



Digital Commons@

Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 29

Number 4 *Symposia—The Religious Voice in the
Public Square and Executing the Wrong Person:
The Professionals' Ethical Dilemmas*

Article 42

6-1-1996

OC's PD's Feeling the Squeeze—The Right to Counsel: In Light of Budget Cuts, Can the Orange County Office of the Public Defender Provide Effective Assistance of Counsel

Sonia Y. Lee

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Sonia Y. Lee, *OC's PD's Feeling the Squeeze—The Right to Counsel: In Light of Budget Cuts, Can the Orange County Office of the Public Defender Provide Effective Assistance of Counsel*, 29 Loy. L.A. L. Rev. 1895 (1996).

Available at: <https://digitalcommons.lmu.edu/llr/vol29/iss4/42>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

**OC'S PD'S FEELING THE SQUEEZE—THE RIGHT TO
COUNSEL: IN LIGHT OF BUDGET CUTS, CAN THE
ORANGE COUNTY OFFICE OF THE PUBLIC
DEFENDER PROVIDE EFFECTIVE ASSISTANCE OF
COUNSEL?**

I.	INTRODUCTION	1896
II.	THE CONSTITUTIONAL GUARANTEE OF RIGHT TO COUNSEL	1899
	A. <i>The Development of the Right</i>	1899
	1. From the right to counsel to the right to court-appointed counsel	1899
	2. The extension of the right to state proceedings .	1901
	3. The scope of the right to court-appointed counsel in state proceedings	1902
	B. <i>The Quality of Counsel Mandated by the Constitution</i>	1904
	C. <i>California's Standard for Effective Counsel</i>	1905
III.	THE PUBLIC DEFENDER PROGRAM	1907
	A. <i>The Evolution of the Program</i>	1907
	B. <i>The Effect of Three-Strikes Laws on Public Defender Caseloads</i>	1908
IV.	ORANGE COUNTY'S PUBLIC DEFENDER PROGRAM ...	1910
	A. <i>The Requirement of Indigence</i>	1910
	B. <i>Before and After the Bankruptcy</i>	1912
V.	A REVIEW OF ORANGE COUNTY'S OFFICE OF THE PUBLIC DEFENDER	1915
	A. <i>The Application of Justice Mosk's Standard</i>	1915
	B. <i>Other States</i>	1918
	1. Louisiana	1918
	2. Arkansas and Kansas	1920
	3. Florida	1921
VI.	THE IMPACT OF UNDERFUNDING ON PUBLIC DEFENDER PROGRAMS—A PUBLIC POLICY ARGUMENT	1923
VII.	CONCLUSION	1927

I. INTRODUCTION

No trial in the recent history of American jurisprudence has captivated the public attention as much as the prosecution of O.J. Simpson. This trial, more than any other, has solidified the public's perception of the inequities of the justice system: wealthy defendants employing private counsel are acquitted, while indigent defendants assisted by public defenders are convicted.

Under the doctrine of equal protection, indigent defendants must have the same opportunity to obtain a meaningful defense as wealthy defendants.¹ In this country, however, the sad truth is that the quality of one's defense is directly proportional to the size of one's bank account. "[O.J.] just happens to be much richer than the average murder defendant—hence the never-ending parade of big-name lawyers, sub-lawyers with DNA specialties, jury consultants, investigators and experts."² According to one of his attorneys, Mr. Simpson will have spent five to six million dollars by the end of the trial.³ Conversely, Robert Spangenberg, coauthor of a 1993 American Bar Association report on indigent defense, believes that if Mr. Simpson had been represented by a public defender, "it would [have been] a two-day trial, an open-and-shut case."⁴

Mr. Spangenberg's statement mirrors the prevailing societal attitude about the quality of legal assistance rendered to indigent defendants. It is reflected in such comments as "I don't want a public defender, I want a real lawyer," or "Did you have an attorney on your last case? No, I had a public defender."⁵ Indigent defendants often refer to their court-appointed attorneys as "dump-trucks," because they believe that public defenders are more interested in trying to "dump" them as soon as possible than in providing a vigorous defense.⁶ The primary dissatisfaction of indigent defendants with their public defenders stems from the clients' perceptions that

1. *Douglas v. California*, 372 U.S. 353, 357-58 (1963).

2. Elizabeth Gleick, *Rich Justice, Poor Justice: Did we need O.J. to remind us that money makes all the difference—in the trial and in the verdict?*, *TIME*, June 19, 1995, at 40, 40.

3. *Id.*

4. *Id.* at 40-41.

5. Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 *WIS. L. REV.* 473, 474.

6. *Id.*

the public defenders do not spend enough time on their cases, do not care about their interests, and pressure them to plead guilty.⁷

Unfortunately, this perception rings true in light of the enactment of the "three-strikes" laws throughout the nation⁸ which resulted in an explosion in trials of indigent defendants, and the concomitant need for publicly funded attorneys to defend them.⁹ The reality is that there are too many indigent defendants and not enough public funds or attorneys.¹⁰ This lack of funding for public defenders is directly responsible for the perceived dumping problem: the less money supplied to the office, the less investigative and medical expert support, the fewer public defenders employed, and hence the fewer public defenders available for indigent defense. Consequently, indigent defendants receive inadequate assistance of counsel.

Obviously, one of the advantages of being wealthy is the ability to purchase the best that money can buy, including the best criminal defense. This Comment does not claim that all indigent defendants are entitled to the same type of defense as O.J. Simpson. Rather, it asserts that there is a minimum level of adequate representation mandated by the U.S. Constitution to which all defendants, whether indigent or wealthy, are entitled. The question is whether this minimum level of adequate representation can be satisfied with inadequately funded public defender programs. This Comment addresses this inquiry by specifically focusing on the recent financial disaster in California's Orange County, that necessitated emergency measures resulting in budget cuts to the county's public defender's office and its complete reorganization. This Comment addresses the effects of such emergency measures on the quality of assistance provided to indigent defendants in Orange County in particular, and uses the Orange County bankruptcy as an example to discuss the effects of underfunding of public defender programs in general.

7. *Id.*

8. As of February 1995, 14 states have enacted "three-strikes" laws. Michael G. Turner et al., *"Three Strikes and You're Out" Legislation: A National Assessment*, FED. PROBATION, Sept. 1995, at 16, 18. They are California, Colorado, Connecticut, Georgia, Indiana, Kansas, Louisiana, Maryland, New Mexico, North Carolina, Tennessee, Virginia, Washington, and Wisconsin. *Id.*

9. *See infra* part III.B.

10. *See* Rebecca Marcus, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact Upon Racial Minorities*, 22 HASTINGS CONST. L.Q. 219 (1994).

Until December 1994 Orange County had a population of nearly 2.6 million and a median household income of \$47,774.¹¹ It was the fifth largest county in the United States and the fourth richest county government¹²—until the financial debacle which resulted in the loss of \$1.5 billion in public funds in an investment pool managed by County Treasurer Robert Citron.¹³ In 1979 Citron initiated a change in state law to allow counties and municipalities to borrow money from private firms to engage in reverse purchase agreements.¹⁴ During the 1980s, this arrangement provided Orange County with a return of over nine percent per year, nearly double that of other California investment pools.¹⁵ However, with the increase in interest rates, the investment began to falter until December 1994 when Orange County declared bankruptcy to prevent creditors from calling in its loans.¹⁶ This was the largest municipal collapse in U.S. history.¹⁷ As a result, the County instituted emergency budget cuts to help deflect the financial consequences of the bankruptcy. The hardest hit by the budget reductions were those public services provided to indigents, including the public defender program.¹⁸

This Comment analyzes the emergency budgetary measures and reorganization of the public defender's office, and concludes that such measures adversely impact the rights of the County's indigent defendants to receive effective assistance of counsel. Part II outlines the historical development of the Sixth Amendment right to the assistance of counsel, including the right to court-appointed assistance of counsel. The development of the public defender programs in general and the current state of public defender programs—their inadequacy in light of tougher sentencing laws¹⁹—is addressed in Part III. Part IV reviews Orange County's public defender program

11. John Greenwald, *The California Wipeout: Orange County files for bankruptcy after losing big on high-risk investments*, TIME, Dec. 19, 1994, at 55, 56.

12. *Id.*

13. *Id.* at 55.

14. *Id.* at 56. This type of arrangement allows counties to borrow short-term loans from private firms and invest them in longer-term bonds that pay more interest thereby resulting in a profit to the counties or municipalities. *Id.* The value of the bonds purchased moves in the opposite direction of interest rates, thus if interest rates fall, the value of the bonds increases. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 55.

18. See discussion *infra* part IV.B.

19. See *infra* part III.B.

specifically, pre- and post-bankruptcy, and in particular the devastating budgetary cuts suffered by the program. Part V applies the recent California Supreme Court decision on the standard for effective assistance of counsel to the Orange County Office of the Public Defender. Part VI discusses and compares the existing laws in other jurisdictions regarding the constitutionality of their public defender programs, and addresses the viability of Orange County's new public defender program. Finally, this Comment identifies similar budget problems faced by other state public defender programs and proposes a possible solution to some of the problems outlined in this Comment.

