

GIDEON'S PROMISE: CAN THE MICHIGAN INDIGENT DEFENSE COMMISSION ACT FIX THE STATE'S BROKEN INDIGENT DEFENSE DELIVERY SYSTEM?

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I. INTRODUCTION

The United States Constitution is supposed to provide equal protection under the laws.¹ It has become increasingly clear in today's society, however, that constitutional protections are guaranteed only for those who can (literally) afford it.² Wealth should not buy constitutional protection; instead, the government should provide the rights afforded by the Constitution to all citizens, regardless of income.

The Sixth Amendment provides the right to the assistance of counsel in criminal prosecutions.³ The Supreme Court has interpreted the Sixth Amendment to provide for the right to *effective* counsel, or what some

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1. U.S. CONST. amend. XIV, § 1.

2. Due to structural and institutional problems that go along with the way in which indigent criminal defense systems are operated, criminal defendants who can afford private representation are much more likely to receive representation that meets the constitutionally required minimum standard than indigent defendants who receive appointed counsel. *See infra* Part II; *see also infra* note 5.

3. U.S. CONST. amend. VI.

today call "*Gideon's Promise*."⁴ The ability to be represented by effective counsel, however, is often dependent on a person's wealth.⁵ This Note examines the right to effective counsel in the State of Michigan and whether the state's indigent defense delivery system provides representation of the quality guaranteed by *Gideon's Promise*.

In 2013, the State of Michigan passed the Michigan Indigent Defense Commission Act ("MIDC Act")⁶ in an effort to reform the state's indigent defense delivery system. This Note will examine the MIDC Act along with the political context surrounding its passage. The goal of this Note is to determine whether the MIDC Act will be successful in providing the right to the effective assistance of counsel in the State of Michigan. The Sixth Amendment should provide representation to all persons equally, regardless of the amount of money they have.

The background section of this Note begins by defining the right to "effective" counsel, an idea commonly referred to as *Gideon's Promise*.⁷ Next, Michigan's broken indigent defense delivery system is discussed, followed by discussion of the political context surrounding the passage of the MIDC Act.⁸

The analysis section of this Note begins by exploring the language of the MIDC Act and whether it allows for the establishment of "minimum standards" that would provide for effective counsel according to the promise made by the Supreme Court in *Gideon v. Wainwright*.⁹ Section B explores whether the MIDC Act provides for any enforcement mechanisms that can be turned to in the event that the counties do not comply with the standards set by the MIDC.¹⁰ Finally, section C explores whether the MIDC Act can fulfill *Gideon's Promise* of effective representation.¹¹ This Note concludes that the mechanisms provided in the MIDC Act will be inadequate to properly address the problem that it

4. See, e.g., Andrew Cohen, *How Americans Lost the Right to Counsel, 50 Years After 'Gideon'*, BRENNAN CENTER FOR JUST., (Mar. 13, 2013), <https://www.brennancenter.org/analysis/how-americans-lost-right-counsel-50-years-after-gideon>.

5. See Leroy D. Clark, *All Defendants, Rich and Poor, Should Get Appointed Counsel in Criminal Cases: The Route to True Equal Justice*, 81 MARQ. L. REV. 47, 48–50 (1997).

6. Michigan Indigent Defense Commission Act, MICH. COMP. LAWS ANN. §§ 780.981–780.1003 (West 2015).

7. See *infra* Part II.A.

8. See *infra* Part II.B.

9. *Gideon v. Wainwright*, 372 U.S. 335 (1963); see *infra* Part III.A.

10. See *infra* Part III.B.

11. See *infra* Part III.C.

was meant to solve, that is, the problem of disparity in the effective representation of indigent defendants.¹²

II. BACKGROUND

A. *Gideon's Broken Promise*

In 1963, the Supreme Court decided *Gideon v. Wainwright*.¹³ Clarence Earl Gideon had been charged in Florida state court with the crime of breaking and entering with intent to commit a misdemeanor.¹⁴ Appearing in court without funds or a lawyer, Mr. Gideon told the judge that the United States Supreme Court guaranteed him the right to appointment of counsel.¹⁵ After being refused the appointment of counsel, Mr. Gideon “conducted his defense about as well as could be expected from a layman.”¹⁶ Although he was convicted in state court and sentenced to serve five years in prison,¹⁷ Mr. Gideon argued on appeal that the Sixth Amendment right to assistance of counsel applied to indigent defendants in state courts.¹⁸

The U.S. Supreme Court ruled that Mr. Gideon was correct and reversed his conviction.¹⁹ The Court decided that in cases where the defendant is too poor to hire his own lawyer, there can be no assurance of a fair trial.²⁰ *Gideon* established that the assistance of counsel was guaranteed by the Sixth Amendment and was necessary to ensure the

12. See *infra* Part IV.

13. *Gideon*, 372 U.S. 335 (1963).

14. *Id.* at 336.

15. *Id.* at 337. The following exchange took place between the trial court and Mr. Gideon:

The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under 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. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.

The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel.

Id.

Today it is common knowledge that every citizen must be afforded counsel. This Note asks, in a system where counsel is not “effective,” can it really be said that indigent defendants get the representation that *Gideon* had in mind?

16. *Id.*

17. *Id.*

18. *Id.* at 340.

19. *Id.* at 345.

20. *Id.* at 344.

fundamental rights of life and liberty.²¹ As a fundamental right, the assistance of counsel was also incorporated to the states.²²

It is still clear today that *Gideon* established counsel must be provided for indigent defendants—persons who are too poor to hire a lawyer.²³ The Court's decision in *Gideon* has infused hope into the minds of public defense and civil rights advocates that it would be possible to reform the nation's indigent defense delivery systems, an idea that has been referred to as "*Gideon's Promise*."²⁴ *Gideon's Promise* is, basically, the idea that indigent defendants will be given adequate representation in criminal cases so that a fair trial is ensured.²⁵ For at least the past twenty years however, the same advocates have said that *Gideon's Promise* remains unfulfilled.²⁶

Many criminal cases still see inadequate representation.²⁷ This problem persists partially because public defenders do not have the time, resources, or the motivation to provide effective representation.²⁸ Indigent defendants often "plead guilty, even if they are innocent, without really understanding their legal rights or what is occurring."²⁹ Courts may not recognize that an indigent defendant is mentally ill or that the defendant does not understand English.³⁰ But all of the blame for

21. *Id.* at 343 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)).

22. *Id.* at 343 (quoting *Grosjean v. American Press Co.*, 297 U.S. 233, 243-44 (1936)).

23. *Id.* at 344.

24. See, e.g., *The Crisis*, GIDEON'S PROMISE, <http://gideonspromise.org/the-crisis/> (last visited Apr. 2, 2015); AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf; *Gideon's Promise, Still Unkept*, N.Y. TIMES (Mar. 18, 1993), <http://www.nytimes.com/1993/03/18/opinion/gideon-s-promise-still-unkept.html>.

25. See, e.g., *The Crisis*, *supra* note 24; AMERICAN BAR ASSOCIATION, *supra* note 24, at ii; *Gideon's Promise, Still Unkept*, *supra* note 24.

