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Speedy Trial as a Viable Challenge to Chronic Underfunding in Indigent-Defense Systems

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NOTE

SPEEDY TRIAL AS A VIABLE CHALLENGE TO CHRONIC UNDERFUNDING IN INDIGENT-DEFENSE SYSTEMS

Emily Rose*

Across the country, underresourced indigent-defense systems create delays in taking cases to trial at both the state and federal levels. Attempts to increase funding for indigent defense by bringing ineffective assistance of counsel claims have been thwarted by high procedural and substantive hurdles, and consequently these attempts have failed to bring significant change. This Note argues that, because ineffective assistance of counsel litigation is most likely a dead end for system-wide reform, indigent defenders should challenge the constitutionality of underfunding based on the Sixth Amendment guarantee of speedy trial. Existing speedy trial jurisprudence suggests that the overworking and furloughing of indigent-defense attorneys that delay bringing cases to trial should be counted against the government when determining a speedy trial violation. And in light of the standards for bringing a speedy trial claim, asserting a violation of speedy trial may actually place a lower burden on the defendant than making an ineffective assistance claim. Finally, this Note contends that, in systems with the most egregious delays, defender organizations should seek structural injunctions mandating increased resource allocation to protect the right to speedy trial.

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INTRODUCTION

The Sixth Amendment grants that, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence[,]”¹ rights that were extended to state-court trials in *Gideon v. Wainwright*² and *Klopfer v. North Carolina*.³ Today, the majority of criminal defendants qualify for indigent representation,⁴ which means that the Sixth Amendment’s guarantee of assistance of counsel largely turns on federal and local governments’ providing adequate resources to indigent-defense systems.

This Note argues that significant underfunding of indigent-defense systems should be counted against the government for the purposes of determining whether defendants’ right to speedy trial has been violated. It also contends that, in extreme cases, chronic underfunding may amount to a systemic constitutional violation that must be remedied by judicial oversight. Sections I.A and I.B survey the status of federal and state indigent-defense systems, emphasizing how a lack of resources leads to system-wide

1. U.S. CONST. amend. VI.

2. 372 U.S. 335 (1963) (guaranteeing appointed counsel at no charge to indigent state-court defendants).

3. 386 U.S. 213 (1967) (guaranteeing right to a speedy trial to state-court defendants).

4. An estimated 90% of federal criminal defendants qualify for appointed counsel. *Sequestering Justice: How the Budget Crisis is Undermining Our Courts: Hearing Before the Subcomm. on Bankruptcy and the Courts of the S. Comm. on the Judiciary*, 113th Cong. 35 (2013) [hereinafter *Hearing*] (statement of Hon. Julia S. Gibbons, Chair, Committee on the Budget of the Judicial Conference of the United States); see *Appointment of Counsel*, U.S. COURTS, <http://www.uscourts.gov/federalcourts/appointmentofcounsel.aspx> (last visited Apr. 4, 2014) (noting that federally funded defenders “represent the vast majority of individuals” prosecuted in federal courts).

delays in taking cases to trial. Section I.C explores the hurdles that plaintiffs must clear in order to bring ineffective assistance claims, lays out how these claims have failed to spur significant change in indigent defense, and concludes that ineffective assistance of counsel litigation is a dead end for system-wide reform. Part II then presents an alternative way to challenge the constitutionality of underfunding indigent-defense systems. Specifically, it asserts that indigent defenders should argue that the overworking and furloughing of indigent-defense attorneys—and the resulting delays in bringing cases to trial—violate the Sixth Amendment guarantee of speedy trial as described in *Barker v. Wingo*,⁵ *Doggett v. United States*,⁶ *Vermont v. Brillon*,⁷ and the recent dissent to dismissal of *Boyer v. Louisiana*.⁸ Moreover, in light of the standards set for bringing a speedy trial violation claim, Part II also argues that asserting a violation of speedy trial places a lower burden on the defendant than making a *Strickland* ineffective assistance claim. Finally, Part III contends that indigent defendants and their attorneys should seek individual relief based on a violation of the right to speedy trial, and this Part also maintains that the most overburdened defender systems should seek structural injunctions mandating increased resource allocation to ensure that the right to speedy trial is protected in the future. Ultimately, this Note argues that the right to speedy trial is inextricably linked to providing adequate resources for indigent-defense systems, and that, when failure to provide funding for indigent defense denies a defendant the right to speedy trial, the courts should dismiss the indictment and possibly enjoin the appropriate government to provide funding in the future. Although this Note focuses mainly on the federal defender and uses federal statistics, the legal argument for holding the government accountable for delays resulting from underfunding largely applies to underresourced state and local defender organizations as well.⁹

I. THE CURRENT STRUCTURE OF INDIGENT DEFENSE AND SYSTEMIC PROBLEMS

Section I.A describes the history and structure of the federal indigent-defense system and provides an analysis of the challenges it faces in the twenty-first century, including the particular challenges posed by the 2013 sequester. Section I.B then gives an overview of state and local indigent-defense systems and explains the chronic problems of underfunding and overwork that these systems confront. Finally, Section I.C details how defendants and indigent-defense providers themselves have tried and failed to use ineffective assistance claims to reform indigent-defense systems in the

5. 407 U.S. 514 (1972).

6. 505 U.S. 647 (1992).

7. 129 S. Ct. 1283 (2009).

8. 133 S. Ct. 1702 (2013).

9. The exception being several federal-specific references to the federal Speedy Trial Act and certain structural aspects of the modern federal-defender system.

states, and how many legislatures have failed to address the crisis in indigent defense on their own. This analysis will show that an innovative approach to indigent-defense reform is necessary to protect the fundamental rights of criminal defendants.

A. *The Federal System*

Congress provided for indigent defense through the Criminal Justice Act of 1964 and its subsequent amendments, which established the Federal Defender Office (“FDO”) and provided funding for Criminal Justice Act “panel” attorneys (“CJAs”), who are private contract attorneys paid by the hour.¹⁰ Federal district courts, under the supervision of the circuit courts, are empowered to create a plan for their districts to provide counsel, investigators, experts, and “other services necessary for adequate representation.”¹¹ Today, federal indigent defendants are represented by a federal public defender from the FDO, by a community defender from a nonprofit local agency, or by a private CJA (in cases of conflict or overflow).¹² Approximately 90% of all federal criminal defendants are indigent.¹³ Nationwide, FDOs and local agencies take approximately 60% of their cases, while the remainder goes to panel attorneys.¹⁴ The FDO has 80 offices covering 91 of 94 federal judicial districts,¹⁵ and it opened 138,039 new cases in 2013,¹⁶ a caseload projected to increase in fiscal year (“FY”) 2014.¹⁷ The remaining cases are handled by over 10,000 panel attorneys¹⁸ at an increased cost per hour and, by general consensus, at decreased efficiency.¹⁹ When an FDO cannot take a case, a CJA must be assigned to it,²⁰ a process that the

10. The Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552 (1964) (codified as amended at 18 U.S.C. § 3006A (2012)); Geoffrey Cheshire, *A History of the Criminal Justice Act of 1964*, FED. LAW., Mar. 2013, at 46, 53; Donna Lee Elm & Richard S. Dellinger, *Dismantling Gideon’s Legacy: Sequestration’s Impact on Public Defender Services*, FED. LAW., July 2013, at 11, 11.

11. 18 U.S.C. § 3006A(a) (2012).

12. Elm & Dellinger, *supra* note 10, at 11; U.S. COURTS, *supra* note 4.

13. *Hearing*, *supra* note 4, at 35 (statement of Hon. Julia S. Gibbons).

14. U.S. COURTS, *supra* note 4.

15. *Id.*

16. ADMIN. OFFICE OF U.S. COURTS, 2013 ANNUAL REPORT OF THE DIRECTOR, tbl.S-21, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/tables/S21Sep13.pdf> (last visited Apr. 4, 2014).

17. Additionally, defense caseloads are driven entirely by prosecutorial policies rather than by the capacity of defender services. *Hearing*, *supra* note 4, at 35 (statement of Hon. Julia S. Gibbons).

18. *See* U.S. COURTS, *supra* note 4.

19. Elm & Dellinger, *supra* note 10, at 12; *Hearing*, *supra* note 4, at 35 (statement of Hon. Julia S. Gibbons).

20. *See* Elm & Dellinger, *supra* note 10, at 11–12. Defendants represented by panel attorneys are more likely to be found guilty and to receive longer sentences. Erwin Chemerinsky, *Lessons from Gideon*, 122 YALE L.J. 2676, 2681 (2013).

Administrative Office of the U.S. Courts believes will be delayed by budget cuts.²¹

Historically, the federal-defender system was held in much higher regard than state systems.²² The federal system's superiority could stem from its relatively robust funding (once provided by the Defender Services Office of the Administrative Office of the U.S. Courts), which gave defenders salary parity with the U.S. Attorney's Office, lower caseloads, more training, superior support staff, and better physical facilities.²³ In 1997, one law professor rejoiced that

[f]ederal defender budgetary requests are . . . depoliticized. They are based, instead, on quantifiable data and demonstrated needs, and then included with the budgetary requests for the entire judiciary. As the CJA Review Committee concluded, the judiciary has been both creative and highly effective in advocating for federal defender offices.²⁴

Yet despite the federal-defender system's strong reputation relative to that of state and local systems, it has always faced challenges. The U.S. Department of Justice ("DOJ")'s Bureau of Justice Statistics estimates that 88% of federal criminal defendants with indigent counsel who are found guilty receive jail or prison sentences, while only 77% of federal criminal defendants with private counsel who are found guilty receive jail or prison sentences.²⁵ In 2011, the median time it took to dispose of a federal criminal

21. Alison Matas, *Furloughs Begin for Public Defenders*, BALT. SUN (Apr. 3, 2013, 9:37 PM), <http://www.baltimoresun.com/news/maryland/crime/blog/bs-md-public-defenders-sequestration-20130403,0,27375.story>.

22. See, e.g., Inga L. Parsons, "Making It a Federal Case": A Model for Indigent Representation, 1997 ANN. SURV. AM. L. 837, 838–39 ("[N]ot all defender programs are created equal, and failing to make a distinction between a federal defender organization and [state] indigent defense providers is a disservice to the analysis, as well as to the federal defender system, a system that provides competent legal services which not only fulfill the noble promise of *Gideon*, but surpass it." (footnote omitted)).

23. *Id.* at 845, 856–66. Federal defenders have a caseload of approximately 100 cases at a time, compared with up to 600 for local New York City defenders. *Id.* at 859–60. The caseload, salary, training, support staff, and facilities led to federal defenders' remaining in their positions as much as three times longer than their state counterparts in one New York location. *Id.* at 856. Additionally, the circuit courts of appeals set the compensation of the federal public defender for any given district; this compensation may not exceed the compensation of the U.S. attorney for the same district. 7 ADMIN. OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICY § 420.10.30 (2011), available at http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Viewer.aspx?doc=/uscourts/FederalCourts/AppointmentOfCounsel/vol7/Vol_07A.pdf. Federal defender staff attorneys are paid on the Court Personnel System pay table—the pay system of the U.S. Courts—at a level equivalent to the entry-level pay of a Department of Justice attorney. See Eric Strauss, *How Much Money Do Public Defenders Make?*, HOUS. CHRON., <http://work.chron.com/much-money-public-defenders-make-11605.html> (last visited Apr. 4, 2014); *Attorney Salaries, Promotions, and Benefits*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/careers/legal/entry-salary.html> (last visited Apr. 4, 2014). But nonpaying furloughs have effectively, and dramatically, cut public-defender salaries. See *infra* text accompanying note 29.

24. Parsons, *supra* note 22, at 849.

25. Chemerinsky, *supra* note 20, at 2680–81.

case by jury trial was 15.7 months.²⁶ Although better resourced than state systems, federal criminal defense appears significantly less effective than its private counterparts, and the system as a whole takes staggeringly long times to dispose of cases.

The 2013 sequester exacerbated these challenges. In FY 2013, the FDO took a \$52-million funding cut, more than 9% of its budget.²⁷ It lost over 200 employees and operated at 90% of adequate staffing levels.²⁸ Nationwide, between March and October, defenders took up to 20 days of furloughs.²⁹ Public defenders, private attorneys, congressmen, the attorney general, and federal judges alike criticized the cuts for reducing the availability of defender services, and they implied that the March-to-October cuts may have been constitutionally invalid due to their denial of “effective counsel.”³⁰

Aside from effective-counsel concerns, there were subtler concerns about resulting *delays* in the criminal justice system. Robert J. Anello, the president of the federal bar, notes as follows:

The sequester has hindered the Second Circuit courts’ ability to efficiently process criminal cases. . . .