II. THE CONSTITUTIONAL GUARANTEE OF RIGHT TO COUNSEL

A. *The Development of the Right*

1. From the right to counsel to the right to court-appointed counsel

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . and to have the assistance of counsel for his defense.²⁰

To determine whether indigent defendants are receiving the constitutionally mandated assistance of counsel, the development of the right, and its intended function, must first be analyzed. The right of indigent defendants to the assistance of court-appointed counsel began with *Powell v. Alabama*²¹ in which the United States Supreme Court declared that the "right to the aid of counsel is of . . . fundamental character."²² The *Johnson v. Zerbst*²³ Court followed by requiring appointment of counsel to all indigent federal defendants—unless the right is competently and intelligently waived.²⁴ The *Johnson* Court concluded that the assistance of counsel "is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth

20. U.S. CONST. amend. VI, § 1.

21. 287 U.S. 45 (1932).

22. *Id.* at 68; *see also* *Grosjean v. American Press Co.*, 297 U.S. 233, 243-44 (1936) (stating that "certain fundamental rights . . . [are] safeguarded against state action . . . among them the fundamental right of the accused to the aid of counsel in a criminal prosecution").

23. 304 U.S. 458 (1938).

24. *Id.* at 467-69.

Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'"²⁵

The issue of whether this Sixth Amendment right to counsel²⁶ is binding on the states was determined in the landmark case of *Gideon v. Wainwright*.²⁷ Gideon was charged with breaking and entering a poolroom with the intent to commit a misdemeanor.²⁸ In Florida, where petitioner was charged, this offense was a felony.²⁹ When petitioner appeared in court, he had no funds and no attorney to assist him.³⁰ When Gideon requested to have an attorney appointed to represent him, the trial court replied that "[u]nder the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense."³¹

Prior to *Gideon*, the Supreme Court followed its rule in *Betts v. Brady*³² that a refusal to appoint counsel for an indigent defendant charged with a felony in a state proceeding did not necessarily violate the Due Process Clause of the Fourteenth Amendment.³³ The Court in *Betts* engaged in a "totality of circumstances" review to determine the constitutionality of the denial of the right to appointed counsel.³⁴ The *Betts* Court held that an "[a]sserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances . . . fall short of such denial."³⁵

It recognized that although the Sixth Amendment mandated "no rule for the conduct of the States,"³⁶ if the amendment imposes upon

25. *Id.* at 462 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), which stated that if the immunity from compulsory self-incrimination were lost, justice could still be done).

26. U.S. CONST. amend. XIV, § 1. The Due Process Clause reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law" *Id.*

27. 372 U.S. 335 (1963).

28. *Id.* at 336.

29. *Id.*

30. *Id.* at 337.

31. *Id.*

32. 316 U.S. 455 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

33. *Id.* at 471-72.

34. *Id.* at 462.

35. *Id.*

36. *Id.* at 465.

the nation "a rule so fundamental and essential to a fair trial, and so, to due process of law, . . . it is made obligatory upon the States by the Fourteenth Amendment."³⁷ The Court, however, went on to conclude that, under the circumstances of the case, the right to appointment of counsel was not a fundamental right which is essential to a fair trial.³⁸

Because the facts in *Betts* were almost identical to those in *Gideon*, the *Gideon* Court directed the parties to specifically address whether "[the] Court's holding in [*Betts* should] be reconsidered."³⁹ The *Gideon* Court accepted *Betts*'s assumption that "a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment."⁴⁰ The *Gideon* Court concluded that based upon precedent which held the right to the assistance or aid of counsel to be fundamental, the right of indigent defendants to appointed counsel is also a fundamental right.

2. The extension of the right to state proceedings

The Court in *Gideon* relied on public policy rationales to overturn *Betts* and held that the right of indigent defendants to receive assistance of appointed counsel extends to state proceedings. The most paramount consideration was the belief that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."⁴¹ The nation's Constitution and laws strongly emphasize procedural and substantive safeguards which are

37. *Id.*

38. *Id.* at 471.

39. *Gideon*, 372 U.S. at 338 (citation omitted).

40. *Id.* at 342 (quoting *Betts*, 316 U.S. at 465). This assumption had already been embraced by this Court to incorporate various enumerated rights within the Bill of Rights against the states. See *Shelton v. Tucker*, 364 U.S. 479 (1960) (freedom of association); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (freedom of religion); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (freedom of assembly); *Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech and press). In *Palko v. Connecticut*, 302 U.S. 319 (1937), the Court refused to extend the Fifth Amendment protection against double jeopardy to the states. However, the Court still recognized and emphasized that "immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states." *Id.* at 324-25 (footnote omitted).

41. *Gideon*, 372 U.S. at 344.

designed to ensure fair trials where every defendant stands equal before the law.⁴²

This ideal cannot be realized by an accused who does not receive the assistance of counsel in facing the accusers. The right to the assistance of counsel is essential in protecting all other rights of the defendant under the Constitution.⁴³ If a defendant does not receive the assistance of counsel, the defendant, as a layperson, will be ill-equipped to fully comprehend the constitutional rights, and as a result, the "right to be heard" will merely be a farce.⁴⁴ As Justice Sutherland stated in *Powell*:

Even the intelligent and educated lay [person] has small and sometimes no skill in the science of law. If charged with [a] crime, [the defendant] is incapable, generally, of determining . . . whether the indictment is good or bad. [The defendant] is unfamiliar with the rules of evidence . . . [and] lacks both the skill and knowledge [to] adequately . . . prepare his [or her] defense, even though he [or she may] have a perfect one. [The defendant] requires the guiding hand of counsel. . . . Without it, though [the defendant] be not guilty, he [or she] faces the danger of conviction because [the defendant] does not know how to establish his [or her] innocence.⁴⁵

3. The scope of the right to court-appointed counsel in state proceedings

Though *Gideon* was successful in extending the protection of court-appointed counsel to state proceedings, the scope of the protection covered only felony cases.⁴⁶ In *Argersinger v. Hamlin*,⁴⁷ the indigent petitioner was charged with carrying a concealed weapon, an offense punishable by imprisonment of up to six months, a \$1000 fine, or both.⁴⁸ The petitioner was denied court-appointed counsel which he claimed denied him the opportunity to raise "good and sufficient defenses" to the charge against him.⁴⁹ The Court in

42. *Id.*

43. See cases cited *infra* note 99.

44. *Gideon*, 372 U.S. at 344-45 (citing *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

45. *Powell*, 287 U.S. at 69.

46. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

47. 407 U.S. 25 (1972).

48. *Id.* at 26.

49. *Id.*

Argersinger rejected the holding in *Duncan v. Louisiana*⁵⁰ that the right to a jury trial is equivalent to the right to assistance of counsel.⁵¹ The *Argersinger* Court stated that the assistance of counsel is often a requisite to the very existence of a fair trial,⁵² whereas a fundamentally fair trial can exist without a jury.⁵³ The Court went on to conclude that the rationales of *Powell* and *Gideon* extend to any criminal trial where those accused are deprived of their liberty.⁵⁴ The Court determined that the right to court-appointed assistance of counsel is applicable in misdemeanor and petty offenses as well as felonies.⁵⁵ However, since the petitioner in *Argersinger* faced actual imprisonment, the Court declined to decide whether the prospect of imprisonment is required before the right to court-appointed counsel attaches.⁵⁶

*Scott v. Illinois*⁵⁷ determined this issue. In *Scott*, the indigent petitioner was convicted of shoplifting and fined \$50.⁵⁸ The maximum sentence for such an offense carried either a \$500 fine, one year imprisonment, or both.⁵⁹ The *Scott* Court declared that “the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.”⁶⁰ Thus, the states can choose between appointing counsel for the indigent defendant and retaining the right to imprison the accused, or not appointing counsel and impose only a fine upon conviction.

The Supreme Court subsequently determined that the Sixth Amendment right to assistance of counsel attaches at the “critical stage” and not necessarily only at trial.⁶¹

50. 391 U.S. 145 (1968).

51. *Argersinger*, 407 U.S. at 29-31.

52. *Id.* at 31.

53. *Id.* at 30-31.

54. *Id.* at 32.

55. *Id.* at 37.

56. *Id.*

57. 440 U.S. 367 (1979).

58. *Id.* at 368.

59. *Id.*

60. *Id.* at 373.

