Indigent Defense Invigorated: A Uniform Standard for Adjudicating Pre-Conviction Sixth Amendment Claims

Emily Chiang
Indigent Defense Invigorated: A Uniform Standard for Adjudicating Pre-Conviction Sixth Amendment Claims

Emily Chiang¹

Abstract

Despite the Sixth Amendment guarantee of the right to counsel, commentators have been documenting the shortcomings of indigent defense systems across the nation for decades: state and county underfunding leads to public defenders without essential resources, which in turn results in harm to indigent criminal defendants. Although a host of litigation brought by would-be reformers has sought improvements in county and state public defense systems, many of the claims have suffered from a lack of a clear governing standard. Some courts have relied on the “cause and prejudice” requirements of Strickland v. Washington, which governs post-conviction ineffective assistance of counsel claims, to great ill effect. This Article contends that rather than resorting to Strickland, claimants and courts should look to allegations of constitutional injury, not prejudice, under other well-settled criminal and civil standards. Those bringing criminal cases should look to the wealth of Sixth Amendment caselaw defining an individual’s substantive right to counsel; and those bringing civil cases should look to the law governing requests for prospective injunctive relief, specifically the need to allege the serious likelihood of irreparable harm — with an eye to the types of harm recognized in the Sixth Amendment criminal cases defining and individual’s substantive right to counsel.

¹ Visiting Assistant Professor of Law, S.J. Quinney College of Law at the University of Utah. The author was a member of the litigation team that successfully procured indigent defense reform in Montana, and has worked on indigent defense reform in Louisiana, Michigan, New York, Nevada, Ohio, Pennsylvania, and Utah. Many thanks go to my Quinney Research Fellow, Blakely Neilson.
Table of Contents

I. Introduction ........................................................................................................................................1

II. The Amply Documented Case for Reform ......................................................................................3

III. A Taxonomy of Pre-Conviction Sixth Amendment Cases .................................................................7

   A. Pre-Conviction Criminal Claims ..............................................................................................8

       1. Routine Adjudication of the Substantive Individual Pre-Conviction Sixth Amendment Rights of Criminal Defendants ..........................................................8

           a. Right to Appointment of Counsel ................................................................................8

           b. Right to Competent Counsel ....................................................................................9

           c. Right to Counsel Serving as an Advocate ................................................................10

           d. Right to Consult with Counsel ..............................................................................12

           e. Right to Counsel without a Conflict of Interest ....................................................12

           f. Right to Counsel with Access to Resources Necessary to Mount a Full Defense .......13

       2. Pre-Conviction Criminal Claims Seeking Systemic Reform ..................................................14


   B. Pre-Conviction Civil Claims .....................................................................................................14

       1. Pre-Conviction Civil Claims Brought by Defense Attorneys ................................................15

       2. Pre-Conviction Civil Claims Brought by Indigent Defendants ............................................17

       3. Civil Claims Brought by Third Party Plaintiffs ................................................................21

IV. Why Strickland is Inappropriate for Pre-Conviction Claims .......................................................22

V. The Standard by Which to Adjudicate Pre-Conviction Sixth Amendment Claims ..........................24

   A. Previously Suggested Standards ..............................................................................................24

       1. Use of Attorney Checklists and Standards ........................................................................24

       2. Evidence of Systemic Shortcomings ..............................................................................26

       3. Trial Judge Supervision ..................................................................................................26

   B. A Standard Rooted in Precedent ..............................................................................................28

VI. Conclusion .....................................................................................................................................29
I. Introduction

In the 46 years since the landmark case of *Gideon v. Wainwright* was decided, the practical difficulties of ensuring meaningful access to constitutionally adequate counsel have been well-documented. While the Supreme Court has continually expanded the right to counsel in theory, in practice, access to counsel for indigent defendants in state courts has arguably remained unchanged, or even contracted.

Because the vast majority of state court criminal cases never proceed to trial, the quality of the pre-trial and pre-conviction representation defendants receive is vital. Funding for public defense services is rarely a popular use of the public fisc, and as state and county budgets contract, the inclination to underfund and under supervise indigent defense systems can become nearly irresistible. As a result of these state and county failures, public defenders are often overloaded with cases; suffer from a lack of essential resources, like access to experts and investigators; and do not receive necessary training, supervision and oversight. The harm to their indigent clients can be grievous, as many are encouraged or forced to plead guilty to

---

3 *See infra*, Part II.
6 See Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics Online tbl. 5.22, http://www.albany.edu/sourcebook/pdf/t522.pdf (last visited Feb. 16, 2010) (showing that the vast majority of defendants who have been convicted and sentenced since 1945 have made a plea of guilty or *nolo contendere* and that the numbers are steadily increasing).
7 The term “pre-conviction” is used throughout this Article to denote those claims which arise prior to a criminal defendant’s sentencing. “Post-conviction” claims are those which arise after sentencing, such as in an appeals or habeas context.
inappropriate charges, spend excessive amounts of time in pre-trial detention, and have little to no ability to consult with counsel on their defenses.

For decades, publicly-minded organizations have been issuing reports documenting the shortcomings of various indigent defense systems at the county level, the state level, and nationally.\(^8\) Sadly, those issued in recent years bear unsettling resemblance to those that pre-date \textit{Gideon} itself.\(^9\) Law review articles have similarly documented shortcomings, called for reform, and advocated various reform strategies.\(^10\) And litigators have filed suit in an array of jurisdictions, challenging funding schemes, caseloads, and/or the structure of the systems themselves.\(^11\)

Pre-conviction litigation seeking systemic reform has become an increasingly popular strategy to force states and counties to provide constitutionally adequate counsel. Such cases are called “pre-conviction” both because they are typically brought on behalf of defendants who have not yet been convicted at the time the claim is filed and because they seek to reform the provision of public defense services to such defendants, with the bulk of such services being provided prior to a defendant’s conviction. Regardless of their structure, the cases seek to ensure that criminal defendants are provided counsel who will serve as an advocate, with the resources necessary to mount a full defense, who can put the prosecution’s case to the “crucible of adversarial testing”\(^12\) — all with an eye to preventing the types of client harm described above.

Litigation has proven successful in a variety of jurisdictions on a variety of legal theories and this Article will neither debate the merits of using litigation versus other reform methods\(^13\) nor delve into the (perhaps increasingly attractive) option of non-litigated reform.\(^14\) Litigation has not, however, proven to be a slam dunk for reformers, as lawsuits have been fought tooth and nail by defendants, state court judges have remained skeptical of prospective claims for relief.

\(^8\) \textit{See infra}, Part II.
\(^9\) \textit{See infra}, Part II.
\(^10\) \textit{See infra}, Part II.
\(^11\) \textit{See infra}, Part III.
under the Sixth Amendment, and what success has been obtained has often been obtained via settlement agreements and legislative reform rather than court-ordered injunctive relief.

This Article will address a central barrier to litigated reform thus far: the mistaken belief that cases seeking systemic pre-conviction indigent defense relief are unique, unprecedented, or unusual. The standard to which litigants seeking reform should be held often appears unclear, in part because courts are confronted with these claims in the criminal or civil context, with a wide variety of plaintiffs, defendants, and procedural postures.

Some courts — urged on by defendants — have inappropriately applied the “cause and prejudice” requirements of *Strickland v. Washington*, which almost inevitably results in the claim’s failure in one of two ways: the court either dismisses the claim for lack of ripeness (because the criminal defendant in question has not yet been convicted and *Strickland* applies only in the post-conviction context) or permits the claim to proceed but finds the complainant unable to meet the stringent “prejudice” prong of the test. Even where claimants seeking reform are successful, the standard to which they are held is often opaque, making their successes more difficult to replicate and the precedents they have set less persuasive.

This Article contends that, despite the seemingly wide variety of systemic indigent defense reform claims, all of them can and should be placed within the broader context in which they are brought, *i.e.*, their proper criminal or civil context. Litigants seeking systemic reform in the context of an individual criminal court prosecution can and should look to the vast body of caselaw adjudicating pre-conviction individual rights under the Sixth Amendment — which clearly establishes the types of constitutional injury under the Sixth Amendment to which courts have traditionally granted relief. And litigants seeking systemic reform in civil cases can and should look to the well-settled standards governing the issuance of injunctive relief — which require claimants to demonstrate the serious likelihood of irreparable harm. This harm can include, of course, constitutional injury under the Sixth Amendment to which courts have traditionally granted relief.

Part II of the Article will provide a brief overview of the well-documented need for indigent defense reform. Part III will provide a taxonomy of pre-conviction Sixth Amendment cases, *i.e.*, those cases implicating the rights of a criminal defendant to counsel prior to conviction. It will catalog the various types of pre-conviction litigation that courts have adjudicated thus far, noting the primary division between criminal and civil cases and highlighting how the constitutional injuries identified in the former may inform the injuries to be pled in the latter. Part IV will demonstrate why the *Strickland* standard is inappropriate for pre-conviction claims, and Part V will argue that courts should instead require a showing of

---

15 466 U.S. 668 (1984). *Strickland* enunciates the requirements criminal defendants must meet if they wish to challenge their convictions on ineffective assistance of counsel grounds. Namely, defendants seeking this type of post-conviction relief must show they have “cause” to make the challenge — by demonstrating that their attorney’s performance fell below an objective standard of reasonableness — and that they were prejudiced by this poor performance, *i.e.*, there is a reasonable probability that the result of the proceeding would have been different if their counsel had not performed inadequately. *Id.* at 687–88.
constitutional harm, drawn from pre-existing understandings of the Sixth Amendment, and not a showing of “prejudice,” as defined by Strickland.\(^{16}\)

II. The Amply Documented Case for Reform

Because even a brief historical survey of the commentary documenting the need for indigent defense reform reveals the same findings over and over again, this Article will not chronicle exhaustively the literature.

