defense work that they are capable of handling. Thus, the sole practitioner or small firm can bid for a small percentage of the contract work, and the county, in order to maximize its resources, may divide the contract between some combination of sole practitioners, small firms, and large firms.

To illustrate this notion, assume that since Jurisdiction *X* must contract for eight attorneys, it divides its misdemeanor contract into one-eighths. Firm *A* and Firm *B*, according to Section 1(a), each submit bids to represent the entire caseload, or eight-eighths of the contract. In addition to these bids, *C*, a sole practitioner, submits a bid of \$30,000 to represent one-eighth of the entire misdemeanor arraignment contract.¹⁵⁵ *C* has represented defendants at misdemeanor arraignments for fifteen years, both as a public defender and as retained counsel. She has developed an intricate system for providing misdemeanor representation, complete with contacts for referring defendants to drug counseling or rehabilitation. She has on retainer an investigator with whom she has worked for many years. *C* has a reputation with both attorneys and judges for being a thorough, efficient counsel for misdemeanor defendants, and her references are excellent. Because she handles misdemeanor

152. This contingency is contemplated in Sections 1(d) and 2(c)(ii)(D) of the proposed legislation. See *supra* text accompanying notes 147-48. If Firm *A*, however, could not spare the services of its two noncontract attorneys, the county would then have to hire an attorney outside of the firm, presumably by reopening the bidding process.

153. Clark County faced this very dilemma. When felony cases increased in 1980, the county awarded its excess contract cases to assigned counsel at a much higher hourly rate. See *supra* note 19 and accompanying text; see also *supra* text accompanying notes 50-54 (discussing studies showing increased costs arising from unanticipated excess cases).

154. See, e.g., *Smith*, 140 Ariz. at 360, 681 P.2d at 1379 ("The judge lists the bids by lowest amount and by percent of the caseload the bidding attorney proposes to accept, such as 'if divided into four contracts,' 'if divided three ways,' and so on.'").

155. *C*, a sole practitioner, can only bid on one-eighth of the indigent defense contract because a single attorney may only represent 300 indigents, one-eighth of the total contract amount of 2400.

cases exclusively, she can devote all of her time to contract work, and therefore has no outside commitments. Finally, although *C*'s cost-per-case allocation is slightly higher than the bids of Firm *A* and Firm *B*, the county may award a portion of the contract to *C* to further the concurrent objective of quality representation.

To maximize its resources, the county should contract with both Firm *A* and Attorney *C*, since the former offers greater flexibility in the event of an unforeseen caseload increase while the latter adds extra experience to the indigent defense system. Therefore, the county should award seven-eighths of the contract to Firm *A* and the remaining one-eighth to Attorney *C*.

B. Costs Associated With the Proposed Legislation

The statute's maximum caseload provisions may raise questions concerning the affordability of implementing this proposal. This Section demonstrates that the proposal is cost-effective in the long run, because it is conducive to effective representation for indigents and, more importantly for this Section, is less expensive over a significant time period.

Although the system may initially cost more, over time, it will provide more effective representation and will eventually cost less than existing low-bid systems. Hiring additional attorneys when maximum caseload limits are exceeded will not necessarily be more expensive over the contract period than administering the low-bid system. Instead of encouraging unrealistically low bids that later require the county to hire more expensive substitutes, this proposal enables the county to assess each bidding firm's capacity and competence to handle the contract limit and to absorb unanticipated caseloads. From this assessment, the county can more readily predict how well a given contract firm or attorney will perform *for the duration of the contract term*.

Thus, while hiring more attorneys may cost more initially, the proposed statute minimizes transactional costs of reopening the bidding process to hire new attorneys because fewer attorneys will be forced to breach their contracts. The proposal will minimize replacement costs by allowing counties to hire firms that can better absorb an unanticipated caseload.

C. Monitoring the System

In order for this proposed legislative scheme to function effectively, procedures must be established to ensure that the county considers the indigent defendant's right to effective representation in addition to its own interest in conserving funds when awarding its indigent defense contracts. Accordingly, counties must be induced to enforce the terms of the contract. This Section discusses why state legislation provides the most

effective way to monitor county awards of indigent defense contracts and explains how counties can best monitor counsel's performance under the contract.