61. See cases cited *infra* note 99.

B. The Quality of Counsel Mandated by the Constitution

Because of the integral role counsel plays in the adversarial system by protecting the defendant's fundamental right to a fair trial, courts recognized that the assistance of counsel entails more than mere presence of counsel in the courtroom.⁶² The Sixth Amendment emphasizes the right to counsel because it envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results.⁶³ Therefore, the courts determined that the "right to counsel is the right to the effective assistance of counsel."⁶⁴

Effective assistance of counsel, in turn, requires that counsel be a "reasonably competent attorney."⁶⁵ In *Strickland v. Washington*,⁶⁶ the Court set forth the standard for determining the ineffectiveness of counsel. The defendant must show that counsel made "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment,"⁶⁷ which entails a showing that "counsel's representation fell below an objective standard of reasonableness."⁶⁸ In addition, "the defendant must show that the deficient performance prejudiced the defense," so that the result is unreliable.⁶⁹ The court must decide the actual effectiveness of the counsel's assistance on the facts of the particular case viewed as of the time of counsel's conduct.⁷⁰ Though the standard of review is very deferential to the strategic decisions of counsel, the primary goal of the review is to ensure that criminal defendants receive a fair trial.⁷¹

In assessing the effectiveness of counsel, the court must look to the most important of counsel functions, the "overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution."⁷²

62. *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

63. *Id.*

64. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (citations omitted).

65. *Id.* at 771.

66. 466 U.S. 668 (1984).

67. *Id.* at 687.

68. *Id.* at 687-88.

69. *Id.* at 687.

70. *Id.* at 690.

71. *Id.* at 689.

72. *Id.* at 688.

This constitutionally mandated commitment to *reasonably effective* assistance of counsel is the key issue being addressed in this Comment. Are indigent defendants in Orange County being accorded this constitutional guarantee? This Comment argues that they are not. With the recent budget cuts, the Orange County Office of the Public Defender is unable to meet the constitutional mandate set forth in *Strickland*.

C. California's Standard for Effective Counsel

The California Supreme Court has thus far only engaged in case-by-case analysis of whether defendants are receiving reasonably effective assistance of counsel. As recently as February 5, 1996, the court reaffirmed the standard by which review of reasonably effective assistance of counsel would be undertaken.⁷³

In California, the *Strickland* standard governs review of effective counsel.⁷⁴ The *In re Avena* court ruled that to prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate the deficiency of the attorney's performance by showing that it fell below an objective standard of reasonableness. The defendant must additionally show prejudice to the defendant flowing from the counsel's performance.⁷⁵ The court stated that such prejudice to the defendant is established when there is a sufficient probability that the confidence in the outcome is undermined by counsel's conduct.⁷⁶

The court, however, recognized that "in some cases ineffective assistance must be presumed 'without inquiry into the actual conduct of the trial' because the 'likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small' that the cost of litigating the issue is unjustified."⁷⁷ The *In re Avena* court further stated

[t]here are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. . . . [I]f counsel entirely fails to

73. *In re Avena*, 12 Cal. 4th 694, 909 P.2d 1017, 49 Cal. Rptr. 2d 413 (1996).

74. *Id.* at 721, 909 P.2d at 1032, 49 Cal. Rptr. 2d at 428 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

75. *Id.* (citing *Strickland*, 466 U.S. at 691-92).

76. *Id.*, 909 P.2d at 1032-33, 49 Cal. Rptr. 2d at 428-29 (citing *Strickland*, 466 U.S. at 694).

77. *Id.* at 726-27, 909 P.2d at 1036, 49 Cal. Rptr. 2d at 432 (quoting *People v. Bonin*, 47 Cal. 3d 808, 844, 765 P.2d 460, 480, 254 Cal. Rptr. 298, 319 (1989) (quoting *United States v. Cronin*, 466 U.S. 648, 659-60 (1983))).

*subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.*⁷⁸

However, Justice Lucas, writing for the majority, and Justice Mosk, dissenting, differed sharply as to when the presumption would apply. The majority narrowly interpreted the scope of *United States v. Cronin*,⁷⁹ the companion case to *Strickland*, and stated that unless counsel was entirely absent or actually prevented from participating in a critical stage of the proceeding, the defendant must show prejudice flowing from the counsel's performance.⁸⁰ Justice Mosk, in contrast, believed that *Cronin* sought to expand the statement in *Strickland* that "[i]n certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of *state interference with counsel's assistance*."⁸¹

Under Justice Mosk's analysis, the fundamental requirement in *Strickland* is for counsel to act in the role of an advocate, so that the accused can subject the prosecution's case to a meaningful adversarial testing.⁸² However, when there is no "*confrontation between adversaries*," there is a violation of the constitutional guarantee.⁸³ The lack of confrontation between adversaries can result either from (1) the absence of counsel altogether, or (2) counsel's failure to subject the prosecution's case to a meaningful adversarial testing.⁸⁴ But unlike the majority, Justice Mosk did not feel that *Cronin* limited the second prong to cases like *Davis v. Alaska*,⁸⁵ in which the defense counsel was actually prohibited from cross-examining the

78. *Id.* at 727, 909 P.2d at 1036, 49 Cal. Rptr. 2d at 432 (citing *Cronin*, 466 U.S. at 658-59) (alteration in original).

79. 466 U.S. 648 (1984).

80. *Avena*, 12 Cal. 4th at 727, 909 P.2d at 1036-37, 49 Cal. Rptr. 2d at 432-33 (citing *Cronin*, 466 U.S. at 659 nn.25-26); *see also* *Davis v. Alaska*, 415 U.S. 308 (1974) (holding that assistance of counsel is ineffective when defense counsel is prevented from cross-examining crucial prosecution witness).

81. *Avena*, 12 Cal. 4th at 774, 909 P.2d at 1067, 49 Cal. Rptr. 2d at 463 (Mosk, J., dissenting) (emphasis added) (quoting *Strickland*, 466 U.S. at 692).

82. *Id.* (Mosk, J., dissenting) (citing *Cronin*, 466 U.S. at 656-57).

83. *Id.* (Mosk, J., dissenting) (quoting *Cronin*, 466 U.S. at 657).

84. *Id.*, 909 P.2d at 1067-68, 49 Cal. Rptr. 2d at 463-64 (Mosk, J., dissenting).

85. 415 U.S. 308 (1974).

prosecution's witness.⁸⁶ Instead, Justice Mosk asserted that *Davis* was but one example of the types of interference which may constructively deny defendant the assistance of counsel.⁸⁷ The *Cronic* analysis, according to Justice Mosk, is not limited to cases of denial of cross-examination but refers to all cases of failure of adversarial testing that are of the same "magnitude."⁸⁸ Most significantly, the failure to engage in timely and in-depth investigation of the strengths, weaknesses, and potential defenses of the prosecution's case, along with thorough pretrial testing of the prosecution's evidence, is a failure of adversarial testing of the same magnitude as a denial of the opportunity to cross-examine a witness.⁸⁹ Therefore, a defendant need not prove actual prejudice affecting the outcome of the case to prevail on the claim of ineffective assistance of counsel. As will be discussed below,⁹⁰ this Comment argues that the standard from Justice Mosk's dissenting opinion is the correct standard of review for effective counsel. Further, it argues that under this standard, the assistance rendered by the Orange County Office of the Public Defender is unconstitutional.

III. THE PUBLIC DEFENDER PROGRAM

A. *The Evolution of the Program*

Since the constitutional requirement of court-appointed counsel developed recently,⁹¹ public defender programs did not develop in large numbers until the late 1960s.⁹² Initially, the number of attorneys required to handle indigent cases was very small due to the *Betts* holding, which failed to extend the right to appointed counsel for indigents to state prosecutions.⁹³ Because most criminal prosecutions are at the state level,⁹⁴ and the "totality of circumstances"

86. *Avena*, 12 Cal. 4th at 776, 909 P.2d at 1069, 49 Cal. Rptr. 2d at 465 (Mosk, J., dissenting).

87. *Id.* at 777, 909 P.2d at 1069, 49 Cal. Rptr. 2d at 465 (Mosk, J., dissenting).

88. *Id.* (Mosk, J., dissenting).

89. *Id.* at 774-75, 909 P.2d at 1068, 49 Cal. Rptr. 2d at 464 (Mosk, J., dissenting).

90. *See infra* part V.A.

91. *See supra* part II.A-B.

92. Mounts, *supra* note 5, at 476.

93. *Betts v. Brady*, 316 U.S. 455, 471 (1942), *overruled by Gideon v. Wainwright*, 372 U.S. 335 (1963).

94. Mounts, *supra* note 5, at 477.

standard used by the *Betts* Court⁹⁵ necessitated appointed counsel in very few cases, it was easier to appoint counsel on a case-by-case basis through the local bar.⁹⁶

This practice changed after *Gideon v. Wainwright*⁹⁷ which held that the right to the appointment of counsel for indigent defendants is a fundamental right which must be applied against the states.⁹⁸ The expansion of the scope of this right in subsequent cases further necessitated the development of a comprehensive public defender program capable of meeting the demands of the increased indigent caseload.⁹⁹ This expansion created a need for defender services on an unprecedented scale¹⁰⁰ which could not be met with appointment through the local bar—which were generally uncompensated services.¹⁰¹ Supporters of the public defender programs believed that if they could institute defender programs that allowed attorneys to specialize in criminal law and receive a reasonable salary for their services, they could ensure competent representation.¹⁰² Because of the sheer volume of indigent cases and the perceived cost effectiveness of public defender programs, a large number of jurisdictions established defender offices after the decision in *Argersinger*.¹⁰³

B. The Effect of Three-Strikes Laws on Public Defender Caseloads

The public defender's offices replaced, for the most part, the appointment of counsel through the private bar for indigent defense. However, the challenge to the public defender's offices to provide effective assistance of counsel has intensified, due not only to the expansion of the right to court-appointed assistance of counsel, but

95. *Betts*, 316 U.S. at 462.