. . . [F]urloughed attorneys have been forced to seek adjournments of proceedings—such as sentencings, plea allocutions, and suppression hearings—in criminal cases. A several-month lag time can also occur between the conclusion of a trial and the filing of the defendant’s motion for judgment notwithstanding the verdict. In the Southern and Eastern Districts, these delays already have hampered the efficient resolution of criminal cases.³¹

26. ADMIN. OFFICE OF THE U.S. COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 258, tbl.D-10, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>. This breakdown does not distinguish between the length of time taken for indigent and nonindigent defendants to go to trial, but since indigent defendants make up 90% of federal criminal defendants, see *supra* note 4, these statistics are likely to accurately reflect the experiences of indigent defendants.

27. *Hearing, supra* note 4, at 54 (statement of Michael S. Nachmanoff, Federal Public Defender for the Eastern District of Virginia on behalf of the Federal Public and Community Defenders).

28. *Id.* at 1.

29. *Id.*

30. *E.g., Hearing, supra* note 4, at 54 (statement of Michael S. Nachmanoff); *id.* at 70 (statement of Sen. Patrick Leahy); Eric H. Holder, Jr., Op-Ed, *Defendants’ Legal Rights Undermined by Budget Cuts*, WASH. POST, Aug. 22, 2013, available at http://www.washingtonpost.com/opinions/eric-holder-defendants-legal-rights-undermined-by-budget-cuts/2013/08/22/efccbec8-06bc-11e3-9259-e2aaf5a5f84_story.html; Letter from Robert J. Anello, President, Fed. Bar Council, to President Barack Obama et al., Regarding Adverse Effects of the Sequester on Federal Courts in Second Circuit (July 27, 2013), available at <http://legalnewsline.com/wp-content/uploads/2013/07/FBCsequesterletter.pdf>; Letter from Loretta A. Preska, Chief Judge, S.D.N.Y., et al., to Joseph R. Biden, Jr., President, U.S. Senate (Aug. 13, 2013), available at <http://news.uscourts.gov/sites/default/files/Chief-Judges-Letter-to-Joseph-Biden.pdf>.

31. Letter from Robert J. Anello, President, Fed. Bar Council, to President Barack Obama et al., *supra* note 30.

Gregory M. Sleet, then the chief judge on Delaware's federal district court, expressed concern about the justice system's ability to meet its "constitutional obligation in the criminal context" in the face of funding cuts to the FDO.³² Chief Judge Traxler, Chairman of the Executive Committee of the Judicial Conference of the United States, also voiced his fear that budget cuts would slow criminal prosecutions and undermine constitutional guarantees.³³ Under the sequester, "[c]riminal prosecutions [were] delayed because defender organizations do not have the staff necessary to continue their representation of the defendant."³⁴ Recognizing that the federal-defender furloughs crippled the ability of defenders to operate at full capacity, several federal courts stopped hearing criminal matters on Fridays or alternate Fridays.³⁵ The longer the FDO operated at a reduced budget, the worse the problem became: delays snowballed over time as federal defenders and courts faced a larger and larger backlog of pending cases.³⁶

Additionally, cuts to the FDO meant that more criminal cases were sent to contract attorneys, causing further delay as defendants waited for the appointment of a new attorney.³⁷ The Administrative Office of the U.S. Courts noted that funding cuts made the process of assigning private attorneys slower than before the sequester and delayed payments to CJAs.³⁸ Exacerbating this problem, the FDO kept furloughs down by delaying payments to CJAs in FY 2013.³⁹ The federal government stopped paying CJAs on September 17, when FY 2013 funds ran out, and the government did not acquire the funds needed to pay them until the October 17 Continuing Resolution ended the federal government shutdown.⁴⁰ The

32. Sean O'Sullivan, *Public Defenders Face "Crippling" Cuts*, USA TODAY (July 23, 2013, 8:37 AM), <http://www.usatoday.com/story/news/nation/2013/07/23/sequestration-public-defenders-face-crippling-cuts/2577483/>.

33. Chief Judge William B. Traxler, Jr., *Statement on Impact of Sequestration on Judiciary, Defender Funding*, U.S. COURTS (Apr. 17, 2013), <http://news.uscourts.gov/statement-impact-sequestration-judiciary-defender-funding> ("[A] significant problem arises when budget cuts impact our responsibilities under the Constitution. This happens when we cannot afford to fulfill the Sixth Amendment right to representation for indigents The predictable result is that criminal prosecutions will slow . . .").

34. *Id.*; see also Sam Stein & Ryan J. Reilly, *Sequestration's Biggest Victim: The Public Defender System*, HUFFINGTON POST (July 22, 2013, 6:29 AM), http://www.huffingtonpost.com/2013/07/22/sequestration-public-defender_n_3624111.html.

35. Preska et al., *supra* note 30, at 3.

36. See *Hearing, supra* note 4, at 70–71 (statement of Sen. Patrick Leahy).

37. *Id.* at 52 (statement of Michael S. Nachmanoff).

38. Matas, *supra* note 21.

39. Traxler, *supra* note 33.

40. See Statement of James R. Silkenat, President of the American Bar Association, Before the House of Representatives Judiciary Committee Forum 3–4 (Oct. 8, 2013), available at <http://news.uscourts.gov/sites/default/files/ABA-Shutdown-Statement.pdf>; Todd Ruger, *Federal Judiciary Budget Increases in Last-Minute Budget Deal*, BLOG LEGALTIMES (Oct. 16, 2013, 10:12 PM), <http://legaltimes.typepad.com/blt/2013/10/federal-judiciary-budget-increases-in-last-minute-budget-deal.html>.

Judicial Conference decreased panel attorney rates by \$15 an hour for FY 2014.⁴¹

Prolonged funding issues raise questions about whether contract attorneys will be willing to take cases when payment for their time and case-related costs is not forthcoming.⁴² Reduced compensation creates a disincentive for attorneys to participate in the indigent-defense system. This disincentive leads to fewer attorneys willing to accept cases, which in turn increases the caseload for the smaller pool of attorneys still open to taking these cases, ultimately compounding the difficulties that criminal defense attorneys already face in attempting effectively to represent clients.⁴³ Continued funding delays, uncertainty about pay rates, and the general unreliability of working in indigent defense will dry up the pool of attorneys needed to take on *forty percent* of federal criminal cases.⁴⁴

The defender system's problems were ameliorated in small part by the resolution that ended the 2013 shutdown.⁴⁵ In that resolution, which funded the government through January, the federal judiciary as a whole received a budget increase of \$51 million for the period through January 15, 2014, although this funding did not make up for the \$350 million that the judiciary lost in budget cuts earlier in 2013 as part of the sequester.⁴⁶ Defender services received \$26 million of that funding increase,⁴⁷ which spared them the losses of up to 23% that they had been expecting.⁴⁸ The funding increase went "primarily" to back pay for CJAs, who were not paid between mid-September and mid-October.⁴⁹ A spokesman for Senator Coons of the Senate Judiciary Subcommittee on Bankruptcy and the Courts insisted that the small increase would be sufficient to end furloughs of federal defenders while admitting that the resolution did not "fully restore the Judiciary and the defenders to the funding levels they need to fully execute their constitutional mission."⁵⁰

The federal-defender system is still operating with less money than it needs in order to fulfill its constitutional mandate,⁵¹ and the sequester and the near-shutdown of the judiciary have revealed that the indigent-defense

41. Silkenat, *supra* note 40, at 7–8.

42. *Id.* at 3–4.

43. AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 7 (2004), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lisclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

44. See *supra* text accompanying note 14.

45. See Continuing Appropriations Act, 2014, Pub. L. No. 113-46, 127 Stat. 558 (2013) (ending the 2013 government shutdown).

46. Ruger, *supra* note 40.

47. *Id.*

48. *Hearing*, *supra* note 4, at 70 (statement of Sen. Patrick Leahy); Stein & Reilly, *supra* note 34.

49. See Ruger, *supra* note 40.

50. *Id.*

51. *Id.*

budget is no longer immune from partisanship. Robust financial support led the system to become a beacon of relative excellence, but lack of support from March to October 2013 undermined the quality of the system. There is no way to give back to defendants the time they spent in jail while their lawyers were furloughed. And given current congressional partisanship,⁵² there is no guarantee that the system—and Sixth Amendment liberties—will not suffer likewise in the near future.

B. *State and Local Systems*

States and localities provide indigent defense through a combination of public defender offices, “an assigned counsel system in which the court schedules cases for participating private attorneys,” and “a contract system in which private attorneys contractually agree to take on a specified number of indigent defendants or indigent defense cases.”⁵³ Twenty-two states have state-based public defender offices, 27 states and the District of Columbia have county-based public defender offices, and Maine, an outlier, lacks a public defender office.⁵⁴ Across the states and the District of Columbia, 15,026 attorneys handled 5,572,450 cases in 2007.⁵⁵

Though states and localities provide indigent-defense counsel in a wide variety of ways, their services are considered largely inadequate: “[e]veryone knows that excessive caseloads, poor funding, and a lack of training plague indigent defense delivery systems throughout the states, such that the promise of *Gideon v. Wainwright* is largely unfulfilled.”⁵⁶ Only “[f]ifteen state public defender programs had caseload or workload limits, the authority to refuse cases, or both.”⁵⁷ DOJ’s Bureau of Justice Statistics calculated that 15 out of 19 reporting state programs exceeded the maximum recommended limit of cases per attorney—an estimate that was admittedly low.⁵⁸ That data show that, *on average*, state and local public defenders are carrying an 80%

52. See generally Drew DeSilver, *Partisan Polarization, in Congress and Among Public, Is Greater Than Ever*, PEW RESEARCH CENTER (July 17, 2013), <http://www.pewresearch.org/fact-tank/2013/07/17/partisan-polarization-in-congress-and-among-public-is-greater-than-ever/>.

53. LYNN LANGTON & DONALD FAROLE, JR., U.S. DEP’T OF JUSTICE, *State Public Defender Programs, 2007*, at 3 (2010), available at <http://www.bjs.gov/content/pub/pdf/spdp07.pdf>. The American Bar Association has put together a map detailing which states use which system. *GIDEON’S BROKEN PROMISE*, *supra* note 43, at 5 chart 1.

54. LANGTON & FAROLE, *supra* note 53, at 3 tbl.1.

55. *Id.* For an explanation of how part-time attorneys factor into this total, see *id.* at 21.

56. Eve Brensike Primus, *Effective Counsel After Martinez v. Ryan: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604, 2606 (2013).

57. LANGTON & FAROLE, *supra* note 53, at 12.

58. *Id.* at 12–13 (“The National Advisory Commission . . . guidelines recommend a caseload for each public defender’s office [T]he caseload of a public defender office should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors . . . per attorney per year: not more than 400” (internal quotation marks omitted)).

higher caseload than they should.⁵⁹ And this is only an average: at the extremes, “[p]ublic defenders routinely handle well over 1,000 cases a year, more than three times the number of cases that the American Bar Association [“ABA”] says one attorney can handle effectively. As a result, many defendants sit in jail for months before even speaking to their court-appointed lawyers.”⁶⁰ Public defenders already lack adequate compensation (particularly contract attorneys with maximum fees for each case), support services (including investigative and expert services), and training, and they are often subject to drastic budget cuts in the face of state fiscal crises.⁶¹

“[L]ack of current and reliable data” is “a significant barrier” to evaluating structural deficiencies of various kinds within the indigent-defense system.⁶² Most state courts do not distinguish between cases that go to trial and cases that are resolved by other means, which makes it difficult to compile a state median filing-to-disposition time for crimes that go to trial.⁶³ But older and jurisdiction-specific data clearly demonstrate that a lack of resources has produced long delays in many state criminal justice systems: a 1991 study of 39 urban courts found that, in 1987, the median time from arrest to judgment for felony cases taken to a jury trial was 209 days; the median time from arrest to judgment for felony cases resolved in *any* way (a plea, a bench trial, dismissal, and so forth) was 131 days.⁶⁴ In places like Brooklyn, the average time until trial was an appalling 15 months.⁶⁵

59. Erica J. Hashimoto, *Assessing the Indigent Defense System*, AM. CONST. SOC'Y FOR L. & POL'Y 15 (Jan. 2013), http://www.acslaw.org/sites/default/files/Hashimoto_-_Assessing_the_Indigent_Defense_System.pdf.

60. Eve Brensike Primus, *Litigation Strategies for Dealing with the Indigent Defense Crisis*, AM. CONST. SOC'Y FOR L. & POL'Y 1 (Sept. 2010), <http://www.acslaw.org/files/Primus%20-%20Litigation%20Strategies.pdf> (emphasis added).

61. *GIDEON'S BROKEN PROMISE*, *supra* note 43, at 7.

62. *Id.* at 28.