1. *Monitoring the County's Procedures for Awarding Indigent Defense Contracts*

In 1963 the U.S. Supreme Court held in *Gideon v. Wainwright*¹⁵⁶ that criminal defendants' constitutional right to counsel requires that a court appoint counsel for a felony defendant who cannot afford representation. The Court extended this rule to misdemeanors in *Argersinger v. Hamlin*.¹⁵⁷ In neither *Gideon* nor *Argersinger*, however, did the Court explain how to administer its decree either through an implementing decision or by other instructions on how to administer the appointment of counsel for indigent defendants.

With the *Smith* case, Arizona became the first court to examine whether any particular system for providing indigent defense—public defender agencies, assigned counsel, or contract systems—met the constitutional mandates of *Gideon* and *Argersinger*. With the advent of low-bid contract systems, however, systemic challenges like those present in *Smith* are more likely to arise, potentially implicating judicial relief.

A statutory solution is preferable to a judicial remedy for two reasons. First, a statute can provide specific and detailed requirements for awarding indigent defense contracts and precise, mathematical equations for maximum caseload and percentage contract provisions. Courts traditionally have been averse to handing down such specific and detailed guidelines, preferring to leave this function to the legislature.¹⁵⁸ Second, a statutory framework prevents systemic deficiencies before they affect the indigent's case. In this way, indigents are provided with more meaningful representation, and need not rely on the slow and uncertain process of constitutional litigation on postconviction review.¹⁵⁹

The importance of a statutory solution lies in its effectiveness as a monitoring mechanism for courts and county administrative boards. The proposed legislation remedies the absence of clear judicial standards for meaningful representation of indigents by providing courts with specific legislative guidelines by which to monitor the administration of indigent defense contracts. Moreover, evidence of statutory violations may

156. 372 U.S. 335 (1963).

157. 407 U.S. 25 (1972).

158. *Brown v. Board of Educ.*, 347 U.S. 483 (1954). The court issued an implementing decision in *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (*Brown II*). *Brown II* required the lower federal courts to oversee desegregation procedures, using general principles of equity for enforcement. Even in the context of school desegregation, the Court did not provide specific guidelines for the lower courts.

159. See *supra* text accompanying notes 135-36.

be used by criminal defendants at the appellate level as proof of ineffective assistance of counsel.

Some may argue that such close state supervision of county administration interferes with local autonomy. The legislation's possible encroachment on local autonomy, however, is similar to the county's accountability to the state for other types of bidding procedures. For example, many state regulations governing bidding procedures for state and municipal contracts provide that low bid shall not be the sole criteria for awarding contracts.¹⁶⁰ Since states are already regulating state and municipal contract procedures, regulation of indigent defense contract procedures constitutes only a marginal increase in the intrusion on local autonomy.

The reasons for quality control sought by state legislatures in municipal building or transportation contracts are just as persuasive in the context of awarding indigent defense contracts. In municipal building or transportation contracts, regulation seeks to further public safety. In indigent defense contracts, the proposed regulation seeks to ensure effective representation for indigent defendants. Although the dangers of inadequate regulation of building contracts may appear more immediate, the more subtle goals of effective representation are equally deserving of state encouragement and supervision.

In sum, the proposed legislation is valuable because it provides detailed standards by which courts can monitor the county's implementation of a contract system, a role that courts may be reluctant to assume in the absence of legislative guidelines. Moreover, the legislation accomplishes its goal of safeguarding an important constitutional right without needlessly encroaching on local autonomy.

2. Monitoring Counsel's Performance of the Indigent Defense Contract

In order for the proposed legislation to be fully effective, attorneys awarded contracts in compliance with the statute must also provide the level of representation indicated by their bid prospectus. The legislation can only operate effectively if the individual contract attorneys and firms operating under the system are accountable to the county administrators for their performance of the contract terms. This Section discusses the need for attorney time records to monitor counsel's performance and to promote effectiveness and efficiency within the system. The Section first presents two alternative methods for monitoring counsel's performance.

