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The Unconstitutionality of Underfunded Public Defender Systems

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NOTE

THE UNCONSTITUTIONALITY OF UNDERFUNDED PUBLIC DEFENDER SYSTEMS

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ABSTRACT

When a defendant is ineffectively represented by a public defender due to an underfunded public defender system, a defendant whose public defender provides him only cursory representation is entitled to a new trial only if blatantly innocent. The U.S. Supreme Court should follow its precedent and declare systemically underfunded public defender systems unconstitutional, with cases meriting reversal when the underfunding is to blame for unreasonable attorney errors, regardless of prejudice. This stems logically from the Court's holdings in Gideon v. Wainwright*,* Strickland v. Washington*, and* United States v. Cronic*. Many have argued for the reversal or modification of Strickland's prejudice requirement, but advocating for this nuanced application to underfunded public defender systems provides a more likely, more natural application of Strickland rather than reversal.*

I. INTRODUCTION

The United States' criminal justice system is made up of police departments, courthouses, prosecutors, the FBI, the DEA, the ATF, Homeland Security, and ICE—all American institutions focused on tracking down, solving, and prosecuting crimes. They all work together to keep America safe by investigating crimes and putting criminals behind bars. However, prosecutors and investigators are not immune from biases or from making mistakes. The only person standing in between those mistakes and

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injustices to poor defendants is their public defender. America's public defender system is an integral facet of America's claim of justice for all. The Court in *Gideon* held that someone without counsel would not be able to adequately defend themselves.[1] More than eighty percent of criminal defendants in America's criminal courts cannot afford counsel.[2]

Many overworked, underpaid, and underappreciated public defenders are struggling to maintain their massive caseloads while still making a difference in their clients' lives. While some public defenders have the institutional funding to provide exceptional representation, others are not so well funded.[3] Wisconsin is currently facing a class-action lawsuit because of the large number of criminal defendants who are currently sitting in jail waiting for representation.[4] Missouri's public defender system has recently been declared unconstitutional, since it had to waitlist defendants because Missouri public defenders are unable to provide effective representation to all the clients needing representation.[5] New York public defenders have not received a raise in eighteen years and receive only half of what federal public defenders receive.[6] The Los Angeles Public Defenders' Union claims that fifty percent of its members are considering quitting due to excessive workload.[7] The American Bar Association recently determined that Oregon and New Mexico only employ one-third of the public defenders

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

[2] John P. Gross, *Without the Right to Adequate Counsel, Is Our Criminal Justice System Legitimate?*, THE HILL (Apr. 5, 2023, 12:00 PM), https://thehill.com/opinion/criminal-justice/3935517-without-the-right-to-adequate-counsel-is-our-criminal-justice-system-legitimate/ (citing Steven K. Smith et al., *Indigent Defense*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS (Feb. 1996) https://bjs.ojp.gov/content/pub/pdf/id.pdf).

[3] Gross, *supra* note 2.

[4] Evan Casey, *Class Action Lawsuit Calls Out Lack of State Public Defenders*, WISCONSIN PUBLIC RADIO (Aug. 24, 2022) https://www.wpr.org/justice/class-action-lawsuit-calls-out-lack-state-public-defenders.

[5] Joe Harris, *Missouri Judge Rules Waiting List for Public Defenders Is Unconstitutional*, COURTHOUSE NEWS SERVICE (Feb. 9, 2023) https://www.courthousenews.com/missouri-judge-rules-waiting-list-for-public-defenders-is-unconstitutional/.

[6] Susan DeSantis, *New York State Bar Association Commences Lawsuit to Raise 18-B Rates*, NEW YORK STATE BAR ASSOCIATION (Nov. 30, 2022) https://nysba.org/new-york-state-bar-association-sues-to-ensure-people-who-cannot-afford-counsel-have-constitutionally-mandated-representation/.

[7] Letter from Christine Rodriguez, President, Los Angeles County Public Defenders Union, Local 148, to Holly Mitchell, Honorable Supervisor, Los Angeles County Public Defenders (Feb. 22, 2022) (contributed by Southern California Public Radio) https://www.documentcloud.org/documents/21398400-cover-letter-mitchell?responsive=1&title=1.

needed to meet their current caseload.[8] These are just a few examples of the systemic issue of underfunded public defender systems across America. Without adequately funded public defender systems, the criminal justice system will fail to live up to the ideals of Magna Carta and America's founding principle of equality of all before the law.[9] One of the most striking consequences of the underfunding of public defender systems is the number of cases that do not go to trial (almost 80%) and the percentage of convictions in federal court that are attained by a plea deal (98%)).[10]

This overwhelmed public defender is the best shot many poor Americans have at justice. The appointment of attorneys for indigent defendants in *Gideon v. Wainwright* in 1963 was a step forward, but the American criminal justice system has yet to attain the ideal of equality of all before the law. However, the Court's previous decisions on the right to appointed counsel point to a future of adequately funded public defender systems. After 1963, the Supreme Court continued to expand the right to appointed counsel into the right of effective counsel through *McMann v. Richardson*, *United States v. Cronic*, and *Strickland v. Washington*.[11] Together, *Cronic* and *Strickland* point to the unconstitutionality of underfunded public defender systems using a two-factor test: 1) whether prejudice is so likely that case-by-case inquiry is not merited and 2) whether the prejudice is easy for the government to prevent.[12] It will be argued that both factors are overwhelmingly met when a criminal defendant's ineffective

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[8] American Bar Association & MossAdams, *The Oregon Project: An Analysis of the Oregon Public Defender System and Attorney Workload Standards*, AMERICAN BAR ASSOCIATION (Jan. 2022) https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-or-proj-rept.pdf; American Bar Association & MossAdams, *The New Mexico Project: An Analysis of the New Mexico Public Defender System and Attorney Workload Standards*, AMERICAN BAR ASSOCIATION (Jan. 2022) https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-moss-adams-nm-proj.pdf.

[9] The Magna Carta of Edward I (1297), 25 Edw. 1.

[10] Thea Johnson et al., *2023 Plea Bargain Task Force Report*, AMERICAN BAR ASSOCIATION: CRIMINAL JUSTICE SECTION (2023) https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf; S. Gibson et al., *Trial Court Caseload Overview: Caseload Detail – Total Criminal*, COURT STATISTICS PROJECT (Oct. 9, 2023) https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-criminal.

[11] McMann v. Richardson, 397 U.S. 759 (1970); U.S. v. Cronic, 466 U.S. 648 (1984); Strickland v. Washington, 466 U.S. 668 (1984).