Critiques of state public defense systems prior to the Supreme Court’s decision in Gideon v. Wainwright will be familiar to advocates working on reform efforts more than four decades later. For example, commentators then noted wide disparities in the payment of appointed counsel,\(^{17}\) that “the existing methods of securing representation by counsel for indigent defendants are often inadequate and frequently operate in a haphazard manner;”\(^{18}\) and the lack of standards governing the appointment of counsel.\(^{19}\)

In 1951, the National Legal Aid and Defender Association published a report on the state of legal aid in the United States.\(^{20}\) It concluded that “except possibly in a few rural areas, the assigned counsel system fails miserably to afford the equal protection under law which it pretends to give and which the Constitution of the United States contemplates.”\(^{21}\) The specific findings of the report are echoed in reports issued more than 50 years later:

First — many large, populous sections of the country do not provide the protection at all.

Second — other sections, also populous, although assigning counsel in at least some of the more serious offenses, fail to compensate the attorney either for his labor or his expenses of preparation for trial.

Third — in only a few sections is the compensation to the attorney remunerative.

Fourth — in most states, counsel is not assigned early enough in the prosecution.

Fifth — too frequently, young, inexperienced or unqualified attorneys are assigned to match skillful, full-time prosecuting specialists.

\(^{16}\) Although the Strickland prejudice requirement is indeed a type of constitutional harm, this Article argues that it is an inappropriate type of harm to require in a pre-conviction proceeding.

\(^{17}\) “Payment of appointed counsel varies strikingly, from five dollars to one thousand dollars, depending on the service and the state. A more realistic examination of this problem is essential if the right to counsel as extended in theory is to become equally substantial in practice.” William M. Beaney, The Right to Counsel in American Courts 139 (1955).


\(^{19}\) David Fellman, The Right to Counsel Under State Law, 1955 Wis. L. Rev. 281, 324 (“[M]any judges seem to prefer to appoint young and inexperienced lawyers whose time is not very valuable, and who may be glad to pick up a little experience.”).

\(^{20}\) E.A. Brownell, Legal Aid in the United States: A Study of the Availability of Lawyers’ Services for Persons Unable to Pay Fees (1951).

\(^{21}\) Id. at 142.
Sixth — the number of available qualified attorneys in private practice in the larger metropolitan areas is insufficient to undertake the quality of representation needed.

Seventh — the protection is too easily waived.\(^\text{22}\)

Two years after *Gideon* was decided, the American Bar Foundation published the results of a state-by-state study of indigent defense. The report, *Defense of the Poor in Criminal Cases in American State Courts*, concluded with a number of recommendations, such as ensuring adequate funding, making experts and investigators available to public defense attorneys, providing facilities for attorneys to consult in private with their clients, and keeping detailed statistics on caseloads.\(^\text{23}\)

In the decades immediately following *Gideon*, the commentary remained much the same. In 1973, David Bazelon, then the Chief Judge of the United States Court of Appeals for the District of Columbia, published an article in which he began with the premise that “a great many — if not most — indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6\(^{th}\) Amendment.”\(^\text{24}\)

In 1980, Warren Burger, then-Chief Justice of the Supreme Court, published an article calling for increased training and evaluation of trial counsel and noting that:

[I]t is precisely those members of society who are already disadvantaged whose interests are most likely to be prejudiced by incompetent trial advocates. . . . The profession owes the public a high duty to insure that every segment of society has access to effective and timely assistance of counsel; it cannot be a luxury only for people who can afford law firms that have internalized the training of their novice advocates.\(^\text{25}\)

The commentary in more recent decades continues to sing the same tune. The Department of Justice\(^\text{26}\) and national organizations such as the American Bar Association,\(^\text{27}\) the

\(^{22}\) *Id.* at 143.


\(^{27}\) “In the case of the indigent defendant, the problem is not that the defense representation is too aggressive but that it is too often inadequate because of underfunded and overburdened public defender offices.” ABA, *Criminal Justice in Crisis: A Report to the American People and the American Bar on Criminal Justice in the U.S.* 9 (November 1988). *See also, e.g.*, ABA Standing Comm. on Legal Aid and Indigent Defendants, *Gideon’s Broken Promise*: 5
National Legal Aid and Defender Association, the National Association of Criminal Defense Lawyers, and the Spangenberg Group still issue reports. And articles in law reviews still cite to them as evidence of a broken public defense system.

The vast majority of commentary boils down to the following: public defenders are overworked and underpaid. One might also add that they are insufficiently supervised and

---


31 The most recent, and arguably most comprehensive, such report issued is The Constitution’s Project’s “Justice Denied.” The Constitution Project, Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel (April 2009).

have inadequate access to the resources — such as experts and investigators — they need to do their jobs.  

III. A Taxonomy of Pre-Conviction Sixth Amendment Cases

In response to the amply documented need for reform, an array of plaintiffs have brought suit against a panoply of defendants with every conceivable outcome. Successful pre-conviction Sixth Amendment claims seeking systemic indigent defense reform may be brought in the criminal or civil context; by indigent criminal defendants through their public defenders, on their own, or through public interest organizations like the American Civil Liberties Union; by public defenders; or by third parties such as county governments. Of course, unsuccessful pre-conviction Sixth Amendment claims seeking systemic reform come in all of those permutations as well.

This Article contends that there are only two meaningful categories of these pre-conviction cases: criminal claims and civil claims.  

This Part will focus solely on pre-conviction claims raised under the auspices of the Sixth Amendment to vindicate the rights of criminal defendants. For example, it will not discuss civil cases in which the only issue raised is attorney compensation. See, e.g., Ricke v. City of El Dorado, 939 P.2d 916 (Kan. 1997). Actions brought by public defenders seeking compensation, but with a Sixth Amendment dimension, are discussed infra pp. 15–17. This Part will also omit discussion of post-conviction claims except to the extent that they shed light upon the pre-conviction Sixth Amendment rights of the accused. Although some post-conviction claims raise concerns about the pre-conviction inadequacies of the public defense system or attorney, they are often denied precisely because they were raised post-conviction. See, e.g., Gardner v. Luckey, 500 F.2d 712 (5th Cir. 1974) (denying post-conviction class action relief because plaintiffs failed to allege that they themselves had been injured by the conduct of a public defender and noting case would have been governed by habeas law if they had); State v. Smith, 681 P.2d 1374, 1384 (Ariz. 1984) (finding criminal defendant failed to meet Strickland standard but holding that if “the same procedure for selection and compensation of counsel is followed as was followed in this case, there will be an inference that the procedure resulted in ineffective assistance of counsel, which inference the state will have the burden of rebutting”). The Court has made amply clear that post-conviction claims are to be governed by Strickland unless they fall within

---


Bright, supra note 33, at 787.

This Part will focus solely on pre-conviction claims raised under the auspices of the Sixth Amendment to vindicate the rights of criminal defendants. For example, it will not discuss civil cases in which the only issue raised is attorney compensation. See, e.g., Ricke v. City of El Dorado, 939 P.2d 916 (Kan. 1997). Actions brought by public defenders seeking compensation, but with a Sixth Amendment dimension, are discussed infra pp. 15–17. This Part will also omit discussion of post-conviction claims except to the extent that they shed light upon the pre-conviction Sixth Amendment rights of the accused. Although some post-conviction claims raise concerns about the pre-conviction inadequacies of the public defense system or attorney, they are often denied precisely because they were raised post-conviction. See, e.g., Gardner v. Luckey, 500 F.2d 712 (5th Cir. 1974) (denying post-conviction class action relief because plaintiffs failed to allege that they themselves had been injured by the conduct of a public defender and noting case would have been governed by habeas law if they had); State v. Smith, 681 P.2d 1374, 1384 (Ariz. 1984) (finding criminal defendant failed to meet Strickland standard but holding that if “the same procedure for selection and compensation of counsel is followed as was followed in this case, there will be an inference that the procedure resulted in ineffective assistance of counsel, which inference the state will have the burden of rebutting”). The Court has made amply clear that post-conviction claims are to be governed by Strickland unless they fall within
underpinnings of their claims do so at their own peril. As the cases discussed below illustrate, the most successful claims are those in which the court feels comfortable that the pre-conviction claim is not *sui generis*, but rather can be tied to an existing, well-established body of law — and adjudicated according to the standards laid out in that body of law. The reliance upon these other bodies of law is often not explicit, from either the litigants’ or the courts’ perspectives, but nonetheless palpable where a claim is successful; one of the goals of this Article is to encourage a more explicit reliance to advance clarity in pleading and adjudication.