63. See LINDSEY DEVERS, U.S. DEP'T OF JUSTICE, PLEA AND CHARGE BARGAINING 1 (2011), available at <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> (“[T]here are no exact estimates of the proportion of cases that are resolved through plea bargaining.”). When contacted for information on statistics regarding how long it takes for a criminal defendant who chooses trial actually to reach trial, California’s Administrative Office of the Courts stated as follows: “The requested information is not information we typically maintain. . . . You may wish to contact individual Superior Courts to request the data from them, however, we think that it is unlikely that individual courts track the type of detailed information that you are requesting.” E-mail from the Judicial and Court Operations Services Division of California to author (Nov. 22, 2013) (on file with the editors).

64. JOHN A. GOERDT WITH CHRIS LOMVARDIAS & GEOFF GALLAS, NAT'L CTR. FOR STATE COURTS, REEXAMINING THE PACE OF LITIGATION IN 39 URBAN TRIAL COURTS 7 fig.2.2 (1991), available at <https://www.ncjrs.gov/pdffiles1/Digitization/134609NCJRS.pdf>. A more recent DOJ report calculated that, in state courts, “[t]he median time from arrest to sentencing for all felony convictions was 265 days.” SEAN ROSENMERKEL ET AL., U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 24 (2009), available at <http://www.bjs.gov/content/pub/pdf/fssc06st.pdf>. Neither report contains a specific statistic for the median time to disposition for cases going to trial.

65. GOERDT ET AL., *supra* note 64, at 9 tbl.2.3. Of the 39 urban areas, Hartford (376 days), the Bronx (412 days), Newark (444 days), and Brooklyn (445 days) took over a year to reach disposition by jury verdict in a felony case. *Id.*

The problem has not improved since 1987. A more recent ABA report detailed crises in specific jurisdictions, finding complete suspension of most prosecutions for 3 months at a time,⁶⁶ detention for up to 11 months without seeing a lawyer,⁶⁷ and averages of 501 days for a case to reach disposition of any kind.⁶⁸ “Aside from the potential violations of the right to a speedy trial, these delays disproportionately harm poor persons who, because they are unable to post bond, endure repeated delays while they remain locked up in jail.”⁶⁹

Although the data on cases disposed of by trial are old or unavailable nationwide, the information that is available demonstrates that there are significant portions of the country where it takes a very long time for cases to be disposed of—and where it takes even longer for cases to go to trial. Inadequate resources for prosecutors and courts may explain these delays, but, based on the ABA’s witness reports described above, the problem is more likely due to lack of indigent-defense manpower.⁷⁰ At least anecdotally, there are jurisdictions where budget cuts to indigent defense are directly responsible for postponing trials (e.g., Oregon), and there are other jurisdictions where it takes months to appoint indigent-defense attorneys, a delay that prevents these attorneys from promptly visiting their clients (e.g., Mississippi and Louisiana).⁷¹

The lack of resources provided for indigent defense is delaying the criminal process. And while the federal-defender system may be heading toward a crisis, many state and local indigent-defender systems have been experiencing a full-blown crisis for years. People are languishing in prisons while awaiting trial, which converts the paradigm from “innocent until proven

66. *GIDEON’S BROKEN PROMISE*, *supra* note 43, at 11 (“In Oregon, due to drastic cuts in the indigent defense budget, only the most serious and violent crimes were prosecuted during the last three months of fiscal year 2003; all remaining cases were postponed until the next fiscal year [P]robably between 15,000 to 20,000 individual citizens [were affected].” (citation omitted)).

67. “[I]n some places throughout the country, poor persons accused of crime are arrested and detained in local jails for months or even years before they have a chance to speak with a lawyer.” *Id.* at 23. One Mississippi woman “was in jail for eleven months before a lawyer was appointed, was in jail two additional months before the lawyer came to see her, and was in jail one more month” while her case was resolved. *Id.* In another Mississippi case, “a woman arrested for stealing \$200 from a casino slot machine spent eight months in jail because she was unable to afford bail. Eventually, without receiving any effective legal representation, the woman pled guilty to time served simply to get out of jail.” *Id.* “[A]lthough Louisiana by statute requires the appointment of public defenders at a hearing to be held within seventy-two hours of arrest, in Calcasieu Parish public defenders rarely meet with clients in felony cases prior to arraignment, which occurs an average of 315 days after arrest.” *Id.* at 18. In the same jurisdiction, it takes an average of 501 days from arrest to disposition of *any kind*, not only disposition by jury trial. *Id.* at 26–27.

68. *Id.* at 26–27 (reporting average delays in Calcasieu Parish, Louisiana).

69. *Id.* at 27.

70. See *supra* notes 66–68 (suggesting that delays were caused by cuts to indigent defense and the unavailability of public defenders to meet with clients).

71. See *supra* notes 66–68.

guilty” to “innocent until pleading guilty just to get out of jail.” As a result, lack of funding for indigent defense is undermining the foundational assumptions of the American criminal justice system.

C. Failed Attempts to Correct Problems in Indigent Defense

This Section argues that legal challenges to underfunding based on ineffective assistance claims have not and will not rectify the underfunding problems in indigent defense. It also contends that the legislature likewise cannot be relied on to ensure effective indigent defense.

1. Legal Efforts Rooted in Ineffective Assistance of Counsel Doctrine

Given the sorry state of indigent defense across the country, there have been attempts to challenge the constitutional inadequacy of entire public-defender systems. Between 1980 and 2000, numerous suits were brought (by defendants and even by public defenders themselves!) in state and lower federal courts alleging that certain state-operated defender systems were so inadequate that they violated the Sixth Amendment right to counsel.⁷² These suits have “generated little actual change in the delivery of indigent defense services nationwide” since courts have found that “systemic problems of ineffectiveness,” absent previous actual or constructive denial of counsel, are not cognizable claims.⁷³ In addition to courts’ finding system-wide claims generally not cognizable, the abstention and standing doctrines would also prevent challenges on the grounds of underfunding: “If the suit were brought on behalf of those in the midst of a state prosecution, the federal court would have to abstain under *Younger v. Harris*. But if a suit were

72. Chemerinsky, *supra* note 20, at 2687–88; Martin Guggenheim, *The People’s Right to a Well-Funded Indigent Defender System*, 36 N.Y.U. REV. L. & SOC. CHANGE 395, 406 n.41 (2012) (listing fifteen such cases).

73. Chemerinsky, *supra* note 20, at 2697–98; Primus, *supra* note 60, at 4 & n.21; see also Heather Baxter, *Gideon’s Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341, 368–81 (discussing cases in Florida, Kentucky, Michigan, and New York). It should be emphasized here that the rights to speedy trial and assistance of counsel are contained in entirely separate clauses of the Sixth Amendment. U.S. CONST. amend. VI. The courts generally consider these two issues separately. *E.g.*, *United States v. Lagasse*, 269 F. App’x 87, 90 (2d Cir. 2008) (rejecting the defendant’s Sixth Amendment speedy trial claim but dismissing without prejudice an ineffective assistance claim because the “facts relevant to the ineffectiveness claim are best developed in collateral habeas proceedings”). In several cases—most of which are unpublished—federal courts of appeals and at least one state supreme court have ruled that counsel’s failure to pursue a speedy trial claim does not render counsel’s performance *per se* ineffective. *E.g.*, *Dillard v. Sec’y, DOC*, 440 F. App’x 817, 820 (11th Cir. 2011) (*per curiam*); *United States v. Williamson*, 319 F. App’x 734, 737 (10th Cir. 2009); *Parisi v. United States*, 529 F.3d 134, 140–41 (2d Cir. 2008); *Gorman v. Goord*, 154 F. App’x 267, 271–72 (2d Cir. 2005); *Salyer v. Sternes*, 34 F. App’x 238, 240–41 (7th Cir. 2002); *Nelson v. Hargett*, 989 F.2d 847, 854 (5th Cir. 1993); *State v. Lewis*, 151 P.3d 883 (Mont. 2007). It is clear from these rulings that courts do not consider the lack of speedy trial to be a systemic problem of ineffectiveness. Rather, they consider the rights to speedy trial and effective assistance of counsel to be unique rights afforded to criminal defendants.

brought by those who are not being prosecuted, there would be a serious issue concerning standing and ripeness.⁷⁴

Additionally, those individuals who have overcome the abstention hurdle and brought ineffective assistance claims have fared poorly in court. Defendants facing imprisonment are nominally entitled to effective assistance of counsel.⁷⁵ But the bar for “reasonably effective assistance” is easily met given *Strickland v. Washington*’s rule that “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”⁷⁶ To meet this benchmark, a defendant must satisfy two prongs: first, he must show that counsel’s performance did not meet an “objective standard of reasonableness,” and second, he must show that there was a “reasonable probability” that “the result of the proceeding would have been different” if not for the unreasonably poor performance.⁷⁷ Professor Chemerinsky calls *Strickland* “usually an insurmountable burden,” noting that there have been only two cases since *Strickland* in which the Supreme Court found sufficient prejudice to overturn a conviction on grounds of ineffective assistance of counsel (both of which turned on inadequate investigation in capital cases).⁷⁸ Simply stated, the “Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy.”⁷⁹ In addition to *Strickland*’s high threshold, the *Younger* abstention doctrine also inhibits individual appeals on the basis of ineffective assistance of counsel, as it prevents defendants from seeking relief until state criminal proceedings have been completed.⁸⁰

74. Chemerinsky, *supra* note 20, at 2697 (footnote omitted); *see also* *Younger v. Harris*, 401 U.S. 37 (1971) (holding that federal courts may not grant declaratory relief based on the validity of the statute when the case is pending in state court). The practical effect of *Younger* is that a defendant on direct appeal in a state court cannot bring a federal habeas action until the direct appeals are concluded. Chemerinsky, *supra* note 20, at 2687, 2692–93; Primus, *supra* note 60, at 4–5.

75. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

76. 466 U.S. 668, 686–87 (1984) (holding that (1) the proper standard for attorney performance is that of reasonably effective assistance; (2) defense counsel’s strategy at sentencing hearing was reasonable and, thus, the defendant was not denied effective assistance of counsel; and (3) even assuming counsel’s challenged conduct was unreasonable, defendant suffered insufficient prejudice to warrant setting aside his death sentence).

77. *Id.* at 688, 694.

78. Chemerinsky, *supra* note 20, at 2689 (referencing *Rompilla v. Beard*, 545 U.S. 274 (2005) and *Wiggins v. Smith*, 539 U.S. 510 (2003)).

79. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (citing *Ross v. Moffitt*, 417 U.S. 600 (1974)). The Supreme Court has established *some* baselines. *Id.* at 84 (holding that, when a defendant has made a preliminary showing that his sanity is likely to be a significant factor at trial, due process requires that the state provide a psychiatrist if the defendant cannot afford one). But *Strickland* sets the bar low for assistance of counsel.

80. Primus, *supra* note 60, at 4–5.

Indigent-defense systems are in crisis across the country, and ineffective assistance of counsel litigation has failed to provide more resources to indigent defenders. But the Supreme Court has recognized that speedy trial violations resulting from breakdowns of indigent-defender systems may be a basis for overturning convictions.⁸¹ Given the onerous requirements of ineffective assistance claims, indigent defendants whose cases took a long time to reach trial may find it more feasible to make speedy trial claims instead.

2. Legislative Efforts to Correct Problems in Indigent Defense

Ideally, the Judicial Conference could rely on Congress to provide funding to stave off a breakdown of the indigent-defense system.⁸² Indeed, through the 1960s and 1970s, Congress went above and beyond its constitutional obligations in writing legislative protections for Sixth Amendment guarantees.⁸³ But current partisan gridlock suggests that, even after the October 2013 boost to the defender budget, relying on Congress is not the best long-term plan to ensure the stability of indigent defense.⁸⁴

Congress was once in the vanguard of protecting the right to counsel and the right to speedy trial. For example, the Speedy Trial Act of 1974 crystalized time limits for speedy trial in a way that the Supreme Court's decisions had not.⁸⁵ And the Criminal Justice Act of 1964 created an indigent-defense system that was the envy of underresourced state and local defender organizations across the country,⁸⁶ and that system ultimately

81. See *infra* Sections II.A–B.

82. But see Traxler, *supra* note 33, for a discussion of why the courts cannot rely on Congress.

83. See *supra* note 10 and accompanying text.

84. See *supra* text accompanying notes 27–52.

85. Pub. L. No. 93-619, 88 Stat. 2076 (codified as amended at 18 U.S.C. §§ 3161–64 (2012)). Only two years after the Court first refused to set a firm limit on speedy trial, see *Barker v. Wingo*, 407 U.S. 514, 529–30 (1972), Congress went beyond the Court's requirements and set its own statutory limitations on speedy trial, recognizing that a defendant who waits long periods before trial suffers from a “magnitude of disabilities,” including difficulties defending himself at trial, severe emotional strain, and financial hardship. *United States v. Mehrmanesh*, 652 F.2d 766, 769 (9th Cir. 1980). A “dissatisfied” Congress passed the Speedy Trial Act to “circumvent the *Barker* opinion and put teeth into the speedy trial guarantee” as well as to protect the societal interest in speedy trials. *Id.*; Brian P. Brooks, Comment, *A New Speedy Trial Standard for Barker v. Wingo: Reviving a Constitutional Remedy in an Age of Statutes*, 61 U. CHI. L. REV. 587, 602–03 (1994). Although there are so many provisions for tolling time requirements in the Act that it does not uniformly keep prosecutions within its hundred-day limit (see 18 U.S.C. § 3161(h)(7)(A)–(B) for an extensive list of reasons a judge may toll the speedy trial time limit when “the ends of justice” are served by granting a continuance), the Act nevertheless demonstrates Congress's dissatisfaction with the Court's refusal to set a firm deadline for speedy trial violations. See *Mehrmanesh*, 652 F.2d at 769.