[12] *Strickland*, 466 U.S. at 692 (citing *Cronic*, 466 U.S. at 659).

assistance of counsel is due to systemic underfunding of a public defender system.

II. HISTORY OF THE RIGHT TO APPOINTED COUNSEL

A. Betts v. Brady

The American right to counsel in state criminal cases can be traced back to the Supreme Court's decision of *Gideon v. Wainwright* in 1963.[13] At the time that *Gideon* was argued, *Betts v. Brady* was the controlling decision regarding the state's duty to appoint counsel for indigent defendants.[14] The Court in *Betts* held that states were not required by the Sixth and Fourteenth Amendments of the Constitution to appoint counsel to indigent criminal defendants, except where special circumstances arose, taking into account severity of potential sentence, defendant's mental condition/intelligence, defendant's familiarity with criminal procedure, and defendant's actual performance acting as counsel.[15] Considering the Sixth and Fourteenth Amendments, the divided Court reasoned that determining whether an action constitutes a denial of due process requires a case-by-case inquiry into the "totality of the facts."[16] After reviewing relevant data on the subject from the constitutional, legislative, and judicial history of the United States, the Court in *Betts* concluded that the denial of appointed counsel did not violate the fundamental ideas of fairness and, thus, did not constitute a denial of due process.[17]

B. Gideon v. Wainwright

In 1963, the Supreme Court revisited *Betts*'s characterization of the right to appointed counsel, hearing an appeal from the conviction of Clarence Earl Gideon. Gideon, a Florida man, was charged and convicted, without counsel, of felony breaking and entering under Florida law.[18] He challenged his conviction in the Florida Supreme Court on the sole ground

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[13] Gideon v. Wainwright, 372 U.S. 335 (1963).
[14] Betts v. Brady, 316 U.S. 455 (1942).
[15] *Id.* at 462.
[16] *Id.*
[17] *Id.*
[18] Gideon v. Wainwright, 372 U.S. 335, 337-38 (1963).

that he was refused the appointment of counsel.[19] Upon denial of his appeal, the United States Supreme Court granted certiorari and appointed counsel for Gideon.[20] Gideon's counsel would argue that both precedent and reason dictate that any criminal defendant who is too poor for a lawyer cannot have a fair trial unless appointed counsel.[21]

The Supreme Court agreed.[22] The Court held that both the Sixth and Fourteenth Amendments were applicable to the right to counsel in state cases.[23] The applicable part of the Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[24] The Court had already mandated the appointment of counsel for indigent defendants in federal court but had yet to extend that mandate to the states.[25] To determine whether the Sixth Amendment should be applied to the states, however, the court determined whether the Due Process Clause extended to the right of counsel in criminal defense cases.[26]

Particularly informative to the Court's decision was the earlier case of *Powell v. Alabama* which demonstrated that the principle of the right of appointed counsel embraced the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[27] Throughout its decisions, the Court had consistently looked at the "fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States."[28] The Court accepted *Betts*' assumption that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is incorporated by the Fourteenth Amendment.[29] However, the Court rejected *Betts'* primary holding.[30] Instead, the court held, "not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal

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[19] *Id.*

[20] *Id.* at 338.

[21] *Id.*

[22] *Id.* at 340.

[23] *Id.*

[24] *Id.* at 339.

[25] *Id.* at 340.

[26] *Id.*

[27] *Gideon*, 372 U.S. at 341 (quoting Powell v. Alabama, 287 U.S. 45, 53 (1932)).

[28] *Gideon*, 372 U.S. at 341.

[29] *Id.* at 342.

[30] *Gideon*, 372 U.S. at 343; *Powell*, 287 U.S. at 53; Grosjean v. American Press Co., 297 U.S. 233 (1936); Johnson v. Zerbst, 304 U.S. 458 (1938); Avery v. Alabama, 308 U.S. 444 (1940); and Smith v. O'Grady, 312 U.S. 329 (1941).

justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[31]

C. McMann v. Richardson

Over the next two decades, the Supreme Court would continue to hear important cases extending the right to appointed counsel. One of these cases, *McMann v. Richardson*, focused mostly on procedural issues surrounding guilty pleas and confessions.[32] But particularly relevant to future cases was its holding "that the right to counsel is the right to effective counsel."[33] The Court would point to *McMann* in later important cases, like *Strickland v. Washington* and *United States v. Cronic*, in defining the right to effective counsel.

D. United States v. Chronic

In *United States v. Cronic*, the respondent was convicted of check kiting after being appointed new counsel only twenty-five days before trial.[34] The government had spent four-and-a-half years investigating thousands of documents for the prosecution of the case.[35] After overviewing the right to effective counsel established in *McMann* and other cases, the Court discussed the proper standard to be applied in the current case.[36]

The Court reiterated precedent on presumptions of prejudice and determined that "only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial."[37] The critical question was whether the circumstances surrounding the respondent's representation justified such a presumption of ineffectiveness.[38] The circumstances in *Cronic* were not enough to justify a presumption of ineffectiveness because the factual issues to be investigated were not particularly complicated and because inexperienced attorneys must begin

[31] *Gideon*, 372 U.S. at 344.
[32] McMann v. Richardson, 397 U.S. 759 (1970).
[33] *Id.* at 771 n.14.
[34] United States v. Cronic, 466 U.S. 648, 649 (1984).
[35] *Id.*
[36] *Id.* at 650-53.
[37] *Id.* at 653-62.
[38] *Id.* at 663.

their careers at some point.[39] The Court reversed the lower court's factors utilized to determine a presumption of ineffectiveness.[40]

E. Strickland v. Washington

The same day that the Court decided *United States v. Cronic* it decided *Strickland v. Washington*, the case that would establish the test for ineffective assistance of counsel. Washington planned and committed three progressively brutal stabbing murders in September 1976.[41] After Washington's two accomplices were arrested, he turned himself in and voluntarily gave a lengthy statement confessing to the third murder and the crimes surrounding it.[42] Washington's appointed counsel began actively pursuing strategies and evidence, but, against the advice of his counsel, Washington confessed to the first two murders and surrounding crimes, waived his right to a trial by jury, and pled guilty to all charges.[43] Washington's statements at his plea hearing that he was under extreme financial stress at the time of the crimes and that he had no prior criminal history would become the basis of Washington's attorney's strategy at the sentencing hearing.[44]

Washington claimed his counsel was ineffective during his capital sentencing proceedings.[45] Washington's attorney later testified that, by this time, he was overcome with a feeling of hopelessness for Washington's case.[46] Washington's attorney's investigation consisted entirely of some phone conversations with Washington's wife and mother and included no witnesses, pre-sentencing reports, or inquiries into Washington's character or emotional state at the time of the crimes.[47] Counsel testified this was part of his strategy based on the judge's previous statements and reputation to rely on Washington's remorse, alleged lack of criminal history, and alleged disturbance at the time of the crime.[48] The judge found no significant

[39] *Id.* at 663-67.