A. Pre-conviction Criminal Claims

Pre-conviction criminal claims can arise either as the routine adjudication of the Sixth Amendment rights of individual criminal defendants, or as the somewhat more unusual case seeking systemic reform of a public defense regime using an individual defendant’s criminal prosecution as a vehicle. Litigants seeking reform in both criminal and civil cases ignore the first category — cases involving the routine adjudication of a criminal defendant’s pre-conviction Sixth Amendment rights — to the great detriment of their claims.

1. Routine Adjudication of the Substantive Individual Pre-Conviction Sixth Amendment Rights of Criminal Defendants

This Section will examine the cases courts typically treat as routine adjudications of a criminal defendant’s right to counsel prior to conviction, from the defendant’s right to be appointed counsel in the first place to the defendant’s right to consult with counsel at trial.\(^{36}\) As the Court recognized in *Powell v. Alabama*,\(^ {37}\) the period from arraignment to trial is “perhaps the most critical period of the proceedings . . . when consultation, thorough-going investigation and preparation [are] vitally important” and defendants are “as much entitled to such aid during that period as at the trial itself.”\(^ {38}\) Although the cases below are typically omitted in discussions of systemic indigent defense reform, they are crucial building blocks for litigants seeking such reform — both to educate courts about the standard by which pre-conviction criminal claims should be adjudicated and to demonstrate that the standard has been met.

\[^{36}\] Although some of the below cases take place in a post-conviction context, they are included because they shed light on a defendant’s pre-conviction rights. For example, although the Supreme Court has dealt with the right to consult with one’s attorney at trial in claims that were adjudicated post-conviction (see *infra* at p. 12), these cases firmly establish a defendant’s pre-conviction right to such consultation.

\[^{37}\] 287 U.S. 45, 57 (1932).

\[^{38}\] In an effort to identify only those pre-conviction rights that have ample support in the caselaw, all of the cases discussed herein are Supreme Court cases. There is a multitude of relevant caselaw in circuit court, lower federal court, and state court jurisprudence which litigants and courts would be well advised to consult to flesh out further the types of constitutional injury that may be applicable in their jurisdictions.
a. Right to appointment of counsel

As the Court in *United States v. Cronic*, 39 noted, the complete denial of counsel represents an “obvious” Sixth Amendment violation: “The presumption that counsel’s assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.” 40 Critical stages at which defendants are entitled to counsel are not, of course, limited to the strictly trial context. 41 Neither is the right to counsel “conditioned upon actual innocence.” 42 The Court has “decline[d] to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt.” 43

Accordingly, the Court has found the right to counsel (and all of its attendant benefits, discussed below) extends to: custodial interrogation, 44 initial court appearances, 45 certain arraignments, 46 preliminary hearings, 47 post-indictment lineups, 48 questioning of defendants by law enforcement designed to elicit statements pertaining to the charge, 49 and plea negotiations. 50

The right to the presence of counsel at these critical stages of the proceedings should also arguably apply if counsel is not present not because she was not appointed but because she refuses to attend or is otherwise unable to attend, e.g. because of the pressing demands of other cases.

---

40 See also id. at 659 n.25 (“The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.”) (citations omitted). Although *Cronic* provides a limited exception to one of the *Strickland* requirements — the need to show prejudice when counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing — it does not provide guidance on what standard would govern a strictly pre-conviction claim.
41 As the Court noted in *U.S. v. Wade*, 388 U.S. 218, 224 (1967), “today’s law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused’s fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to ‘critical’ stages of the proceedings.”
43 Id.
50 *White*, 373 US at 60.
b. **Right to competent counsel**

The Court has long recognized that “the right to counsel is the right to effective assistance of counsel.”\(^{51}\) In the post-conviction context, this means courts evaluate advice provided by attorneys based “on whether that advice was within the range of competence demanded of attorneys in criminal cases.”\(^{52}\) These claims typically arise in the context of a post-conviction *Strickland* evaluation,\(^{53}\) but the types of attorney shortcomings that courts have found sufficient to satisfy *Strickland*’s “cause” prong shed light on the level of attorney competency to which defendants are entitled pre-conviction.\(^{54}\)

Thus, defendants are arguably entitled to counsel who seek pre-trial discovery and conduct appropriate pre-trial investigation,\(^{55}\) interview witnesses and request records where

---


\(^{52}\) McMann, 397 U.S. at 771.

\(^{53}\) The majority of the Supreme Court’s jurisprudence on this topic involves post-conviction challenges to attorney competence at the sentencing phases of death penalty cases — where the bar for attorney competence is arguably set higher by the prevailing professional norms than it would be for non-death cases — but the general principles governing attorney obligations remain the same. Although a defendant in a non-death case may not be entitled to the same level of investigation as one facing the death penalty, the principle that a defense attorney should conduct basic investigation into the facts of the case where appropriate should be unchanged. Whether the ineffective assistance of counsel claim met the “prejudice” prong of *Strickland* or was ultimately successful is irrelevant for the purposes of determining pre-conviction rights. *Post-conviction*, all of the state’s concerns about the importance of finality and not second-guessing defense counsel in hindsight — as explicated in *Strickland*, 466 U.S. 668, 689–90 (1984) — come into play. See infra Part III. Our concern *pre-conviction* is merely whether counsel had the requisite level of competence.

\(^{54}\) *Kimmelman*, 477 U.S. at 385. The Court noted:

> Viewing counsel’s failure to conduct any discovery from his perspective at the time he decided to forgo that stage of pretrial preparation and applying a heavy measure of deference to his judgment, we find counsel’s decision unreasonable, that is, contrary to prevailing professional norms. . . . Respondent’s lawyer neither investigated, nor made a reasonable decision not to investigate, the State’s case through discovery. Such a complete lack of pretrial preparation puts at risk both the defendant’s right to an ample opportunity to meet the case of the prosecution and the reliability of the adversarial testing process.

*Id.* (internal citations and quotation marks omitted). See also Wiggins v. Smith, 539 U.S. 510, 534 (2003).
appropriate,\textsuperscript{56} do not ignore pertinent avenues for investigation of which they should have been aware,\textsuperscript{57} obtain information that the state has and will use against the defendant (such as court files for prior convictions),\textsuperscript{58} timely file suppression motions where warranted,\textsuperscript{59} and present mitigating evidence.\textsuperscript{60}

c. Right to counsel serving as an advocate

The Court has repeatedly emphasized the right of the indigent to counsel who will serve as an advocate, not as an adviser to the judge or as a government employee: “The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae.”\textsuperscript{61} Indigent defendants in particular, who must rely upon counsel provided by the state, are entitled to “the services of an attorney devoted solely to the interests of his client.”\textsuperscript{62}

The Court in Cronic further explained:

The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted — even if defense counsel may have made demonstrable errors — the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.\textsuperscript{63}

Thus, an accused “denied the right of effective cross-examination,” had suffered “constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.”\textsuperscript{64}

In Herring v. New York,\textsuperscript{65} the Court vacated a conviction because the defendant’s lawyer had been barred by the trial judge from making a closing argument. In so ruling, it noted: “The right to the assistance of counsel has thus been given a meaning that ensures to the defense in a

\textsuperscript{56} Porter v. McCollum, 130 S.Ct. 447, 453 (2009).
\textsuperscript{57} Id.
\textsuperscript{58} Rompilla v. Beard, 545 U.S. 374, 387 (2005).
\textsuperscript{59} Kimmelman, 477 U.S. at 385.
\textsuperscript{60} Williams v. Taylor, 529 U.S. 362, 393 (2000).
\textsuperscript{61} Anders v. California, 386 U.S. 738, 743 (1967) (finding defendant was denied due process where his counsel filed a letter with the court stating his appeal had no merit). \textit{See also} Ferri v. Ackerman, 444 U.S. 193, 204 (1979) (“Indeed, an indispensable element of the effective performance of [defense counsel’s] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.”).
\textsuperscript{62} Von Moltke v. Gillies, 332 U.S. 708, 725 (1948). As the Court went on to note: “Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer . . .” \textit{Id.} at 725-26.
\textsuperscript{65} 422 U.S. 853 (1975).
criminal trial the opportunity to participate fully and fairly in the adversary factfinding process.”