86. Although the Criminal Justice Act was passed a year after the Court handed down its ruling in *Gideon*, support for a public defender system had been growing in both the legislative and executive branches since 1949. See generally Cheshire, *supra* note 10. For example, in 1960, Congress passed the District of Columbia Legal Aid Act, “foreshadowing future national legislation”; and in 1961, Attorney General Kennedy appointed the committee whose language and recommendations were incorporated into the Criminal Justice Act. *Id.* at 51–52. After the

provided greater protections to defendants than the Supreme Court jurisprudence at the time required.⁸⁷ In light of this history, the simplest way to address the deficiencies in the judicial budgets would be for Congress to revive its principled stance on providing adequate counsel and speedy trials—a stance that prompted it to pass the Criminal Justice Act and the Speedy Trial Act in the first place. As part of recommitting itself to safeguarding these rights, Congress could restore funding to the federal-defender system without the need for judicial intervention.

Yet given the gridlock that ultimately led to the sequester and the October 2013 federal government shutdown, Congress should not be relied on to restore the federal-defender system to its former glory. There is no guarantee that the next budget will be equally generous to the federal-defender system or that Congress will avoid a second shutdown.⁸⁸ Accordingly, while Congress *should* continue to legislate in ways that uphold the Sixth Amendment, it is not necessarily interested in protecting trial rights in the current political climate, and it cannot necessarily be relied on to fund adequately indigent-defense institutions.⁸⁹

For their parts, many states have never enjoyed the support for indigent defense that the federal system had throughout the 1960s and 1970s.⁹⁰ As a result, defendants in states with systemically deficient indigent-defense systems should not expect a dramatic funding increase in the near future.

The Sixth Amendment creates fundamental guarantees—rights that cannot be left to the whims of dysfunctional legislatures that have proven they can turn a blind eye to indigent-defense crises for months or years on

House passed the Act in 1964, its longtime champion Senator Hruska urged passage in the Senate, triumphantly proclaiming as follows:

The case for this legislation is easy to state: we are a nation dedicated to the precept of equal justice for all. Experience has abundantly demonstrated that, if the rule of law will hold out more than an illusion of justice for the indigent, we must have the means to insure adequate representation that the bill before us provides.

Id. at 53 (quoting 110 CONG. REC. 18,521–22 (1964)). The modern federal-defender system was not established to achieve grudging compliance with *Gideon*: it was the thoughtful product, decades in the making, of the executive’s and legislature’s understanding that “justice for all” required a professionalized indigent-defense system.

87. See Parsons, *supra* note 22, at 838–39.

88. At least one district court judge did not view the October Continuing Resolution as an indication of positive things to come. Judge Kopf of the U.S. District Court for the District of Nebraska responded to news that the shutdown had ended by blogging T.S. Eliot’s “The Hollow Men.” Richard George Kopf, *The Shut Down Is Over, So Why Am I Depressed?*, HERCULES & UMPIRE (Oct. 17, 2013), <http://herculesandtheumpire.com/2013/10/17/the-shut-down-is-over-so-why-i-am-depressed/> (“This is the way the world ends / Not with a bang but a whimper.”).

89. Professor Primus, in a 2010 issue brief, proposed creating a federal enforcement action allowing DOJ or a deputized private party to seek equitable relief in federal courts for violations of Sixth or Fourteenth Amendment rights. But Primus herself recognizes that DOJ has limited resources—a fact underscored by the sequester and shutdown, which forced the department to halt numerous civil proceedings. Primus, *supra* note 60, at 2, 8.

90. See *supra* Section I.B.

end. Since indigent defendants can rely on neither ineffective assistance doctrine nor legislatures to rehabilitate indigent-defense systems, they should look to alternative tools for challenging the systemic lack of resources.

II. SPEEDY TRIAL MAY BE USED TO CHALLENGE FUNDING CUTS TO INDIGENT DEFENSE

Supreme Court and appellate court precedent suggest that the breakdown in indigent defense resulting from a lack of funding should count against the government for purposes of speedy trial. Section II.A lays out the Court's test for speedy trial violations and then contextualizes the dicta that indicate that breakdowns in indigent-defense systems resulting from underfunding should contribute to a finding that a defendant's right to speedy trial has been violated. Section II.B argues that Justice Sotomayor's dissent to the dismissal of certiorari in *Boyer v. Louisiana* represents a natural extrapolation of Court precedent. This Section also contends that delays caused by state or federal governments' lack of funding for indigent defense should be counted against the government for purposes of determining whether the right to speedy trial has been violated. Finally, Section II.C explains how indigent defendants should make an argument that budget cuts violated their right to speedy trial, and this Section then elaborates on the advantages of such an argument over a *Strickland* ineffective assistance claim.

A. *Speedy Trial Jurisprudence Suggests That Funding-Related Delays Should Count Against the Government for Purposes of Finding Speedy Trial Violations*

The Sixth Amendment guarantees a right to speedy trial, and courts typically count administrative delays against the government for purposes of assessing when that right has been violated. The body of law on speedy trial was fairly limited until the mid-1960s,⁹¹ when the Supreme Court in *United States v. Ewell*⁹² discussed the right itself and in *Klopfer v. North Carolina* declared the right just as fundamental as the rights to counsel and trial by jury.⁹³ Then in *Barker v. Wingo*, the Court, warning that the speedy trial right is "amorphous," "slippery," and "necessarily relative,"⁹⁴ rejected a fixed time period for determining a violation of speedy trial and adopted instead a flexible "balancing test, in which the conduct of both the prosecution and

91. *Supreme Court Review—Speedy Trial*, 68 J. CRIM. L. & CRIMINOLOGY 543, 543 n.6 (1977). *Beavers v. Haubert*, 198 U.S. 77 (1905), dealt with particular circumstances surrounding the case, and *Pollard v. United States*, 352 U.S. 354 (1957), held that delay could not be purposeful.

92. 383 U.S. 116 (1966) (finding that, in the particular circumstances of the case, a nineteen-month interval between defendants' arrest and a subsequent indictment did not violate the speedy trial right).

93. 386 U.S. 213, 223 (1967) (extending the fundamental right of speedy trial to the states).

94. 407 U.S. 514, 522 (1972) (quoting *Beavers*, 198 U.S. at 87).

the defendant are weighed” on an ad hoc basis.⁹⁵ Rather than focusing only on a set length of time, a proper balancing test was required to include (1) the length of delay, (2) the reason for delay, (3) the defendant’s assertion of his right, and (4) prejudice to the defendant.⁹⁶ No single factor is necessary or sufficient for finding a deprivation of speedy trial, and other circumstances may still be relevant.⁹⁷ And yet court rulings since *Barker* show that the test may effectively be used to challenge many of the delays common to indigent criminal cases.

The first *Barker* factor is “length of delay.” When the delay is long enough, it becomes “presumptively prejudicial”; at this presumptively prejudicial point, the delay triggers full application of the other *Barker* factors.⁹⁸ Consistent with its rejection of a set number of months for speedy trial, the Supreme Court has never specified a point at which postaccusation delay becomes presumptively prejudicial, and it has held that “the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.”⁹⁹ In *Doggett v. United States*, however, the Court observed in a footnote that

[d]epending on the nature of the charges, the lower courts have generally found postaccusation delay “presumptively prejudicial” as it approaches one year. . . . We note that, as the term is used in this threshold context, “presumptive prejudice” does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry.¹⁰⁰

95. *Barker*, 407 U.S. at 530.

96. *Id.* The Second and Tenth Circuits and some district courts recognize “federal-state comity” as a fifth *Barker* factor, but they regard it as a secondary factor relative to the first four and significant only in the context of “considering whether undue delay excuses a failure to exhaust” state remedies before applying for a writ of habeas corpus. *Roberites v. Colly*, 546 F. App’x 17, 19 (2d Cir. 2013); see also, e.g., *Harris v. Champion*, 15 F.3d 1538, 1553–57 (10th Cir. 1994); *Jackson v. Duckworth*, 844 F. Supp. 460, 462–63 (N.D. Ind. 1994). The remaining courts treat comity as a general requirement for habeas relief rather than describing it as a fifth *Barker* factor. E.g., *Johnson v. Roberts*, No. 96-60153, 1996 WL 405773 (5th Cir. July 1, 1996) (per curiam). For examples of federal courts considering whether the Speedy Trial Act has been violated, see *infra* text accompanying notes 129–131.

97. *Barker*, 407 U.S. at 533.

98. *Id.* at 530.

99. *Id.* at 531. Yet many simple street crimes that go to trial have median filing-to-jury-trial times greater than a year in federal courts. In 2011, the median filing-to-jury-trial time for assault was 12.9 months and for drug offenses was 17.0 months. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 26, at 258–59 tbl.D-10. For state filing-to-jury-trial times, see *supra* notes 62–71 and accompanying text.

100. 505 U.S. 647, 652 n.1 (1992) (citations omitted). The pretrial delay in *Doggett* was eight-and-a-half years, *id.* at 648, which is admittedly much longer than the delays attributable to recent spending cuts. But the fact that the Court approvingly made reference to the one-year mark in such an extreme case appears to indicate a broader concern that encompasses shorter delays for simple street crimes, particularly when the delay in those cases is not, in the Court’s words, “both inevitable and wholly justifiable.” *Id.* at 656.

The second *Barker* factor assesses the government's reason for delay, with different reasons assigned different weights. Deliberate delay by the prosecution weighs heavily against the government, while a "valid reason, such as a missing witness[,]" may justify the delay.¹⁰¹ Significantly for purposes of analyzing the sequester, a "more neutral reason such as . . . overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant."¹⁰² In other words, although delays resulting from administrative issues are not weighted as heavily as intentional prosecutorial foot dragging, unintentional government delays are still counted against the government for purposes of determining speedy trial violations. Under this clear guideline, any court congestion resulting from underfunding weighs against the government in assessing speedy trial violations, even if it does not weigh as heavily as deliberate prosecutorial delay.

Since *Barker*, the Supreme Court has indicated in dicta that systemic issues in public-defender agencies may be imputed to the state. In *Polk County v. Dodson*, for example, the Court noted that a defender system's "hiring and firing decisions" are considered *made on behalf of the state*.¹⁰³ Likewise, in *Brillon v. Vermont*, the Court stated that delays resulting from "a systemic 'breakdown of the public defender system'" may still be counted against the state.¹⁰⁴

Additionally, federal circuit courts and state supreme courts have largely applied *Barker* in counting breakdowns in an appellate system against the state.¹⁰⁵ Courts have deemed inadequate an array of justifications for delays in the appellate process, including delays due to multiple substitutions of public defenders;¹⁰⁶ lack of effective supervision of indigent counsel during the appellate process;¹⁰⁷ lack of funding or mismanagement of resources;¹⁰⁸

101. *Barker*, 407 U.S. at 531.

102. *Id.*

103. *Polk Cnty. v. Dodson*, 454 U.S. 312, 324–25 (1981) (citing *Branti v. Finkel*, 445 U.S. 507 (1980)).

104. *Brillon v. Vermont*, 129 S. Ct. 1283, 1292 (2009). Like the factual scenario in *Boyer v. Louisiana*, 133 S. Ct. 1702 (2013), the facts in *Brillon* are critical to understanding the majority opinion. The indigent defendant went through six court-appointed attorneys in the three years between arrest and trial: he fired one county public defender, a second attorney conflicted off the case immediately, a third court-appointed attorney withdrew after *Brillon* threatened his life, and the fourth and fifth were contract attorneys who withdrew following modifications of their contract with Vermont's defender general. *Brillon*, 129 S. Ct. at 1287–89. The defender general required legislative approval to appropriate funds specifically to hire *Brillon*'s sixth attorney, who took the case to trial and made the speedy trial violation argument. *Id.* at 1289.