[40] *Id.* at 666-67.

[41] *Strickland*, 466 U.S. at 671-72. Notably, Washington was also charged with torture, kidnapping, severe assault, attempted murder, attempted extortion, and theft.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 675.

[46] *Id.* at 673.

[47] *Id.*

[48] *Id.*

mitigating factors while finding several aggravating factors: the cruelness of the stabbings, the coincidence of each murder with at least one other dangerous and violent felony, the interest of pecuniary gain in committing the crimes, and the intention of committing the murders to avoid arrest.[49] The Florida Supreme Court unanimously affirmed Washington's death penalty.[50]

Washington then applied for collateral relief alleging that his counsel had rendered ineffective assistance at the sentencing proceeding.[51] Throughout Washington's ineffective assistance of counsel proceedings, the Court focused on two alleged errors that it considered the most meritorious: the failure to request a psychiatric report and the failure to investigate and present character witnesses.[52] The state denied collateral relief rejecting both errors as insubstantially prejudicial, and the Florida Supreme Court again affirmed the state court's ruling.[53] Washington then filed a habeas corpus petition in Federal District Court alleging ineffective assistance of counsel.[54] After another evidentiary hearing, the District Court would also not grant Washington collateral relief, with similar holdings to the state courts.[55] The courts pointed to the overwhelming nature of the aggravating factors to insinuate that no error on the part of counsel would have been large enough to constitute an ineffective assistance of counsel claim.[56]

Washington then appealed this decision to the United States Court of Appeals for the Fifth Circuit, which originally affirmed in part, vacated in part, and remanded the case.[57] However, the Court of Appeals decided to rehear the case *en banc* and reversed and remanded the entire judgment for new factfinding under updated standards.[58] First, the Fifth Circuit held that the Sixth Amendment gave criminal defendants a right to reasonably effective assistance of counsel given the totality of the circumstances.[59] Second, the court held that the defendant must show that the counsel's errors

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[49] *Id.* at 674.
[50] *Id.* at 675.
[51] *Id.*
[52] *Id.* at 676-77.
[53] *Id.* at 678.
[54] *Id.*
[55] *Id.* at 679.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at 680-81.

resulted in actual and substantial disadvantage to the course of a defense.[60] The State of Florida then successfully appealed for a writ of certiorari to the United States Supreme Court.[61]

Although the Court had recognized the right to counsel in all state cases in *Gideon v. Wainwright* and the right to effective counsel in all state cases in *McMann v. Richardson*,[62] it had never defined what the meaning of actual ineffectiveness was.[63] The lower courts had employed a two-pronged test for ineffectiveness claims.[64] The first focused on the counsel's performance, and the second focused on the prejudice that the counsel's performance resulted in.[65] The Court accepted this view but had to create clear definitions for both prongs to resolve both semantic and substantial differences between the lower courts.[66]

The Supreme Court held that the differences in the standard for counsel's performance were generally semantic, for almost all courts had adopted some form of a reasonably effective assistance of counsel standard.[67] The Supreme Court adopted a standard that required a showing that the defendant's counsel's representation fell below an objective standard of reasonableness considering all the circumstances.[68] The Court rejected more specific guidelines but declared the ABA standards as guidelines (not rules) to determine reasonableness.[69] The standard must be highly deferential to a defendant's counsel and eliminate the benefit of hindsight.[70] A defendant must point to counsel's specific unreasonable acts or omissions instead of a general idea of unreasonableness.[71] When strategic choices are made after a thorough investigation of the law and facts, conduct is virtually unchallengeable.[72]

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[60] *Id.* at 682-83.
[61] *Id.* at 683.
[62] Gideon v. Wainwright, 372 U.S. 335 (1963); McMann v. Richardson, 397 U.S. 759 (1970).
[63] *Strickland*, 466 U.S. at 683.
[64] *Id.* at 683-84.
[65] *Id.* at 684.
[66] *Id.*
[67] *Id.* at 687.
[68] *Id.* at 688.
[69] *Id.* at 688-89.
[70] *Id.* at 691.
[71] *Id.* at 690.
[72] *Id.* at 691.

The Court also noted that the lower court's prejudice requirement formulations were more than just semantically different.[73] A defendant must show that a counsel's unreasonable errors were so serious as to deprive the defendant of a fair trial.[74] The prejudice requirement comes from the government's lack of responsibility for the counsel's unreasonable errors.[75] The Court reasoned that because the government is not responsible for and not able to easily prevent attorney errors, the government should not have to devote more resources to the retrying of a case that would have been the same, despite counsel's errors.[76] The defendant must therefore prove actual prejudice, not just a conceivable effect on the outcome or even likely prejudice.[77]

This standard came from the test for the materiality of exculpatory information not disclosed to the defense by the prosecution but differed in its choice of the reasonable probability burden of proof over the preponderance of the evidence.[78] The prejudice test is as follows: a reasonable probability sufficient to undermine confidence in the outcome that, but for the counsel's unprofessional errors, the result of the proceeding would have been different.[79] This assumes the judge or jury acted according to law and excludes arbitrariness, nullification, and the idiosyncrasies of the decision maker, except for the reasonableness of counsel's strategies.[80] The Court rejected the respondent's standard which focused on whether errors impaired the presentation of the defense.[81] The Court held that the alternative standard did not present a workable principle to classify which impairments were sufficiently serious to warrant setting aside a judgment.[82]

The Court noted a few practical considerations in applying the reasonableness and prejudice requirements.[83] First, the focus of inquiry must be on the fundamental fairness of the proceeding being challenged.[84] Second, courts do not have to address effectiveness or prejudice in the same order, or

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[73] *Id.* at 692.
[74] *Id.*
[75] *Id.* at 693.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 694.
[79] *Id.*
[80] *Id.* at 695.
[81] *Id.*
[82] *Id.* at 694.
[83] *Id.* at 696.
[84] *Id.*

even both at all, if one is sufficient to determine the outcome of the case.[85] Third, ineffectiveness claims should not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.[86] And fourth, a finding that counsel rendered effective assistance in a state court is not a finding of fact binding on the federal court, although it is given deference.[87]