Where a public defender is unable to participate fully and fairly in the adversary process — whether because of direct interference from the trial judge or due to systemic breakdown in the public defender system — the defendant’s Sixth Amendment rights have been violated. A defendant’s right to counsel as an advocate is also endangered when public defense counsel’s independence is compromised, e.g. because defense counsel is hired by and accountable to county commissioners or trial judges, or where counsel is unable to put the prosecution’s case to the crucible of adversarial testing because of overwork or a lack of resources.

d. Right to consult with counsel

The right to consult with one’s counsel pre-dates Gideon: “[A] defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense.”68 The Court has also emphasized the importance of the right to consult with one’s attorney during trial, “[o]ur cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer’s guidance.”69 The communications between attorney and client are, moreover, to be held in private, the sanctity of this privacy stemming from “the oldest of the privileges for confidential communications known to the common law.”70

66 Id. at 858.
67 Cf. Vermont v. Brillon, 129 S.Ct. 1283, 1293 (2009) (finding delay caused by assigned counsel did not violate defendant’s speedy trial right but noting that “[d]elay resulting from a systemic ‘breakdown in the public defender system’ could be charged to the State.”) (internal citation omitted)).
68 Powell v. Alabama, 287 U.S. 45, 59 (1932). See also Avery v. Alabama, 308 U.S. 444, 446 (1940) (“[T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution’s requirement that an accused by given the assistance of counsel.”).
69 Geders v. United States, 425 U.S. 80, 88 (1976) (finding a trial court’s order barring the defendant from consulting with his attorney during an overnight recess violated the Sixth Amendment). Although the Court subsequently declared that prohibitions on consultation with counsel for short recesses at trial are permissible under the Sixth Amendment, Perry v. Leeke, 488 U.S. 272 (1989), that opinion was limited to the particular constraints on witness testimony at trial and does not undermine the essential principle that defendants must be permitted to consult with counsel on matters of overall defense strategy and the like. Id. at 284 (“[T]he normal consultation between an attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant’s own testimony — matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of a negotiating a plea bargain.”).
70 Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). See also Weatherford v. Busey, 429 U.S. 545, 554 n.4 (1977) (noting the government’s concession that “the Sixth Amendment’s assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private”).
This right is endangered when public defenders are unable or unwilling to consult with their clients in private — e.g. because of a lack of private space in which to do so or a perceived lack of time — and instead hold such consultations in the jury box or courthouse hallways in front of other defendants and within earshot of the prosecution.

e. **Right to counsel without a conflict of interest**

It is also well-settled that defendants have a right to be represented by counsel without a conflict of interest. In *Holloway v. Arkansas*, the Court required state courts to investigate timely pre-conviction objections to multiple representation. In fact, in the post-conviction context, demonstration of an actual conflict of interest is sufficient for reversal of conviction and “a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.” Although *Cuyler v. Sullivan*, establishes that “the possibility of conflict is insufficient to impugn a criminal conviction,” conflicts of interest raised pre-conviction — before a strong interest in finality takes hold — must be investigated.

This right is endangered when public defense counsel functions without a conflict checking system, a lack made particularly egregious when public defense counsel is also permitted to take on private cases or holds multiple contracts in a jurisdiction (to provide other legal services, such as juvenile abuse and neglect work).

f. **Right to counsel with access to resources necessary to mount a full defense**

In *Ake v. Oklahoma*, the Court found that the defendant in question was entitled to a state-provided psychiatric evaluation because his (and presumably the state’s) interest in the accuracy of the criminal proceeding outweighed the state interest in saving money, particularly when the probable value of the psychiatric assistance sought was high and the risk of error increased without such assistance. Although the Court has subsequently made clear that defendants must offer more than “undeveloped assertions that the requested assistance would be beneficial,” a number of courts have applied the *Ake* test in the context of experts and investigators generally.

---

72 See, e.g., Glasser v. United States, 315 U.S. 60 (1942).
74 *Id.* at 348 (“[A] defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial.”); see also *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978).
76 *Id.* at 78-79.
78 See, e.g., Goodwin v. Johnson, 132 F.3d 162, 188–190 (5th Cir. 1997) (rehabilitation expert); United States v. Hartsell, 127 F.3d 343 (4th Cir. 1997); Matthew v. Price, 83 F.3d 328, 335 (10th Cir. 1996) (investigative aid); Brewer v. Reynolds, 51 F.3d 1519, 1530–31 (10th Cir. 1995)
The Court has also indicated the need for attorneys themselves to conduct investigation as needed to mount a full defense: ‘“strategic choices made after less than complete investigation are reasonable’ only to the extent that ‘reasonable professional judgments support the limitations on investigation.”’

This right is endangered when public defenders must conduct investigations themselves, lack access to investigative or expert assistance, must petition the court for such resources, or must pay for such resources out of a flat-fee contract (directly impacting their compensation).

2. Pre-Conviction Criminal Claims Seeking Systemic Reform

In a case now so well-known that it has given rise to a motion named after it, the Louisiana Supreme Court ruled in *State v. Peart*, that the indigent defense services being provided in one section of the New Orleans criminal district court were so lacking that unless significant improvements were made, trial court judges were to apply “a rebuttable presumption . . . that indigents in [that section] are receiving assistance of counsel not sufficiently effective to meet constitutionally required standards.” Trial court judges concluding that constitutional standards are not being met were then directed to halt the prosecution until the defendant is provided with reasonably effective assistance of counsel.

*Peart* was brought in the form of a pre-trial motion in the course of an individual criminal defendant’s prosecution by the public defender assigned to his case, Rick Teissier. The Louisiana Supreme Court treated it as a pre-conviction claim for ineffective assistance of counsel, grouping it with those cases in which “the judge has an adequate record before him,” such as conflict of interest cases or claim of attorney incompetence. The evidence the court reviewed indicated the following:

At the time of his appointment, Teissier was handling 70 active felony cases. His clients are routinely incarcerated 30-70 days before he meets with them. In the period between January 1 and August 1, 1991, Teissier represented 418 defendants. Of these, he entered 130 guilty pleas at arraignment. He had at least one serious case set for trial for every trial date during that period. [The Orleans Indigent Defender Program] has only enough funds to hire three investigators. They are responsible for rendering assistance in more than 7,000 cases per year . . . . In a routine case Teissier receives no investigative support at all. There are no funds for expert witnesses. [The Orleans Indigent Defender Program’s] library is inadequate.

---

80 621 So.2d 780 (La. 1993).
81 *Id.* at 791.
82 *Id.* at 791–92.
83 *Id.* at 787.
84 *Id.* at 784.
Although the court in *Peart* was not explicit about the standard to which Teissier’s claim was held, it drew upon the body of law protecting the rights of criminal defendants to be timely appointed counsel, to consult with counsel, and to have counsel with the resources necessary to mount a full defense.

Similarly, in *State v. Citizen*,

two criminal defendants had been indicted in 2002 — three years prior to the opinion the court issued — and were functionally being held in indefinite pre-trial detention because of a lack of public defense funding.

The court found that “unless adequate funds are identified and made available in a manner authorized by law as expressed in this opinion, upon motion of the defendants, the trial judge may halt prosecution of these cases until adequate funds become available to provide for these indigent defendants’ constitutionally protected right to counsel.”

The constitutional harm alleged by the criminal defendants was clear: three years of pre-trial detention as a result of a complete lack of counsel.

**B. Pre-Conviction Civil Claims**

The civil suits discussed below all seek systemic reform of one type or another, whether they are brought by public defenders, criminal defendants, or third parties. And they all do so via a request for equitable relief, typically seeking both declaratory and injunctive relief. The test for granting such relief is laid out in *O’Shea v. Littleton*:

plaintiffs must demonstrate “the likelihood of substantial and immediate irreparable injury, and the inadequacies of remedies at law.”

For the purposes of demonstrating injury, it is also clear that the named plaintiffs themselves must have suffered or be at risk of suffering the injuries complained of, and that “past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.”

The cases discussed below demonstrate that regardless of who the plaintiff is, civil suits seeking systemic reform tend to be successful when the standard for injunctive relief has been met and plaintiffs have demonstrated the likelihood of irreparable injury. Plaintiffs most often do so by directly or indirectly referring to the constitutional injuries enumerated above, e.g. a failure to appoint counsel, lack of opportunity to consult with counsel, and/or appointment of counsel without access to the resources necessary to mount a full defense.

**1. Pre-Conviction Civil Claims Brought by Defense Attorneys**

Compensation, or the lack thereof — whether in the form of resources or pay — typically plays a starring role in pre-conviction Sixth Amendment claims filed by public defense attorneys.

Setting aside those claims solely on behalf of the attorney, i.e. takings or equal

---

85 898 So. 2d 325 (La. 2005).
86 Id. at 338.
87 Id. at 339.
89 Id. at 502.
90 Id. at 495–96.
91 Indeed, public defense attorneys may not have standing to raise any other type of claim. *Cf.* Kowalski v. Tesmer, 543 U.S. 125, 134 (2004) (holding that public defense attorneys lack third party standing to bring action on behalf of indigent defendants denied appellate counsel).
protection cases,\textsuperscript{92} successful claims with a Sixth Amendment component require that the attorney plaintiffs demonstrate some sort of Sixth Amendment harm to their clients (the criminal defendants) as a result of the attorney’s lack of compensation or resources.\textsuperscript{93} Attorneys who fail to do so are far less likely to prevail.