105. See generally Brief *Amici Curiae* of the ACLU et al. at 18–23, *Brillon*, 129 S. Ct. 1283 (No. 08-88), 2008 WL 5417434 (discussing twelve cases from both federal and state appellate courts, all finding ineffective assistance of counsel in the appellate process).

106. *United States v. Brown*, 292 F. App'x 250, 252–53 (4th Cir. 2008) (per curiam); *Brooks v. Jones*, 875 F.2d 30, 31 (2d Cir. 1989).

107. *Brooks*, 875 F.2d at 31.

108. *Harris v. Champion*, 15 F.3d 1538, 1546 (10th Cir. 1994).

the inability of an indigent defender to provide “professional attention” to an appeal in light of her heavy caseload commitments;¹⁰⁹ and understaffing of the appellate defender’s office.¹¹⁰ Delays as short as eighteen months to appoint counsel have been counted against the state in determining speedy trial violations.¹¹¹ Where a defendant’s appeal “slipped through the cracks” of the state-funded indigent-appellate-defender system, “[r]esponsibility for this delay cannot be charged” against a defendant.¹¹² Although nonsystemic delays that occur after an attorney is assigned, such as those resulting from the defense’s voluminous motions practice, are counted against the defendant,¹¹³ delays that cannot reasonably be imputed to the defendant and his legal strategy are instead counted against the state. As the text of the Sixth Amendment makes plain, the right to speedy trial is a *trial* right;¹¹⁴ by contrast, most circuit courts consider the right to an appeal free of undue delay a due process right.¹¹⁵ Nevertheless, these appellate cases all applied the *Barker* factors when judging undue delay at the appellate level.¹¹⁶

The third *Barker* factor is assertion of the right to speedy trial.¹¹⁷ The assertion-as-a-factor construction was intended to allow for judicial discretion based on the circumstances of the particular situation, including applicable procedural rules. This construction “would permit, for example, a court to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, *or from a situation in which no counsel is appointed.*”¹¹⁸ By contrast, the Court has noted that, “if

109. *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006).

110. *Gaines v. Manson*, 481 A.2d 1084, 1095 (Conn. 1984).

111. *State v. Bussart-Savalaja*, 198 P.3d 163, 168 (Kan. Ct. App. 2008) (“Reasons such as lack of funding, briefing delay by court-appointed attorneys, and mismanagement of resources by public defender offices are not considered acceptable excuses for inordinate delay.”).

112. *Simmons v. Beyer*, 44 F.3d 1160, 1169–70 (3d Cir. 1995).

113. Delay caused by court-appointed attorneys, *once they are assigned*, count against the defendant rather than the state; although public defenders are part of the criminal justice system, they act on behalf of the defendant rather than the state. *Brillon v. Vermont*, 129 S. Ct. 1283, 1287 (2009). As with private attorneys, public defenders’ strategic actions are imputed to their clients after assignment. *Id.* at 1291.

114. U.S. CONST. amend. VI (“[T]he accused shall enjoy the right to a speedy and public trial . . .” (emphasis added)).

115. *E.g.*, *Simmons*, 44 F.3d at 1169 & n.6. “The Supreme Court has not explicitly recognized a criminal defendant’s right to a speedy appeal,” but the First, Second, Third, Fourth, Fifth, Ninth, and Tenth Circuits agree that the Due Process Clause guarantees a “reasonably speedy appeal” on an appeal as of right, and the Seventh Circuit has assumed that “excessive” delay in the appellate process may violate due process. *Id.*

116. *United States v. Brown*, 292 F. App’x 250, 252–53 (4th Cir. 2008) (per curiam); *Simmons*, 44 F.3d at 1169; *Harris v. Champion*, 15 F.3d 1538, 1546 (10th Cir. 1994); *Brooks v. Jones*, 875 F.2d 30, 31 (2d Cir. 1989); *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006); *Gaines v. Manson*, 481 A.2d 1084, 1092 (Conn. 1984); *Bussart-Savalaja*, 198 P.3d at 168.

117. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

118. *Id.* at 528–29 (emphasis added).

delay is attributable to the defendant,” the defendant is considered to have waived the right.¹¹⁹

The fourth and final *Barker* factor is prejudice to the defendant.¹²⁰ The *Barker* Court announced that prejudice should be assessed in light of the interests that speedy trial is intended to protect: (1) preventing oppressive pretrial incarceration, (2) minimizing the accused’s anxiety and concern, and (3) limiting the possibility that the defense will be impaired.¹²¹ The clock begins running against the government after “arrest, indictment, or other official accusation”¹²² triggers it.

In *Doggett*, the government argued that the defendant had made no “affirmative showing that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence,” and the Supreme Court agreed that he “did indeed come up short in this respect.”¹²³ Nevertheless, the Court went on to state that “affirmative proof of particularized prejudice is not essential to every speedy trial claim.”¹²⁴ “[W]e generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.”¹²⁵

Since *Doggett*, the federal circuit courts have split on the application of *Barker*. Some federal circuits give equal weight to the four *Barker* factors¹²⁶ and will find a presumption of prejudice even where a defendant does not offer particularized proof that the delay has prejudiced his case in chief.¹²⁷

119. *Id.* at 529.

120. *Id.* at 530.

121. *Id.* at 532. This definition of prejudice must be distinguished from the length-of-delay factor needed to start the *Barker* inquiry—a factor that is purely time based. See *supra* notes 98–100 and accompanying text. It is also distinguishable from the actual prejudice requirement of *Strickland v. Washington*, 466 U.S. 668, 687 (1984), because some federal circuit courts may not require an actual showing of prejudice in the speedy trial context. See *infra* notes 126–128 and accompanying text.

122. *Doggett v. United States*, 505 U.S. 647, 655 (1992); see also *Dillingham v. United States*, 423 U.S. 64, 65 (1975) (per curiam) (holding speedy trial clock triggered by arrest); *United States v. Marion*, 404 U.S. 307, 313 (1971) (holding speedy trial clock triggered by indictment).

123. 505 U.S. at 655.

124. *Id.*

125. *Id.*

126. Brooks, *supra* note 85, at 592.

127. E.g., *United States v. Flowers*, 476 F. App’x 55, 61, 64 (6th Cir. 2012) (stating that being incarcerated for 902 days before trial on a “straightforward” crime created a presumption of prejudice and that anxiety and health problems caused by the delay constituted actual prejudice without defendant showing that his defense had been impaired by the delay); *United States v. Mensah-Yawson*, 489 F. App’x 606, 612 (3d Cir. 2012) (holding that federal courts must recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or identify and that this presumption becomes stronger as a delay lengthens); *United States v. Battis*, 589 F.3d 673, 683 (3d Cir. 2009) (“We now hold that prejudice will be presumed when there is a forty-five-month delay in bringing a defendant to trial, even when it could be argued that only thirty-five months of that delay is attributable to

The Fifth and Eleventh Circuits, by contrast, persist in requiring a particularized demonstration of actual prejudice to the defendant's case, unless the first three factors "weigh heavily in the defendant's favor."¹²⁸

In addition to using the *Barker* factors, federal courts also take a deferential view of the timelines laid out in the Speedy Trial Act. "[T]he Speedy Trial Act was . . . intended by Congress to give effect" to the Sixth Amendment right to speedy trial and, "[a]s the Congressional view of what suffices to satisfy the Constitution, the Act is entitled to much deference."¹²⁹ Although the Act is riddled with loopholes that prevent it from setting a universally applicable deadline for all criminal trials or from being an effective guarantor of speedy trial on its own,¹³⁰ circuit court deference to the Act¹³¹

the Government. After such a long delay, witnesses become harder to locate and their memories inevitably fade. As *Doggett* recognized, the Government may attempt to rebut this presumption. However, here, as in *Doggett*, it has not affirmatively proved that the delay left Battis's ability to defend himself unimpaired."); *United States v. Mendoza*, 530 F.3d 758, 764 (9th Cir. 2008) (finding that an eight-year delay between indictment and arrest created an un rebutted presumption of prejudice and that the defendant's speedy trial right had been violated).

128. *E.g.*, *United States v. Harris*, 566 F.3d 422, 432–33 (5th Cir. 2009) ("If 'the first three factors weigh heavily in the defendant's favor,' prejudice may be presumed If they do not, the defendant 'must demonstrate actual prejudice.' . . . Harris contends that, as a result of the pretrial delay, he lost his opportunity to present his mother as a witness at his trial, because she died twenty months after the indictment. He claims that his mother 'could have supported defense assertions of innocence at trial.' This blanket statement gives no indication as to the content and relevance of the lost testimony, and how its absence impaired Harris's defense; nor does Harris explain why he or his attorneys failed to take any steps to preserve this testimony for trial Therefore, Harris has not shown 'actual prejudice,' and we reject his claim of a Sixth Amendment violation." (internal citations omitted)); *United States v. Harris*, 376 F.3d 1282, 1290–91 (11th Cir. 2004); Brooks, *supra* note 85, at 604 n.94.

129. *United States v. Horton*, 705 F.2d 1414, 1416 n.5 (5th Cir. 1983) ("[I]t is perhaps conceivable that an occasional extreme case may arise in which the Act is satisfied but not the Constitution"); *see also* *United States v. Fox*, 788 F.2d 905, 909 (2d Cir. 1986) ("[The Speedy Trial Act] gives effect to, but does not entirely displace, the Sixth Amendment right to a speedy trial."); *United States v. Pollock*, 726 F.2d 1456, 1459–60 (9th Cir. 1984) ("The Act was intended to clarify the rights of defendants and to ensure that criminals are brought to justice promptly."); *United States v. Nance*, 666 F.2d 353, 360 (9th Cir. 1982) ("[I]t will be an unusual case in which the time limits of the Speedy Trial Act have been met but the sixth amendment right to speedy trial has been violated.").

130. The following reasons for delay, among others, do not count in computing time constraints on speedy trial: delay for examinations; delay resulting from trials against the defendant on other charges; delay resulting from interlocutory appeal; delay resulting from pretrial motion; delay resulting from proceedings to transfer a case to another district; delay resulting from transportation; delay resulting from the court's considering plea deals; any delay resulting from absence or unavailability of witnesses; any delay resulting from defendant's being mentally or physically unable to stand trial; any "reasonable" delay related to joining codefendants; and any delay resulting from the judge's granting the government's attorney a continuance "on the basis of his findings that the ends of justice" are served by such a continuance. 18 U.S.C. § 3161(h) (2012). The exemption for continuances is particularly important for the instant issue.

131. *See supra* note 129 and accompanying text.

indicates that the exceptions it provides for *not meeting* deadlines should be considered in a *Barker* analysis.

B. *Boyer v. Louisiana Presented a Possible Extension of Established Speedy Trial Jurisprudence*

The Supreme Court in *Boyer* seemed poised to decide a speedy trial question based on delay caused by a lack of indigent-defense funding.¹³² In granting certiorari, the Court relied on the Louisiana Court of Appeal's conclusion that a "lack of funding" for the defense caused the "majority of the seven-year delay."¹³³ Accordingly, it granted certiorari to decide "[w]hether a state's failure to fund counsel for an indigent defendant for five years, particularly where failure was a direct result of the prosecution's choice to seek the death penalty, should be weighed against the state for speedy trial purposes."¹³⁴ But in April 2013, the Court, per curiam, dismissed certiorari as improvidently granted, with the three concurring justices and four dissenting justices disagreeing over whether the record supported the Louisiana Court of Appeal's conclusion.¹³⁵

In 2002, Jonathan Boyer allegedly robbed and murdered a man.¹³⁶ State prosecutors announced that they would seek the death penalty, and Louisiana appointed "experienced trial attorney" Thomas Lorenzi as Boyer's primary defense counsel, with assistance from attorneys at the Louisiana Capital Assistance Center ("LCAC").¹³⁷ While the LCAC attorneys were paid by the state, "there was confusion about which branch of the state government was responsible for paying Mr. Lorenzi's fees."¹³⁸ The concurrence and dissent diverged on the primary cause of the delay in bringing Boyer to trial. Justice Alito's concurrence attributed the delay not to funding issues but largely to "voluminous" defense motions.¹³⁹ By contrast, Justice Sotomayor's dissent deferred to the Louisiana Court of Appeal's finding that "most of the delay in Boyer's case was caused by the State's failure to pay for his defense due to a "funding crisis" experienced by the State of Louisiana."¹⁴⁰ Downplaying the extent of the time-consuming defense practices, the dissenting justices emphatically noted that they would have remanded the case to the lower court to reassess the *Barker* factors, this time counting the delay caused by lack of indigent-defense funding against the state.¹⁴¹

132. 133 S. Ct. 1702 (2013).

133. *Id.* at 1706 (Sotomayor, J., dissenting) (internal quotation marks omitted).

134. *Id.* at 1702 (Alito, J., concurring) (alteration in original).