Perhaps the simplest method for monitoring counsel's performance

160. In California, for example, contracts are awarded to the lowest responsible bidder. See, e.g., CAL. EDUC. CODE § 22324 (West Snp. 1988) (educational building contracts); CAL. PUB. CONT. CODE § 10122 (West. Supp. 1988) (construction contracts); CAL. PUB. CONT. CODE § 20192 (West Supp. 1985) (municipal utility contracts).

is to require counsel to keep records on each case handled, including the amount of time spent by attorneys and its ultimate disposition. Such records should also note amounts spent on extra-judicial resources such as investigation and extraordinary paralegal or clerical assistance.

Contract attorneys should submit their records at a specified interval (for example, quarterly or semi-annually). Interval reporting promotes on-going recordkeeping, and diligent recordkeeping, in turn, enhances the accuracy of records. The deadline for submitting records may also remind the county to inspect records upon receipt, thereby discouraging inattention to inspection.¹⁶¹

Once the attorneys submit their records to the county, the county can tally how many cases were handled and assess whether it underestimated the total caseload for the contract period. The county can then hire other attorneys to handle any excess cases indicated by the interim report. The interim report thus allows the county to evaluate the efficiency of its system and cure any problems that occur during the contract term. Similarly, the county can use the information included in the records to adjust its indigent caseload projection for the following year. Finally, interim reports provide useful data to counsel as well. Contract attorneys may rely on this data to identify inefficiencies in representation and cost.

Unlike interval inspections, ad hoc inspections have the possible advantage of surprise. Attorneys may be encouraged to keep records if they do not know exactly when the county inspection will occur. The scarcity of county resources, however, makes it likely that such surprise visits would occur infrequently, thus reducing the incentive for accurate recordkeeping. Moreover, surprise visits are potentially disruptive to the day-to-day operations of the contract firm or attorney.

The problem of disruption could be remedied by requiring the county to give ten days notice before inspection. Even with the notice provision, however, counsel may not be encouraged to keep records diligently. If the county or its field representative becomes inattentive to inspecting records, contract attorneys may eventually forget that records are subject to inspection and become lax in their recording procedures.

The failure to inspect or update records regularly diminishes counsel's and the county's accountability to the system and to individual indigents. In the event of a post hoc inquiry into counsel's performance under the contract, neither the contract attorney, the county, nor—most importantly—the indigent defendant, has the means to assess the amount

161. While the county may still ignore the records upon receipt, their mere presence is more likely to prompt inspection than a system that relies on the county to initiate spot checks.

of time and resources expended on a particular case and thereby evaluate the adequacy of their representation.

Regardless of whether interim inspection or ad hoc inspection is used, the county should insist that the agreed inspection procedures be in writing. If the parties view the bid submitted by counsel as the offer and the contract award as the acceptance,¹⁶² and therefore do not execute a written contract, the parties should enter into a separate addendum or agreement specifying the inspection procedures. If the parties draw up a separate contract after the bidding process, the inspection provision should be included in that agreement. In either case, the written provision attaches additional importance to the procedure and memorializes the fact that records will be inspected.¹⁶³

While the county can theoretically hold attorneys accountable to their contracts under both the low-bid system and the proposed legislative scheme, only the proposed legislation contains a monitoring system that helps to ensure effective assistance of counsel. For example, if the county discovers that counsel is not performing the contract in the manner indicated by the bid prospectus,¹⁶⁴ it should first determine the extent to which contract counsel cannot or will not perform. In the event that the county must rely on additional noncontract attorneys to handle the caseload, it could sue the contract firm for the costs of hiring additional attorneys and providing other resources to the unrepresented indigents.¹⁶⁵ This remedy, however, is not satisfactory in those cases where contract counsel is unable to perform the contract because of financial

162. According to modern contract law, the county, by opening bidding for indigent defense contracts, "invites" offers, and the attorney's bid constitutes the actual offer. The county may then accept or reject this offer. See, e.g., *Universal Constr. Co. v. Arizona Consol. Masonry & Plastering Contractors Ass'n*, 93 Ariz. 4, 8, 377 P.2d 1017, 1019 (1963). See generally E. FARNSWORTH, *CONTRACTS* § 3.10, at 130-31 (1982).

163. See generally Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-06 (1941) (discussing functions of legal formalities); Perillo, *The Statute of Frauds in Light of the Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39, 43-68 (1974) (discussing functions of contract formalities).