96. Mounts, *supra* note 5, at 478.

97. 372 U.S. 335 (1963).

98. *Id.* at 344; *see supra* part II.A.1.

99. *See* *Scott v. Illinois*, 440 U.S. 367 (1979) (holding that the right attaches to any case in which conviction would result in actual incarceration); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (holding that the right attaches to misdemeanors as well as felonies); *Coleman v. Alabama*, 399 U.S. 1 (1970) (holding that the right attaches at preliminary hearing); *United States v. Wade*, 388 U.S. 218 (1967) (holding that the right attaches during pretrial lineup); *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that the right attaches during custodial interrogation). Furthermore, the Supreme Court determined that a Sixth Amendment right to appointed counsel exists at the first level of appeal. *Douglas v. California*, 372 U.S. 353, 356-57 (1963).

100. Mounts, *supra* note 5, at 481.

101. *Id.* at 478.

102. *Id.* at 478-79.

103. *Id.* at 481 & n.40.

because of the newly enacted three-strikes laws.¹⁰⁴ In California, the three-strikes law has taken its toll on an already beleaguered public defender's office.¹⁰⁵

In March 1994, California Governor Pete Wilson signed the Jones-Costa Bill into law.¹⁰⁶ Under this new three-strikes scheme, first-time felony offenders are sentenced according to the prior existing sentencing guidelines.¹⁰⁷ For second-time offenders, the new law doubles the minimum required sentence.¹⁰⁸ The crux of the new law, however, is the three-strikes provision, which mandates that state courts sentence to an indeterminate term of life imprisonment those individuals previously convicted of two or more serious or violent felonies.¹⁰⁹

The intent of the three-strikes legislation is to target habitual felons—or career criminals—and remove them from the nation's communities.¹¹⁰ Its proponents argue that removal of criminals allows society to function without the worry of further victimization from individuals who should have been locked away in prison.¹¹¹ In California, the three-strikes legislation has imposed staggering burdens on the criminal justice system.¹¹² Since the enactment of the three-strikes law, California has experienced a 150% increase in felony trials.¹¹³ With the increase in felony trials, the courts are experiencing a substantial backlog of cases which could prevent the detainment of offenders awaiting trial, forcing jurisdictions to release violent pretrial felons.¹¹⁴

104. See *supra* note 8 and accompanying text.

105. See *supra* notes 92-100 and accompanying text.

106. Daniel M. Weintraub, "3 Strikes" Law Goes into Effect, L.A. TIMES (Orange County ed.), Mar. 8, 1994, at A1, A23.

107. CAL. PENAL CODE § 1170(d) (West 1985 & Supp. 1996).

108. Note, *Recent Legislation: Criminal Procedure—Sentencing—California Enacts Enhancements for Prior Felony Convictions*, 107 HARV. L. REV. 2123, 2123 (1994).

109. *Id.* at 2124 (citing to CAL. PENAL CODE § 667(e)(2)(A) (West Supp. 1996)). The statutes do not call for life imprisonment without possibility of parole when a defendant is convicted of a third felony. It actually means that a convicted three-time felon will now have to serve triple the first-time sentence, with a minimum of 25 years. *Id.* at 2124 n.10; see CAL. PENAL CODE § 667(e)(2)(A).

110. Turner et al., *supra* note 8, at 32.

111. *Id.*

112. *Id.* at 34.

113. *Id.*

114. *Id.* This is especially true in light of the fact that as more habitual offenders are sentenced to life under the three-strikes legislation, prisons will be unable to house all those convicted and will have to utilize county jails to house convicts until space becomes available. *Id.*

The Supervisor of the Orange County District Attorney's Office, Brent Romney, believes that the "three-strikes, you're out" legislation has made defendants less likely to plea bargain, sending twice as many felony cases to trial than one year ago.¹¹⁵ A defendant charged with a felony under this scheme has no incentive to plea bargain and instead chooses to go to trial. Judges in California have considered reducing the number of civil trials to free up courtrooms and to make room for criminal trials.¹¹⁶ However, the increase in the number of cases resulting from the three-strikes legislation will require counties to expand the physical size of their courts, and hire more judges and prosecutors to process the cases.¹¹⁷ Consequently, counties must hire more public defenders to provide adequate defense for indigent defendants. However, the bankrupt Orange County is unable to hire the needed public defenders for indigent representation. As a result, indigent defendants prosecuted under the three-strikes provision may face life imprisonment without the constitutionally mandated level of assistance.

IV. ORANGE COUNTY'S PUBLIC DEFENDER PROGRAM

A. *The Requirement of Indigence*

The level of indigence that qualifies for public defender assistance varies according to each state. In California, a defendant who is unable to afford counsel may have one provided by the county in which the accused is charged.¹¹⁸ California Penal Code section 987 provides that in a noncapital or capital case "[i]f [the defendant] desires and is unable to employ counsel the court shall assign counsel to defend [the defendant]."¹¹⁹ Likewise, California Government Code section 27706 states that it is the duty of a public defender, [u]pon the order of the court or upon the request of the person involved, . . . [to] represent any person who is not financially able to employ counsel in a proceeding of any nature relating to the nature or conditions of detention, of

115. Anne C. Mulkern & Stuart Pfeifer, *System is trying to many victims*, ORANGE COUNTY REG., Oct. 8, 1995, (News) at 32.

116. Turner et al., *supra* note 8, at 34.

117. *Id.*

118. CAL. GOV'T CODE § 27706(g) (West 1988); CAL. PENAL CODE §§ 987, 987.2(d) (West 1985 & Supp. 1996).

119. CAL. PENAL CODE § 987(a)-(b) (West 1985 & Supp. 1996).

other restrictions prior to adjudication, of treatment, or of punishment resulting from criminal or juvenile proceedings.¹²⁰

The final determination of the defendant's financial ability to retain private counsel is made by the court.¹²¹ However, "[t]he public defender shall . . . render legal services . . . for any person the public defender determines is not financially able to employ counsel until such time as a contrary determination is made by the court."¹²²

This requirement of indigence does not equate to absolute destitution. If, by their nature, the assets of an accused cannot be timely reduced to cash, the present financial inability to obtain counsel which defines indigence for Sixth Amendment purposes is met.¹²³ If the status is temporary or the defendant later gains an ability to pay, the defendant may have to reimburse the state.¹²⁴

120. CAL. GOV'T CODE § 27706(g).

121. CAL. PENAL CODE § 987(c) (West Supp. 1996) (stating that "[i]n order to assist the court in determining whether a defendant is able to employ counsel in any case, the court may require a defendant to file a financial statement or other financial information under penalty of perjury").

122. CAL. GOV'T CODE § 27707 (West 1988).

123. See CAL. PENAL CODE § 987.8(c) (West 1985 & Supp. 1996). Further, California Penal Code 987.8(g)(2) states:

"Ability to pay" means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following:

(A) The defendant's present financial position.

(B) The defendant's reasonably discernible future financial position

(C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing.

(D) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant.

CAL. PENAL CODE §987.8(g)(2) (West Supp. 1996).

124. CAL. PENAL CODE § 987.8(b) (West Supp. 1996). Section 987.8(b) provides as follows:

In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, or upon the withdrawal of the public defender . . . , the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof.

Id.

In *People v. Amor*, 12 Cal. 3d 20, 523 P.2d 1173, 114 Cal. Rptr. 765 (1974), the California Supreme Court determined this practice to be constitutional.

B. Before and After the Bankruptcy

Those determined by the court to be indigent are assigned an attorney through the Orange County Office of the Public Defender. Prior to the December 1994 bankruptcy,¹²⁵ Orange County employed a dual system of legal services to indigents through the use of the Office of the Public Defender and an Alternate Defense Fund, which provided private attorney services through a flat-fee contract for conflict of interest cases.¹²⁶ As provided by California Penal Code section 987.2, the Alternate Defense Fund was financed by the County's general fund.¹²⁷ The Office of the Public Defender handled the majority of the indigent defense cases at a cost of approximately \$20 million, and the private attorneys handled the conflict of interest cases at a cost of about \$12.2 million.¹²⁸

This has drastically changed. Subsequent to the bankruptcy, a three-member Operations Management Council was formed in December 1994 to recommend an immediate budget reduction to mitigate the consequences of the bankruptcy.¹²⁹ The reduction went

125. See *supra* part I.

126. Jodi Wilgoren, *Private Lawyers Left Dry as County Work Evaporates*, L.A. TIMES (Orange County ed.), Jan. 9, 1995, at B1. Wilgoren estimates that contract attorneys earn about \$350 for a misdemeanor, \$450 for a felony that is settled before it goes to a preliminary hearing, \$1000 for a preliminary hearing and the first day of a felony trial, and \$340 per trial day after that. *Id.* at B4.