135. *Id.* at 1703.

136. *Id.* at 1702.

137. *Id.* at 1702–03.

138. *Id.* at 1703.

139. *Id.*

140. *Id.* at 1704 (Sotomayor, J., dissenting) (quoting *State v. Boyer*, 56 So. 3d 1119, 1142 (La. Ct. App. 2011)).

141. *Id.* at 1706–08.

Drawing on *Barker* and *Brillon* dicta, Justice Sotomayor wrote unequivocally that a defendant cannot logically be faulted for state funding decisions that are out of his control, and she reasoned as follows:

A State's failure to provide adequate funding for an indigent's defense that prevents a case from going to trial is no different [from court overcrowding or a systemic breakdown in the public defender system]. . . . The failure to fund an indigent's defense is not as serious as a deliberate effort by a State to cause delay. . . . But States routinely make tradeoffs in the allocation of limited resources, and it is reasonable that a State bear the consequences of these choices.¹⁴²

After decades of failed challenges to underresourced public-defender systems for ineffective counsel, the dissenters acknowledged that providing inadequate funding for indigent defense might amount to a violation of a fundamental right that could warrant overturning a conviction.¹⁴³

But Justice Sotomayor went beyond Boyer's individual situation to critique Louisiana's broader violation of trial rights. She called the dismissal of certiorari "especially regrettable" because the case "appear[ed] to be illustrative of larger, systemic problems."¹⁴⁴ She lamented that 22% of pending cases in New Orleans were more than a year old, that Calcasieu Parish had a 501-day (16.5 month) average time between arrest and trial, and that indigent defenders had untenably high caseloads across the state.¹⁴⁵ Justice Sotomayor also expressed concern that "[t]he Louisiana Supreme Court has suggested on multiple occasions that the State's failure to provide funding for indigent defense contributes to extended pretrial detentions."¹⁴⁶

There are potentially significant ramifications of Justice Sotomayor's critique about understaffing and delay—a critique that came shortly after a citation to *Brillon*'s language intimating that "[d]elay resulting from a systemic breakdown in the public defender system[] could be charged to the State."¹⁴⁷ Justice Sotomayor's opinion suggests that, when underfunding and understaffing result in pretrial extended detention, these administrative problems merit the Court's scrutiny and criticism and should be resolved.

142. *Id.* at 1706–07 (citation omitted).

143. *See id.* at 1707 ("I take no view as to how the other elements of the *Barker* inquiry should be weighed, or the ultimate issue whether the delay violated Boyer's right to speedy trial. Instead, I would . . . hold that, under *Barker*, any delay that results from a State's failure to provide funding for an indigent's defense weighs against the state. On remand, the Louisiana court could conduct the *Barker* analysis under the correct legal standard.").

144. *Id.* at 1708.

145. *Id.* at 1708 (citing MICHAEL M. KURTH & DARYL V. BURCKEL, *DEFENDING THE INDIGENT IN SOUTHWEST LOUISIANA* 27 (2003); ERNIE LEWIS & DAN GOYETTE, *REPORT ON THE EVALUATION OF THE OFFICE OF THE ORLEANS PUBLIC DEFENDERS* 28–29 (2012); NAT'L LEGAL AID & DEFENDER ASS'N, *IN DEFENSE OF PUBLIC ACCESS TO JUSTICE, AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES IN LOUISIANA 40 YEARS AFTER GIDEON* 35 & n.119 (2004); METRO. CRIME COMM'N, *2011 ORLEANS PARISH JUDICIAL ACCOUNTABILITY REPORT* 1 (2012)).

146. *Id.*

147. *Id.* at 1706 (first alteration in the original) (internal quotation marks omitted).

Moreover, while Justice Sotomayor does not reference *Doggett* specifically in her dissent, her criticism of the “one-year-old” cases in New Orleans¹⁴⁸ lends additional support to the idea that a delay as short as one year is constitutionally significant in determining whether speedy trial rights have been violated.

Critically, the justices concurring in the dismissal *did not* disagree with the dissent’s legal analysis but diverged in their assessment of the primary source of Boyer’s seven-year delay given the facts on the record.¹⁴⁹ After decades of failing to force adequate funding as well as more general reform of public-defender systems for ineffective counsel, the Supreme Court came within a vote of making systemic delays in public-defender systems a reason for overturning convictions. *Boyer* is not the law of the land, of course, but its strong dissent, in conjunction with *Barker*, *Doggett*, *Ewell*, *Brillon*, and the circuit courts’ rulings on appellate practice,¹⁵⁰ suggests that a sound case may be made that delay caused by a lack of funding counts against the government for purposes of calculating speedy trial violations. The defense bar just needs a model client to bring the issue to the Court again.

C. How Boyer Applies to Barker

This Section reiterates that the sequester caused significant delays to criminal trials and that, when analyzed through the constitutional lens of the *Barker* line of cases, these delays should count against the government for purposes of speedy trial violations. While the Section focuses mainly on the sequester and the federal indigent-defense system, the arguments broadly apply as well to delays in state criminal trials precipitated by insufficient state funding for indigent-defender systems.

In broad terms, federal-defender furloughs mean more time before cases are resolved.¹⁵¹ The time it takes a federal case to go to trial already pushes the “presumptively prejudicial” one-year baseline noted in *Doggett*.¹⁵² In 2011, for example, the median time from filing to disposition for a criminal defendant who goes to a jury trial was 15.7 months.¹⁵³ The sequester

148. *Id.* at 1708.

149. *Id.* at 1703–04 (Alito, J., concurring). Professor Little speculates that “Justice Sotomayor’s [dissenting] opinion almost reads as though it began as a majority, but then Justice Alito (who seemed favorably inclined on Boyer’s narrow point at oral argument) thought better of it.” Rory Little, *The Court “DIGs” in Boyer v. Louisiana—and Sometimes Silence Can Speak Volumes*, SCOTUSBLOG (Apr. 30, 2012, 12:22 PM), <http://www.scotusblog.com/2013/04/the-court-digs-in-boyer-v-louisiana-and-sometimes-silence-can-speak-volumes/>.

150. See *supra* note 105.

151. See *supra* text accompanying notes 31–52 for a discussion of how cuts to federal funding inhibit the ability to bring cases to trial quickly.

152. *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992) (noting that “the lower courts have generally found postaccusation delay ‘presumptively prejudicial’ at least as it approaches one year”).

153. See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 26, at 258 tbl.D-10. The median is lowest in the U.S. District Court for the Northern District of Florida (7.3 months) and

delayed the process of assigning clients their attorneys and prolonged the time it took defenders to bring a case through the justice system.¹⁵⁴ It also led to extended periods of uncertainty about funding for private attorneys¹⁵⁵—the same funding concern at the center of *Boyer*.¹⁵⁶

The furloughs, layoffs, time-consuming appointments of CJAs and delays in providing funding to them, and cuts to the courts themselves are all reasons that should count against the government in determining whether the right to speedy trial has been violated. They are quintessential “hiring and firing” and “administrative” decisions that are “made on behalf of the state,” and they represent a “systemic ‘breakdown in the public defender system’” that can be attributed to the state under *Polk County* and *Brillon*.¹⁵⁷ And while Justice Sotomayor’s opinion in *Boyer* is only a dissent, her reading of *Barker* and *Brillon* directly supports the idea that a government’s failure to provide indigent-defense funding counts against the state when assessing speedy trial violations.¹⁵⁸ A defendant cannot be faulted for delays resulting from inadequate funding, and since governments “routinely make tradeoffs in the allocation of limited resources . . . it is reasonable that [the government] bear the consequences of these choices.”¹⁵⁹

While “reason for delay” is only one of the *Barker* factors, there probably exists a substantial subset of criminal defendants who have passed the presumptive-prejudice threshold, whose attorneys have been unable to take their cases to trial due to the negative effects of inadequate funding, who have not themselves contributed to delays, and who have experienced prejudice from such substantial delays. The *Barker* factors ostensibly support dismissing many of these defendants’ charges on speedy trial grounds.

The first *Barker* factor—length of delay resulting in presumptive prejudice—should open the door to speedy trial analyses in a large number of current criminal cases. The median time for a federal criminal case to go from filing to jury trial was 15.7 months in 2011, before the sequester affected judicial budgets; only 20 of 94 districts had a median lower than *Doggett*’s presumptively prejudicial one-year mark.¹⁶⁰ Twelve of 94 districts had

highest in the U.S. District Court for the Western District of New York (47.3 months). *Id.* at 240–42 tbl.D-6. When the data are broken down by offense, kidnapping (42.2 months), homicide (25.7 months), and money laundering (24.1 months) had the longest median filing-to-disposition times. *Id.* at 258–61 tbl.D-10.

154. See *supra* text accompanying notes 31–41.

155. See *supra* text accompanying notes 37–44.

156. See *Boyer v. Louisiana*, 133 S. Ct. 1702, 1703–04 (2013) (Alito, J., concurring); *id.* at 1706–07 (Sotomayor, J., dissenting).

157. *Vermont v. Brillon*, 129 S. Ct. 1283, 1291 n.7 (2009) (dicta) (“A public defender may act for the State . . . ‘when making hiring and firing decisions on behalf of the State,’ and ‘while performing certain administrative and possibly investigative functions.’” (quoting *Polk Cnty. v. Dodson*, 454 U.S. 312, 325 (1981))).

158. *Boyer*, 133 S. Ct. at 1706 (Sotomayor, J., dissenting).

159. *Id.* at 1707.

160. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 26, at 240–42 tbl.D-6. For state statistics, see *supra* notes 62–69 and accompanying text.

median disposition times of 2 years or longer, with the Western District of New York having a median of 47.3 months—or almost 4 years.¹⁶¹ These times also violate the base timeline laid down in the Speedy Trial Act,¹⁶² which, “[a]s the Congressional view of what suffices to satisfy the Constitution[,] . . . is entitled to much deference.”¹⁶³ Justice Sotomayor’s critique of the Louisiana indigent-defense system would similarly find fault with the federal system: the *Boyer* dissent noted that 1 parish had many cases that were more than a year old, and another had an average wait of 501 days between felony arrest and trial.¹⁶⁴ “Conditions of this kind,” Justice Sotomayor wrote, “cannot persist without endangering constitutional rights.”¹⁶⁵ The furloughs taken by public defenders, the delays in assigning and paying contract attorneys, and the court closures between March and October 2013 increased wait times in a system where over half of the defendants already endured more than the presumptively prejudicial one-year time period to go to trial.

The third *Barker* factor—assertion of the right—should count delays resulting from inadequate resources against the government. Where delay is attributable to the defendant, the defendant is considered to have waived the right to speedy trial.¹⁶⁶ That should not be the case, however, in the many situations where indigent defendants must wait for counsel to be appointed or where the defendants’ trials are delayed because their attorney cannot spend time working on the case. A lack of funding and a breakdown of a defender system are not within the defendant’s control and are therefore more properly attributed to the state.¹⁶⁷ Moreover, the Supreme Court itself has specifically cited “a situation in which no counsel is appointed” as an example that does *not* count against a defendant.¹⁶⁸ Accordingly, any delay in appointing counsel should unquestionably count against the state. And considering the *Boyer* dissent, any delay caused by a CJA’s lack of funding should also weigh against the state.¹⁶⁹ The status of delays resulting from defender furloughs is less clear, but they are conceivably, like hiring and firing decisions, a routine “tradeoff” in the allocation of government resources that should count against the state.¹⁷⁰ As long as the attorney can clearly explain which periods of pretrial delay were attributable to the state’s

161. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 26, at 240–42 tbl.D-6. The median times to jury trial for these districts are as follows: E.D.N.Y. (24.0); E.D. Ky. (24.1); S.D.N.Y. (24.4); D. Mass. (25.3); D. Colo. (25.7); N.D. Cal. (27.7); N.D. Ill. (29.4); E.D. Mich. (29.5); E.D. Cal. (29.8); D.V.I. (30.0); D.D.C. (34.5); and W.D.N.Y. (47.3). *Id.*

162. See 18 U.S.C. § 3161(c)(1) (2012).

163. *United States v. Horton*, 705 F.2d 1414, 1416 n.5 (5th Cir. 1983).

164. *Boyer*, 133 S. Ct. at 1708–09 (Sotomayor, J., dissenting).

165. *Id.* at 1709.

166. *Barker v. Wingo*, 407 U.S. 514, 529 (1972).

167. See *supra* notes 101–113 and accompanying text.

168. *Barker*, 407 U.S. at 529.

169. *Boyer*, 133 S. Ct. at 1706–07 (Sotomayor, J., dissenting).