26. See, e.g., *The Crisis*, *supra* note 24 ("Fifty years later the promise is unfulfilled as public defenders are pressured to process human beings through a system that merely pays lip service to the hallowed right to counsel."); AMERICAN BAR ASSOCIATION, *supra* note 24, at v ("Forty years after *Gideon v. Wainwright*, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.").

27. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1841 (1994) ("Inadequate legal representation does not occur in just a few capital cases. It is pervasive in those jurisdictions which account for most of the death sentences.").

28. AMERICAN BAR ASSOCIATION, *supra* note 24, at iv.

29. *Id.*

30. *Id.*

these deficiencies cannot be placed squarely on the backs of defense attorneys.³¹ At the heart of the problem is the lack of funding for public defense services.³²

The State of Michigan is no exception when it comes to breaking *Gideon's Promise*.³³ Michigan has failed to provide adequate resources—and as it necessarily follows, failed to provide adequate representation—to its indigent defendants. But before addressing the specifics of the Michigan system, it is important to consider an oft-cited counter-argument to the funding problem—namely, that the problem of sub-par representation for indigent defendants is a result of shoddy criminal defense work.³⁴

Indigent defendants who receive constitutionally deficient counsel, or “ineffective assistance of counsel,” were afforded a remedy by the Supreme Court in *Strickland v. Washington*.³⁵ The Court in *Strickland* recognized *Gideon's Promise* that every indigent defendant accused of a crime has the right to appointed counsel.³⁶ More importantly, *Strickland* gave individual defendants the ability to make ineffective assistance claims as violations of the Sixth Amendment right to counsel.³⁷ In order to show the assistance was ineffective, a defendant must prove that his lawyer's performance was deficient and that the deficient performance

31. See James M. Anderson & Paul Heaton, *Measuring the Effect of Defense Counsel on Homicide Case Outcomes*, NAT'L CRIM. JUS. REF. SERV. (Dec. 2012), http://media.mlive.com/chronicle/news_impact/other/PD%20Study%20-%20DOJ%20study%20Phil%20PD%202013%20full%20report.pdf. The authors of this study make the following claim:

Under nearly every normative theory of punishment or criminal responsibility, the characteristics of the offender's defense counsel should make no difference in the outcome of the process. Whether or not a defendant is found guilty and the extent to which the offender is sentenced to be punished should only depend upon facts about the offender and perhaps the possibility and need of deterring a particular crime. The effect of the individual lawyer is pure “noise.”

Id. at 3. Based on statistics the authors found in their study of the Public Defender system in Philadelphia, they found that:

Compared to private appointed counsel, public defenders reduce the murder conviction rate by 19%. They reduce the probability that their clients receive a life sentence by 62%. Public defenders reduce overall expected time served in prison by 24%. This suggests that defense counsel makes an enormous difference in the outcome of cases.

Id.

32. See AMERICAN BAR ASSOCIATION, *supra* note 24.

33. See *infra* text accompanying notes 44–67.

34. See *infra* notes 35–39 and accompanying text.

35. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

36. *Id.* at 686.

37. *Id.*

actually prejudiced the defendant.³⁸ The remedy for ineffective assistance of counsel is automatic reversal of the defendant's conviction.³⁹ Today, ineffective assistance of counsel claims are still used to remedy an attorney's deficient performance, but many limitations have been placed on how "effective" counsel for indigent defendants must be before the assistance will be recognized as "deficient." Under *Strickland*, the focus is on deficient performance of defense counsel; by contrast, the inadequate funding argument focuses on *the structural reasons behind why* any given lawyer is found to have performed "deficiently."

Inadequate funding for public defense has led to a plethora of problems related to the delivery of adequate representation for indigent defendants. It is nearly impossible for a public defender's office to do everything required of them under their current budgets: to find and hire an appropriate amount of defense attorneys, to pay for the training of those defense attorneys, to pay for expert witnesses, and to pay for investigative services.⁴⁰ Probably because this system has become the status quo, "judges sometimes fail to honor the independence of counsel and routinely accept legal representation in their courtrooms that is patently inadequate."⁴¹ The purpose of bringing a *Strickland* ineffective assistance of counsel claim is to reverse the defendant's conviction if the defense attorney's deficient performance prejudiced the defendant. Because *Strickland* focuses on deficient performance, ineffective assistance of counsel claims cannot serve their purpose when judges openly accept "patently inadequate" representation.⁴²

Strickland gives indigent defendants a tool to use on a case-by-case basis, but *Gideon*'s promise cannot be fulfilled if indigent defendants are expected to rely solely on this post-hoc remedy. The problem, as this Note recognizes, is structural: the result of a society that favors prosecution and incarceration-based models of criminal justice on one hand, and equal protection of constitutionally guaranteed rights for the poor and rehabilitative models of criminal justice on the other.⁴³ This system has resulted in a structural failure to provide adequate funding for indigent defense services. *Strickland* alone cannot solve the structural

38. *Id.* at 687.

39. *Id.* at 713-14.

40. See AMERICAN BAR ASSOCIATION, *supra* note 24, at iv.

41. *Id.* at iv-v.

42. *Id.*

43. Consider, for example, the failure of most states to provide the same amount of resources to criminal defense as it does to prosecution and law enforcement. It is not an unreasonable inference to make, from this fact, that society favors aggressive prosecution as a quick-fix to criminality over strong criminal defense work that may result in more lenient sentences. See, e.g., Anderson, *supra* note 31.

problems associated with inadequate defense attorney performance. Because the problem of inadequate representation is so severe in Michigan, in 2013 the state passed the MIDC Act in an attempt to provide a solution.

B. Michigan's Inadequate Indigent Defense Delivery System

Prior to the passage of the MIDC Act in 2013,⁴⁴ there was no state-wide uniformity or consistency among Michigan's counties in the delivery of services to indigent defendants.⁴⁵ Each locality, normally a county, would choose how to provide representation to the local indigent population.⁴⁶ Systems ranged from contracts with private attorneys to county public defender offices.⁴⁷

However, Michigan's system also resulted in problems associated with delivering constitutionally adequate counsel to indigent defendants—problems that are illustrative of *Gideon's* broken promise. Michigan defense attorneys, overworked and lacking in resources, occasionally had to make clients wait in line across from the judge's chambers in order to discuss their cases in private in unisex bathrooms.⁴⁸ Because of the different standards among counties, there was no requirement that defense attorneys receive continuing training—for example, in the scientific developments of forensic evidence—outside of large urban areas.⁴⁹ Compared to county prosecutors, who themselves complained of being understaffed and overworked even with the investigative tools of law enforcement to complement their budgets, defense attorneys could not have been expected to provide adequate representation to indigent defendants.⁵⁰ But whether Michigan's old system provided constitutionally “effective assistance” was an issue that was overlooked or ignored by the courts, as judges routinely accepted

44. Michigan Indigent Defense Commission Act, MICH. COMP. LAWS ANN. §§ 780.981–780.1003 (West 2015).

45. See, e.g., John Hausman, *Playing Defense: Muskegon County's Much-Maligned Indigent Legal Defense System Headed for Scrap Heap*, MLIVE (May 10, 2013), http://www.mlive.com/news/muskegon/index.ssf/2013/05/muskegon_countys_indigent_defe.html.

