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Eve Brensike Primus

University of Michigan Law School, ebrensik@umich.edu

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Procedural Obstacles to
Reviewing Ineffective Assistance
of Trial Counsel Claims in State and
Federal Postconviction Proceedings

By Eve Brensike Primus

Ineffective assistance of trial counsel is one of the most frequently raised claims in state and federal postconviction petitions. This is hardly surprising given reports of trial attorneys who refuse to investigate their cases before trial, never meet with their clients before the day of trial, and fail to file any motions or object to inadmissible evidence offered at trial. Unfortunately, the current structure of indigent defense funding makes it impossible for many public defenders to provide effective representation to their clients.

The American Bar Association recently concluded that indigent defense in this country is in a state of crisis. (See ABA Standing Committee on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (2004).) Many defenders are forced to handle well over a thousand cases a year, more than three times the number of cases that the American Bar Association says one attorney can handle effectively. (See, e.g., Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, November 8, 2008.) Public defenders in Florida, Georgia, Kentucky, Maryland, and Minnesota, for example, are unable to handle all of their cases due to budget constraints. Georgia recently cut the hourly rate that it pays appointed counsel in capital cases, fired 41 employees, and dismantled a number of offices. Virginia places a \$120 cap on the fee that it will pay to an attorney who handles a juvenile delinquency case, regardless of the severity of the charges. In Louisiana, the primary means of funding indigent defense is through traffic ticket revenue. When Hurricane Katrina hit, the police stopped writing traffic tickets, and New Orleans was forced to lay off almost all of its public defenders. In Mississippi, defendants may wait up to a year before speaking to their court-appointed lawyers. And a recent report revealed that certain counties in Michigan routinely deny indigent criminal defendants access to counsel, leaving them to represent themselves. With public defenders representing 80 percent of criminal defendants nationwide, the indigent defense crisis is a problem that our criminal justice system can no longer afford to ignore.

Unfortunately, the very structure of our state and federal postconviction review systems contributes to the problem rather than providing a means for redressing it. In practice, procedural obstacles to review make it difficult for defendants to challenge the effectiveness of their trial attorneys' performance.

EVE BRENSIKE PRIMUS is a former trial and appellate defender and is currently an assistant professor of law at the University of Michigan Law School. She is the author of *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 *CORNELL L. REV.* 679 (2007) and *A Structural Vision of Habeas Corpus*, 98 *CAL. L. REV.* (forthcoming 2010).

As a result, there is no effective means of detecting and deterring incompetent trial attorney performance and no judicial catalyst for legislative or executive reform.

The Problem with State Postconviction Review Procedures

A majority of states require defendants who want to challenge the effectiveness of their trial attorneys to do so through postconviction petitions rather than on direct appeal. (See *Massaro v. United States*, 538 U.S. 500 (2003).) In most states, direct appeals are limited to the facts and issues that are clearly reflected in the trial record. Because ineffective assistance of counsel claims often involve allegations about a trial attorney's *failure* to do something, additional factual development is frequently required to fully present the claims. However, the motion for a new trial is the only mechanism currently available in many jurisdictions to supplement a trial record before appellate review. Because defense attorneys are given very short time periods (often less than 30 days) to file such motions, the attorney who files a motion for a new trial is frequently the same attorney who represented the defendant at trial and is unlikely to raise a challenge to his or her own effectiveness. Even if a defendant files a pro se motion for a new trial or finds a new lawyer, it is very difficult to reinvestigate the case and adequately supplement the trial court record with information about the trial attorney's deficient performance in such a short time period.

As a result, the evidence of trial attorney ineffectiveness is frequently missing from the trial record, and defendants often cannot raise effective challenges to their trial attorneys' performance on direct appeal. For this reason, many states require defendants to wait until state postconviction, where there is a built-in mechanism for supplementing the trial record through evidentiary hearings, to raise these claims. Requiring defendants to raise ineffectiveness claims at the state postconviction stage, however, comes at a high price.