127. CAL. PENAL CODE § 987.2 (West 1985 & Supp. 1996). Section 987.2(a)(3) states:

(a) In any case in which a person . . . desires but is unable to employ counsel, and in which counsel is assigned in the . . . court to represent the person in a criminal trial, proceeding, or appeal, the following assigned counsel shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the county:

(3) In a case in which the court finds that, because of a conflict of interest or other reasons, the public defender has properly refused.

Id. § 987.2(a)(3).

128. Anna Cekola, *Defender's Office Meets Cuts but Seeks Relief*, L.A. TIMES (Orange County ed.), June 24, 1995, at B1, B8. In 1993-1994 the Office of the Public Defender handled 61,379 indigent cases while private attorneys handled about 6100 cases. *Id.* In the 1994-1995 fiscal year, the Orange County Office of the Public Defender actually spent \$20,339,238, and the Alternate Defense Fund spent \$9,051,925. COUNTY EXECUTIVE OFFICE, COUNTY OF ORANGE, FY 1995-96 ANNUAL BUDGET 32 (1995) [hereinafter ANNUAL BUDGET].

129. Tracy Weber & Anna Cekola, *Public Defender Cuts Cost Private Lawyers*, L.A. TIMES (Orange County ed.), Jan. 5, 1995, at A7; Dan Weikel & Rene Lynch, *Sheriff and D.A.'s Role in Cuts Is Questioned*, L.A. TIMES (Orange County ed.), Dec. 24, 1994, at A20; Dan Weikel & Julie Marquis, *Services Used by Poor are Hit Hardest*, L.A. TIMES (Orange

into effect for the fiscal year ending in June 1995. Sheriff-Coroner Brad Gates, District Attorney Michael R. Capizzi, and Health Care Agency Director Thomas E. Uram comprised the members of this council.¹³⁰

The most severe reductions recommended by this council affected programs which serviced Orange County's poor. Orange County's funding for poor citizens' health care, social services, and defense attorneys for impoverished criminal defendants bore the brunt of the reductions adopted by the Board of Supervisors.¹³¹ Most severely impacted by the reduction was the Alternate Defense Fund which suffered a devastating cut of 29%, or \$3.7 million.¹³² In contrast, the Orange County Sheriff-Coroner's Department and the Office of the District Attorney, which both enjoyed budget increases exceeding 24% and 31% respectively in the 1994-1995 fiscal year, suffered only minimal budget cuts.¹³³ The Office of the District Attorney suffered a cut of only 1.1% and the Sheriff-Coroner's Department a reduction of only 0.7%.¹³⁴

The Office of the Public Defender was able to escape any reduction in its actual budget but only at a substantial cost to its effective operation.¹³⁵ The Office of the Public Defender took over virtually every indigent case by splitting into three offices.¹³⁶ A new

County ed.), Dec. 23, 1994, at A1, A32.

130. Weikel & Marquis, *supra* note 129, at A32.

131. *Id.* at A1.

132. *Id.* at A32. In the final approved budget for the 1995-1996 fiscal year, the Alternate Defense Fund was appropriated \$3,292,334, a reduction of over \$5,000,000. COUNTY OF ORANGE, STATE OF CALIFORNIA, BUDGET UNIT FINANCING USES DETAIL, UNIT TITLE CLASSIFICATION PUBLIC DEFENDER (1994-1995) (on file with *Loyola of Los Angeles Law Review*) [hereinafter UNIT FINANCING USES DETAIL (1994-1995)]; COUNTY OF ORANGE, STATE OF CALIFORNIA, BUDGET UNIT FINANCING USES DETAIL, UNIT TITLE CLASSIFICATION PUBLIC DEFENDER (1995-1996) (on file with *Loyola of Los Angeles Law Review*) [hereinafter UNIT FINANCING USES DETAIL (1995-1996)];

133. *Id.*

134. Weikel & Lynch, *supra* note 129, at A20-A22; Weikel & Marquis, *supra* note 129, at A32. The District Attorney's Office was appropriated \$55,273,873 for the 1995-1996 fiscal year and the Sheriff-Coroner's Office received \$184,636,465, whereas the Office of the Public Defender was given \$23,244,476. ANNUAL BUDGET, *supra* note 128, at 32.

135. The Office of the Public Defender received a budget of \$23,244,476 for the 1995-1996 fiscal year, which is an increase of more than \$1.5 million from the 1994-1995 fiscal year. UNIT FINANCING USES DETAIL (1995-1996), *supra* note 132. However, the funds appropriated must now fund both the Office of the Public Defender and the secondary Alternate Defender's Office. The tertiary Associate Defender's Office is funded by the Alternate Defense Fund which received a devastating budget cut of over \$5,000,000. See *supra* note 132 and accompanying text.

136. Weber & Cekola, *supra* note 129, at A7.

secondary "Alternate Defender's Office" and a tertiary "Associate Defender's Office" were created to handle any conflict of interest cases.¹³⁷ If the Office of the Public Defender cannot handle an indigent defendant because of a conflict of interest, the case is forwarded to the Alternate Defender's Office. If a conflict arises in the secondary office, the case is then forwarded to the Associate Defender's Office. It was estimated that the cases which could not be handled by any of the three offices would be minimal. This move, approved by the Board of Supervisors for the 1995-1996 fiscal year beginning in July 1995, was expected to result in a \$7.4 million savings per year.¹³⁸

Unfortunately, all is not bliss. This move has overburdened an already heavily taxed program. It resulted in an estimated 6000 additional cases for the Office of the Public Defender, without any increase in its budget. It was estimated that in the fiscal year 1995-1996, the Office of the Public Defender will handle about 75,000 cases with an estimated case load of 610 cases per each full-time lawyer.¹³⁹

The California Supreme Court has not yet addressed the question of whether this type of inadequate funding for a public defender's program renders it unconstitutional under the *Strickland* standard. With these recent changes in the Orange County Office of the Public Defender, this Comment asserts that it cannot meet its "overarching duty to advocate the defendant's cause" and that the lack of resources necessarily forces the defenders' representation below the objective standard of reasonableness, resulting in prejudice to indigent defendants as required by *Strickland*.¹⁴⁰ For this reason, the Orange County's public defender's program must be declared unconstitutional.

137. *Id.*

138. Cekola, *supra* note 128, at B8; Weber & Cekola, *supra* note 129, at A7. This move has, in fact, resulted in a \$5 million savings since the implementation of the new structure. Cekola, *supra* note 128, at B1.

139. Cekola, *supra* note 128, at B8.

140. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

V. A REVIEW OF ORANGE COUNTY'S OFFICE OF THE PUBLIC DEFENDER

A. *The Application of Justice Mosk's Standard*

Justice Mosk's analysis in *In re Avena* identifies the constitutional standard that *should* be used in determining the constitutionality of the new public defender program in Orange County. The budget cuts in the Office of the Public Defender and the reorganization of the structure are circumstances which are "so likely to prejudice [indigent defendants] that the cost of litigating their effect in a particular case is unjustified."¹⁴¹ Justice Mosk's dissenting analysis provides a much more logical and rational solution to protecting the constitutional right to counsel for the state's citizens, and is much more in accord with the intent and rationale for the development of the right to court-appointed counsel.¹⁴²

The Supreme Court recognized that right to counsel is integral to a fair trial, because of the role that counsel plays in an adversarial system.¹⁴³ For this reason, the Court acknowledged the need to provide counsel to indigent defendants, and extended the scope of Sixth Amendment protection to include the right to court-appointed counsel.¹⁴⁴ Justice Mosk's standard recognizes the fact that this right can be compromised by more than an actual denial of counsel. It can result from lack of participation and assistance of counsel which amounts to a constructive denial of counsel.¹⁴⁵

The budget cuts and the reorganization by the Orange County Board of Supervisors is a type of state interference which amounts to a constructive denial of the assistance of counsel and must be presumed to result in prejudice to the indigent defendants. Approximately two-thirds of those charged with crimes in Orange County cannot pay for their own lawyers.¹⁴⁶ The defense of these indigent defendants falls upon the Orange County's Office of the Public Defender. In light of the Orange County bankruptcy,¹⁴⁷ the Orange

141. *United States v. Cronin*, 466 U.S. 648, 658 (1983).

142. *See supra* parts II.A-B.

143. *See supra* parts II.A-B.

144. *See supra* parts II.A.2-3.

145. *See supra* part II.C.

146. *Public Defenders' Rising Burden*, L.A. TIMES (Orange County ed.), July 26, 1995, at B8.

147. *See supra* part IV.B.