46. *Id.*

47. For example, Washtenaw County funded their own Public Defender Office, while Muskegon County largely contracted criminal defense work to private attorneys. See *id.*

48. NAT'L LEGAL AID & DEFENDER ASS'N, A RACE TO THE BOTTOM, SPEED & SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS iv (June 2008), http://www.mynlada.org/michigan/michigan_report.pdf.

49. *Id.*

50. *Id.*

inadequate defense attorney representation in light of these systematic failures.⁵¹

In 2011, Governor Rick Snyder created a commission to explore the problems associated with Michigan's broken indigent defense system and to recommend cost-efficient ways to fix it.⁵² The legislation, later adopted in July 2013, is called the Michigan Indigent Defense Commission Act.⁵³ Proponents of *Gideon's Promise* hailed passage of the MIDC Act as a victory for indigent defendants.⁵⁴ However, as this Note will explain, the celebration may have been premature.

Aside from Governor Snyder's investigatory commission, at least two other events were instrumental in putting enough pressure on the state legislature to enable passage of the MIDC Act.⁵⁵ First, there was a 2008 report by the National Legal Aid and Defender Association called *A Race to the Bottom*.⁵⁶ Second, advocates of *Gideon's Promise* brought a class action lawsuit against the State of Michigan in a case called *Duncan v. State*.⁵⁷

A Race to the Bottom was published after a detailed, year-long, ten-county study of Michigan's indigent defense delivery system and involved a partnership with the State Bar of Michigan and the state legislature.⁵⁸ Spear-headed by Republican State Senator Alan Cropsey, the advisory group that composed the report consisted of a diverse cross-section of the criminal law community, including the Prosecuting Attorney's Association of Michigan, the State Bar of Michigan, the State Appellate Defender Office, and Michigan trial-court judges.⁵⁹ The report found undeniable evidence⁶⁰ that Michigan had failed "to provide

51. See *supra* text accompanying note 41 ("[J]udges sometimes fail to honor the independence of counsel and routinely accept legal representation in their courtrooms that is patently inadequate.").

52. Executive Order No. 2011-12, available at http://www.michigan.gov/documents/snyder/EO_2011-12_366247_7.pdf.

53. Michigan Indigent Defense Commission Act, MICH. COMP. LAWS ANN. §§ 780.981-780.1003 (West 2015).

54. See, e.g., Tanya Greene, *Victory! Michigan Turns the Corner on Public Defense Reform*, AM. CIV. LIBERTIES UNION (July 1, 2013, 4:55 PM), <https://www.aclu.org/blog/criminal-law-reform/victory-michigan-turns-corner-public-defense-reform>.

55. MICH. COMP. LAWS ANN. §§ 780.981-780.1003.

56. See NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 48.

57. *Duncan v. State*, 774 N.W.2d 89 (Mich. Ct. App. 2009), *appeal dismissed*, 832 N.W.2d 752 (Mich. 2013).

58. See NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 48, at vii.

59. *Id.* at i.

60. The conclusions in the report were reached after a year-long study conducted by the National Legal Aid & Defender Association, in cooperation with Republican State Senator Alan Cropsey. *Id.*

competent representation to those who cannot afford counsel in its criminal courts.”⁶¹

In 2009 the Michigan Court of Appeals decided *Duncan*, a class-action lawsuit against the State of Michigan and then-Governor Jennifer Granholm.⁶² The plaintiffs claimed that certain counties in Michigan were providing ineffective assistance of counsel “directly as a result of the court-appointed, indigent defense systems currently being employed by those counties.”⁶³ Despite the fact that the counties and circuit court chief judges were statutorily delegated the duty to provide representation for indigent defendants, the plaintiffs claimed that the Governor and the State were the ones ultimately responsible for the deficiencies in the indigent defense delivery system.⁶⁴ Specifically, the plaintiffs claimed the State was responsible by failing to provide adequate resources and by a lack of administrative oversight.⁶⁵ After four years of litigation, on July

“[T]o avoid criticism that either the best or worst systems were cherry-picked to skew the results . . . the advisory group was composed of representatives from the State Court Administrator’s Office, the Prosecuting Attorneys Association of Michigan, the State Bar of Michigan, the State Appellate Defender Office, the Criminal Defense Attorneys of Michigan, and trial-level judges.”

Id. at iv. The evidence was “undeniable” in the sense that the study was bi-partisan, and both liberal and conservative groups agreed with the conclusion that Michigan’s indigent defense system was sub-par. For example, it unearthed the practice of making indigents wait in line to speak in private with their appointed counsel in unisex bathrooms. *Id.*

61. *Id.* at i. It is likely that the NLADA report and the threat of Federal involvement in the *Duncan* lawsuit were significant motivators for Senator Cropsey in urging the Republican-controlled state legislature to pass the MIDC Act. *See, e.g.,* Rick Pluta, *Campaign to Urge Governor, Lawmakers to Fix Indigent Defense Counsel System*, MICH. PUB. RADIO NETWORK (Feb. 17, 2009), <http://wkar.org/post/campaign-urge-governor-lawmakers-fix-defense-counsel-system>. *Duncan* is the lawsuit referred to in the following excerpt from this news article:

State Senator Alan Cropsey says no one is denying the problem. But the state’s budget situation makes fixing it a low priority. He notes the report and the state of indigent defense are not mentioned in Governor Granholm’s latest budget proposal.

Both Cropsey and Granholm are attorneys.

“We’re in tough budget times and creating a new program is probably not going to be looked upon with a lot of favor by the Legislature, or by the governor, obviously,” said Cropsey.

The state is already facing a lawsuit in Michigan courts and Cropsey says he’s concerned a federal civil rights lawsuit could be in the works. He says that could lead to federal control of over the system, which could cost the state even more than fixing the problem on its own.

Id.

62. *Duncan*, 774 N.W.2d at 97.

63. *Id.*

64. *Id.*

65. *Id.*

15, 2013, *Duncan* was dismissed without prejudice at the stipulation of both parties.⁶⁶ It is no coincidence that the MIDC Act was enacted just two weeks earlier on July 1.⁶⁷

Aside from the pressure put on the state by *Duncan*, passage of the MIDC Act showed many signs of bi-partisan decision making. Typically a cause championed by the political left, the cooperative environment the MIDC Act was passed in seemed conducive to real, effective, good-faith fixes to Michigan's indigent defense delivery systems. It may have been the case, however, that the only thing legislators, academics, and commentators agreed on was that Michigan's defense attorneys were providing constitutionally inadequate services to indigent defendants. The MIDC Act was a result of agreement on the *ends* the state should aspire to, which was to create a system in which defense attorneys could fulfill *Gideon's* Promise by providing effective representation to indigent defendants. The problem with the MIDC Act, however, is not with the *ends* aspired to. Instead, it is with the *means* that were chosen to fix Michigan's inadequate indigent defense delivery system.

C. The Michigan Indigent Defense Commission Act

Proponents of the MIDC Act believed that a state-funded system would create uniformity and relieve many of the burdens associated with defense attorneys' lack of resources.⁶⁸ Opponents of the bill were worried that a state-run system would be too costly and would deprive

66. *Duncan v. State*, 832 N.W.2d 752 (Mich. 2013).