170. *Id.*

inadequate provision of resources rather than to her legal strategy—such as the “voluminous” motions practice mentioned in Justice Alito’s concurrence¹⁷¹—a defendant should be able to assert his right to speedy trial based on the third *Barker* factor.¹⁷²

The final *Barker* factor—prejudice to the defendant—is extremely salient in both the federal and state criminal justice systems. Delays caused by furloughed defenders and late appointment of counsel will result in (1) oppressive pretrial incarceration, (2) anxiety and concern on the part of the accused, and (3) the possibility that the defense will be impaired, all of which the right to speedy trial is intended to protect against.¹⁷³ In fact, a significant number of defendants suffer the oppression of pretrial incarceration: in 1994, 34% of federal defendants were detained by the court pending adjudication,¹⁷⁴ while a 1990–2004 survey of state criminal defendants in the 75 largest counties found that 38% of state felony defendants remained in detention pending adjudication.¹⁷⁵ Even the majority of defendants released prior to adjudication suffer the anxiety of pending criminal procedures. For courts that read *Doggett* as not requiring proof of particularized prejudice to a defendant’s case,¹⁷⁶ the first two elements plus the *possibility* of actual prejudice should be enough to find a speedy trial right violation under this factor, even when the defendant did not suffer “oppressive pretrial incarceration.”¹⁷⁷

More than half of federal criminal cases met the threshold presumptive-prejudice requirement necessary to trigger a full *Barker* analysis *before* the sequester.¹⁷⁸ With furloughs of up to twenty days for federal defenders, delayed appointments and pay for CJAs, and the closing of courts on Fridays, these delays inevitably became longer—and, under *Barker*’s second and third factors, such delays are attributable entirely to the state. The one-time injection of funding in October 2013 was a promising start, but these delays will snowball if Congress fails to restore the federal-defender system’s

171. *Id.* at 1703 (Alito, J., concurring).

172. This does presuppose that the defendant has access to an attorney who can bring the speedy trial violation claim in the first place—not a given when some defendants wait months without meeting with counsel. *See supra* note 67. For jurisdictions where this is a recurring danger, injunctive relief may be the most effective remedy. *See infra* Section III.B.

173. *See Barker*, 407 U.S. at 532.

174. JOHN SCALIA, U.S. DEP’T OF JUSTICE, FEDERAL PRETRIAL RELEASE AND DETENTION, 1996, at 1 (1999), available at <http://www.bjs.gov/content/pub/pdf/fprd96.pdf>.

175. THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1 (2007), available at <http://www.bjs.gov/content/pub/pdf/prfdsc.pdf>.

176. *See supra* notes 127–128 and accompanying text.

177. *Barker*, 407 U.S. at 530. Admittedly, the affirmative-showing requirements of the Fifth and Eleventh Circuits might foreclose the dismissal of an indictment on grounds of delay resulting from the sequester. *See supra* note 128 and accompanying text.

178. *Supra* text accompanying note 26.

budget to 2011 levels and maintain the funding necessary to protect Sixth Amendment rights.¹⁷⁹

D. *The Benefits of Making a Speedy Trial Claim Instead of an Ineffective Assistance of Counsel Claim*

The crucial difference between making a speedy trial violation claim and an ineffective assistance claim is that, for speedy trial claims brought in many circuits, long delays create a presumption of prejudice that the *government* must rebut rather than leaving the burden on the defendant.¹⁸⁰ Admittedly, in cases involving only brief delays, a defendant must still show how the delay caused prejudice to his defense.¹⁸¹ But outside the Fifth and Eleventh Circuits, a defendant who has endured a sufficiently long pretrial delay need not offer “affirmative proof of particularized prejudice” to establish a violation of his speedy trial right;¹⁸² when the “portion of the delay attributable to the Government[] . . . far exceeds the threshold needed to state a speedy trial claim . . . and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant’s acquiescence, nor persuasively rebutted, the defendant is entitled to relief.”¹⁸³ In other words, the defendant need not show that he would have been found not guilty *but for* this violation of a Sixth Amendment right.

Without having to prove actual prejudice under *Strickland*—and under the reasoning from *Brillon* and Justice Sotomayor’s dissent in *Boyer* that a breakdown of the public-defender system related to lack of funding could be counted against the state—a defendant or public-defender system would have to show the following: (1) that it took more than a year to go to trial; (2) that government action caused the delay; and (3) that the defendant suffered harm in the form of pretrial incarceration, anxiety, or a nonaffirmative showing of prejudice. Compared to showing prejudice under *Strickland*, it should be far easier to argue, for example, that the public defender could not work on the defendant’s case because he was furloughed that day, or that he could not bring this case to trial for three months because the state ran out of funding for indigent defense. Although the procedural hurdles that make ineffective assistance claims difficult to bring also apply to speedy trial claims,¹⁸⁴ removing the *Strickland* requirement of showing actual prejudice should make the most egregiously delayed criminal cases appealable as speedy trial violations.

179. Delays in many state courts have already snowballed out of control. *See supra* Section I.B.

180. *See supra* notes 126–128 and accompanying text.

181. *See supra* notes 126–128 and accompanying text.

182. *Doggett v. United States*, 505 U.S. 647, 655 (1992).

183. *Id.* at 657–58 (footnotes omitted) (citations omitted).

184. *See supra* note 74 (describing how federal courts will not take habeas claims for cases on direct appeal in state courts).

III. APPLYING LEGAL ANALYSIS TO POTENTIAL REMEDIES FOR SPEEDY TRIAL VIOLATIONS

This Part discusses two potential tools to protect indigent defendants' right to speedy trial. Section III.A addresses individual relief, which is well established in law but potentially time consuming for indigent defenders to pursue en masse. Section III.B argues that, in the most chronically underfunded jurisdictions with system-wide delays in bringing cases to trial, the most efficient and meaningful protection of the right to speedy trial can and should come from lawsuits seeking structural injunctions requiring the increased allocation of resources for indigent defense. Both remedies have their strengths and weaknesses, and they accordingly should be useful in different contexts. In jurisdictions where violations are relatively rare but there are a handful of especially extreme delays in bringing defendants to trial, indigent defenders should pursue individual challenges. In jurisdictions where speedy trial violations are pervasive but less extreme, by contrast, it is not effective for indigent defenders repeatedly to litigate individual violations. Rather, they should seek more sweeping injunctive relief.

A. *Vacation of Sentence as a Potential Individual Remedy for Speedy Trial Violations*

A defendant whose right to speedy trial has been violated is entitled to vacation of his entire sentence and a dismissal of the indictment.¹⁸⁵ While the failure to afford other constitutional rights, such as a public trial or impartial jury, can be cured by providing those rights in a new trial, holding a new trial when the first trial has already been prejudicially delayed “may subject the accused to an emotional stress that can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial or of receiving a sentence longer than, or consecutive to, the one he is presently serving”—uncertainties the accused would not have faced had he been afforded a prompt trial in the first place.¹⁸⁶

Individual appeals, then, would certainly provide a remedy to a defendant whose delay was impermissibly long and attributable to a breakdown of the defender system. In fact, one of the cases delayed by the sequester might even provide a sufficient factual basis to prompt the Supreme Court to rule on the question *Boyer* left unanswered: “Whether a state’s failure to fund

185. *Strunk v. United States*, 412 U.S. 434, 440 (1973). Vacation and dismissal are extreme remedies, and, admittedly, courts are reluctant to grant them. *Id.* at 438–39. Judges are understandably loath to dismiss charges against a defendant when the evidence against that defendant is particularly strong or when the defendant is accused of a serious crime. But federal judges have been willing to vacate convictions and dismiss charges on speedy trial grounds in the past. *E.g.*, *Doggett*, 505 U.S. 647. See *supra* note 127 for a sample of circuit-court cases dismissing charges on speedy trial grounds and see *supra* notes 105–112 and accompanying text for an overview of appellate cases dismissing charges for appellate speedy trial violations. Despite the serious nature of this remedy, then, in clear cases of speedy trial violations the courts *have* been willing to dismiss charges.

186. *Strunk*, 412 U.S. at 439.

counsel for an indigent defendant . . . should be weighed against the state for speedy trial purposes[?]"¹⁸⁷ A resounding yes would have ramifications far beyond the federal judiciary, particularly in state and local defender offices that take a long time to assign a defender to the case or that underresource their defender staffs to the point of delaying trials.¹⁸⁸ Fifty years after *Gideon*, speedy trial requirements could help effectuate the right to counsel by securing funding for indigent defense.¹⁸⁹

Although individual remedies have great promise for victims of egregious delays, the appeals may be drawn out and costly. It would be impractical to ask overworked indigent defenders, CJAs, and their pro bono partners to litigate every case that passes the presumptive threshold for a *Barker* balancing test. Indigent defenders simply lack the time or availability to pursue in large numbers legitimate claims of a constitutional violation of speedy trial rights, and they would likely find themselves bringing claims implicating their own offices.¹⁹⁰ This means that filing many individual suits may not be an appropriate long-term strategy for the most egregiously overworked and underfunded state or local defender systems: *the problem of scarce resources makes fighting the consequences of scarce resources more difficult*. So,

187. *Boyer v. Louisiana*, 133 S. Ct. 1702, 1702 (2013) (Alito, J., concurring) (alteration in original).

188. For instance, in the parishes discussed in Justice Sotomayor's dissent in *Boyer*. See *id.* at 1708–09 (Sotomayor, J., dissenting).

189. While this observation remains outside the scope of this Note, I would suggest that the *Gideon* right to counsel loses much of its meaning when the coordinate right to speedy trial is not protected. Justice Stevens, concurring in *Maryland v. Shatzer*, objected to the notion that police could Mirandize a suspect, promise him an attorney, and then attempt to interrogate him fourteen days later without an attorney present. 559 U.S. 98, 121 (2010) (Stevens, J., concurring). When a suspect has been Mirandized and informed that he has the right to an attorney at no cost, and when a significant period of time has passed but he has not been provided with a lawyer, the “suspect is likely to feel that the police lied to him and that he really does not have any right to a lawyer . . . ‘exacerb[at]ing whatever compulsion to speak the suspect may be feeling.’” *Id.* (quoting *Anderson v. Roberson*, 486 U.S. 675, 686 (1988)). Surely a defendant who has been promised an attorney and a speedy trial, only to have that trial delayed by an overworked or furloughed indigent defender, will conclude that he is better off resolving his case without a trial in order to avoid staying in jail for seven years before the trial actually begins. See, e.g., *Boyer*, 133 S. Ct. at 1703–04 (Sotomayor, J., dissenting) (describing the seven-year delay between arrest and trial). Such a scenario undermines both the adversarial system of justice and the prosecution's obligation to prove guilt beyond a reasonable doubt.

190. In ineffective assistance cases, courts have found a conflict of interest when an appellate attorney arguing ineffective assistance of counsel at the trial level comes from the same office as the trial attorney because attorneys from the same office cannot effectively argue their colleagues' ineffectiveness. E.g., *Burns v. Gammon*, 173 F.3d 1089, 1092 (8th Cir. 1999). And a public defender's (or his colleague's) arguing that a speedy trial violation resulted from the state's inability to fund the public defender's office superficially appears to raise similar, although not identical, issues. On the one hand, an appellate public defender would be arguing that his own office was incapable of upholding its constitutional mandate. On the other, he would be making the argument that ultimate responsibility rests with the state, not with his own office's misconduct. This Note is not prepared to determine whether this situation would actually be a conflict of interest but acknowledges it as a potential challenge of litigating individual speedy trial violations.

while the sequester's delays might provide an opportunity to choose a model case to relitigate *Boyer* and reverse the convictions of a handful of critically affected individuals, appealing individual speedy trial violations en masse will be the best use of resources in those jurisdictions that experience widespread delays in bringing indigent defendants to trial. Indigent defenders in jurisdictions where a chronic lack of resources prevails, by contrast, should look to injunctive relief to correct structural deficiencies and protect the right to speedy trial in the long run.

B. *Structural Injunctions as Potential Relief for Systemic Speedy Trial Violations*

Ultimately, judicial oversight may be the most effective method of securing the right to speedy trial for indigent defendants in especially resource-strapped jurisdictions. Indigent defendants and their attorneys should sue for structural injunctions requiring increased indigent defense personnel.¹⁹¹ Both the text of the Criminal Justice Act and precedent from prison-reform cases suggest that federal courts have the authority to demand reforms such as hiring more personnel. Analogizing to other areas of constitutional jurisprudence suggests that judicial oversight through structural injunctions may be an appropriate remedy to insulate the federal-defender system from federal-budget fights, and many of the arguments for the legality and necessity of judicial oversight apply to chronically underfunded state and local systems.