County Board of Supervisors created the Alternate Defender's Office and the Associate Defender's Office in hopes of saving the county money. These additional agencies have saved approximately \$5 million between December 1994 and June 1995 by eliminating the need to hire private attorneys to handle conflict of interest cases.¹⁴⁸ But even with three units, the caseload at the Office of the Public Defender has become nearly unbearable.¹⁴⁹ Carl Holmes, Orange County's Chief Deputy Public Defender, stated that backlogs are growing in cases involving the death penalty and repeat felons facing twenty-five years to life in prison under the state's three-strikes law.¹⁵⁰ The Office of the Public Defender is losing attorneys—about six so far—and efforts to attract experienced replacements to handle complicated cases is almost impossible due to the perceived insecure future with Orange County as the employer.¹⁵¹ The Orange County Office of the Public Defender is handling its heaviest caseload ever with virtually no increase in full-time personnel.¹⁵² Currently, the lawyers in all three offices are working sixty-hour weeks without overtime—many working on weekends.¹⁵³ Holmes believes that without additional lawyers, the agencies will not be able to maintain that pace.¹⁵⁴

The Associate Defender's Office, with a staff of five lawyers, represents indigent defendants when the County's two other criminal-defense offices declare conflicts of interest.¹⁵⁵ Holmes stated that his office may have to close the Associate Defender's Office¹⁵⁶ and return to the appointment of private counsel for conflict cases because the secondary Alternate Defender's Office and the tertiary Associate Defender's Office do not have enough seasoned attorneys to handle their cumbersome caseloads.¹⁵⁷ Holmes believes that a viable

148. *Public Defenders' Rising Burden*, *supra* note 146, at B8; Cekola, *supra* note 128, at B1.

149. *Public Defenders' Rising Burden*, *supra* note 146, at B8.

150. Cekola, *supra* note 128, at B8.

151. *Id.*

152. *Id.* Total cases for 1995-1996: 75,000; cases per full-time lawyer for 1995-1996: 610. *Id.*

153. Stuart Pfeifer, *Defender's office: Spinoffs a bargain*, ORANGE COUNTY REG., June 24, 1995, (Metro) at 8.

154. *Id.*

155. Stuart Pfeifer, *Silver lining for private lawyers?*, ORANGE COUNTY REG., Aug. 16, 1995, (Metro) at 4.

156. *Id.*

157. *Id.*

solution to the backlog of the Office of the Public Defender is to remove 1000 or so cases from its tertiary office to private attorneys.¹⁵⁸

In addition, Orange County faces problems with its investigators assigned to the Office of the Public Defender. Orange County failed to pay forty-four public defense investigators overtime for the period between September 1992 to September 1994.¹⁵⁹ These investigators put in an average of forty-seven hours of work per week during the two years without receiving overtime pay or compensatory vacation time.¹⁶⁰

Currently, the Orange County Office of the Public Defender is hopelessly backlogged with the addition of the cases previously handled by private attorneys. It operates with funding and personnel that is inadequate to meet the needs of its clients. The circumstances under which the Office of the Public Defender operates fall below the objective reasonable standard for effectiveness, as measured by assistance rendered by private as well as public defense attorneys. The lack of funds and resources, including investigative support, removes the fundamental guarantee of "confrontation between adversaries" necessary to ensure a fair trial. This inadequacy is a failure of adversarial testing of the same magnitude as denial of the right to cross-examine a witness, such that a showing of actual prejudice to an individual indigent defendant is unjustified. Justice Mosk's standard for ineffective assistance of counsel in *In re Avena* is intuitively and analytically correct when applied to the Orange County Office of the Public Defender as a whole. The failure of adversarial testing from the entire institution of the Office of the Public Defender results from "state"—Orange County Board of Supervisors—interference. It potentially affects all indigent defendants represented by the Office of the Public Defender, and thus, an individualized showing of prejudice flowing from the defender's action in each case is an unjustifiably duplicative and excessive cost to be borne by a single indigent defendant. As a matter of judicial economy, Justice Mosk's standard is more logical and reasonable than that set forth by the majority.

158. Rene Lynch, *Judges, Lawyers Argue Over Defense of Poor*, L.A. TIMES (Orange County ed.), July 22, 1995, at A17.

159. Don Lee, *Labor Dept. to Sue O.C. on Behalf of 44 Workers*, L.A. TIMES (Orange County ed.), Nov. 21, 1995, at D1.

160. *Id.* at D9.

This Comment urges that a presumption of ineffective assistance of counsel be attached to the legal assistance rendered by the Office of the Public Defender without inquiry into the actual conduct of the trial. Under the current budget and structure, "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small' that the cost of litigating the issue is unjustified."¹⁶¹ This is exactly the type of "constructive" denial of assistance of counsel envisioned by the United States Supreme Court in *Cronic* and articulated by Justice Mosk in *In re Avena*.

Other jurisdictions have applied a similar analysis to that of Justice Mosk in reviewing their respective public defender programs and found them to be sadly inadequate. Though they do not have any precedential value in California, it is imperative that California follow these jurisdictions' leads to scrutinize the Orange County Office of the Public Defender as a whole. California should abandon the costly and protracted process of individualized review of indigent defendants' claims of ineffective assistance of counsel.

B. Other States

1. Louisiana

One such analysis was applied in the Orleans Parish Criminal District Court Section E, in *State v. Peart*.¹⁶² In Louisiana, the legislature enacted statutes to establish an indigent defender system, under which Indigent Defender Boards were created to determine the method of indigent defense operations in each judicial district.¹⁶³ The Boards choose among public defender, contract attorney, and assigned counsel models or may use a combination of these models.¹⁶⁴ The New Orleans Board created the Orleans Indigent Defender Program (OIDP) which operates under a public defender model.¹⁶⁵ The trial court appointed Rick Teissier to defend Peart against charges of armed robbery, aggravated rape, aggravated burglary, and attempted armed robbery.¹⁶⁶ Teissier, in turn, filed a

161. *In re Avena*, 12 Cal. 4th 694, 726-27, 909 P.2d 1017, 1036, 49 Cal. Rptr. 2d 413, 432 (1996) (quoting *Cronic*, 466 U.S. at 659-60).

162. 621 So. 2d 780 (La. 1993).

163. *Id.* at 783.

164. *Id.* at 784 n.1.

165. *Id.* at 784.

166. *Id.*

Motion for Relief to Provide Constitutionally Mandated Protection and Resources, claiming that Peart was denied his right to effective assistance of counsel.¹⁶⁷

At the time Teissier was appointed to Peart's case, Teissier was one of only two ODP attorneys assigned to the district and was handling seventy active felony cases.¹⁶⁸ Teissier's clients were routinely incarcerated thirty to seventy days before he met with them, and in the period between January 1 and August 1, 1991, Teissier represented 418 defendants—of which he entered 130 guilty pleas at arraignment.¹⁶⁹ The ODP had only enough funds to hire three investigators and were responsible for rendering assistance in more than 7000 cases per year in the ten sections of Criminal District Court.¹⁷⁰ In routine cases Teissier received no investigative support and no funds for expert witnesses.¹⁷¹

The Louisiana Supreme Court held that since there is no precise definition of reasonably effective assistance of counsel, any inquiry into the effectiveness of counsel must necessarily be individualized and fact driven.¹⁷² However, the court determined that it must make some global findings about the state of indigent defense to aid the trial judge reviewing a defendant's pretrial claim that he is receiving ineffective assistance of counsel.¹⁷³ The court interpreted reasonably effective assistance of counsel to mean that the lawyer not only possess skill and knowledge, but also that the lawyer has the time and the resources to apply the skill and knowledge to the task of defending each individual client.¹⁷⁴ The court contrasted the conditions set forth above against those of the American Bar Association Standards for Criminal Justice and found that the conditions routinely violated the standards on workload by interfering with the rendering of quality representation, initial provision of counsel, and investigation—defense counsel should conduct a prompt

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 788.

173. *Id.* The court held that when the trial court has sufficient information before trial, the judge can inquire into any ineffective assistance claims where possible to further the interest of judicial economy, and defendant need not wait until appeal to bring up the claim. *Id.* at 787. Further, it is immaterial that the ineffective assistance rendered may or may not affect the outcome of the trial to the defendant's detriment. *Id.*

174. *Id.* at 789.

investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case.¹⁷⁵ As a result, the court found the indigent defendants in Section E to be provided with counsel who could perform only pro forma, and who were so overburdened as to be effectively unqualified.¹⁷⁶

The court, to avoid more intrusive and specific measures in remedying this defect, held that a rebuttable presumption arose that indigents in Section E were not receiving assistance of counsel sufficiently effective to meet constitutionally required standards.¹⁷⁷ This presumption may be rebuttable as evidenced by the fact that the trial court in *Peart* found Peart himself had received effective assistance.¹⁷⁸ It does demonstrate, however, that the public defender must select certain clients to whom they give more attention than others.¹⁷⁹

This is essentially the situation prevailing at this time in the Orange County Office of the Public Defender. The lack of resources, investigative support, and expert witnesses; the excessive caseload per attorney; and the need to "pick and choose" the clients to whom a public defender will give more attention than others mirror those inadequacies found presumptively unconstitutional in *Peart*. The public defenders in Orange County can serve as no more than pro forma counsel and are so overburdened as to be effectively unqualified. The public defenders, although they may possess the skill and knowledge, lack the time and resources to apply their skills to adequately defend their clients. Therefore, a rebuttable presumption should arise that indigent defendants represented by the Orange County Office of the Public Defender are not receiving assistance of counsel sufficiently effective to meet constitutionally required standards.