The Court determined that the test it laid out was close enough to those in the Florida and District courts that it could not find Washington's counsel's actions to be unreasonable.[88] The counsel made a strategic choice about the trial, not a choice because he felt hopeless, and the choice was well within the range of professionally reasonable judgments.[89] Furthermore, Washington suffered insufficient prejudice to warrant setting aside his death sentence, for the evidence that was not offered at the sentencing hearing would have barely helped (if it did not hurt) the sentencing profile presented to the sentencing judge.[90] In summary, *Strickland v. Washington* held Washington's attorney's conduct to be constitutional by establishing a two-part test for ineffective assistance of counsel: (1) whether the specific acts of the defendant's counsel fell below an objective standard of reasonableness; and (2) whether the specific acts were so serious as to deprive the defendant of a fair trial.[91]

In discussing the ineffective assistance of counsel test, the Court also outlined several factors that would trigger *Cronic's* automatic presumption of prejudice. In determining whether to grant an automatic presumption of prejudice, the Court outlined the following factors: (1) Whether the prejudice is so likely that case-by-case inquiry into prejudice is not worth the cost; and (2) whether the prejudice is easy for the government to prevent.[92] In determining whether the prejudice is easy for the government to prevent, the Court pointed to two areas of emphasis: (a) whether the errors are easy to identify; and (b) whether the prosecution is directly responsible.[93]

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[85] *Id.* at 697.
[86] *Id.*
[87] *Id.* at 698.
[88] *Id.*
[89] *Id.* at 699.
[90] *Id.* at 700.
[91] *Strickland,* 466 U.S. at 683-95.
[92] Strickland v. Washington, 466 U.S. 668, 692 (1984) (citing *Cronic*, 466 U.S. at 659).
[93] *Strickland*, 466 U.S. at 692 (citing *Cronic*, 466 U.S. at 659).

F. Weaver v. Massachusetts

Even though the Supreme Court had outlined its test for ineffective assistance of counsel cases, the test could not exist in a vacuum. Sometimes, the test appeared alongside other constitutional analyses, such as the structural error analysis in *Weaver v. Massachusetts*. In *Weaver*, the courtroom was closed to the public for two days of *voir dire* for a first-degree murder trial, but the defense counsel never objected or raised the issue on direct review.[94] According to *Presley v. Georgia,* the counsel's failure to object constituted a structural error that indicated that counsel suffered from "serious incompetency, inefficiency, or inattention."[95] The Court determined in *Presley v. Georgia* that the public-trial right extends to jury selection as well as other portions of the trial.[96]

However, Massachusetts's courts did not grant the petitioner a new trial because no prejudice had been argued or shown.[97] The United States Supreme Court granted certiorari to hear the case.[98] At the time, Courts of Appeals and state courts of last resort were split on whether prejudice needed to be shown in ineffective assistance of counsel cases involving structural errors.[99] Structural errors are a category of errors that are so serious that they affect the framework of the trial.[100]

The Court felt constrained to explain two intertwined doctrines: (1) structural error doctrine; and (2) ineffective assistance of counsel doctrine.[101] The general rule is that "constitutional error does not automatically require reversal of a conviction."[102] If the government can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," then the error is deemed to be harmless and the conviction is not reversed.[103] Structural errors are exceptions to that general rule:[104] "The defining feature of a structural error is that it 'affect[s] the framework within

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[94] Weaver v. Massachusetts, 582 U.S. 286, 291 (2017).

[95] Presley v. Georgia, 558 U.S. 209 (2010) (*per curiam*); *Weaver*, 582 U.S. at 293 (quoting Massachusetts v. Chleikh, 82 Mass. App. 718, 722, 978 N.E.2d 100 (2012)).

[96] *Weaver*, 582 U.S. at 293; *Presley*, 558 U.S. at 209.

[97] *Weaver*, 582 U.S. at 293.

[98] *Id.*

[99] *Id.*

[100] Id.

[101] *Id.*

[102] Chapman v. California, 386 U.S. 18 (1967).

[103] *Id.* at 24.

[104] *Weaver*, 582 U.S. at 293.

which the trial proceeds.'"[105] Structural errors have been born out of three rationales: (1) if the right at issue protects an interest other than the protection against erroneous convictions (e.g. right to conduct own defense), (2) if the effects of the error are too hard to measure (e. g. right to select own attorney), and (3) if the error always results in fundamental unfairness (right to appointed counsel).[106] The public-trial right is one of these structural rights, but it is not absolute and is subject to exceptions.[107] The public trial right falls into the second rationale category because it is difficult to assess the effect of the error and often results in fundamental unfairness and, to a lesser extent, protects some interests other than those of the defendant.[108] All these rationales work together to classify public trial violations as structural errors.[109] When the error is raised at trial and on direct appeal, the defendant is entitled to automatic reversal.[110]

Notably, the issue of ineffective assistance of counsel becomes relevant since the issue was not raised during the trial or on direct appeal.[111] Normally, to prove ineffective assistance of counsel, a defendant must show unreasonably deficient performance and prejudice.[112] However, the prejudice requirement is not to be applied mechanically, for the final question is on the "fundamental fairness of the proceeding."[113] Because not every public-trial violation leads to a fundamentally unfair trial, the burden is on the defendant to show either a "reasonable probability of a different outcome" or to show "that the particular violation was so serious as to render his or her trial fundamentally unfair."[114] The Court stated that this decision did not affect any previous structural error precedents since this is fundamentally different under the addition of the ineffective assistance of counsel framework.[115] There are multiple reasons for this distinction: (1) If a public-trial violation is not raised in trial, the Court has no chance either to rectify it or to explain its rationale for it;[116] and (2) The systemic costs of a new trial when a

[105] Arizona v. Fulminante, 499 U.S. 279 (1991).
[106] *Weaver*, 582 U.S. at 295-96.
[107] *Id.*, at 296.
[108] *Id.*
[109] *Id.*
[110] Neder v. United States, 527 U.S. 1, 7 (1999).
[111] *Weaver*, 582 U.S. at 299.
[112] Strickland v. Washington 466 U.S. 668, 687 (1984).
[113] *Id.* at 696.
[114] *Weaver*, 582 U.S. at 301.
[115] *Id.*
[116] *Id.* at 302.

structural error is raised at trial and on direct appeal are much lower than the costs of a new trial because more time will have elapsed in most cases.[117]

After presuming that the petitioner had shown deficient performance by counsel in *Weaver*, the Court proceeded to a prejudice analysis.[118] However, the petitioner offered no evidence or argument establishing prejudice.[119] Furthermore, the petitioner did not make the showing that the trial was fundamentally unfair.[120] Therefore, the Supreme Court rejected the petitioner's motion for a new trial, affirming the Massachusetts Superior Court.[121]