For example, in \textit{New York County Lawyers’ Association v. State},\textsuperscript{94} a legal association brought suit seeking declaratory and injunctive relief on the grounds that New York’s failure to increase compensation rates for assigned counsel violated the Sixth Amendment.\textsuperscript{95} After hearing from forty-one witnesses and reviewing 435 exhibits, the court concluded that:

1) assigned counsel are necessary; 2) there are an insufficient number of them; 3) the insufficient number results in denial of counsel, delay in proceedings, excessive caseloads, and inordinate intake and arraignment shifts; further resulting in rendering less than meaningful assistance of counsel, and impairment of the judiciary’s ability to function; and 4) the current assigned counsel compensation scheme — the rates, the distinction between the rate paid for in and out-of-court work, and the monetary caps on per case compensation — is the cause of the insufficient number of assigned counsel.\textsuperscript{96}

The court further noted that the proper standard to which plaintiffs should be held was establishing “the likelihood of substantial and immediate irreparable injury”\textsuperscript{97} and that “the more taxing two-prong \textit{Strickland} standard used to vacate criminal convictions [is] inappropriate in a civil action that seeks prospective relief.”\textsuperscript{98}

In \textit{Jewell v. Maynard},\textsuperscript{99} the attorney plaintiff similarly prevailed under his allegation that he had been appointed so many cases that he could not provide effective assistance of counsel to any of his court-appointed clients.\textsuperscript{100} A special master appointed by the court determined that “the amount of compensation for court-appointed lawyers combined with the failure of the legislature adequately to fund the existing public legal services program have caused a critical

\textsuperscript{92} This Article does not discuss claims brought by public defenders seeking compensation under breach of contract claims, the Takings Clause, the Due Process Clause, the Equal Protection Clause, or similar state statutes. \textit{See, e.g.}, State Pub. Defender v. Iowa Dist. Ct. for Warren County., 594 N.W.2d 34 (1999); State v. Campbell, 851 S.W.2d 434 (Ark. 1993); State v. Wigley, 624 So.2d 425 (La. 1993); Arnold v. Kemp, 813 S.W.2d 770 (Ark. 1991); State v. Lynch, 796 P.2d 1150 (Okla. 1990); White v. Bd. County Comm’rs Pinellas County., 537 So.2d 1376 (Fla. 1989); State v. Longjaw, 761 P.2d 1331 (Or. 1988); DeLisio v. Alaska Super. Ct., 740 P.2d 437 (Alaska 1987).

\textsuperscript{93} This pattern holds for cases decided under state law as well. \textit{See, e.g.}, Zarabia v. Bradshaw, 912 P.2d 5, 6 (Ariz. 1996) (finding rotational indigent defense appointment process in violation of state law where attorneys were an estate planning lawyer and a civil transactional lawyer).

\textsuperscript{94} 763 N.Y.S.2d 397 (N.Y. Sup. Ct. 2003).

\textsuperscript{95} \textit{Id.} at 399.

\textsuperscript{96} \textit{Id.} at 400.

\textsuperscript{97} \textit{Id.} at 412.

\textsuperscript{98} \textit{Id.} at 412 n.12.

\textsuperscript{99} 383 S.E.2d 536 (W. Va. 1989).

\textsuperscript{100} \textit{Id.} at 574.
shortage of qualified lawyers to represent indigent criminal defendants.”\textsuperscript{101} Crucially, the special master concluded that “the low hourly fee may prompt an appointed lawyer to advise a client to plead guilty, although the same lawyer would advise a paying client in a similar case to demand a jury trial.”\textsuperscript{102} In other words, there was evidence that the right of indigent criminal defendants to counsel serving as an advocate was being violated.

In contrast, in \textit{Lewis v. Iowa District Court for Des Moines County},\textsuperscript{103} plaintiffs were also court-appointed attorneys for indigent defendants seeking increased compensation for their services. Plaintiffs contended that the existing compensation system resulted in constitutional harm to indigent defendants, because it resulted in an effective denial of counsel, had a chilling effect on counsel’s representation of indigent defendants, and tended to deny seasoned counsel to indigent defendants.\textsuperscript{104} The court ruled against plaintiffs, noting that they had made “no showing that any particular indigent actually was placed at a disadvantage by the fee guidelines.”\textsuperscript{105}

Similarly, in \textit{Kennedy v. Carlson},\textsuperscript{106} the chief public defender in a judicial district filed for a declaratory judgment that the public defense funding system in Minnesota violated the Sixth Amendment rights of indigent criminal defendants. The court rejected his claim, noting that he had “not shown that his attorneys provide substandard assistance of counsel to their clients.”\textsuperscript{107}

The heart of Sixth Amendment claims brought by public defenders is necessarily the constitutional injury to their clients. \textit{Lewis} and \textit{Kennedy} demonstrate that without a showing of such injury, Sixth Amendment claims by public defenders can go nowhere; they may have other claims on their own behalf to address their own injuries, but not a Sixth Amendment claim. The cases discussed in this Part also demonstrate that successful Sixth Amendment claims brought by defenders point to the very types of constitutional injury that courts address in more “regular” or usual pre-conviction Sixth Amendment claims.

2. Pre-Conviction Civil Claims Brought by Indigent Defendants

This category includes class actions in which the class consists of indigent criminal defendants, even if the action is functionally being brought by a third party, such as the American Civil Liberties Union (“ACLU”). Again, those cases in which plaintiffs allege and demonstrate the likelihood of imminent injury tend to prevail.

\textsuperscript{101} \textit{Id.} at 574.
\textsuperscript{102} \textit{Id.} at 575.
\textsuperscript{103} 555 N.W.2d 216 (Iowa 1996).
\textsuperscript{104} \textit{Id.} at 218.
\textsuperscript{105} \textit{Id.} at 219.
\textsuperscript{106} 544 N.W.2d 1 (Minn. 1996).
\textsuperscript{107} \textit{Id.} at 8. \textit{See also, e.g.}, Cooper v. Reg’l Admin. Judge of Dist. Ct. for Region V, 854 N.E.2d 966, 971 (Mass. 2006) (denying attorney’s petition for a higher hourly rate or to be excused from appointment because she was willing to be appointed and was capable of providing adequate services if paid a higher rate); State v. Clark, 624 So.2d 422, 424 (La. 1993) (finding attorney failed to “support with any specificity his claim that his private practice suffered [from involuntary appointments] or that he was unable adequately to represent the indigent defendants”).
Platt v. Indiana,\textsuperscript{108} stands out as a case in which the court inappropriately applied the Strickland standard to a pre-conviction Sixth Amendment claim. Platt, along with several other indigent criminal defendants with pending prosecutions at the time their litigation was filed, filed suit to enjoin the county public defender system, claiming it effectively denied indigent defendants the right to effective assistance of counsel.

Although at least one named plaintiff — Platt himself — alleged that he had spent 15 months in jail with no trial and only three communications with his public defender each lasting less than sixty seconds, that his public defender had conducted no investigation, filed no pretrial motions, or prepared an effective defense, the Indiana Court of Appeals dismissed the case.\textsuperscript{109} The court concluded that the claim was not ripe under Strickland because he had not yet had a trial; therefore, Platt did not have a record upon which he could prove a Sixth Amendment violation.\textsuperscript{110} It further found that Platt had an adequate remedy at law (in the form of various appeals that would be available to him after conviction) and that he had not shown he would suffer irreparable injury if denied the injunction.\textsuperscript{111}

The lesson of Platt is that unless the court understands that Strickland is wholly inapplicable to pre-conviction claims, plaintiffs with even the most egregious of Sixth Amendment rights violations will see their claims fail. The Platt court sought to apply the usual standard governing the issuance of injunctive relief — irreparable injury — but defined the injury plaintiffs had to demonstrate through a Strickland lens. It believed the only injury that would suffice, in other words, was for plaintiffs to show cause and prejudice, \textit{i.e.} functionally to prove an ineffective assistance of counsel claim.

Courts that do not recognize that Sixth Amendment claims are cognizable prior to conviction can also simply refuse to adjudicate the claim, forcing plaintiffs to wait until the all but inevitable conviction — given the quality of their counsel — and then to be subject to the rigors of the Strickland test.

Fortunately, many if not all of the remaining cases filed since Platt have proven successful, resulting either in judicially mandated reform or in settlement agreements designed to reform the public defense system in question.\textsuperscript{112} Unfortunately, many of the positive decisions

\textsuperscript{109} Brief of Appellants at 11–12, Platt, 664 N.E.2d 357 (No. 49A05-9411-CV-432).
\textsuperscript{110} Platt, 664 N.E.2d at 363.
\textsuperscript{111} Id.
\textsuperscript{112} At the time of writing, the ACLU of New York had received a negative decision from a trial court in New York, Hurrell-Harring v. State, 883 N.Y.S.2d 349 (N.Y. App. Div. 2009), and had appealed. The court’s primary complaint in dismissing plaintiffs’ claims was that the complaint alleged various deficiencies in the New York State public defense system, but “fails to show how these ‘deficiencies’ have resulted in a denial of a defendant’s right to counsel in their criminal prosecution and how such ‘deficiencies’ had served to affect the outcome of any particular case.” \textit{Id.} at 351. Although the opinion does not clearly articulate the standard to which it held plaintiffs’ pleadings, a companion decision issued denying plaintiff’s motion for a preliminary injunction notes that plaintiffs failed to include “factual allegations in evidentiary detail that any of the attorneys who regularly take assignments as counsel in the subject counties are incompetent or inadequately trained;” that plaintiffs “have failed to submit any proof in
are murky as to the standard to which plaintiffs are held, decreasing their precedential value for successive litigants and courts.