67. Michigan Indigent Defense Commission Act, MICH. COMP. LAWS ANN. §§ 780.981–780.1003 (West 2015); see also HOUSE FISCAL AGENCY, LEGISLATIVE ANALYSIS: MICHIGAN INDIGENT DEFENSE COMMISSION ACT, H. 98-4529, 1st Sess., at 10 (2013). According to the legislative history of the Act, fear of federal sanctions and Department of Justice involvement, probably prompted by the *Duncan* lawsuit, were considered an argument for passage of the bill:

[F]ailure to adopt changes invites lawsuits or sanctions by the U.S. Department of Justice, say supporters. Moreover, the state is already incurring expenses due to inappropriate sentences and longer incarcerations related to ineffective appointed counsel at the trial level and appointed appellate counsel when such sentences are appealed. Others believe the state has a moral and ethical obligation, in addition to the legal obligation under state and federal constitutional requirements, to guarantee the right to effective representation to all.

In short, the bill package as enacted represents a thoughtful approach that addresses concerns raised through the many years that this issue has been debated.

Id.

68. HOUSE FISCAL AGENCY, *supra* note 67.

the counties of local control.⁶⁹ The legislature settled on a system that does not rely completely on state-funding and that yields a great deal of local control to the counties responsible for providing indigent defendants with representation.

The MIDC Act provides “minimum standards” for the local delivery of indigent criminal defense services throughout the state.⁷⁰ It creates a separate enforcement body within Michigan’s judicial branch called the Michigan Indigent Defense Commission (MIDC), which is also responsible for developing a new standard for indigent defense and submitting it for approval to the Michigan Supreme Court.⁷¹ Through county compliance with the new standard and guidance given by “minimum standards” and other “principles” in the MIDC Act, it is the State of Michigan’s hope that the indigent defense delivery system can be reformed to provide for the constitutionally effective counsel promised by *Gideon*.⁷² But as this Note will discuss, the enforcement mechanisms built into the MIDC Act leave much of the Act’s success up to the discretion of members comprising the commission responsible for enforcing the standard among the counties.

III. ANALYSIS

A. The MIDC Act’s “Minimum Standards” for Effective Assistance of Counsel

Indigent defendants can bring claims of ineffective assistance of counsel as Sixth Amendment violations per the Supreme Court’s decision in *Strickland v. Washington*.⁷³ *Strickland* recognized part of *Gideon*’s Promise that every indigent defendant accused of a serious crime has the right to appointed counsel.⁷⁴ But mere appointment of counsel was not enough; instead, the Court stated that “the right to counsel is the right to the *effective* assistance of counsel.”⁷⁵ Today, *Strickland* case law has developed so that indigent defendants only have

69. *Id.*

70. MICH. COMP. LAWS ANN. §§ 780.981–780.1003.

71. *Id.* § 780.985(3) (“A proposed minimum standard shall be final when it is approved by the supreme court.”).

72. *Gideon v. Wainright*, 372 U.S. 335 (1963); *see also* HOUSE FISCAL AGENCY, *supra* note 67 (discussing how proponents of the MIDC Act wanted a uniform standard for “effective assistance of counsel” and a uniform system among all counties to relieve the burdens associated with the lack of resources available to defense attorneys).

73. 466 U.S. 668, 685–86 (1984).

74. *Id.*

75. *Id.* (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)) (emphasis added).

the right to effective assistance of counsel at “critical stages” of the criminal justice process.⁷⁶ The critical stages of prosecution begin when the proceeding has become “solidly adversarial,” or whenever the defendant is brought before a judicial officer and informed of the charges against him.⁷⁷

The language of the MIDC Act requires that the new state-wide standard ensures the appointment of an attorney during the critical stages of prosecution. The text of the MIDC Act provides:

The MIDC shall propose minimum standards for the local delivery of indigent criminal defense services providing effective assistance of counsel to adults throughout this state. These minimum standards shall be designed to ensure the provision of indigent criminal defense services that meet constitutional requirements for effective assistance of counsel.⁷⁸

According to the MIDC Act, “indigent criminal defense services” means legal defense services provided to a defendant who is being “prosecuted or sentenced for a crime for which an individual may be imprisoned upon conviction, beginning with the defendant’s initial appearance in court to answer to the criminal charge.”⁷⁹ In addition, the MIDC Act requires the MIDC to adhere to the principle that “[t]he same defense counsel continuously represents and personally appears at every court appearance throughout the . . . case.”⁸⁰ Here, it appears the language of the MIDC Act provides a guaranteed right to counsel during the initial appearance, or the “arraignment,” where a defendant is first informed of the charges against him and must give an answer to those charges.⁸¹

Under Michigan’s old system, an indigent defendant whose attorney failed to appear at a critical stage, such as the arraignment, would often lead to a new attorney arbitrarily and spontaneously appointed to their case if one happened to be standing in the same room.⁸² The inclusion of

76. See *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008).

77. *Id.* at 202 (“[B]y the time a defendant is brought before a judicial officer, is informed of a formally lodged accusation, and has restrictions imposed on his liberty in aid of the prosecution, the State’s relationship with the defendant has become solidly adversarial.”).

78. MICH. COMP. LAWS ANN. § 780.985(3) (West 2015).

79. *Id.* § 780.983(d)(i).

80. *Id.* § 780.991(2)(d).

81. See *What is ARRAIGNMENT?*, L. DICTIONARY, <http://thelawdictionary.org/arraignment/> (last visited Apr. 2, 2015).

82. See NAT’L LEGAL AID & DEFENDER ASS’N, *supra* note 48, at iv–v.

the language in the MIDC Act that “[t]he same defense counsel continuously represents and personally appears at every court appearance throughout the . . . case,”⁸³ may eliminate the practice of arbitrarily appointing different counsel to indigent defendants.⁸⁴ At the absolute minimum, there will be more of an incentive for counties to provide indigent defendants with consistent and continuous representation, or else risk exposing themselves to litigation for failing to comply with the MIDC Act’s minimum standards. But it is not altogether clear that the MIDC Act makes it easier for an indigent defendant in this situation to successfully claim ineffective assistance of counsel under *Strickland*, because there is no “right to the same attorney” under the constitution; a the fact that a defendant was represented by multiple different attorneys does not in itself constitute deficient performance.⁸⁵ As this Note will discuss, there are also additional reasons why indigent defendants cannot rely on *Strickland* for enforcement of the MIDC Act.

Aside from the possible guarantee of representation at the defendant’s initial appearance and continued representation by the same attorney throughout the criminal proceeding, the MIDC Act does not make clear what the standard for effective assistance of counsel will be. The MIDC Act requires the MIDC (the commission responsible for enforcing the Act) to “establish minimum standards, rules, and procedures” in order to guarantee: (1) that the delivery of indigent defense services be independent of the judiciary, (2) that if indigent caseloads are “sufficiently high” other members of the state bar may participate in the representation of indigent defendants alongside indigent defender offices, and (3) that courts shall ensure indigent defendants are advised of their right to counsel as soon as they are determined eligible.⁸⁶ The only other guidance the MIDC Act provides is that the MIDC “adhere to” six different “principles” in recommending a standard to the

83. MICH. COMP. LAWS ANN. § 780.991(2)(d).

84. See *id.* Although Section 11(2)(d) provides the continuous representation principle, it also states that counties “may exempt ministerial, non-substantive tasks, and hearings from this prescription.” *Id.* Therefore, even though this provision can be read as providing for more protection for the right to effective assistance “at every court appearance throughout the . . . case,” it still allows for debate over the meaning of the terms “ministerial task,” “non-substantive task,” or “ministerial/non-substantive hearing.”