164. Contract law usually applies a substantial performance standard to contracts for services, and in particular, construction contracts. See, e.g., *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 244, 129 N.E. 889, 891 (1921) (if builder has substantially performed, he can recover the full contract price, less damages caused by the builder's breach). It is a question of fact whether the contractor's performance is substantial. *Id.* at 243, 129 N.E. at 891. See generally E. FARNSWORTH, *supra* note 162, § 8.12, at 590-91. Thus, if the county sues the contract attorney for damages, it would most likely have to prove substantial nonperformance.

165. Courts generally require the nonbreaching party to take reasonable steps to mitigate damages, primarily to avoid the wasteful results of the breach. E. FARNSWORTH, *supra* note 162, § 12.12, at 858. Thus, the injured party cannot recover damages for any loss that she could have avoided. *Id.* at 859. To prevent losses, the injured party, therefore, must hire substitutes. See, e.g., *Allied Silk Mfrs. v. Erstein*, 195 A.D. 366, 368, 186 N.Y.S. 295, 296 (App. Div. 1921) (denying plaintiff recovery for business losses because plaintiff did not use reasonable efforts to replace the breaching defendant with a substitute financier); see also Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 61 (1936).

constraints.¹⁶⁶

A court is also unlikely to order specific performance of the agreement. Courts disfavor specific performance of contracts where damages would be adequate to protect the injured party; here, the county easily purchases a substitute to furnish the promised performance.¹⁶⁷ Moreover, specific enforcement would not be prudent on policy grounds.¹⁶⁸ Courts should be reluctant to order specific performance of a contract that is likely to result in ineffective assistance of counsel to indigent defendants.

An alternative method for ensuring effective representation, however, appears to have greater potential for practical success. Unlike the low bid system, the proposed legislation requires the county to hire new contract attorneys if any attorney's caseload exceeds the maximum statutory figure, a number designed to be the most an attorney can competently handle. The county's remedy, therefore, for counsel's ineffective performance under the proposed system is simply compliance with the maximum caseload provisions.

Presumably, this provision will be valuable for both parties. In the event that a caseload becomes unduly burdensome, the county first will confer with counsel to determine if the contract obligations can be met in the foreseeable future.¹⁶⁹ If the county receives some assurance from counsel concerning future performance, the parties can then adjust the contract price and the number of cases that counsel must represent to fulfill the contract. Based on this conference, the county can decide whether to hire substitutes and can determine the number of new attor-

166. Of course, some firms who choose not to perform the contract will not be judgment-proof. They may determine, rather, that it is not economically efficient to continue performing the contract because they are not making enough money per case. The maximum caseload provisions in the proposed legislation remedy this problem. See *supra* text accompanying notes 142-43 and 149. By contracting for a specific number of cases pursuant to the maximum caseload figure, the contract attorney can submit a bid that more accurately reflects the manner in which she will perform the contract. This avoids any financial dissatisfaction that an attorney may experience if her workload becomes excessive while the cost-per-case remains the same. See Repard, *supra* note 1, at 26 ("Some contracting lawyers [in San Diego] staged a boycott over their low fees.").

167. If the injured party can purchase a substitute, courts usually consider damages to be an adequate remedy and therefore deny specific performance. E. FARNSWORTH, *supra* note 162, § 12.6, at 828.

168. See E. FARNSWORTH, *supra* note 162, § 12.7, at 838; see also, e.g., *Seaboard Air Line Ry. v. Atlanta B & C R.R.*, 35 F.2d 609 (5th Cir. 1929) (denying specific performance of financially troubled railroad on the ground that performance might disable the railroad's duties to the public), *cert. denied*, 281 U.S. 737 (1930). Specific performance has also been denied when it would adversely affect the rights of third persons. See, e.g., *Hawks v. Sparks*, 204 Va. 717, 133 S.E.2d 536 (1963).

169. See E. FARNSWORTH, *supra* note 162, § 12.12, at 860-61 ("Even after breach . . . it may be reasonable for the injured party to expect the other party to perform if, for example, the breach is accompanied by assurance that performance will nevertheless be forthcoming.").

neys necessary both to fulfill the obligations of the defaulting attorney and to comply with the maximum caseload provisions.