In *Rivera v. Rowland*, plaintiffs survived a motion to dismiss their suit over the adequacy of Connecticut’s indigent defense system. The court noted that because plaintiffs sought injunctive relief, they did “not necessarily need to allege that they have already suffered harm as they would be required to do in other types of cases, but rather that they are at imminent risk of harm if the court does not grant the relief requested.” It then cited specifically to the paragraphs in plaintiffs’ complaint alleging:

Public defenders are not able to spend adequate time interviewing their clients, counseling their clients, or even explaining the basic information to their clients about the upcoming court proceedings. Forced excessive caseloads and inadequate resources prevent public defenders from spending adequate time reviewing each client’s file, conducting necessary legal research, conducting necessary fact investigation and witness preparation, pursuing motions for speedy trials, preparing for trial, filing certain pretrial motions and exploring pretrial alternatives to incarceration as well as sentencing options.

 Defendants ultimately implemented a series of reforms — including the hiring of new attorneys and support staff, increased compensation, adopting caseload goals, developing an attorney training program, and improving supervision and oversight of attorney performance — after which plaintiffs withdrew their lawsuit pursuant to a settlement agreement.

Similarly, in *Lavallee v. Justices in the Hampden Superior Court*, the Committee on Public Counsel Services (the public defender office) and the American Civil Liberties Union of Massachusetts filed petitions on behalf of indigent defendants claiming that underfunding by the state had resulted in a lack of sufficient indigent defense counsel available to defend the petitioners. The court found in favor of petitioners and held that “on a showing that no counsel is available to represent a particular indigent defendant despite good faith efforts, such a
evidentiary detail establishing that any attorneys, let alone a significant number of attorneys, in the five counties are actually burdened with excessive caseloads;” that there was “no proof in evidentiary detail indicating that the services of investigators and experts have actually been denied in any of the five counties when an attorney has deemed them useful;” and that there was no proof “indicating that any significant number of actually indigent individuals have been wrongly denied the services of defense counsel at public expense.” *Hurrell-Harring*, Decision/Order Index No. 8866-07 at 8-11 (N.Y. App. Div. July 15, 2009). The court denied plaintiffs’ motion because it concluded plaintiffs would not “suffer irreparable injury in the absence of the injunction” — i.e., plaintiffs had failed to meet the standard both for a preliminary injunctive and regular injunctive relief.

---

114 Id. at *5.
115 Id. at *6.
118 Id. at 900.
defendant may not be held more than seven days and the criminal case against such a defendant may not continue beyond forty-five days.”

In so finding, the court noted that the criminal defendants in question had been denied appointment of counsel altogether, sufficiently showed the “likely result of irremediable harm if not corrected.”

Although the harm may not be fully developed — a matter than can be ascertained at some later date after a petition has counsel — the harm nevertheless exists; the loss of opportunity to confer with counsel to prepare a defense is one that cannot be adequately addressed on appeal after an uncounseled conviction.

These successes have been replicated even when plaintiffs have sought even more wide-ranging relief. In *White v. Martz*, the ACLU filed suit against the state of Montana, seeking for the first time to hold the state responsible for indigent defense functions carried out wholly by the counties. Plaintiffs contended that they had been denied the appointment of counsel altogether, denied the right to competent counsel, the right to consult with their counsel, and the right to counsel with the resources necessary to mount a full defense. Plaintiffs survived a motion to dismiss, with the Montana trial court judge concluding that *Strickland* was inapplicable to pre-conviction claims. As the Stipulation and Order of Postponement of Trial noted, plaintiffs went on to depose over eighty witnesses, including those of current and former public defenders and various state and county officials. Plaintiffs’ expert report, produced by the National Legal Aid and Defender Association, concluded that the state had failed to adequately fund the provision of indigent defense services; that public defenders were woefully under-resourced as a result and had too many cases, not enough training, and not enough time to meet with their clients; and that indigent defense clients in turn suffered, with attorneys who had conflicts of interest, lack of meaningful contact with their attorneys, and pressure to take guilty pleas and sign speedy trial waivers.

---

119 Id. at 901.
120 Id. at 905.
121 Id. at 907. Days after the *Lavallee* ruling, the Massachusetts state legislature passed a bill (which was ultimately signed into law) improving compensation for indigent defense attorneys and establishing “a commission to study the provision of counsel to indigent persons who are entitled to the assistance of assigned counsel.” 2004 Mass. Adv. Legis. Serv. 1151 (LexisNexis).
The Attorney General ultimately entered into a settlement agreement in which it agreed to cooperate with plaintiffs to seek passage of legislation reforming the Montana indigent defense system. In 2004, the Montana legislature passed the Montana Public Defender Act, which established a state-wide commission with oversight and supervisory authority over indigent defense functions and provided for state funding of public defense services.

More recently, in *Best v. Grant County*, plaintiffs successfully procured summary judgment against Grant County, Washington State. The Superior Court of Washington for Kittitas County noted in its 2005 decision that the high caseloads of public defenders in the county was undisputed, as was a lack of county supervision, and interference from the prosecutor’s office over the ability of public defenders to seek funds for experts and investigators. Although the court referred to the issue presented as “whether class plaintiffs had and have a well-grounded fear of immediate invasion of their right to effective assistance of counsel” — using the loaded *Strickland* terminology — it also made clear that the *Strickland* test did not apply: “only prospect of relief is being sought to fix the system: As such, class plaintiffs do not have to demonstrate individual prejudice.”

4. Civil Claims Brought by Third Party Plaintiffs

In *Quitman County v. State*, the plaintiff was actually a county. Quitman County sued the state of Mississippi, the governor, and the attorney general for declaratory and injunctive relief on the grounds that the state’s policy of delegating the provision of indigent defense services to the counties violated the state constitution’s Sixth Amendment equivalent. The Supreme Court of Mississippi ultimately ruled that the county had failed to meet its burden of proof, which it stated was to prove “that the funding mechanism established by statute had led to systemic ineffective assistance of counsel in Quitman County and throughout the state.”

Although the *Quitman* court declined to apply directly the *Strickland* standard, it did find that successful ineffective assistance of counsel claims brought under *Strickland* would have probative value. The county’s failure to produce any such cases alone likely did not doom its claim. Rather, the county’s claim ultimately failed because although it alleged that chronic underfunding of its indigent defense system had resulted in a system conductive to ineffective assistance of counsel (with an unusually high number of guilty pleas entered on the day of appointment of counsel, a lack of investigators, and insufficient motion practice), the evidence presented at trial said otherwise. The court explained: “none of the public defenders for this judicial district, circuit judges, or district attorneys testified to this effect. Further, none of the

---

127 *Id.*
129 *Id.* at § 47-1-102.
131 *Id.*
132 *Id.* at 5.
133 910 So.2d 1032 (Miss. 2005).
134 *Id.* at 1034.
135 *Id.*
136 *Id.* at 1037.
three witnesses tendered by the County as experts concluded in their testimony that either of the public defenders in Quitman County was incompetent.”

Actions in which the plaintiff is neither a public defense attorney nor a criminal defendant with a pending claim are rare. *Quitman County* offers a plausible explanation for why this is so — plaintiffs without a vested personal interest in both alleging and proving Sixth Amendment harm may find it difficult to mount the evidence necessary to show such harm exists. Public defenders who are not active participants as plaintiffs in a case, for example, are far less likely to testify that the services they have provided fall beneath constitutional minimums, or that their clients have suffered any grave injuries as a result. Human nature would teach us to expect nothing more nor less.

In *State v. Smith*, another case with an usual procedural posture, two state court judges entered orders forbidding the appointment of private attorneys as public defense counsel without reasonable compensation. The orders further specified that if such compensation were not available within 30 days after a defendant was declared indigent, the charges would be dismissed without prejudice. The Kansas attorney general filed a petition for mandamus, arguing that the orders issued were inconsistent with Kansas state statute.

Interestingly, although the Kansas Supreme Court denied the petition for mandamus and found the indigent defense system in the state violated the Fifth Amendment and the Equal Protection Clause with respect to the rights of private attorneys being appointed as public counsel, it was unwilling to find a Sixth Amendment violation:

While the system . . . creates the potential for ineffective assistance of counsel, there is no specific evidence in the record here of any deficient performance that adversely affected the outcome of a trial. Simply because the system *could* result in the appointment of ineffective counsel is not sufficient reason to declare the system unconstitutional; those rare cases where counsel has been ineffective may be handled and determined individually by the appellate courts.

Thus, although the judges alleged — and the court acknowledged — that the indigent defense system created a potential conflict of interest for attorneys “because the more hours an attorney spends on the case, the greater the personal cost to the attorney” and that the system appointed attorneys without necessary criminal law experience or expertise, there was no Sixth Amendment violation because the *Strickland* standard had not been satisfied.

All of these civil cases taken together demonstrate that allegations of systemic deficiencies alone are insufficient to form the foundation of a Sixth Amendment claim. Even though all of

---

137 *Id.* at 1039.
139 *Id.* at 822.
140 *Id.*
141 *Id.* at 822–23.
142 *Id.* at 842, 845–46.
143 *Id.* at 831 (internal citations omitted, emphasis in the original).
144 *Id.*
these plaintiffs seek systemic reform under the Sixth Amendment, the Sixth Amendment at its core protects the rights of individuals, not the integrity of systems. To succeed in procuring systemic reform, allegations of systemic deficiencies can perhaps best be thought of as necessary but not sufficient: at the end of the day, plaintiffs must also demonstrate the likelihood of serious constitutional injury to individual criminal defendants. And the best source of cognizable injuries remains the body of well-settled law adjudicating individual pre-conviction rights under the Sixth Amendment.