First, there is the problem of delay. In most jurisdictions, state postconviction proceedings only start once direct appellate review ends. A defendant's ability to reinvestigate the case and demonstrate that the trial attorney was ineffective dwindles with time. Witnesses die or disappear. Evidence is lost. Memories fade. With direct appeals taking more than four years in some jurisdictions, the delay drastically decreases the likelihood that defendants will be able to mount effective challenges to their trial attorneys' performance.

The delay also ensures that fewer defendants will raise claims of trial attorney ineffectiveness. Defendants have little incentive to challenge their convictions once they have served their sentences. In fact, in some jurisdictions, defendants who are no longer in custody are not permitted to

file postconviction challenges. Given the delays inherent in appellate proceedings, most felons and almost all misdemeanants never get to state postconviction review. For these defendants, there is effectively no opportunity to challenge their trial attorneys' performance.

Additionally, locating ineffective assistance of trial counsel claims in postconviction proceedings deprives most defendants of any meaningful opportunity to raise the claims because there is no constitutional right to counsel for postconviction challenges. The Supreme Court has held that indigent defendants who are actually imprisoned after a criminal conviction have a Sixth Amendment right (incorporated through the Fourteenth Amendment) to have the assistance of an effective lawyer at trial and a Fourteenth Amendment right to the assistance of an effective lawyer on their first appeals as of right. (*See Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Douglas v. California*, 372 U.S. 353 (1963).) In *Ross v. Moffitt*, 417 U.S. 600 (1974), however, the Supreme Court cut off the constitutional right to the assistance of counsel after the first appeal. Because defendants at that point have access to the trial court record, appellate briefs from the first appeal, and the appellate court's decision, the Court reasoned that they have meaningful access to the higher appellate courts and can fairly present their claims to those courts without the assistance of counsel. As a result, a state does not violate a defendant's due process rights when it deprives the defendant of counsel for discretionary appeals.

In *Pennsylvania v. Finley*, 481 U.S. 551 (1987) and *Murray v. Giarratano*, 492 U.S. 1 (1989), the Supreme Court used similar logic to hold that defendants have no constitutional right to counsel for postconviction attacks on criminal judgments after direct appeal (even in capital cases). Although many states have a statutory right to counsel in postconviction proceedings, the right is often quite limited. In some jurisdictions, it only extends to capital defendants; in others, it only applies if the court gives the defendant an evidentiary hearing (which is difficult for a defendant to get without the assistance of counsel). As a result, a large majority of defendants who file state postconviction challenges to their criminal convictions do so without the assistance of counsel.

The decision to relegate ineffective assistance of trial counsel claims to state postconviction proceedings and, at the same time, to deny defendants a right to counsel at that stage contributes to the indigent defense crisis. How can a state prisoner reinvestigate the case to support an ineffective assistance of trial counsel claim from within a prison cell? If indigent defendants cannot raise challenges to their trial attorneys' performance until state postconviction review and do not have the means to raise the claims effectively at that stage because they have no counsel to conduct the necessary extra-record investigation to support the

claims, then the right to effective trial counsel becomes a right without a remedy.

The Problem with Federal Habeas Corpus Review Procedures

Without a meaningful opportunity to challenge their ineffective trial attorneys' performance in state postconviction proceedings, some defendants turn to the federal courts. They file habeas corpus petitions alleging that they are being held in violation of their constitutional rights because the states violated their Sixth and Fourteenth Amendment rights to effective counsel. These habeas petitioners, however, must successfully maneuver through a complex obstacle course of procedural requirements before the federal courts will entertain their constitutional arguments. Moreover, as with state postconviction review, these habeas petitioners have no constitutional right to counsel to help them navigate the tangled procedural maze. There are a number of procedural barriers to federal habeas review, but this article will discuss two that particularly affect defendants' abilities to raise ineffective assistance of trial counsel claims—namely, procedural default and the availability of evidentiary hearings.

Procedural default. In many cases, the federal courts will deem defendants' ineffective assistance of trial counsel claims waived on the basis of the defendants' failure to comply with state procedural rules. Grounded in principles of federalism and finality as well as concerns about conserving resources, the procedural default doctrine requires federal habeas courts to respect adequate and independent state procedural grounds for denying federal constitutional claims. If a state prisoner fails to comply with the state's procedural requirements for raising a federal constitutional claim and the state courts refuse to address the underlying federal claim as a result, the federal courts will respect the state rules and similarly refuse to address the underlying federal claim. (*See Lee v. Kemna*, 534 U.S. 362 (2002).)