III. WHY UNDERFUNDED PUBLIC DEFENDER SYSTEMS ARE UNCONSTITUTIONAL

Strickland's prejudice requirement is especially odious when an ineffective assistance of counsel claim arises because of an underfunded public defender system. Both the Constitution and Supreme Court precedent provide two potential exceptions for the prejudice requirement in ineffective assistance of counsel cases. The first is a structural error analysis following the factors set forth in *Weaver v. Massachusetts*.[122] Although an underfunded public defender system would qualify as a structural error, the prejudice requirement in ineffective assistance of counsel cases is still high.[123]

The second potential exception for the prejudice requirement is a presumption of prejudice following the factors outlined in either *United States v. Cronic* or *Cuyler v. Sullivan*.[124] Considering the two factors set forth in *Cronic* and the three factors set forth in *Cuyler*, underfunded public defender systems match most closely with the two *Cronic* factors: (1) whether prejudice is so likely that case-by-case inquiry into prejudice is not worth the cost and (2) whether the prejudice is easy for the government to prevent.[125] Following a *Cronic* presumption of prejudice analysis is preferable to a *Weaver* structural error analysis for defendants because it follows most

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[117] *Id.*
[118] *Id.* at 304.
[119] *Id.*
[120] *Id.*
[121] *Id.* at 305.
[122] Weaver v. Massachusetts, 582 U.S. 286 (2017).
[123] Id.
[124] United States v. Cronic, 466 U.S. 648 (1984); Cuyler v. Sullivan, 446 U.S. 335 (1980).
[125] Strickland v. Washington, 466 U.S. 668, 683-83 (1984) (citing *Cronic*, 466 U.S. at 659).

logically from the Court's decisions in *Gideon v. Wainwright* and *Strickland v. Washington* and provides a more lenient prejudice requirement for defendants to meet.[126]

A. *Does Systemic Underfunding Qualify as a Structural Error?*

Determining whether an underfunded public defender system fits within the *Weaver* structural error framework requires a two-part analysis: 1) whether an underfunded public defender system constitutes a structural error and 2) whether any prejudice must be proved.[127] In determining whether an act is a structural error, *Weaver* outlined three avenues: (1) whether the right protects an interest other than erroneous convictions (for example, the defendant's right to conduct his/her own defense); (2) whether the effects of the error are hard to measure (for example, when defendants are denied the right to select their attorney); and (3) whether the error always results in fundamental unfairness (for example, when indigent defendants are denied an attorney).[128] An underfunded public defender system falls strongly within both the second and third rationales.

The adversarial system of justice requires well-prepared cases on both sides to provide the decision-maker with enough evidence to ensure a just outcome. If a defense attorney is so overworked so as not to be able to prepare accordingly, few cases will result in trials that are fundamentally fair to the defendant. As the combination of these rationales worked together in *Weaver* to establish a violation of the right to a public trial during *voir dire* as a structural error, they work together to establish underfunded public defender systems as structural errors.

Furthermore, the denial of effective counsel due to an underfunded public defender system is analogous to the structural error recognized by the Supreme Court in *United States v. Gonzalez-Lopez*.[129] In *Gonzalez-Lopez*, the Court recognized the denial of one's choice of counsel as a structural error.[130] Justice Scalia explained that the Sixth Amendment "commands, not

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[126] *Cronic*, 466 U.S. 648; Gideon v. Wainwright, 372 U.S. 335 (1963); Strickland v. Washington, 466 U.S. 668 (1984).

[127] Weaver v. Massachusetts, 582 U.S. 286, 292 (2017).

[128] *Id.*

[129] Zachary L. Henderson, *A Comprehensive Consideration of the Structural-Error Doctrine*, 85 MO. L. REV. 965, 986 (Fall 2020) (citing United States v. Gonzalez-Lopez, 548 U.S. 140 (2006)).

[130] Henderson, *supra* note 126 (citing *Gonzalez-Lopez*, 548 U.S. at 156).

that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best."[131] This structural error is satisfied when a defendant opts for a court-appointed attorney if the defendant is not forced into such a decision.

However, *Gonzalez-Lopez* establishes a relevant principle for the application to underfunded public defender systems. Errors in the way a court handles a defendant's counsel can result in a denial of the guarantee of fairness—the type of denial that leads a Court to recognize a structural error. The coincidence of the rationales along with the analogous structural error in *Gonzalez-Lopez* indicate that underfunded public defender systems constitute a structural error following the *Weaver* line of cases.

This argument is most likely to be raised after trial through an ineffective assistance of counsel claim, like the claim brought in *Weaver*. This is, admittedly, an unfortunate outcome for the public defender. In *Weaver*, the Court required showing either a "reasonable probability of a different outcome" or "that the particular violation was so serious as to render his or her trial fundamentally unfair."[132] The Court based this prejudice requirement on two judicial economy rationales: (1) the Court has no chance to rectify or explain an alleged violation if it is not raised at trial; and (2) the systemic costs of a new trial are lower when raised at trial or on direct appeal since more time will have elapsed.[133]

This prejudice requirement seems to clash with Justice Scalia's rationale in *United States v. Gonzalez-Lopez* and structural analysis, in general, which focuses not on the fairness of a trial but on a particular guarantee of fairness for all trials. Furthermore, errors that would often be so systemic, such as errors from an underfunded public defender system would likely reduce judicial economy much less than many other case-by-case applications of structural errors. Nevertheless, under structural error analysis, the Court is likely to follow its precedent in *Weaver* and require the prejudice showing when structural error analysis is combined with ineffective assistance of counsel analysis.

Unfortunately, when an ineffective assistance of counsel claim is raised after trial, structural error analysis ends up applying a similar prejudice requirement to the more straightforward analysis in *Strickland v. Washington* requires. Furthermore, connecting the underfunded public

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[131] Henderson, *supra* note 126 (citing *Gonzalez-Lopez*, 548 U.S. at 155).

[132] Weaver v. Massachusetts, 582 U.S. 286 (2017).