85. Nor is there recourse under *Strickland* for defendants who fear inadequate representation and choose to conduct a defense without a lawyer. A defendant may waive his right to counsel, *Johnson v Zerbst*, 304 US 458, 463 (1938). In the event that he chooses to represent himself, the court may appoint “standby counsel” even if he objects. *Faretta v California*, 422 US 806, 834 n.46 (1975) (“ . . . a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of ‘effective assistance of counsel.’”).

86. MICH. COMP. LAWS ANN. §§ 780.991(1)(a)–(c).

Michigan Supreme Court.⁸⁷ It is necessary to briefly discuss those principles in order to examine whether the MIDC Act will provide a minimum standard that will improve the representation afforded to the state's indigent defendants.

First, defense counsel must be given sufficient time and space to safeguard the attorney-client privilege.⁸⁸ Second, the MIDC shall "avoid" any standard that creates "economic disincentives or incentives that impair defense counsel's ability to provide effective representation."⁸⁹ Third, defense counsel's abilities should "match the nature and complexity of the case."⁹⁰ The fourth principle is one that has already been discussed; the same lawyer should represent an indigent defendant continuously throughout the case.⁹¹ Fifth, lawyers who provide indigent criminal defense services must receive training relevant to their work.⁹² The sixth, and final, principle merely recites that the MIDC shall consistently and systematically review local indigent defense delivery systems for effective representation according to whatever standard is approved by the Michigan Supreme Court.⁹³

There are important implications of the conscious decision to include the six principles as guidelines for what will become the final, Michigan Supreme Court-approved standard, especially since there are two obvious textual alternatives the MIDC Act could have followed that it did not. First, the MIDC Act could have explicitly included the six principles themselves as a supplement to the three "minimum standards," instead of listing the principles in a different section and attaching the weaker requirement that "the MIDC shall adhere to" the principles.⁹⁴ If

87. *Id.* § 780.991(2).

88. § 780.991(2)(a) (ensuring that "defense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client.").

89. § 991(2)(b) ("Defense counsel's workload is controlled to permit effective representation. Economic disincentives or incentives that impair defense counsel's ability to provide effective representation shall be avoided. The MIDC may develop workload controls to enhance defense counsel's ability to provide effective representation.").

90. § 780.991(2)(c) ("Defense counsel's ability, training, and experience match the nature and complexity of the case to which he or she is appointed.").

91. § 780.991(2)(d) ("The same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case. However, indigent criminal defense systems may exempt ministerial, nonsubstantive tasks, and hearings from this prescription.").

92. § 780.991(2)(e) ("Defense counsel is required to attend continuing legal education relevant to counsel's indigent defense clients.").

93. § 780.991(2)(f) ("Defense counsel is systematically reviewed at the local level for efficiency and for effective representation according to MIDC standards.").

94. § 780.991(1) ("The MIDC shall establish minimum standards, rules, and procedures to effectuate the following" three standards.), *with id.* § 780.991(2) ("In

this alternative had been followed, there would be no confusion about what the legislature intended the “minimum standards” to encompass. As it is presently written, the MIDC Act leaves open the possibility that the MIDC will not recommend a rigorous standard to the Michigan Supreme Court because separation of the “minimum standards” provision and the “principles” provision implies that the former holds a greater deal of importance. Second, the MIDC Act could have used more concrete words as requirements for the minimum standard; instead of “principles” the MIDC must merely “adhere to,”⁹⁵ the Act could have provided for “requirements” or “standards” that the MIDC “must enforce” or “shall enforce.” As presently written, even if the MIDC recommends a rigorous standard for effective assistance of counsel, the Michigan Supreme Court could interpret the MIDC Act’s mere “principles” as something other than concrete, objective rules that counties must abide by, and reject the MIDC’s recommended standard in favor of a less-rigorous standard that is easier for counties to comply with.⁹⁶

What does the MIDC Act’s inclusion of “principles” mean in terms of the resources that will be afforded to indigent defense attorneys? Perhaps the counties will be deterred from allowing certain instances of ineffective assistance to occur. For example, the first principle providing sufficient space for attorney-client confidentiality *should* deter counties from accepting lines leading to the unisex bathroom as an acceptable practice.⁹⁷ But will the MIDC’s final recommendation include this *principle* as a *requirement*, and will the Michigan Supreme Court approve it? Furthermore, do the six principles make it more likely that an indigent defendant will have a remedy if the representation afforded to him is insufficient in this manner? Is enforcement of the principles left solely to the MIDC? One thing is certain—once the Michigan Supreme Court approves the new standard, it cannot be challenged by an individual plaintiff, nor can a plaintiff sue a county, the MIDC, or the state for failing to comply with the standard.⁹⁸ The MIDC itself is the only party responsible for ensuring counties are in compliance with the

establishing minimum standards, rules, and procedures, the MIDC shall adhere to the following principles.”).

95. MICH. COMP. LAWS ANN. § 780.991(2).

96. The problem of inadequate representation for indigent defendants is structural. Without concrete rules for the counties that will reform the bureaucratic structure of indigent delivery services, there will be no systematic reform. At the heart of the problem is inadequate funding for indigent criminal defense services; without a guarantee that funding will be provided for this specific purpose, the right of effective assistance of counsel risks being lost in the details of the MIDC Act.

97. See NAT’L LEGAL AID & DEFENDER ASS’N, *supra* note 48, at iv.

98. See MICH. COMP. LAWS ANN. §§ 780.1003(1)–(5).

new standard and the only party with authority to bring a cause of action against the counties for non-compliance.⁹⁹

The only other guidance given by the text of the MIDC Act is that “effective assistance of counsel” means “legal representation that is compliant with standards established by the appellate courts of the state and the United States supreme court [sic].”¹⁰⁰ Perhaps, then, without an active or litigious MIDC to enforce its standards among each and every one of the counties, indigent defendants will be left with the usual option of hoping to succeed on a *Strickland* ineffective assistance of counsel claim. This is troubling, considering the difficulty an indigent defendant normally faces in making a successful *Strickland* claim. If the burden to enforce the six principles falls on the backs of indigent defendants through winning case-by-case *Strickland* ineffective assistance of counsel claims, it will be a significant blow to the effectiveness of the MIDC Act.

In order to show ineffective assistance, a defendant must meet *Strickland*’s two-prong standard.¹⁰¹ However, even when a defendant can show that counsel’s performance was deficient, it is extremely difficult to prove that the defendant was actually prejudiced by the deficient representation.¹⁰² Because the MIDC Act on its face only guarantees the minimum protection required by the Michigan Court of Appeals and the United States Supreme Court,¹⁰³ it does nothing extra for defendants who cannot prove actual prejudice. Unless the MIDC recommends (and the Michigan Supreme Court approves) a standard that is higher than the constitutional minimum, indigent defendants will not have any greater success bringing *Strickland* ineffective assistance claims.