Consider the following example: A state procedural rule requires defendants to object contemporaneously to the improper admission of evidence. A defense attorney in one case fails to object to evidence that is offered in violation of the defendant's confrontation clause rights, and the evidence is admitted. When the defendant attempts later to challenge the admission of the evidence, the state courts deem the argument waived because of the failure to comply with the state procedural rule. The federal courts will rely on the procedural default doctrine to refuse to address the confrontation clause claim in federal habeas.

There are two exceptions to the application of the procedural default doctrine. First, if a defendant can show cause for failing to comply with the state procedural rule and prejudice to the outcome of the case, then the fed-

eral court will bypass the procedural default and consider the merits of the underlying constitutional claim. (*See* *Wainwright v. Sykes*, 433 U.S. 72 (1977).) To demonstrate “cause” for a procedural default, the habeas petitioner must present reasons for failing to comply with the state’s procedural rules. In general, “the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded [the defendant’s] efforts to comply with the state procedural rules.” (*Murray v. Carrier*, 477 U.S. 478, 488 (1986).) Examples of such external factors include a change in the law or interference by state officials. Alternatively, if a defendant can demonstrate that he or she is actually innocent of the underlying criminal offense, the federal court will look beyond the procedural default to address the underlying constitutional claim. (*See* *Schlup v. Delo*, 513 U.S. 298 (1995).)

Many defendants seeking federal habeas relief on the basis of an ineffective assistance of trial counsel claim

lawyers or who are fortunate enough to find attorneys who are willing to take on their cases pro bono do not fare much better. If their lawyers miss a deadline or fail to comply with a state procedure in some other way, their ineffective assistance of trial counsel claims are lost unless they can make a showing of actual innocence, which is nearly impossible to do. The federal courts will not view the ineffectiveness of a postconviction attorney as cause sufficient to bypass a procedural default. Only attorney error that rises to the level of a constitutional violation can be cause to excuse a procedural default. Since there is no constitutional right to a postconviction lawyer, any mistakes that a postconviction lawyer makes, no matter how egregious, are attributable to the client and can form the basis of a procedural default. (*See* *Coleman v. Thompson*, 501 U.S. 722 (1991).) As a result, a state prisoner who has both an ineffective postconviction lawyer and an ineffective trial lawyer is likely to face an insurmountable procedural default in federal court. In short, the more ineffective attorneys a defen-

run head-on into the procedural default doctrine. Because a majority of states require defendants to raise ineffectiveness challenges in state postconviction proceedings and because most states do not provide defendants with the assistance of effective counsel at the postconviction stage, many defendants fail to preserve the claims.

Consider the following typical scenario: A defendant wants to allege that his or her trial attorney was constitutionally ineffective because the attorney failed to meet with the defendant, file a single motion, or do any investigation before trial. The appellate lawyer tells the defendant to wait until state postconviction proceedings to raise that claim. After the defendant loses on appeal, he or she is told that there is no additional right to the assistance of counsel. The defendant misses the deadline for the postconviction filing and files an untimely pro se state postconviction petition. The state courts hold that the ineffective assistance of trial counsel claim is defaulted due to the failure to present the claim in a timely fashion in accordance with the state’s procedural rules. When the defendant goes into federal court, the federal court will honor the state default and refuse to address the claim unless the defendant can, without the assistance of counsel, show innocence.

State prisoners who can afford to hire postconviction

defendant has, the less likely the defendant is to obtain relief in federal court.

The availability of evidentiary hearings. Those habeas petitioners who manage to comply with their state procedural rules and adequately preserve their ineffective assistance of trial counsel claims for federal review face yet another procedural hurdle to obtaining relief on a claim of ineffective assistance of trial counsel—namely, the restrictions on the availability of evidentiary hearings. By statute, if a defendant fails to develop the factual basis for a claim in state court, the federal habeas courts are not permitted to grant an evidentiary hearing unless the defendant can show (1) by clear and convincing evidence that he or she is innocent of the underlying offense and (2) that the claim relies on either (a) a new rule of constitutional law made retroactive by the U.S. Supreme Court or (b) a factual predicate that could not have been discovered previously through due diligence. (*See* 28 U.S.C. § 2254(e)(2).)