[133] *Id.* at 299.

defender system to a defendant's case must require more than blanket application to an entire affected jurisdiction. There must be evidence showing that the structural error is relevant in the defendant's case. The Court would likely handle this in the same way that it handled the *Strickland* case, by requiring a showing of unreasonable acts of the defendant's counsel. In the end, *Weaver* structural error analysis does not seem to be much more lenient to defendants than a *Strickland* ineffective assistance of counsel analysis. However, even with a similar prejudice and responsibility test, structural error analysis may still be more beneficial for a defendant than a *Strickland* analysis because the scarcity of precedent and the complicated nature of *Weaver* allows a judge to tailor his/her judgment more equitably to a defendant and allows the Court to adopt a more lenient responsibility requirement. The Court may even adopt a responsibility requirement that shines a less harsh light on the public defender's whose counsel is alleged to have been ineffective.

B. *Should Prejudice Be Presumed?*

Strickland provides hope for defendants to pursue a route around the noxious prejudice requirement in cases involving underfunded public defender systems. The Court in *Strickland v. Washington* recognized two different circumstances that lead to a "presumption of prejudice" in ineffectiveness cases.[134] The first scenario results in an automatic presumption of prejudice, while the second leads to a more limited presumption of prejudice.[135] In determining whether certain facts lead to an automatic presumption of prejudice, the Court relied on the following factors from *US v. Cronic*: (1) whether the prejudice is so likely that case-by-case inquiry into prejudice is not worth the cost and (2) whether the prejudice is easy for the government to prevent.[136] In determining whether the prejudice is easy for the government to prevent, the Court pointed to two areas of emphasis: (a) whether the errors are easy to identify and (b) whether the prosecution is responsible.[137] These *US v. Cronic* factors have been applied to a variety of scenarios in which the government has interfered with the defense counsel's ability to zealously advocate for the defendant.

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[134] Strickland v. Washington, 466 U.S. 668, 683-84 (1984).

[135] Strickland, 466 U.S. at 692 (citing U.S. v. Cronic, 466 U.S. 648, 659 (1984)); Cuyler v. Sullivan, 446 U.S. 335 (1980)).

[136] *Strickland*, 466 U.S. at 692 (citing *Cronic*, 466 U.S. at 659).

[137] *Id.*

The Court also recognized a more limited presumption of prejudice which could be triggered if the following factors from *Cuyler v. Sullivan* were met: 1) when counsel breaches the duty of loyalty, the most basic of counsel's duties, 2) when it is difficult to measure the precise effect on the defense, 3) the counsel has an obligation to avoid the alleged conduct, and 4) trial courts have an obligation to make early inquiry in certain situations likely to give rise to conflicts.[138] If these factors are met, the defendant has a small burden of proof to carry before prejudice is presumed.[139] These factors from *Cuyler v. Sullivan* have been specifically applied to ineffectiveness cases where the lack of professional responsibility comes from a conflict of interest.[140]

The *Cronic* automatic presumption of prejudice is triggered when the state is primarily at fault for the lack of professional responsibility, while the *Cuyler* limited presumption of prejudice is triggered when counsel is primarily at fault for the lack of professional responsibility.[141] When a public defender's defense falls below the level of professional responsibility, not because of anything within his or her control, but because of a lack of government funding or resources, prejudice should also be presumed. Although this circumstance correlates with both the *Cronic* and *Cuyler* factors, it matches the most strongly with the *Cronic* factors set forth for the automatic presumption of prejudice. Most notably, the state is primarily at fault for the lack of professional responsibility when the mistakes are due to a lack of state funding or resources.

The *Cronic* factors match remarkably well with ineffective assistance of counsel caused by underfunded public defender systems. The first factor is whether prejudice is so likely that case-by-case inquiry into prejudice is not worth the cost. The most valuable resource to an overworked, underfunded public defender is time. The less money and resources that are designated to a public defender's office, the fewer public defenders they can hire. The fewer the public defenders, the less time and mental capacity each public defender can devote to each client. Furthermore, less funding means that public defenders with experience will leave for higher-paying jobs, leaving those jobs for less experienced attorneys. With less time and mental capacity for each client, public defenders are much less likely to see flaws in the

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[138] *Strickland*, 466 U.S. at 692 (citing *Cuyler*, 446 U.S. at 345-350).

[139] *Id.*

[140] *Id.*

[141] *Id.*

prosecution's case or spend extra time researching the best case law and trial strategies.

The second thing that underfunded public defenders lose is the right of investigation. Investigation is a crucial part of criminal defense. The large number of cases limits public defenders' time to investigate their cases themselves, while the lack of funding prohibits hiring an investigator except for the most important cases. Although the loss of the right to investigation is more limited when open file discovery is provided by the prosecution, the loss is still substantial. Although the police and prosecution are required to turn over exculpatory evidence to public defenders, the police and prosecution investigators are looking, not for exculpatory evidence, but for convicting evidence and are less likely to notice exculpatory evidence. Defense counsel is much more likely to find exculpatory evidence if funded to specifically search for it, for she is the one most familiar with the defense strategy and knows best what evidence will help it. The third thing defendants lose because of underfunded public defender systems is the right to trial. When public defenders are buried in cases, it becomes much easier to urge their defendants to plea out a case. Because trials require immense amounts of time, preparation, and resources, a plea deal can be an easy route around a packed docket.

Finally, defendants are much less likely to win trials when their public defenders suffer from a lack of resources or funding. Underfunded public defenders will be limited in the time available for them to put into the trial, while they try to balance their other clients. Furthermore, underfunded public defenders may be limited in the evidence they can present in trials. For instance, public defenders may be unable to pay for the expert witnesses that a more adequately funded attorney would easily pay for. Underfunded public defenders are also unlikely to pay for jury consultants. Poor jury selection can result in a defendant losing the trial before it has begun. Therefore, the first factor, that prejudice must be so likely that case-by-case inquiry into prejudice is not worth the cost, is met.