In addition, a defendant who successfully shows that counsel’s deficient performance actually prejudiced his case only gets a remedy for himself. There will be no state-level structural change unless the claim is appealed all the way to the Michigan Supreme Court or the United States Supreme Court.¹⁰⁴ There is therefore no pressure on local counties,

99. *See id.* If no private plaintiff can bring a cause of action against local indigent defense delivery systems, it follows that the MIDC is the only party with authority to do so.

100. § 780.983(b). This does not require that the standard created be higher than the current constitutional minimums.

101. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

102. *See id.*

103. *See* MICH. COMP. LAWS ANN. § 780.983(b).

104. That is not to say that this does not happen. The Supreme Court recently expanded the ability of defendants to succeed in *Strickland* claims in the context of plea-bargaining. *See Burt v. Titlow*, 134 S. Ct. 10 (2013); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

outside of mechanisms built in to the MIDC Act, to provide higher than the minimum constitutional standards of effective counsel.¹⁰⁵ There is also no way for outside parties to challenge the “minimum standard” set by the MIDC after it is approved by the Michigan Supreme Court, because the MIDC Act does not allow for any challenge to the final approved standard.¹⁰⁶

Further, the dependence on indigents to bring case-by-case *Strickland* claims carries with it the assumption that every defendant who actually receives constitutionally deficient representation will (1) realize this fact and (2) actually appeal their conviction. But it is doubtful an indigent defendant will realize the ways in which he might have received ineffective assistance of counsel—after all, prior to the passage of the MIDC Act, the problem was not that indigent defendants were unaware of the violations of their rights; the problem was that courts were willing to accept sub-par representation because of the systematic deficiencies associated with indigent defense delivery services.¹⁰⁷ But even if courts recognize situations where representation is inadequate, must every single defendant who is forced to wait in line in front a unisex bathroom *know* they are presently receiving ineffective assistance of counsel before they are afforded a remedy?¹⁰⁸

Finally, consistent deficient performance may leave an individual attorney liable for a civil malpractice lawsuit.¹⁰⁹ But just as indigent defendants cannot be relied on to enforce the MIDC Act’s minimum standards by proving *Strickland* prejudice, the ability to discipline individual attorneys for poor performance on a case-by-case basis will not prevent other attorneys from providing inadequate representation for indigent defendants.¹¹⁰ Even if an attorney is disbarred and removed

105. Because it is unclear whether the “principles” in the MIDC Act are objective standards that will be included in the final minimum standard, it is difficult to determine what is really “built in” to the Act. Michigan Indigent Defense Commission Act, MICH. COMP. LAWS ANN. §§ 780.981-780.1003 (West 2015).

106. *Id.* § 780.1003(4).

107. See *supra* text accompanying notes 41–45.

108. In addition, the United States Supreme Court has only given indigent defendants the right to appointed counsel during their first appeal as of right, so a defendant who has exhausted this appeal no longer is entitled to an appointed attorney to make a *Strickland* claim. See *Douglas v. California*, 372 U.S. 353 (1963). *Douglas* gave indigent defendants the right to an attorney on a first appeal on due process grounds and did not require an inquiry of whether counsel was afforded at a “critical stage.”

109. See MICH. COMP. LAWS ANN. § 600.5838 (West 2015).

110. Indigent defendants who are required to rely on *Strickland*, even if they are successful, do not help other indigent defendants. In the same way, individual attorneys who are disciplined for malpractice, even if the individual is deterred from poor practice habits or is disbarred, will not instantly make other attorneys better at their practice. This is especially true in the context of under-paid and under-resourced defense attorneys.

from the pool of attorneys that provide ineffective representation to indigent defendants, the root cause of the problem still remains—appointed criminal defense attorneys do not have the resources to provide adequate representation to indigent defendants because of the lack of funding and resources.¹¹¹ Removing one over-worked defense attorney from the entire state of Michigan's pool of attorneys does nothing to heighten the standard of counsel afforded to indigent defendants or to ensure enforcement of the MIDC Act.

B. Enforcement Mechanisms of the MIDC Act

Even if the language of the MIDC Act does not guarantee that the recommended standard will be higher than minimum constitutional protections, it does not foreclose the possibility that the MIDC will use its discretion and *choose* to recommend a higher standard. Assuming that (1) the MIDC recommends rigorous state-wide standards for local indigent defense delivery, (2) those standards are higher than the current constitutional minimums, or at least higher than those set out explicitly by the MIDC Act,¹¹² and (3) the Michigan Supreme Court approves the MIDC's recommended standard,¹¹³ what mechanisms are in place to ensure the new standards are enforced?

The MIDC Act has a number of built-in mechanisms that will encourage counties to comply with the new indigent defense delivery standards (whatever they may be). First, there is a process involving monetary grants from the state.¹¹⁴ Second, there is a mediation process that takes place between the MIDC and the county.¹¹⁵ Third, the MIDC has the option to sue the county or locality for non-compliance.¹¹⁶

111. See AMERICAN BAR ASSOCIATION, *supra* note 24 at 17–24.

112. Whether the standard is higher than what is explicitly provided for in the MIDC Act requires an inquiry into whether the six principles in Section 11(2) will be incorporated into the ultimate minimum standard, and what those six principles mean. See *infra* text accompanying notes 117–123.

113. Under the MIDC Act, the Michigan Supreme Court must approve any standard set by the MIDC. MICH. COMP. LAWS ANN. § 780.985(3) (“Opposition to a proposed minimum standard may be submitted to the supreme court in a manner prescribed by the supreme court, but a minimum standard that is approved by the supreme court is not subject to challenge through the appellate procedures under section 15. A proposed minimum standard shall be final when it is approved by the supreme court. If the supreme court neither approves nor disapproves a proposed minimum standard within 180 days of its submission, then the standard is not approved.”).

114. See *infra* notes 117–120 and accompanying text.

115. See *infra* notes 121–123 and accompanying text.

116. See *infra* notes 124–130 and accompanying text.

In complying with the MIDC standards, no county or locality will have to spend funds beyond their “local share,” defined as the average amount of funding the county spent over the past three years.¹¹⁷ Any amount needed by the county in excess of the local share must be covered by the state through grant money given to the county by the MIDC.¹¹⁸ Before the county can secure a grant, it must describe to the MIDC how it plans to bring its local indigent defense system up to par using the State’s grant money.¹¹⁹ The MIDC can decide to approve or reject each plan based on whether the plan seems likely to achieve the minimum standards approved by the Michigan Supreme Court.¹²⁰

If the MIDC disapproves of a plan, both parties (MIDC and county) must go through a mediation process.¹²¹ If the initial mediation is unsuccessful, the mediator will recommend a compliance plan to the MIDC.¹²² The MIDC can then either approve the plan, which the county would have to implement, or either party (MIDC or county) can bring a lawsuit in the circuit court in which the indigent defense system is located.¹²³

117. See § 780.993(6) (defining the meaning of “local share” as the county’s “average annual expenditure for indigent criminal defense services in the 3 fiscal years immediately preceding the creation of the MIDC under this act, excluding money reimbursed to the system by individuals determined to be partially indigent.”).