Federal habeas petitioners who want to challenge their trial attorneys’ ineffectiveness are often in the position of needing to supplement their state court records. After all, most of them did not have the assistance of lawyers in state postconviction proceedings. As a result, they often have failed to unearth all of the potential evidence of poor

trial attorney performance by the time they get to federal court. The federal courts, however, attribute the failure to develop the state court record to these pro se defendants and, as a result, prevent them from obtaining hearings to present evidence of ineffective trial attorney performance. Thus, once again, defendants who received inadequate trial representation are left with no judicial remedy.

Some Partial Solutions

The structural decisions to (1) relegate ineffective assistance of trial counsel claims to state postconviction review; (2) deny defendants a constitutional right to counsel for postconviction proceedings; (3) procedurally default these claims in federal court; and (4) routinely deny defendants' requests for federal evidentiary hearings to support the claims have left no meaningful postconviction check on incompetent trial attorney performance. Without a judicial catalyst, the elected branches of government are unlikely to take significant action to solve the problem. After all, it is never popular for legislators or executive officials to be "soft on crime."

Some argue that we should abandon postconviction processes entirely as a means of solving the counsel crisis and rely on private civil rights class actions to catalyze reform. Advocacy groups have recently begun filing such actions in state and federal courts across the country. These attempts to obtain structural classwide relief are clearly a positive development, but they need not be the only approach to redressing right-to-counsel problems. Removing or softening some of the structural obstacles that prevent postconviction litigants from effectively challenging trial attorneys' performance would force the state and federal judiciaries to focus on the indigent defense crisis and could similarly catalyze reform.

Option 1: Limited Constitutional Right to Postconviction Counsel

Some scholars have suggested that the federal courts should recognize a limited constitutional right to counsel in state postconviction proceedings in order to raise ineffective assistance of counsel claims. The Supreme Court left open this possibility in *Coleman v. Thompson*, 501 U.S. 722 (1991). Roger Coleman was convicted of rape and capital murder and sentenced to death. After his direct appeal ended, he filed a state postconviction petition alleging that his trial attorney was constitutionally ineffective. He lost in the trial court, but with the aid of some lawyers working pro bono, he appealed. Because his lawyers filed his postconviction appeal one day too late, the state courts dismissed the appeal. The federal courts held that his ineffectiveness claim was procedurally defaulted. Coleman argued that he satisfied the cause and prejudice exception to the procedural

default doctrine. Specifically, he claimed that his state postconviction attorneys were ineffective in failing to file a timely appeal and that their ineffectiveness was a factor external to him that impeded his efforts to comply with the state rule.

The U.S. Supreme Court disagreed, noting that "[b]ecause Coleman had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of Coleman's claims in state court cannot constitute cause to excuse the default in federal habeas." (*Id.* at 756-57.) However, the Supreme Court was careful in limiting the scope of its holding. It noted that it was not addressing the question of whether there might be a limited constitutional right to counsel "in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction." (*Id.* at 755.) More specifically, the Supreme Court reserved the question of whether there might be a limited constitutional right to counsel for initial postconviction review proceedings in which claims are raised that cannot be raised earlier—claims such as ineffective assistance of trial counsel.

The Supreme Court's rationale for cutting off the right to counsel after direct appeal would support recognition of the limited exception left open in *Coleman*. In *Ross*, *Finley*, and *Giarratano*, the Court emphasized that a defendant's access to the trial record, appellate briefs from the first appeal as of right, and the appellate court decision would sufficiently inform the defendant of all of the claims such that the defendant could fairly present any claims pro se in discretionary appeals and later postconviction proceedings. This presupposes that a defendant is able to present all claims challenging the lawfulness of the conviction either at trial or in a first appeal. This may have been a fair assumption when *Ross*, *Finley*, and *Giarratano* were decided. Then, some state and federal prisoners were raising ineffective assistance of trial counsel claims on direct appeal. That is no longer true in a majority of states. (*See Commonwealth v. Grant*, 813 A.2d 726, 735-38 & n.13 (Pa. 2002) (describing the trend toward relocating ineffective assistance of trial counsel claims to state postconviction proceedings).) Defendants who are filing their first postconviction review petitions in these states have never had the assistance of counsel in identifying, investigating, researching, or presenting ineffective assistance of trial counsel claims. There is no appellate brief on the claim on which they can rely, and no appellate court decision has ever been issued addressing the claim. Litigants should argue that the circumstances in a majority of states are different now from what they were when earlier federal cases rejected the *Coleman* exception. Perhaps it is time for state and federal courts to recognize a limited right to postconviction counsel to raise ineffective assistance of trial counsel claims.