The second factor, that the prejudice is easy for the government to prevent, is even more overwhelmingly met. To remedy the situation, the state need not institute more rules of evidence or keep up with any complicated tests; it must fund its Supreme Court-mandated public defender system with enough money to effectively represent all its counsel.[142] The prosecution does not have to hold the public defenders' hands, but the public defender must

[142] *See* discussion *infra* Part III.D. for the definition of adequate funding.

be funded adequately to ensure the adversarial system of justice remains effective. The solution is simple, allocate more funding to underfunded public defender's offices. Court-mandated redistribution of legislative appropriations is a well-established practice that state courts have relied on for decades in constitutional litigation regarding unequal funding of public schools for poor students beginning with *Serrano v. Priest* in 1971.[143]

Bolstering the second factor even further, the error is easy to identify. Systemic underfunding of public defender systems requires taking a broad look at the system, something that is easier to identify than a case-by-case analysis. To a lesser extent, the prosecution is responsible for the underfunding. After all, the prosecution represents the state in Court, and the state is responsible for the underfunding of public defender systems. Although the connection between the prosecution and the underfunding is not as strong as the other factors, the main factors requiring prejudice to be likely and easy to prevent are still overwhelmingly met in favor of applying an automatic presumption of prejudice to defendants suffering under an underfunded public defender system.[144]

Furthermore, applying an automatic presumption of prejudice follows logically from the Court's jurisprudence on the Sixth and Fourteenth Amendments. Combining the Court's holdings in *Gideon v. Wainwright* and its progeny (all indigent defendants facing the possibility of jail time must have court-appointed counsel) with *McMann v. Richardson* and its further definition in *Strickland v. Washington* (the right to appointed counsel means the right to effective counsel) leads to the natural conclusion that there must be some benchmark for adequacy of funding for public defenders' offices. No one would think that a state is fulfilling its constitutionally mandated responsibility to provide court-appointed counsel by hiring one public defender in every jurisdiction who stayed in court all day and signed off on his clients' convictions and plea deals. What level of adequacy is appropriate can be debated, but that there must be a baseline for adequacy cannot.

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[143] Serrano v. Priest, 487 P.2d 1241 (Cal. 1971); Zachary Liscow, *Are Court Orders Sticky? Evidence on Distributional Impacts from School Finance Litigation*, 15, JOURNAL OF EMPIRICAL LEGAL STUDIES, 4, 4-5 (2018).

[144] *See* discussion *infra* Part III.D. for more on the application of these factors.

C. *What Constitutes Reversible Error?*

There is no reason to fear that just because prejudice is presumed a convicted defendant is entitled to automatic reversal. *Strickland v. Washington* applies a two-part, and this analysis only presumes one-half of the test—the reasonableness requirement must still be met. The *Strickland* test for unreasonableness requires a showing that the defendant's counsel's representation fell below an objective standard of reasonableness considering all the circumstances.[145] This test uses the ABA standards as guidelines and is highly deferential to the public defender.[146] The defendant must point to specific unreasonable acts or omissions while eliminating the benefit of hindsight.[147] Courts should rely on the relevant precedent and the intricacies of the case with the help of the ABA standards in determining unreasonableness.

Furthermore, defendants seeking to prove ineffective assistance of counsel must also establish a reasonable causal connection between the unreasonable acts and the underfunding of a public defender system. This first requires demonstrating actual systemic underfunding. Systemic underfunding occurs when the average, reasonable attorney in a jurisdiction would often fail to represent his/her clients in a professionally responsible way due to an overwhelming caseload, lack of resources, or other factors attributable to lack of funding. Inquiry into underfunding should consider relevant comparative funding statistics, comparative conviction statistics, and other relevant statistics and personal testimony necessary to investigate the state's funding of public defender systems. Just because a public defender system is systemically underfunded does not lead to the automatic presumption that the underfunding leads to unreasonable acts. Instead, the Court should look at each defendant on a case-by-case basis to determine if there is a reasonable causal connection between the unreasonable acts and the actual systemic underfunding.

D. *What Qualifies as Systemic Underfunding?*

Three scenarios may occur in which a lack of resources for public defenders could result in a counsel's unreasonable errors:

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[145] Strickland v. Washington, 466 U.S. 668, 688 (1984).

[146] *Id.* at 688-91.

[147] *Id.* at 690-91.

(1) When a state allocates so little to its public defender system that almost all public defenders suffer from a lack of funding or resources.

(2) When a state allocates money so poorly (or politically) that some public defender's offices are well-funded, while others are poorly funded.

(3) When the chief public defender inequitably assigns cases to public defenders so that some public defenders make unreasonable errors while representing their clients due to the inequitable assignments of cases.

It is important to determine how many of these three scenarios constitute systemic underfunding and justify an automatic presumption of prejudice. All three of these scenarios tend to meet the first *Cronic* factor somewhat equally, but they do not meet the second *Cronic* factor equally. Therefore, each scenario merits a discussion by itself.

When scarcity of funding affects almost all public defenders, the error is easy for the government to prevent. Two areas of emphasis in measuring whether the error is easy for the government to prevent are whether the errors are easy to identify and whether the prosecution is directly responsible. A systemic issue such as a lack of funding across the state is an error that is easy to identify (and easy to fix), putting it directly in line with the first point of emphasis under this factor. Furthermore, the prosecution's representation of the state, the people, or the commonwealth satisfies the second area of emphasis as well. The state may not avoid adequately funding its public defender system merely because it is doing the action and not its court representative. When scarcity of funding affects almost all public defenders, prejudice should be automatically presumed.

When funding is inequitably divided at the state level, it is mostly analogous to first scenario with slight differences. For instance, it is sometimes easier to increase a budget for a public defender system than it is to ensure equitable distribution of funds from an equitable allocation. However, this is still a systemic issue that can be resolved by more stringent supervision of the distribution of funds and minimally affects the fit of the scenario with the second factor. Therefore, statewide inequitable distribution of funding should result in an automatic presumption of prejudice as well.

The third scenario, in which inequitable funding occurs because of the unfair distribution of funds within a particular public defender's office, does not satisfy the second factor, for prejudice is not easy for the government to identify. Public defender systems hire many attorneys, making oversight of specific caseloads an excessive burden for the government. Furthermore, neither the prosecution nor the state is directly responsible for the unfair distribution of cases by the chief public defender. Therefore, the third

scenario does not fit with the second factor and should not result in an automatic presumption of prejudice.

In summary, the systemic underfunding of public defender systems is a violation of the Sixth and Fourteenth Amendments following the Court's precedent in *Gideon v. Wainwright*, *Strickland v. Washington*, and *United States v. Cronic*. When a defendant alleges ineffective assistance of counsel, the defendant must usually prove both unreasonableness and prejudice. In such a claim, the defendant must first prove that specific acts of his/her counsel fell below an objective standard of reasonableness, using the ABA rules as guidelines while being highly deferential to the defendant's counsel. Usually, ineffective assistance of counsel claims would then proceed to an analysis of whether sufficient prejudice to the defendant should result in reversal. However, when a public defender's unreasonableness is due to systemic underfunding, prejudice should be automatically presumed. Systemic underfunding occurs when the average, reasonable attorney in a jurisdiction would often fail to represent clients in a professionally responsible way due to a lack of funding. This systemic underfunding must be reasonably connected to the public defender's unreasonable acts. Connecting systemic underfunding to a public defender's unreasonable acts leads to an automatic presumption of prejudice and results in reversal and remand for a new trial for the convicted defendant.