If a contract attorney is not performing the contract in compliance with her bid prospectus, and cannot or will not perform to the county's satisfaction, the county must then either reopen the bidding process or select a replacement from the other firms or attorneys that initially bid for the contract.¹⁷⁰ These contingencies, however, will occur less frequently under the proposed legislation. The maximum caseload provisions are designed to avoid the need to hire new attorneys when contract attorneys become overworked or financially unwilling to perform the contract. The selection criteria are designed to require bidding attorneys to submit realistic bids, taking into account both projected cost per case and the attorney's ability to handle the specified number of cases.

Because the county risks higher per-case costs if caseload numbers exceed projections, the county should not contract for any term longer than one year. By negotiating a new contract each year, the county can ameliorate financial disincentives that occur when counsel's caseload exceeds the contract amount in the first year of a multiyear term. One year contracts also allow the county to limit the scope of its caseload projections. The potential systemic damage incurred when actual caseload figures exceed projections is restricted to excesses in that one year. In this way, the proposed legislation prevents the accumulation of excess caseloads from one year into the next, thus facilitating the performance of each contract for its full term.

The proposed system also enables the indigent defendant to challenge counsel's representation more readily than under the low-bid contract system. First, the indigent can examine counsel's bid, bid application form, and resume. This provides the indigent with figures on counsel's cost allocation, resources, competence, and capacity to handle the number of cases required by the contract.¹⁷¹ The indigent can also examine the records counsel submitted to the county during the performance of the contract.¹⁷² From these records, the indigent can determine whether counsel's performance deviated from her prospectus in any significant way.

170. The proposed legislation facilitates hiring replacements, since the county already has access to the bid prospectus of these unsuccessful bidders. Provided these attorneys are still willing to perform according to that prospectus, the county may not have to pay substantially higher contract prices.

171. See *supra* text accompanying notes 144-49.

172. If either the county or the contract attorneys are lax in maintaining, submitting, or inspecting records, however, the indigent may not have an accurate, or even existing, source of information with which to challenge counsel's effectiveness. Requiring contract attorneys to submit records at specified intervals reduces the potential for inattentiveness to records that may occur in a system that uses flexible field inspections on an ad hoc basis. See *supra* text accompanying notes 161-63.

The individual indigent, however, still must tie this general administrative information to counsel's actual performance in the case in order to prevail in an effective representation challenge. If the indigent challenges her representation systemically under one of the burden-shifting devices discussed earlier, this information still may be an evidentiary asset. In either case, the system provides data useful to indigents in the event that the system promotes, either universally or in particular cases, ineffective representation.

In sum, the proposed legislation makes it easier for the county to remedy any substandard performance by indigent defense contractors. The system provides flexibility so that both the county and contract attorneys can adjust their performance to enhance efficiency and effectiveness of representation. Finally, the system balances cost and effective representation by reducing the number of cases handled by each attorney and by assessing counsel's competence and resources to handle the contract volume. Thus, the system provides an effective monitoring mechanism, particularly when the county renegotiates its contracts each year.

III CONCLUSION

The statutory scheme proposed in this Comment is not presented as an exclusive means for providing meaningful representation to indigent defendants. The proposal instead reflects an effort to work within existing contract systems and to guide those jurisdictions that switch to the contract system in the future. If a contract system is implemented, these statutory provisions can alleviate its inherent problems.

There are no clear solutions to the problems of providing effective representation to indigents. Since the U.S. Supreme Court has failed to articulate any meaningful standards to implement the mandates of *Gideon* and *Argersinger*, county administrative boards must safeguard the indigent defense systems that they implement. Without these safeguards, any system, regardless of its acclaimed cost-effectiveness, may fail to provide meaningful representation to indigents.

Innovation in indigent defense representation should be encouraged. The contract system has received sharp criticism from practitioners and the media¹⁷³ primarily because, as implemented, it has compromised the representation of indigents. Thus, the contract system itself is not to blame. This system, however, can only provide meaningful assistance of counsel if it is implemented with an eye to the competence and capacity of firms and attorneys who represent the indigent defendants. The pro-

173. See, e.g., Gallante, *Contract Public Defenders Slammed*, 8 NAT'L L.J. 3, col. 1 (April 7, 1986); Mayer, *supra* note 10; Repard, *supra* note 1.

posed legislation seeks to assist counties in administering an indigent defense system that promotes reasonable caseloads, competent representation, and cost-effectiveness.