Option 2: Move Ineffective Assistance Claims to Direct Appeal

Alternatively, attorneys could advocate the relocation of ineffective assistance of trial counsel claims to direct appeal. A minority of states has opted to allow defendants to raise ineffective assistance of trial counsel claims on direct appeal rather than forcing them to wait until state postconviction review. These states provide a mechanism for defendants to open and supplement their trial records on direct appeal and make it the responsibility of the defendant's appellate attorney to conduct the necessary investigation to determine whether an ineffective assistance of trial counsel claim should be raised and whether extra-record development of that claim is necessary.

Such a procedure has a number of beneficial consequences. First, it decreases substantially the delay that accompanies relegating these claims to state postconviction review. When the claims are raised closer to the time of the trial, witnesses and evidence are more likely to be available, and the state's interest in finality is not nearly as compromised by the need for a retrial. Additionally, when there is less delay, more defendants have a realistic opportunity to file challenges. They will still be feeling the effects of their criminal convictions and will have an incentive to raise ineffectiveness challenges. When more defendants raise structural challenges to the indigent defense delivery system, the judiciary gets a clearer picture of the nature of the problem. The fact that reversals are closer in time to the actual trials also means that the judiciary can send a strong deterrent message back to the offending state actors. Perhaps more importantly, moving ineffective assistance of trial counsel claims from postconviction to direct appeal ensures that defendants have lawyers to help them raise these claims.

That said, moving ineffective assistance of trial counsel claims to direct appeal does have costs. Consideration of other potentially meritorious claims will be delayed in some cases in order to give the appellate attorney time to reinvestigate the case and supplement the trial record. Moreover, it is more expensive for the state to fund indigent defense when it has to pay appellate attorneys to take on the additional responsibility of reinvestigating and raising ineffective assistance of trial counsel claims. As with all proposed structural changes, there are tradeoffs involved in this proposal. I believe the tradeoffs are worth it, because there is no right as fundamental to the defendant as the right to have the assistance of an effective attorney. A defendant's trial attorney is the conduit through which all other constitutional rights are asserted. Moving ineffective assistance of trial counsel claims to direct appeal would focus the courts on the indigent defense crisis and might catalyze desperately needed reforms.

Of course, moving ineffective assistance of trial counsel claims to direct appeal is not a complete solution to the indi-

gent defense crisis. With no constitutional right to counsel in state postconviction proceedings and no opportunity to raise ineffective assistance of appellate counsel until state postconviction proceedings, there is no meaningful check on the appellate attorney's performance. A defendant who has a bad trial attorney and a bad appellate attorney will have to wait until state postconviction (where there is no right to a lawyer) to allege ineffective assistance of appellate counsel for failure to raise ineffective assistance of trial counsel. The chances of a pro se petitioner failing to properly raise and preserve that claim are high. Although it is not a perfect solution, moving ineffectiveness challenges to direct appeal is better than relegating them to postconviction where defendants are much less likely to have the assistance of a lawyer to identify, investigate, research, and present the claims.