IV. ANTICIPATED CRITIQUES

A. *Critique 1: This Will Place a Bad Name on Good Public Defenders*

It may appear that this new standard will place a bad name on good public defenders who are already under-compensated and underappreciated. However, this will help public defenders for several reasons. (1) This new standard will inevitably decrease the number of ineffective assistance of counsel claims against individual public defenders as the standard for the job and resources increase. (2) When public defenders receive adequate funding, the only reason for successful ineffective assistance of counsel claims is poor public defenders, not poor resources. As poor public defenders are uncovered, they will either be removed or held accountable to do better work, and public defenders will become more appreciated. (3) As more attorneys are hired for public defenders' offices and wages increase, the prestige of the job will increase. (4) Attorneys will be given margin to help their marginalized defendants, instead of pushing minor alleged criminals through

the system as fast they can. (5) Most importantly, it will shift the blame at hearing from the public defender to the state system.

B. *Critique 2: This Will Flood an Overburdened Judicial System with Even More Litigation*

The number of cases that may need to be retried due to underfunded public defender systems may result in an initial spike in criminal cases across America. However, this short-term spike is likely to lead to substantial long-term gains in both justice and judicial economy. Properly funded public defender systems will eventually lead to fewer credible ineffective assistance of counsel claims on *habeas corpus* actions as public defenders make fewer mistakes during their representation. Furthermore, the correct way to solve an overburdened judicial system is not to take away the constitutional rights of defendants and place innocent people behind bars. Those who receive a criminal record and spend time in prison have much higher rates of recidivism and encourage generational poverty. The short-term spike in criminal cases is likely to be lessened by the consolidation of ineffective assistance of counsel cases; in some states, criminal defendants may file class-action lawsuits against the state, instead of against their public defender, reducing the total number of ineffective assistance of counsel cases. Finally, as the Court in *Gideon* did not see the large number of unrepresented cases that needed to be retried as a barrier to its decision, it should not be a barrier in this case either.

C. *Critique 3: This Will Lead to Higher Rates of Crime as More Criminals Get Off Based on Technicalities*

Better public defender representation for indigent criminal defendants will result in more acquittals of guilty defendants. But better public defender representation will also result in fewer criminal convictions of innocent defendants who would have otherwise been convicted or pled guilty. However, Blackstone famously said, "It is better that ten guilty persons escape than that one innocent suffer."[148] This concept, at the heart of so many of America's founding principles and constitutional rights, has led to numerous protections for the criminal defendant in court, such as the right to be considered innocent until proven guilty, the right to a trial by one's

[148] 4 William Blackstone, Commentaries *337, *352.

peers, and even the right to counsel of one's choice. Surely, more criminals will be acquitted, but the gains that a properly funded public defender system brings for marginalized innocent defendants far outweigh the prospective losses.

D. *Critique 4: This Will Lead to Higher Taxes*

If a state's public defender system is systemically underfunded, this theory would require the state to allocate more money to its public defender system. However, several factors indicate that allocating more money to a state's public defender system will not materially increase the tax burden on the average citizen. First, ensuring adequate funding of public defender systems does not require them to have equal funding to prosecutor's offices. Prosecutor's offices must handle a larger number of criminal cases than a public defender does. Prosecutors must prosecute cases for privately represented and unrepresented clients in addition to public-defender-represented clients. Public defenders must only defend clients falling within the last category. Furthermore, public defenders and prosecutors prepare for cases in very different ways. Prosecutors must put together a coherent theory of their case meeting each statutory or common law standard, while public defenders need only poke one significant hole in the prosecutor's argument to win their client's case. Therefore, the test for adequate funding can never be based solely on funding for prosecutor's offices. Instead, it is based on whether an average, reasonable attorney would consistently fall below an objective standard of reasonableness, a test based on the first half of the *Strickland* test.

A second factor indicating that an increased allocation of money to a state's public defender system will not add a material burden on the average citizen is the relatively minor part of a government's expenditures that the public defender system makes up. Although state and local governments have incredibly varied budgets, the federal budget is a uniform benchmark through which to illustrate this principle. Lawmakers point to $1.52 billion as a base level of funding for the federal public defender system in 2024.[149]

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[149] Ryan Tannehill, *Lawmakers Press to Avoid Funding Pitfall for Public Defenders*, ROLL CALL (Feb. 21, 2024) https://rollcall.com/2024/02/21/lawmakers-press-to-avoid-funding-pitfall-for-public-defenders/.

Compared with the federal outlays of 2023, this would have constituted only .025% of federal outlays.[150]

A third and final reason that adequately funded public defender systems will not increase the burden on the average taxpayer is that the unmeasurable benefits of an adequately funded public defender system will lead to other decreases in government spending. For example, a more just justice system will lead to fewer innocent defendants being convicted. This will lead to fewer inmates in jail (a tax burden), more workers without felony convictions on their permanent records, fewer direct and *habeas corpus* appeals, and fewer single-parent homes. While this is just one of many potential unmeasurable benefits of an adequately funded public defender system, it illustrates that increasing expenditures in one area is not necessarily a net loss for the taxpayer.

Finally, the Supreme Court in *Gideon v. Wainwright*, in requiring states to appoint attorneys to indigent defendants, did not consider the increased tax burden as prohibitive for its decision.[151] After all, the Constitution (along with the Supreme Court's interpretation of it) is the supreme law of the land.[152] Furthermore, budget allocations ensuring the principles of justice, like equality of all before the law, must come before budget allocations aimed at aiding the prosperity of the citizenry.

V. CONCLUSION

Systemically underfunded public defender systems violate the Sixth and Fourteenth Amendments of the Constitution *per se* and lead to a presumption of prejudice in ineffective assistance of counsel cases. Systemic underfunding occurs when the average, reasonable attorney would consistently fall below the level of professional responsibility due to underfunding. Defendants must pass a highly deferential test for the defendant's counsel that requires proving specific unreasonable acts of counsel. Finally, the defendant must establish a causal connection between the acts and the underfunding. This change follows logically from the Court's effective appointed counsel case law, the Constitution's original principles,

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[150] *The Federal Budget in Fiscal Year 2023*, CONGRESSIONAL BUDGET OFFICE (Mar. 5, 2024) https://www.cbo.gov/publication/59727; Tannehill, *supra* note 146.

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

[152] U.S. CONST. art. 6, cl. 2; Cooper v. Aaron, 358 U.S. 1, 18 (1958).

and the Constitution's criminal protections and leads America's criminal justice system closer to the ideal of equality of all before the law.