Structural injunctions are court decrees intended to reform a social institution.¹⁹² They seek to “remodel an existing social or political institution to bring it into conformity with constitutional demands.”¹⁹³ In *Brown v. Board of Education*, the Supreme Court instructed four federal courts to “take such proceedings and enter such orders and decrees” as were necessary to protect the constitutional rights at issue in the school-desegregation cases.¹⁹⁴ This procedural move opened the door to widespread institutional reform by “authoriz[ing] district judges to assess the need for, order, and oversee sweeping changes not only to schools but to the full range of important governmental institutions.”¹⁹⁵ Of course, general principles of separation of powers caution that the judiciary should be hesitant to encroach on the functions of its coordinate branches.¹⁹⁶ But when authorities fail in their

191. Again, the removal of *Strickland's* prejudice requirements should make this tactic more successful than the system-wide challenges described *supra* Section I.C.1.

192. OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 9 (1978), available at <http://www.law.yale.edu/documents/pdf/Faculty/injunction.pdf> (explaining that structural injunctions seek to reform a social institution).

193. *Lampkin v. District of Columbia*, 886 F. Supp. 56, 62 (D.D.C. 1995).

194. Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 552 (2006) (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955)).

195. *Id.*

196. Guggenheim, *supra* note 72, at 455 n.282.

affirmative constitutional obligations,¹⁹⁷ federal judicial authority may be invoked to remedy past violations¹⁹⁸ or protect against risks of future violations.¹⁹⁹ Where a constitutional violation has been found, a district judge may order the expenditure of government funds to correct the condition that offends the Constitution, as long as the measure is remedial and tailored to the nature and scope of the violation.²⁰⁰

Moreover, the Supreme Court need not explicitly find a constitutional violation before lower courts can take action. District court judges have independently “assess[ed] the need for, order[ed], and oversee[n] sweeping changes . . . to the full range of important governmental institutions.”²⁰¹ They have used injunctions to reform prisons and mental hospitals, to protect the environment, and to establish public-housing policy.²⁰² Federal prison reform presents a particularly appropriate model for judicial oversight of indigent-defender systems. Before the Prison Litigation Reform Act of 1996 (“PLRA”) statutorily impeded the courts’ ability to intervene in prison-conditions cases,²⁰³ there were many civil suits “in which extensive changes in prison practices [were] required by the federal courts. Local officials [were] ordered to do everything from hiring dozens of guards and other workers and building new, or substantially altering old, facilities, to appointing a prison ombudsman and creating a Department of Detention and Correction.”²⁰⁴ District courts may find constitutional rights and violations without the Supreme Court’s first articulating those rights and violations, and they may create an adequate remedy even when that remedy will require hiring staff at additional cost to the government.

197. The Sixth Amendment creates affirmative obligations. Chemerinsky, *supra* note 20, at 2685.

198. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (“Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.”).

199. John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1395 (2007) (“Some risk of future violation is necessary for prospective relief. But where future violation is threatened, injunctions are often the only effective relief.”).

200. *Milliken v. Bradley (Milliken II)*, 433 U.S. 267 (1977).

201. See Schlanger, *supra* note 194, at 552.

202. Robert E. Easton, Note, *The Dual Role of the Structural Injunction*, 99 YALE L.J. 1983, 1983–84 (1990).

203. Michele Deitch, *The Need for Independent Prison Oversight in a Post-PLRA World*, 24 FED. SENT’G REP. 236 (2012). Professor Schlanger argues that the PLRA significantly constrained the strong injunctive practice that existed throughout the 1980s and 1990s. Schlanger, *supra* note 194, at 554. And *despite* the PLRA, Schlanger asserts that, “[a]t the end of the day, the civil rights injunction remains stronger than conventional wisdom would have it.” *Id.* at 555.

204. *Rhem v. Malcolm*, 507 F.2d 333, 340 (2d Cir. 1974) (footnotes omitted) (providing an overview of four successful prison-reform cases at the district court level, some of which the circuit courts subsequently affirmed). The authority was not unlimited; indeed, while the Second Circuit’s decision in *Rhem* affirmed that conditions in the institute in question were unconstitutional, the court still remanded the case, instructing the district court judge to reframe his order closing an entire prison. *Id.* at 340–42. Interestingly for the issue of sequestration, the Second Circuit noted that “[i]nadequate resources can never be an adequate

Prison-reform precedent does envisage a limit to the demands that courts can make on the other branches, however. The Second Circuit admonished one district court judge for issuing an order that placed the judge “in the difficult position of trying to enforce a direct order to [New York City] to raise and allocate large sums of money, steps traditionally left to appropriate executive and legislative bodies responsible to the voters[,]” particularly when alternatives existed that did not require the district court to adopt a legislative role.²⁰⁵ But the Second Circuit also noted that when an “unconstitutionally-administered governmental function *must* be kept operating . . . a court might have no choice but to order an expensive, burdensome, or administratively inconvenient remedy.”²⁰⁶ The Sixth Amendment provides an *affirmative* right²⁰⁷: the government has “no choice” but to provide assistance of counsel to indigent defendants. Since the government must continue to provide indigent-defense counsel to fulfill its constitutional obligations, a court may have no choice but to order a remedy that imposes additional costs on the federal government. In a district with particularly long median times from filing to trial, it is not implausible that a district court might rely on *Brillon* and Justice Sotomayor’s dissent in *Boyer* to issue a decree requiring increased funding to remedy systemic speedy trial violations.²⁰⁸

Moreover, district courts are even better suited to oversee indigent-defense systems than they are to oversee prisons, schools, and other institutions. Regulating aspects of the judiciary can be considered part of lower courts’ inherent powers.

As the Supreme Court explained . . . when another branch is responsible for overseeing certain functions, such as running schools or prisons, *and* courts conclude that others have greater expertise to make the challenged decisions, courts should defer to the expert judgment of those branches.

justification for the state’s depriving any person of his constitutional rights. If the state cannot obtain the resources to detain persons awaiting trial in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons.” *Id.* at 341 n.20 (quoting *Hamilton v. Love*, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971)). This proposition has been favorably noted by the Second and Fifth Circuits as well as by several district courts. *E.g.*, *Udey v. Kastner*, 805 F.2d 1218, 1220 (5th Cir. 1986); *Thompson v. Vilsack*, 328 F. Supp. 2d 974, 979 (S.D. Iowa 2004). And yet the proposition does not seem to be accepted widely enough for this Note to rely solely on *Rhem*’s forty-year-old dicta.

205. *Rhem*, 507 F.2d at 341 (footnote omitted) (citation omitted).

206. *Id.* at 341 n.19 (emphasis added) (relying on *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28–30 (1971); *Medley v. Sch. Bd.*, 482 F.2d 1061, 1065 (4th Cir. 1973) (en banc), *cert. denied*, 414 U.S. 1172 (1974); *Goss v. Bd. of Educ.*, 482 F.2d 1044, 1046 (6th Cir. 1973) (en banc), *cert. denied*, 414 U.S. 1171 (1974)). Such a scenario did not exist in *Rhem*, the Second Circuit reasoned, because the district court on remand could impose narrower remedial measures, such as limiting the duration of detainees’ confinement.

207. Chemerinsky, *supra* note 20, at 2685.

208. *See supra* note 161 and accompanying text. The Western District of New York, in particular, might rely on *Brillon*, the dissent in *Boyer*, and *Rhem* to craft a remedy.

But this principle has no application to the subject of overseeing operation of federal courts.²⁰⁹

Judges are not experts in education or prison administration. Still, by nature of their office, federal judges should be experts in the requirements of the adversarial process and a fair trial.

While some might argue that such a structural injunction violates the separation of powers, the Supreme Court has recognized a “‘twilight area’ in which the activities of the separate Branches merge.”²¹⁰ Rulemaking is an example of such a twilight area: the Court has recognized that Congress delegated to the courts its power to engage in a quasilegislative, nonadjudicatory activity.²¹¹ In the case of reforming indigent defense through injunctions, the courts would also operate in such a twilight area, which would mitigate the severity of the judicial branch’s encroaching on legislatures’ resource-allocation function. The modern formulation of the Criminal Justice Act states as follows:

Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation.²¹²

This language strongly indicates the delegation of at least some power to circuit and district court judges and perhaps grants some leeway for nonadjudicatory steps to be taken within the sphere of providing for indigent defense. The text also suggests that Congress is willing to defer in some measure to judges’ expertise in the needs of indigent defense in their jurisdictions.²¹³ These signals from Congress support greater judicial oversight of

209. Guggenheim, *supra* note 72, at 454 (emphasis in original) (citing *Bell v. Wolfish*, 441 U.S. 520, 547–48 (1979)).

210. *Mistretta v. United States*, 488 U.S. 361, 386 (1989).

211. *Id.* at 386–87.

212. 18 U.S.C. § 3006A(a) (2012). On the issue of funding, the Act states that “[t]here are authorized to be appropriated to the United States courts, out of any money in the Treasury not otherwise appropriated, sums necessary to carry out the provisions of this section When so specified in appropriation acts, such appropriations shall remain available until expended.” *Id.* § 3006A(i).

213. Additionally, in desegregation jurisprudence, the Supreme Court recognized that the federal courts’ decentralization “made it possible for them to individuate application of law to fact and to enter injunctions tailored to address particular or even unique circumstances, institution by institution.” Schlanger, *supra* note 194, at 552. Many federal districts and state judicial districts have wildly different median times to trial. See *supra* notes 160–161 and accompanying text; *supra* notes 62–69 and accompanying text. Federal district court judges are well placed to fashion remedies that take into account the disparities among individual districts.

indigent defense and partially mitigate concerns about the judiciary's encroaching on a coordinate branch.²¹⁴

While there are certainly risks to seeking injunctive relief rather than pursuing individual remedies or waiting for additional legislative funding, there are also significant advantages. When authorities fail to protect an affirmative constitutional right, federal courts are ultimately entitled to craft a remedy for the violation.²¹⁵ The disadvantage of this option, compared with Congress's simply reinstating federal-defender funding at presequester levels, is that the process of obtaining relief is likely to take months—if not years—and will apply only to a single jurisdiction. And yet providing defendants relief for speedy trial violations is an established part of federal and state jurisprudence: it is only a small step to imagine a court reversing an individual conviction because of a speedy trial violation due to lack of funding for indigent defense. It would be a considerably larger step to craft a new remedy for *systemic* violations of the right to speedy trial by joining the constitutional violations hinted at in *Brillon's* dicta and *Boyer's* dissent with the drastic remedies of desegregation and prison-reform rulings. Applying a judicial remedy requires that an attorney make (and a federal court accept) two arguments that the Supreme Court has not yet endorsed: that delays caused by lack of funding for indigent defense violate a defendant's right to speedy trial, *and* that a federal court has the authority to mandate reforms of an indigent-defense system. By contrast, arguing that an indictment should be dismissed for lack of speedy trial requires only that a federal court accept the first argument.

Yet the benefit of making the two-pronged argument for judicial oversight greatly outweighs the risk. Crafting a judicial remedy based on a systemic violation of speedy trial would insulate the jurisdiction's indigent-defense program and its defendants' rights from the uncertainties of partisan politics. And although the litigation would take time and judicial resources, so would the process of throwing out individual indictments on speedy trial grounds. In districts where many trials take much longer than the presumptively prejudicial one-year mark, it may be a more effective use of defender and court resources to consolidate the claims into a large action alleging systemic violations than repeatedly to litigate variations on the same individual claims.²¹⁶ In light of the dissent in *Boyer*, the challenges to timely adjudication presented by the sequester, the general power of district courts to craft remedies for constitutional violations, and Congress's statutory expression of some deference to the judiciary on providing for indigent defense, judicial oversight may serve as a legal and necessary means to restore

214. Naturally, this argument—rooted in the Criminal Justice Act and the delegation of powers—does not apply to state and local defender systems.

215. Federal judges, in particular, are better suited to demand unpopular funding increases for indigent defendants because they have life tenure—unlike their elected state counterparts. See Primus, *supra* note 60, at 2.

216. Cf. *Harris v. Champion*, 15 F.3d 1538, 1548–54 (10th Cir. 1994) (consolidating approximately 302 habeas petitions arising from lengthy delays in filing appellate briefs by court-appointed indigent-defense counsel in Oklahoma).

adequate funding to the federal defender and prevent systemic violations of the right to speedy trial.

CONCLUSION

Indigent-defense systems suffer from an acute lack of resources, which often creates long delays in bringing cases to trial. Under *Doggett*, *Brillon*, and the dissent in *Boyer*, such delays caused by a lack of funding for indigent defense may be counted against the government for purposes of determining a speedy trial violation. Indigent defendants who face long delays because they have been assigned an overworked attorney should appeal on the grounds of speedy trial violations, and indigent-defense systems in jurisdictions with the longest delays should seek injunctions requiring increased funding for their organizations. If these measures are not taken, people who have not been found guilty will continue to languish in jails, with the specter of a criminal prosecution hanging over them and the Sixth Amendment's guarantees remaining unfulfilled.