IV. Why Strickland is Inappropriate for Pre-Conviction Claims

Just as reports chronicling the sad state of public defense systems across the country are too many to list, commentary criticizing the Strickland standard is de rigueur for scholars of the right to counsel. For better or worse, the Supreme Court has made it clear that the Strickland standard is well and alive. In fact, while the “prejudice” prong of the test has always been notoriously difficult to meet, the Court recently underscored the difficulty criminal defendants have in meeting even the “cause” prong. In Bobby v. Van Hook, the Court stated that ABA guidelines are not “inexorable commands with which all capital defense counsel must fully comply,” but rather “only guides to what reasonableness means, not its definition.”


146 See, e.g., Knowles v. Mirzayance, 129 S. Ct. 1411, 1419-22 (2009) (reiterating the firm application of the Strickland test to all ineffective assistance of counsel claims and rejecting criminal defendant’s ineffective assistance of counsel claim).

147 130 S.Ct. 13 (2009).

148 Id. at 18-19 (internal quotation marks and citations omitted). Justice Alito concurred and noted that he wished to “emphasize my understanding that the opinion in no way suggests that the American Bar Association’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) (2003 Guidelines or ABA Guidelines) have special relevance in determining whether an attorney’s performance meets the standard required by the Sixth Amendment.” Id. at 20 (Alito, J., concurring). Commentary contending that Strickland “has teeth” to strengthen criminal defense counsels’ obligations to their clients is rather less persuasive in light of this decision. See, e.g., Robert R. Rigg, The T-Rex Without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel, 35 Pepperdine L. Rev. 77, 104 (2007) (contending that the Supreme Court has “tightened counsel’s duty
However, nothing in the Court’s jurisprudence has ever counseled application of the *Strickland* standard in pre-conviction criminal cases — much less in civil cases seeking pre-conviction relief. As the Eleventh Circuit noted in *Luckey v. Harris*,¹⁴⁹ this is likely because application of the standard is inappropriate in pre-conviction cases where the justice system’s interest in finality does not yet exist:

Where a party seeks to overturn his or her conviction, powerful considerations warrant granting this relief only where that defendant has been prejudiced. The *Strickland* court noted the following factors in favor of deferential scrutiny of a counsel’s performance in the post-trial context: concerns for finality, concern that extensive post-trial burdens would discourage counsel from accepting cases, and concern for the independence of counsel. These considerations do not apply when only prospective relief is sought.¹⁵⁰

The interests articulated in the post-trial context are simply not implicated when the claim at issue is raised pre-conviction.¹⁵¹ Further, as the *Luckey* court also noted, “[t]he Sixth Amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the ‘ineffectiveness’ standard may nonetheless violate a defendant’s rights under the Sixth Amendment.”¹⁵²

V. The Standard by Which to Adjudicate Pre-Conviction Sixth Amendment Claims

A. Previously Suggested Standards

Dissatisfaction with *Strickland* and an intuitive understanding that it should not apply as is to pre-conviction claims for relief have led a number of commentators to suggest ways of tweaking the standard.¹⁵³ This Article contends that fiddling with *Strickland* is bound to yield unsatisfying results because *Strickland* was never meant to address pre-conviction claims or civil claims for prospective relief.¹⁵⁴ Manipulation of the standard for such claims is akin to shaving to investigate, not by changing the test formulated in *Strickland*, but by using the ABA standards as an evaluative tool rather than mere ‘guidelines.’”

¹⁴⁹ 860 F.2d 1012 (11th Cir. 1988).
¹⁵⁰ Id. at 1017. This 1988 decision by the Eleventh Circuit is sometimes referred to as *Luckey I*. After wending its way back and forth between various courts, see, e.g., Luckey v. Harris, 896 F.2d 479 (11th Cir. 1989); Harris v. Luckey, 918 F.2d 888 (11th Cir. 1990); Luckey v. Miller, 929 F.2d 618 (11th Cir. 1991), the claim was eventually dismissed by the Eleventh Circuit on abstention grounds. Luckey v. Miller, 976 F.2d 673, 679 (11th Cir. 1992).
¹⁵¹ Cf. Hill v. Lockhart, 474 U.S. 52, 58 (1985) (requiring that prejudice be shown when contesting a guilty plea because doing so “serve[s] the fundamental interest in the finality of guilty pleas”).
¹⁵² Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988).
¹⁵³ See, e.g., George C. Thomas, *History’s Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543, 592 (arguing that “after –the-fact inquiry into the quality of . . . representation” should only be upheld if the attorney “failure could rise to a breach of the duty of loyalty.”); Green, supra note 145, at 507 (proposing a redefinition of the right to counsel to mean the “right to a qualified advocate, rather than a right to any duly licensed attorney”).
¹⁵⁴ Some commentators have raised proposals completely outside the *Strickland* box, but which present other problems of political impracticality or unfeasibility. See, e.g., Adam M.
down a square peg to fit into a round hole: you might be able to get the peg into the hole, but the results will not be pretty. Below are three of the most common “tweaks” to Strickland, each of which is problematic in its own way.

1. **Use of Attorney Checklists and Standards**

   Strickland’s “cause” prong asks judges to look to an “objective standard of reasonableness” to determine whether an attorney’s performance was deficient. Some commentators seek to give substantive content to the “objective standard of reasonableness” and suggest that pre-conviction lawyering be evaluated based upon the use of American Bar Association standards (or standards issued by other similar organizations) and/or checklists that tick off the types of attorney actions particular cases require. These standards and checklists might recommend, for example, that defense counsel interview the defendant as quickly as possible, that defense counsel inform the defendant of all of her rights; and that defense counsel engage in prompt investigation.

   As Adele Bernhard correctly points out, however, the use of checklists to evaluate attorney performance is tricky: “[P]ractice is in constant conflict with performance standards,” and however useful “performance standards may be for training purposes, or to inspire defense attorneys, they sometimes set unrealistic goals for handling routine minor criminal cases and can be too vague to be helpful in a serious investigation into the adequacy of defense services.”

   Bernhard advocates a variation on the checklist that would focus not on the individual attorney’s performance but rather upon the performance of the indigent defense system as a whole. She urges the creation and use of “administration” standards, that “address the functioning of systems rather than the performance of individual lawyers, focusing on management issues.” Unfortunately, while the violation of administration standards — which can require, for example, the use of a case management system, the provision of training for attorneys, and

---

Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 Conn. L. Rev. 85, 89 (2007) (suggesting that “rather than the traditional ‘beyond a reasonable doubt’ standard, the prosecution would shoulder the burden to prove indigent defendants guilty under a higher ‘beyond all doubt’ standard” unless legislatures adequately fund their indigent defense systems); Others propose modifications of Strickland that functionally turn Strickland on its head. See, e.g., Suzanne E. Mounts, *The Right to Counsel and the Indigent Defense System*, 14 N.Y.U. Rev. L. & Soc. Change 221, 224 (1986) (arguing that “an adequate showing of defects in the defense system should create a presumption of innocence”).


access to experts and investigators — can indicate the presence of injury, courts will often demand the demonstration of injury itself before granting relief.

Another variation on the checklist/standard rubric is the use of community standards to fill in for the “objective standard of reasonableness.” Richard J. Wilson proposes that the prospective standard by which a defendant’s right to counsel should be reviewed is one of “reasonableness, as measured in the local community.” 159 “Reasonableness” can be an amorphous quality, however, particularly when measured in the local community — how to define the local community, whether the legal culture in the local community is actually a source of the problem with the provision of indigent defense in that community, and how to define what is reasonable are all questions that Wilson leaves unanswered. 160

Ultimately, although violations of checklists and standards suggested by national organizations may have some persuasive value, 161 plaintiffs should also find the surer footing of injuries that the Court has already recognized are constitutional in nature, particularly in hostile litigation environments. Although checklist violations may go part of the way towards showing cause, they are both unnecessary in the face of and insufficient in the absence of actual harm. 162

2. Evidence of Systemic Shortcomings

Bernhard’s management standards suggestion is closely related to the notion that if litigants can prove the indigent defense system suffers from all sorts of shortcomings — i.e. that it is in gross violation of a set of hypothetical management standards — courts should grant systemic relief. It is the “where there’s smoke, there’s fire” theory of litigation. Margaret Lemos, for example, argues that allegations of “systemic defects in the contract system” suffice to show injury. 163 And the plaintiff county in Quitman County v. State, offered the court a similar theory, that plaintiffs need only demonstrate that the indigent defense system in question fails to provide the tools of an adequate defense to prevail. 164

Unfortunately, as the outcome in the Quitman case itself, as well as the other cases discussed above indicate, evidence of systemic shortcomings — such as a lack of resources for public defenders, a lack of supervision and oversight, a lack of training programs, of conflict checking programs, and/or a lack of access to experts and investigators — indicates a strong

161 Cf. Charles M. Kreamer, Adjudicating the Peart Motion: A Proposed Standard to Protect the Right to Effective Assistance of Counsel Prospectively, 39 Loy. L. Rev. 635, 654 (proposing an “objective ‘checklist’ of actions constituting the minimum requirements for constitutionally adequate pretrial preparation.”). See also Calhoun, supra note 152, at 448 (noting that “predictability and objectivity [are] inherent in [a] checklist-based standard “).
163 Lemos, supra note 32, at 1825.
164 910 So.2d 1032, 1038 (Miss. 2005).
likelihood of client harm but cannot substitute for an allegation of actual client harm. Without an allegation of concrete constitutional injury to specific criminal defendants, plaintiffs simply cannot meet the basic test governing the granting of injunctive relief.