118. *Id.* (“Except as provided in subsection (8), an indigent criminal defense system shall maintain not less than its local share.”); § 780.993(8) (“[A county] is not required to expend its local share if the minimum standards established by the MIDC may be met for less than that share, but the local share of a system that expends less than its local share under these circumstances is not reduced by the lower expenditure.”).

119. § 780.993(3) (“A plan submitted under this subsection shall specifically address how the minimum standards established by the MIDC under this act shall be met and shall include a cost analysis. . . . [The plan] shall include a statement of the funds in excess of the local share, if any, necessary to allow its system to comply with the MIDC’s minimum standards.”).

120. § 780.993(4). This provision lays out the procedures that must be followed prior to mediation:

If the MIDC disapproves the plan, the cost analysis, or both the plan and the cost analysis, the indigent criminal defense system shall consult with the MIDC and submit a new plan, a new cost analysis, or both within 30 calendar days of the mailing date of the official notification of the MIDC’s disapproval. If after 3 submissions a compromise is not reached, the dispute shall be resolved as provided in section 15.

Id.

See also § 780.995 (providing for mediation); *infra* text accompanying notes 77–87.

121. See § 780.995.

122. §§ 780.995(2)(a)–(c).

123. § 780.995(3). In addition, the county can bring a claim for equitable relief if the MIDC fails to provide the necessary grant award amount. § 780.995(3)(b).

No lawsuit brought by the county seeking equitable relief can challenge the validity or legality of the standards approved by the Michigan Supreme Court.¹²⁴ Possible remedies the court can grant to either party include modification, rejection, or approval of the proposed compliance plan,¹²⁵ contempt of court,¹²⁶ or, in cases where a county cannot comply, the court can order the MIDC to take over the county's indigent defense delivery system.¹²⁷ If the MIDC takes over for a county, the county must pay a portion of the costs necessary to bring the system into compliance to the MIDC each year.¹²⁸ The fees increase each year, starting at 10% for the first year, 20% for the second year, 30% for the third year, up to a cap of 40% for the fourth and any subsequent years.¹²⁹ The county can resume control of its local indigent defense delivery system at any point in time after it agrees to abide by the compliance plan.¹³⁰

Supporters of *Gideon's Promise* are, perhaps, most attracted to the provision of the MIDC Act that awards grant money to the counties in order to comply with MIDC standards.¹³¹ Unfortunately, the grant-reward system will only be effective if (1) the Michigan Supreme Court approves a standard rigorous enough to provide meaningful reform, and (2) the MIDC actively enforces the standards against the counties. One implication of these facts is that success of the MIDC Act largely depends on the makeup of the commission.¹³²

A motivated and activist MIDC would set high standards and be thorough in making sure each locality is in compliance. The MIDC would not be afraid to be litigious if it had to. The downside to an activist

124. § 780.995(3)(e). ("The action shall not challenge the validity, legality, or appropriateness of the minimum standards approved by the supreme court.").

125. § 780.995(4).

126. § 780.995(5) ("If a party refuses or fails to comply with a previous order of the court, the court may enforce the previous order through the court's enforcement remedies, including, but not limited to, its contempt powers . . .").

127. *Id.* "If a party refuses or fails to comply with a previous order of the court, the court may . . . order that the state undertake the provision of indigent criminal defense services in lieu of the indigent criminal defense system.").

128. *See* § 780.995(7). ("If the court orders the MIDC to provide indigent criminal defense services on behalf of an indigent criminal defense system, the court shall order the system to pay [an] amount of the state's costs that the MIDC determines are necessary in order to bring the indigent criminal defense system into compliance with the minimum standards established by the MIDC[.]").

129. § 780.995(7)(a)-(e).

130. § 780.995(8). If and when the county resumes providing indigent criminal defense services, it is no longer required to pay the fees required under subsection (7) but still must pay no less than its local share. *Id.*

131. Greene, *supra* note 54.

132. *Id.*

MIDC is that the counties are not required to spend any local money beyond that which is currently spent on their sub-par indigent defense delivery systems, because the state will cover any costs needed to bring the counties into compliance.¹³³ In other words, the higher the standards, the more work there will be for MIDC staff. The indigent defense systems for most of Michigan's counties are already sub-par,¹³⁴ so it is likely that many counties will vie for state grant money to bring their systems into compliance¹³⁵ (if, again, the MIDC sets high standards).

In contrast, if the MIDC is staffed with unmotivated members, it will be less likely to seek equitable relief where counties refused to comply. In addition, an apathetic MIDC is unlikely to recommend rigorous minimum standards. Lower standards means less money needed by the counties to comply, which translates into less grant money the MIDC needs to secure and award. An inactive MIDC would save money for the state and the counties at the expense of maintaining the status-quo for indigent defendants.¹³⁶

C. The Solution to Indigent Defense Delivery?

In a typical criminal case, the court resolves a dispute between the defendant and the government. In contrast, indigent defense delivery under the MIDC Act more closely resembles functions that would be carried out by an administrative agency or other agency in the executive branch. Furthermore, resolution of disputes regarding compliance with the minimum standard must first go through a complex mediation process.¹³⁷ The MIDC Act charges the MIDC with what is, in essence, the regulation of Michigan's counties, so that the MIDC must determine whether those counties are in compliance with the Michigan Supreme Court's "minimum standards."¹³⁸ Successful enforcement of the standards depends on many variables, including whether the Michigan Supreme Court approves the standards, whether the MIDC is active/litigious or passive/unmotivated, and whether the counties comply

133. See *supra* text accompanying notes 62–68.

134. See *supra* text accompanying notes 31–37.

135. Why spend your own money when the state will foot the bill? Counties are unlikely to go out of their way to use local funds for indigent defense delivery services if they can successfully petition for supplemental money from the state.

136. At the time of writing, Governor Snyder has not yet announced any appointments to the MIDC.

137. See *supra* notes 121–123 and accompanying text.

138. See generally Michigan Indigent Defense Commission Act, MICH. COMP. LAWS ANN §§ 780.981–780.1003 (West 2015).

or instead resort to mediation and litigation.¹³⁹ In the event of non-compliance with the MIDC standards, parties have the option of resolving disputes in Michigan courts,¹⁴⁰ but therein lies the problem with the Act. Resolution of any dispute under the MIDC Act will, as provided by the statute, involve parties that are *not* indigent defendants themselves. The counties, the MIDC, the arbitrators, the indigent defendants, and other bodies of state government all have different interests and goals when they go to the courts looking for a solution.