Option 3: Adequacy Challenges to State Procedural Rules

Federal habeas litigants can also push the evolution of federal procedural doctrines in a way that makes it easier for state prisoners to present ineffective assistance of trial counsel claims in federal habeas proceedings. Take, for example, the procedural default doctrine. In order to procedurally default a federal constitutional claim, the underlying state procedural rule that the defendant failed to comply with must be both an adequate and independent state procedural rule. If a state procedural rule is inconsistently applied across defendants, it is not an adequate basis upon which to predicate a procedural bar. (*See James v. Kentucky*, 466 U.S. 341 (1984).) If the way in which a state rule is applied unduly burdens the defendant's exercise of his/her constitutional rights, the federal court will refuse to recognize a procedural default. (*See Lee v. Kemna*, 534 U.S. 362 (2002).) Federal habeas litigants facing potential defaults should examine how the underlying state procedural rules operate and raise adequacy challenges when the procedures (either individually or in combination with other state rules) significantly compromise defendants' abilities to present federal constitutional challenges.

State prisoners who are convicted in states that relegate ineffective assistance of trial counsel claims to postconviction should consider challenging the adequacy of the state procedural rules about raising ineffective assistance claims. If the state does not provide counsel for raising these claims and does not make evidentiary hearings to supplement the record readily available to prisoners, one could argue that the state procedural scheme is inadequate such that a failure to properly and completely raise an ineffectiveness challenge at the postconviction stage cannot be the basis for a procedural default in federal court.

Even in the minority of states where ineffective assistance of trial counsel claims are raised on direct appeal, the procedures that the state uses for raising the challenges may not

be evenly applied or may unduly burden defendants' constitutional rights to effective counsel. For example, Oklahoma had a state procedural rule that allowed defendants alleging ineffective assistance of trial counsel to ask the appellate court for a remand to the trial court in order to have an evidentiary hearing on the claim. In practice, however, the appellate courts almost never granted hearings despite frequent requests. The Tenth Circuit Court of Appeals held that the state procedural rule requiring defendants to raise ineffective assistance of trial counsel claims on direct appeal or waive them was inadequate as applied to defendants with extra-record ineffectiveness challenges, because the state did not evenhandedly provide all defendants with a fair opportunity to raise the claim at that stage. (*See Breechen v. Reynolds*, 41 F.3d 1343, 1364 (10th Cir. 1994).) More habeas petitioners should consider raising adequacy challenges, both individual and structural, to state procedural rules prescribing how ineffective assistance of trial counsel claims must be raised.

Option 4: More Federal Evidentiary Hearings

Litigants could also push the doctrine surrounding the availability of evidentiary hearings to be more receptive to ineffective assistance of trial counsel claims. As discussed above, habeas petitioners who need federal evidentiary hearings to supplement their ineffective assistance of trial counsel claims often run into statutory restrictions on the availability of evidentiary hearings in federal court. (*See* 28 U.S.C. § 2254(e)(2).) However, those statutory constraints only restrict the availability of evidentiary hearings in cases in which the defendant "fail[s] to develop the factual basis of [the] claim in State court proceedings." (*Id.*)

In *Williams v. Taylor*, 529 U.S. 420 (2000), the Supreme Court held that the statutory restrictions on the availability of evidentiary hearings do not apply when the defendant is not at fault for the failure to develop the claim in state court. Specifically, the Court noted that "a person is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance." (*Id.* at 432.) Rather, there must be "a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." (*Id.*) A prisoner acts diligently, the Court explained, when he/she makes "a reasonable attempt, in light of the information

available at the time, to investigate and pursue claims in state court." (*Id.* at 435.)

Habeas petitioners who did not have the assistance of counsel to raise ineffectiveness challenges in state postconviction proceedings can use the defendant-friendly language in *Williams* to argue that the statutory restrictions on the availability of evidentiary hearings do not apply to their cases. When a defendant is imprisoned and is not entitled to counsel, the defendant has no opportunity to investigate. As a result, the information available at the time to raise an ineffective assistance of trial counsel claim is minimal. For this reason, defendants who do not have a full state court record to support their ineffectiveness claims often have deficient records through no fault of their own. Rather, the structure of the state process prevented them from having a meaningful opportunity to develop a record. As a result, their abilities to obtain evidentiary hearings in federal court should not be restricted.

Conclusion

Our current system of defense representation is broken, and the failure of postconviction review to check ineffective trial attorney performance is one large part of the problem. Procedural barriers to review in state and federal court should be revisited so that the attention of the judiciary is focused on the indigent defense crisis. Perhaps then, there will be a chance for meaningful and lasting reforms. ■