3. Trial Judge Supervision

Many of the proposed ex-ante Strickland-type standards rely on the trial judge in individual criminal cases to make findings about the quality of the indigent defense services being provided and/or to evaluate the public defender practicing before her. For example, Donald Dripps proposes that trial judges determine “whether the defendant is represented by a lawyer roughly as good and roughly as well-prepared as counsel for the prosecution.”165 Charles M. Kreamer suggests a similar modification of Strickland, to require “a showing of a reasonable probability that the appointed counsel will commit unprofessional errors at trial.”166 Upon such a showing, the trial would continue, but “all convictions should be subject to reversal unless the state can demonstrate that the appointed attorney’s acts or omissions were either harmless or justified.”167

Galia Benson-Amram similarly suggests that trial court judges intervene in cases of “egregious ineffectiveness,” and that their failure to do so should result in a presumption of prejudice in any post-conviction proceedings.168 And Suzanne Mount proposes that upon motion by a public defender, trial courts conduct a “hearing to establish the system defects.”169 Upon a finding of “prospective inadequacy of representation,” the trial court could order substitution of alternate counsel or other such remedies as it sees fit — and “[r]efusal to grant a hearing should be grounds for automatic reversal on appeal.”170

In addition to the practical and political difficulties of implementing each of these proposals,171 any standard requiring direct oversight or evaluation of individual public defenders at the trial court level potentially runs afoul of the very first principle of the ABA’s Ten Principles of a Public Defense Delivery System, namely that the public defense function be

166 Kreamer, supra note 161, at 653-54 (1993).
167 Id. at 655. Although Kreamer characterizes his proposed standard as one that would “protect the right to effective assistance of counsel prospectively,” it would not actually result in pre-conviction relief, Id., and as such remains deeply problematic in light of the interests in finality once a conviction has taken place.
169 Suzanne E. Mounts, supra note 154, at 236 (1986).
170 Id. at 237-38. See also Note, Gideon’s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense, 113 Harv. L. Rev. 2062, 2073 (2000) (contending that judges “are well suited to oversee indigent defense systems”).
171 For example, one would have to determine at what stage such evaluations should be conducted (presumably after some injury has occurred but not before too much injury) and on what criteria. One would also have to account for the fact that the trial judge will not necessarily have access to all the facts in a given case, or time to review what is contained in each case file.
independent, in particular from the judiciary.\textsuperscript{172} Just as it would be inappropriate for trial judges to evaluate and supervise the prosecutors appearing before them, so too it would be inappropriate for them to evaluate and supervise public defenders.\textsuperscript{173}

As Stephen Bright has noted, oversight by trial judges is also problematic for reasons having more to do with their natural incentives and human nature:

Judges not only tolerate attorney incompetence, but they very often continue to appoint the same lawyers to case after case. . . . Many judges may be more interested in docket control or avoiding reversal than in ensuring an earnest defense for poor defendants. Judges also use appointment as a patronage system for lawyers who need the business because they cannot get other legal work. . . . The appointed lawyers also stay in the good graces of the judges by contributing to their campaigns for office.\textsuperscript{174}

And it is not just academics who hold this belief; the Chief Judge of the United States Court of Appeals for the District of Columbia published an article in 1973 noting the similar problems with relying upon judicial oversight of public defense counsel. David Bazelon wrote,

Consciously or not, many judges are looking for, as the labor cases put it, a ‘sweetheart’ lawyer. They just do not want lawyers to present a lot of motions or to put on a lengthy trial. . . . Even the most conscientious judge will feel the pressures of his overloaded calendar, and this concern will be evident to the perceptive lawyer. When defense counsel’s earnings flow from the pen of the trial judge, the principle of independent advocacy that is essential to the adversary system of justice is undermined.\textsuperscript{175}

In many of the challenged systems judges are already the sole backstop for Sixth Amendment violations. Their inability or unwillingness to act often stems not only from the incentives described by Bright and Bazelon, but also from the fact that they are integral members of the (sometimes very small) legal community — and hence of the indigent defense system — whose practices are being challenged.

\textsuperscript{172} The commentary to the first principle elaborates: “The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. . . . Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.” ABA Comm. on Legal Aid and Indigent Defendants, ABA Ten Principles of a Public Delivery System 2 (2002) available at http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf.

\textsuperscript{173} Cf. Hafkin, supra note 32, at 665-67 (arguing that judges should “oversee indigent defense representation and ensure that ethical standards are followed in the cases before them,” including those standards governing defender workload).

\textsuperscript{174} Bright, supra note 33, at 825-26 (1997). Bright concludes, unsurprisingly, that “[m]anagement of the defense is not a proper judicial function. Judges should be fair and impartial, and independent of both prosecution and defense.” Id. at 828.

\textsuperscript{175} Bazelon, supra note 24, at 15-16.
B. A Standard Rooted in Precedent

Rather than forcing judges adjudicating cases seeking systemic public defense reform to wrestle with a new prospective standard or directly to oversee the practices of every public defender before them, judges should instead be asked to look to pre-existing, well-settled standards with which they are already familiar. Pre-conviction criminal claims should look to the host of caselaw governing an individual’s substantive right to counsel discussed supra, Part III. Pre-conviction civil claims should look to the host of caselaw governing any claim for prospective injunctive relief.

As the Luckey court noted, the appropriate burden on plaintiffs seeking prospective relief is to show “the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.”176 What the Luckey court did not spell out is what type of injury plaintiffs should allege to meet this burden. This Article suggests that plaintiffs look to the host of Sixth Amendment caselaw codifying the pre-trial rights of criminal defendants to effective assistance of counsel. Plaintiffs could allege, for example, that counsel in a given jurisdiction do not have access to the resources they need to mount a full defense, that criminal defendants are routinely appointed counsel with conflicts of interest, and/or that criminal defendants are denied their right to consult meaningfully with counsel to prepare for their defenses. Because each of these claims is tied directly to a Sixth Amendment right (and line of Supreme Court cases), it should suffice for a showing of constitutional injury.

Criminal defendants who wish to substitute counsel prior to conviction and civil litigants bringing suit for injunctive relief all know the standards to which their claims will be held. They can structure — and courts can evaluate — their claims accordingly. The resultant predictability for litigants and adjudicants increases litigation efficiency and reduces unnecessary time and resource investment in cases that are doomed to failure. A clear, well-articulated, and uniformly applied standard for pre-conviction Sixth Amendment claims would have several similar benefits. Would-be reformers would be better able both to assess their chances of success in litigation and to manage scarce resources in assembling the claims they do decide to bring. For example, plaintiffs in Quitman County could have decided not to bring suit entirely, or to devote more resources to locating evidence of client harm. Furthermore, courts with a uniform and familiar standard to which to look save the time and resources of having to manufacture a new standard and can devote that energy instead to evaluating whether plaintiffs have actually met their burden of proof.

These advantages are incurred with any uniform standard, but application of the ones urged by this Article has two further distinct benefits. First, they are already familiar to courts across the nation. In fact, many courts confronted with these types of claims are already applying some version of them, albeit not always consciously. While public defense reform claims may still be unfamiliar to some courts, they routinely apply these standards. Second, and relatedly, these standards are clearly rooted in existing doctrines of constitutional injury. Courts have groped towards these standards because they are familiar — in the criminal context, it is well-settled that defendants must demonstrate the presence of particular types of injury to gain pre-conviction relief, and in the civil context, it is equally well-settled that plaintiffs must

---

176 Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988) 860 F.2d at 1017 (citing O’Shea v. Littleton, 414 U.S. 488, 502 (1974)).
demonstrate irreparable injury to gain injunctive relief. Use of these principles to adjudicate cases seeking systemic indigent defense reform is natural, fitting, and grounded in the law.

VI. Conclusion

Judges sympathetic to the cause of indigent defense reform have found and will continue to find in favor of reform almost regardless of the allegations in the pleadings or what is revealed in discovery. Litigants seeking reform before such judges may not need to identify with utmost clarity the standard to which they expect to be held, or the harms to which the criminal defendants in their jurisdiction have been subject. There is, however, never a guarantee that one will draw such a judge, or that even the most sympathetically minded judges will not want some assurance that their rulings are within well-defined parameters of the law.

The recommendations in this Article are designed to provide greater clarity in systemic indigent defense reform litigation, ensuring that litigants seeking reform rise or fall on the merits of their cases rather than on the basis of whether they can pass a test that is all but impossible to meet in the pre-conviction context. Removing the Strickland test from pre-conviction reform cases serves only to remove a barrier to litigated reform, not to guarantee it. The standard to which litigants should be held — that of showing constitutional injury, but not “prejudice” — remains a meaningful one, but at least one that is both capable of being met and has its roots firmly in criminal and civil precedent.