2. Arkansas and Kansas

Likewise, in *Arnold v. Kemp*¹⁸⁰ and *State v. Smith*,¹⁸¹ two state supreme courts addressed the issue of inadequate funding for the

175. *Id.* (citing AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE 4-1.3(e), 4-4.1, 5-6.1 (1991)).

176. *Id.*

177. *Id.* at 791.

178. *Id.* at 785 n.4.

179. *Id.*

180. 813 S.W.2d 770 (Ark. 1991).

181. 747 P.2d 816 (Kan. 1987).

defense of indigents. Though the cases specifically dealt with whether the fee limitations for court-appointed indigent defense attorneys violated their right to due process and just compensation,¹⁸² they are significant because of their holdings regarding the standard for sufficient funding for indigent defense. In essence, both cases determined that attorneys make their living through their services and “[w]hen attorneys’ services are conscripted for the public good, such a taking is akin to the taking of food or clothing from a merchant or the taking of services from any other professional for the public good.”¹⁸³ The cases also noted that when attorneys are required to donate out-of-pocket funds to subsidize a defense for an indigent defendant, the attorneys are deprived of property in the form of money.¹⁸⁴ Thus the attorneys’ services are property subject to Fifth Amendment protection.¹⁸⁵

Though these cases deal with court-appointed attorneys through the private sector, the courts set forth an inescapable standard. Indigent defense attorneys must be provided with adequate funding for expenses that are plainly necessary for defendants to have their day in court and that permit counsel to fairly and adequately present the defendant’s case.¹⁸⁶

3. Florida

Florida similarly reviewed the impact of inadequate funding on indigent appellants.¹⁸⁷ The state of Florida provides defendants with the statutory right to appeal their judgments and sentences.¹⁸⁸ Because *Douglas v. California*¹⁸⁹ held that indigent appellants are entitled to the same ability to obtain meaningful appellate review as wealthy appellants, the Florida Supreme Court in *In re Order* addressed whether this constitutional mandate is met by the Florida indigent defender scheme.¹⁹⁰

182. *Arnold*, 813 S.W.2d at 771; *Smith*, 747 P.2d at 821.

183. *Arnold*, 813 S.W.2d at 774 (quoting *Smith*, 747 P.2d at 842).

184. *Id.* (quoting *Smith*, 747 P.2d at 842).

185. *Id.* (quoting *Smith*, 747 P.2d at 842).

186. *Id.* at 777; *Smith*, 747 P.2d at 836.

187. *In re Order* on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130 (Fla. 1990).

188. FLA. STAT. ANN. § 924.06 (West 1989 & Supp. 1996).

189. 372 U.S. 353 (1963).

190. *Order*, 561 So. 2d at 1131.

In the Second District of Florida, due to the tremendous backlog of indigent appeals, the briefs of nonindigents were being filed at least a year sooner than those of indigents represented by the public defender.¹⁹¹ The court held that the lengthy delay in filing initial briefs in appeals by indigents is a clear violation of the indigent state defendant's constitutional right to effective assistance of counsel on appeal.¹⁹² The court determined the source of this problem as the "woefully inadequate funding of the public defenders' offices."¹⁹³ Though this case dealt with appellate review, the court acknowledged that the problem of underfunding affects both trial and appellate caseloads.¹⁹⁴

With a backlog of cases, the public defender must choose which of the appellants' appeals to pursue according to the severity of their sentences. Such excessive caseloads forcing the public defender to choose between the rights of the various indigent criminal defendants invariably creates a conflict of interest.¹⁹⁵ The court reiterated the lower court's holding that "[t]he rights of defendants in criminal proceedings brought by the state cannot be subjected to the fate of choice no matter how rational that choice may be because of the circumstances of the situation."¹⁹⁶

The court held that where the "backlog of cases in the public defender's office is so excessive that there is no possible way [the attorney] can timely handle those cases," the attorney should move the court to withdraw, and the court should appoint other private counsel to handle such "conflict of interest" cases.¹⁹⁷ The court specifically held that this procedure is to be applied prospectively to both trial and appeal cases.¹⁹⁸ However, for those cases which are currently stuck in the enormous backlog of appellate cases awaiting briefs, the court recommended the "massive employment of the private sector bar on a 'one-shot' basis"—the funding of such emergency measure to be determined by the legislature.¹⁹⁹

191. *Id.*

192. *Id.* at 1131-32 (citation omitted).

193. *Id.* at 1132.

194. *Id.*

195. *Id.* at 1135.

196. *Id.* (quoting *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender*, Nos. 74574, 74580, 74629, 74630 & 74631, slip op. at 3 (Fla. Dist. Ct. App. May 12, 1989)).

197. *Id.* at 1138.

198. *Id.*

199. *Id.* at 1138-39.

Under the standards in *Arnold, Smith*, and *In re Order*, the Orange County Office of the Public Defender yet again falls short of the constitutional mandate for effective assistance of counsel. All three cases emphasized the need for adequate funding of expenses as are plainly necessary for the defendants to have their day in court and for counsels to adequately and fairly present the defendants' cases. This includes adequate funding for investigation and expert witnesses. Equally important is adequate funding of the public defender's office to eliminate or reduce the backlog of cases so that the defender is not forced to choose between the rights of the various indigent defendants. The Orange County Office of the Public Defender is unable to meet these requirements because of the inadequate funding of its offices. Inadequate resources and staff make it impossible for public defenders in Orange County to meet the overarching duties to advocate the defendant's cause and to consult with the defendant on important decisions and developments in the course of the prosecution, deemed so important by the Supreme Court. Consequently, the Orange County Office of the Public Defender should be determined unconstitutional.

VI. THE IMPACT OF UNDERFUNDING ON PUBLIC DEFENDER PROGRAMS—A PUBLIC POLICY ARGUMENT

The underfunding problem of public defender programs is sadly not confined to the Orange County district. Reductions in funding for indigent services by bankrupt or financially strapped municipalities are exceedingly prevalent in today's depressed economy. With the focus on fighting crime, more and more funding is diverted to hiring more police officers and to district attorney's offices, with the resulting adverse effect on the public defender's programs.²⁰⁰ Politicians receive "Brownie points" for making and enforcing laws and for

200. The nationwide movement to enact three-strikes legislation reflects this sentiment. The legislators and the public support "law and order" policies because they appear to provide a simple solution to the pressing problem of increasing crime. Turner et al., *supra* note 8, at 33. However, statistics show that the number of violent crimes from 1976 to 1991 has actually decreased from 3260 to 3130 per 100,000 victimizations, as have the number of property crimes, such as burglary—from 8890 to 5310. *Id.* at 16. The total number of crimes increased only nominally from 5287 to 5898 per 100,000 during the same period. *Id.* In addition, research suggests that habitual-offender laws have done little to achieve a meaningful reduction in crime. *Id.* at 33.

adding more police, but none for funding the defense.²⁰¹ This imbalance simultaneously slows down the system and fuels appeals based upon the argument of ineffective assistance of counsel.²⁰²

Several states have undergone reductions in their public defender's budgets in the past year. In Cayuga County, New York, the number of criminal and state prisoner parole hearing cases assigned to lawyers at taxpayer expense increased by 16% in 1995.²⁰³ In addition, the costs of assigned counsel programs rose by 18%.²⁰⁴ The public defender's office provided services to indigent defendants at a cost of \$269,438 in 1995.²⁰⁵ Yet, even though the number of cases handled by the public defender's office increased from 1005 in 1994 to 1166 in 1995, the 1996 budget allocates only \$252,271 for indigent defense.²⁰⁶ The courts' answer to meeting the new budget crunch is to more closely scrutinize defendants claiming indigent status.²⁰⁷

In Arizona, counties hope to receive relief from a bill proposed by Senate Judiciary Chair Patti Noland which would increase funds to public defender's offices.²⁰⁸ The Pima County Deputy Administrator noted that the cost of indigent defense has risen 250% in the past decade.²⁰⁹ On average, all fifteen counties in Arizona have increased funding for indigent defense by 292% over the last ten years but are still unable to meet the burden.²¹⁰ The financial burden stems partly from the fact that public defenders must pay for their own experts whereas the prosecutors are provided free medical experts by the county.²¹¹ The trainer for the Maricopa County Public Defender's Office noted that because the defenders are overworked and underpaid, errors occur in cases.²¹² The public

201. Rhonda Bodfield, *Help sought for public defenders*, TUCSON CITIZEN, Jan. 4, 1996, at 1C.

202. *Id.*

203. David L. Shaw, *Request for Lawyers Could Get More Scrutiny: The Director of the County Assigned Counsel Program Asks for the Cooperation of Judges*, SYRACUSE NEWSPAPERS, Feb. 2, 1996, at B1.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. Bodfield, *supra* note 201, at 1C, 3C.