The MIDC Act, therefore, is an attempt to solve a complex problem with many interacting centers of interest.¹⁴¹ Even if the Michigan Supreme Court approved a standard that incorporates the six principles in a manner that translates into something like a state-wide public defender's office, the courts are likely either to do a poor job applying the standard in the context of an adjudicative dispute or will tend to make decisions that are formalistic, linear solutions that are enforceable but will not adequately solve the problem.¹⁴²

139. *See id.*

140. *See id.*

141. *See* Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978), <http://people.rit.edu/wlrgh/Fuller.pdf>. Former Harvard Law Professor Lon L. Fuller was one of the most influential legal thinkers of the 20th Century. *See* Robert S. Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433 (1978), (discussing how Professor Fuller "played an influential role in the development of American jurisprudence" and emerged as "one of America's foremost jurists."). While a full discussion of Fuller's ideas is outside the scope of this Note, the idea of "polycentric problems" is helpful in understanding the problems associated with the MIDC Act. A polycentric problem is one with many interacting centers-of-interest, in which a decision involving one center has a complex pattern of consequences that impacts every other center. Fuller & Winston, *supra*, at 353. All disputes between litigants have polycentric elements, but some obviously have more "interacting centers" than others. *Id.* at 397. Fuller concludes that problems which are sufficiently polycentric - or in other words problems that involve many interacting centers - are not well-suited for the adjudicative process. *Id.*

142. *See generally* Fuller, *supra* note 141. In a typical criminal case the dynamic between the parties is limited to indigent defendant's counsel on one hand and the government on the other. Both parties have an opportunity to present reasoned argument within an institutional framework. *Id.* at 365-66. "The proper province of adjudication is to make an authoritative determination of questions raised by claims of right and accusations of guilt." *Id.* at 368. The judge is merely a "necessary condition" that is required for the presentation of reasoned arguments to have any meaning or authority, as opposed to factors that promote "optimal conditions." *Id.* at 363-67. Under a well-funded public defender system where defense attorneys would be adequately trained to provide the best representation possible for their indigent clients, we begin to approach a system which presents the "optimal conditions" for the presentation of proofs and reasoned arguments. *Id.* at 363-64. The "typical criminal case" is well-suited for adjudication because the judge's decision will affect only the defendant in the court room. *Id.* at 368. In contrast, as a polycentric problem, the delivery of services to indigent defendants calls

For example, suppose a county and the MIDC disagree about the terms of their compliance plan.¹⁴³ If the dispute cannot be solved through mediation,¹⁴⁴ each party will look for resolution in the courts. However, the MIDC and the county will not be entering into litigation with the interests of indigent defendants at the forefront of their minds. Counties will be concerned with their budgets or with arguing for as much supplemental state aid as possible to comply with the MIDC standard.¹⁴⁵ The MIDC may take into account the reactions of other counties and may be apprehensive to aggressively pursue litigation or may question whether it recommended too high of a “minimum standard.”¹⁴⁶ The bottom line is that in litigation over whether a county is in compliance with the MIDC standards, a number of concerns unrelated to providing defense attorneys with adequate resources will be the parties’ primary concern. This is, of course, unless the final standard approved by the Michigan Supreme Court includes a bright-line requirement that provides ample resources for defense attorneys or public defender’s offices. Litigation that involves any other unrelated concern will come at the expense of direct advocacy for the rights of indigent defendants.

Whether adequate resources for indigent defense delivery services will be provided depends on whether indigent defense counsel have the ability to effectively represent a client in court every time the attorney appears in court.¹⁴⁷ The MIDC Act creates a system in which different agencies, commissions, and governing bodies will be concerned with resolving a dispute that involves issues *other than* the rights of indigent defendants. In contrast to an alternative legislative solution that would provide for a statewide public defender’s office, the MIDC Act risks setting standards for indigent defense delivery that does not provide defense attorneys with the ability to provide effective assistance of

for a solution that allows for “managerial discretion.” *Id.* at 398–404. There are too many interacting centers in which the different agencies, commissions, and governing bodies will be concerned with resolving a dispute that involves issues other than the rights of indigent defendants. *Id.* at 393–98. Adequately trained public defenders who have the resources to present proofs and reasoned arguments on behalf of their indigent clients would be able to operate under the “optimal conditions” in the context of a “typical criminal case,” one that is best suited for resolution in the adjudicative process. *Id.* at 398–405. Under the MIDC Act, however, Michigan courts will be forcing a complex polycentric problem into the rigid case-by-case framework of the adjudicative process, a task that is inherently unsuited for resolution in the courts. *Id.* at 405–09.

143. See generally Michigan Indigent Defense Commission Act, MICH. COMP. LAWS ANN §§ 780.981–780.1003 (West 2015).

144. See generally *id.*

145. *Id.*

146. *Id.*

147. *Id.*

counsel every time the attorney appears in court to represent an indigent defendant.

The root of the problem in indigent defense delivery is not the lack of minimum standards *per se*; it is the lack of well-defined, concrete standards that guarantee defense attorneys have adequate funding and resources to do their jobs effectively. The purpose of the MIDC Act is not to "beef up" the ability of indigent defendants to make *Strickland* claims. Instead, the purpose is to provide defense attorneys with enough resources so that indigent defendants no longer have to rely solely on *Strickland*. Michigan courts should enforce *Strickland* ineffective assistance claims, but it is the Michigan Legislature that should be responsible for writing standards that counties must abide by. Instead of fulfilling *Gideon's* Promise, the MIDC Act leaves open questions about what the standards for effective assistance will be, whether the Michigan Supreme Court will approve them, and if they will be enforced.

IV. CONCLUSION

The MIDC Act may not be the solution to Michigan's broken indigent defense delivery system that it purports to be. Interest groups who advocate for the rights of indigent defendants should not claim instant victory with the passage of the MIDC Act. While the MIDC Act is a step in the right direction, it is unlikely to correct many of the problems associated with Michigan's sub-par indigent defense delivery system.

When it was passed into law, the Act seemed like it promised large-scale, structural reform of Michigan's broken indigent defense delivery system. But the MIDC Act was too much of a political compromise. In thinking about budgetary issues and problems of "local control," the Act marginalized the rights of indigent defendants.¹⁴⁸ In the end, all that the passage of the MIDC Act may have accomplished is putting false hopes in the minds of advocates, setting the stage for the next *Duncan*, and delaying the right to adequate counsel that the Constitution requires and all citizens deserve.

The structural reform that is needed can only be achieved with objective standards that provide adequate resources for defense attorneys. *Gideon's* Broken Promise cannot be solved by fixing each instance of injustice on a case-by-case basis through *Strickland* ineffective assistance claims. The MIDC Act sets the stage for litigation over whether indigent defense delivery systems are in compliance with

148. See *supra* note 69 and accompanying text.

currently unknown minimum standards.¹⁴⁹ By failing to include objective standards that guarantee resources for defense attorneys in the MIDC Act, the Michigan legislature may have created a system in which enforcement of indigent defense delivery services will depend on the resolution of disputes in a context that takes the focus off of the rights of indigent defendants.

Without more funding, it is not clear that the MIDC Act fulfills *Gideon's* Promise. The MIDC Act only partially addresses the funding problem;¹⁵⁰ it also charges the MIDC with enforcing “minimum standards” in the courts when what is really needed is effective defense attorneys. If Michigan wants to build its indigent defense delivery system into one capable of fulfilling *Gideon's* Promise, it is likely that it will have to do so by providing guaranteed funding for a statewide public defender's office.¹⁵¹ Otherwise, Michigan is merely setting itself up again for another class-action lawsuit like *Duncan*.

149. See *supra* notes 143–146.

150. See *supra* notes 117–120 and accompanying text.

151. See *supra* note 142 and accompanying text.