209. *Id.* at 1C.

210. *Id.*

211. *Id.* The public defender's office spends up to \$10,000 to hire an expert to conduct DNA tests. *Id.*

212. *Id.*

defenders have such burdensome caseloads that it sometimes takes two or three weeks to see the person they are assigned to defend, and the defender will go to court immediately after spending two months on another trial without having time to research the latest case.²¹³

In addition, the Marion County Public Defender Agency, in Indianapolis, barely escaped shutting its doors recently when the City-County Council voted to give the agency an extra \$482,000 to see its budget through 1995.²¹⁴ The agency saw a 17% increase in the number of indigents and a 41% increase in trials in 1995.²¹⁵ The additional funds were requested to hire investigators and expert witnesses, and to pay for records and other documents,²¹⁶ as well as to prevent cuts in staff.²¹⁷ While the agency was awaiting approval of its request for additional funds, the agency instituted a thirty-day moratorium on ordering trial transcripts.²¹⁸ The agency was further prohibited from accepting collect calls from prisoners in jail.²¹⁹

The public defender agency in Marion County had a budget of \$4.4 million but requested and received an additional \$116,000 earlier in the year.²²⁰ The prosecutor's office has a budget of \$5.2 million.²²¹ Marion County Prosecutor Scott Newman opposed the budget increase claiming that the county is "spending more money on crooks than on crime victims."²²²

This is a common response to any increase in budgets for indigent defense. Approval for the additional \$482,000 in Marion County came only after Republicans expressed strong reservations about the increased costs of defending people described as "so-called indigents."²²³ There is a prevailing view that deems it "[un]fair for

213. *Id.*

214. Gerry Lanosga, *Council OKs extra \$482,000 for Public Defender Agency*, INDIANAPOLIS STAR, Oct. 31, 1995, at E1.

215. *Id.* at E2.

216. *Id.*; *Murder case on hold; defense lacks funds*, COURIER-J. (Indiana), Oct. 22, 1995, at B5.

217. *Marion County's public defender may have to cut staff*, COURIER-J. (Indiana), Sept. 19, 1995, at B2.

218. *Id.*

219. *Id.*

220. Kathleen M. Johnston, *Public defender agency running out of funds*, INDIANAPOLIS STAR, Sept. 18, 1995, at A1, A2.

221. Janet E. Williams, *Public defender has too much money and shouldn't get more, Newman says*, INDIANAPOLIS STAR, July 3, 1995, at A1, A2.

222. *Id.* at A1.

223. Lanosga, *supra* note 214, at E1 (quoting William Dowden, Chairman of the City-County Council's public safety and criminal justice committee).

[the county] to ask law-abiding citizens to carry the financial burdens of the *lawless . . .*”²²⁴ This view originates from the erroneous general public belief that those who are arrested and charged with a crime must be guilty—if not of the crime for which they are charged, then of some other crime. But fundamental to the viability of the criminal-justice system is the ideal that all persons are innocent until *proven guilty*.²²⁵ Each person must be provided with assistance reasonably effective enough to allow the adversarial system to seek and find the truth. The goal of the Constitution is *not* to convict as many defendants as possible, but rather to convict, after a fair and equitable trial, those persons found guilty of a crime. The constitutional guarantees, enumerated and implied, do not differentiate between the rich and the poor. The Fourteenth Amendment of the U.S. Constitution specifically provides that “[a]ll persons born or naturalized in the United States” shall be accorded its protections.²²⁶ It does not accord less protection for the poor. Any person who faces the risk of losing life, liberty, or property must be accorded the full protections of the Constitution.²²⁷ This nation is founded upon the often tested and—one hopes by now—the proven principle that “all [persons] are created equal,”²²⁸ and as such are entitled to the same protections under its laws.

Thus, the failure to provide adequate funding for the defense of the nation’s poor can, in the end, only harm the society as a whole. Any diminution in the rights of the indigent results in a proportional diminution and erosion of the rights of all persons. No one benefits if one side has more resources than the other. “The criminal justice system doesn’t move any faster than the slowest-moving party. [Prosecutors and public defenders] need to be able to run at the same speed.”²²⁹ What does it mean to convict all those accused if the cost of such convictions is the loss of individual rights and erroneous punishment of innocents? The indigent defendants must be entitled to the same *minimal* standards of effective assistance of counsel as

224. *Id.* (emphasis added) (quoting Republican Ron Franklin).

225. See CALIFORNIA JURY INSTRUCTIONS: CRIMINAL (CALJIC) No. 2.90 (5th ed. Supp. 1995) (emphasis added).

226. U.S. CONST. amend. XIV, § 1.

227. *Id.*

228. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

229. Williams, *supra* note 221, at A2 (quoting Jon M. Bailey, Chairman of the Marion County Public Defender Board).

fee-paying defendants.²³⁰ The American Bar Association agrees. John J. Curtin, Jr., of the American Bar Association, recently stated his concerns before Congress that indigent defendants should receive at least the same quality of representation afforded the fee-paying client.²³¹

Reduction of crime is a goal which most Americans can agree must be pursued diligently and zealously. However, this goal can not and must not be obtained by depriving the poor of their life or liberty without due process of law. A victory in the fight against crime can only ring hollow if society must sacrifice its poor to achieve it.

VII. CONCLUSION

In light of the above analysis, it is clear that the rights of indigent defendants in Orange County, as those of indigents around the country, are in serious jeopardy. The right to the effective assistance of counsel is one of the most precious rights that citizens of the United States possess. The Fourteenth Amendment guarantees to all persons born or naturalized in the United States the right to equal protection of its laws.²³² This noble and honorable ideal becomes a mere sham in a system which determines people's innocence on the basis of their wealth.

As an emergency measure, the Board of Supervisors for the County of Orange must immediately appropriate funding for the massive employment of the private sector bar on a "one-shot" basis to clear the backlog of indigent cases which the combined Orange County Office of the Public Defenders are unable to handle.²³³ Carl Holmes, Orange County's Chief Deputy Public Defender, stated that the removal of approximately 1000 cases from the combined public defender offices to private attorneys can eliminate the current backlog.²³⁴

230. This Comment does not suggest that indigent defendants are entitled to the same type of defense as O.J. Simpson, or others who are able to afford the best attorneys that money can buy. It merely suggests that there is a minimum standard of effective assistance of counsel to which all defendants are entitled, whether they are indigent or fee-paying.

231. *The Federal Courts Improvement Act: Hearings on S. 1101 Before the Subcomm. on Administrative Oversight and Courts of the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995) (statement of John J. Curtin, Jr., A.B.A.), available in WESTLAW, ALLNEWS database (quoting John J. Curtin, Jr.).

232. U.S. CONST. amend. XIV, § 1.

233. See *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender*, 561 So. 2d 1130, 1138 (Fla. 1990).

234. Lynch, *supra* note 158, at A17; see *supra* part V.A.2.

One such measure has already been proposed. State Senator Quentin L. Kopp (I-San Francisco) has introduced a bill in the state senate to allow Orange County judges to bypass the Office of the Public Defender and appoint private attorneys for a price to be determined by the judges.²³⁵ The bill proposed an amendment to California Penal Code section 987.2 which would allow the judges to, "[i]n the interest of justice, . . . depart from that portion of the procedure requiring appointment of county-contracted attorney after making a finding of good cause and stating the reasons therefor on the record."²³⁶ It is the hope that this bill will eliminate the current problems with backlog of cases in the Office of the Public Defender by giving the judges the authority to bypass it when warranted. Though this bill may prospectively assist the Office of the Public Defender with its excessive caseload, it faces opposition because of the concerns that the bill could lead judges to favor certain attorneys.²³⁷ Though he concurs with the method, Carl Holmes opposes Kopp's bill because of its potential for favoritism.²³⁸ It is recommended that such legislative action can alleviate the caseload that plagues the new Orange County public defender program. However, any law which allows for appointment of private counsel when needed must set forth some guidelines to avoid any arbitrary and capricious selection of attorneys.

This Comment also proposes that Orange County undertake an extensive investigation into the constitutionality of the public defender's program and remedy whatever defects exist through additional funding. Until this action is taken by Orange County, this Comment urges the California Supreme Court to find a rebuttable presumption of unconstitutionality in the Orange County public defender's program which must be overcome by the prosecution. These recommendations are further urged to be applied to public defender's programs throughout the nation to ensure the protection of the rights of all persons, rich or poor.

Sonia Y. Lee

235. Lynch, *supra* note 158, at A17; *Public Defenders' Rising Burden*, *supra* note 146, at B8.

236. CALIFORNIA S.B. 16, 1995-1996 2d Extraordinary Sess. 3 (1995).

237. Lynch, *supra* note 158, at A17; *Public Defenders' Rising Burden*, *supra* note 146, at B8.

238. Lynch, *supra* note 158, at A17.