(Page 380)Court-Appointed Counsel for Indigent Defendants Court-appointed counsel is an attorney appointed by the judge and paid by the county or state to represent an “indigent” accused at a “critical stage” in the criminal proceedings. More than half of felony defendants are classified as indigent defendants, yet the Court has not set a uniform rule to determine indigency. In general, a defendant is indigent if he or she is too poor to hire a lawyer. Standards used by judges include being unemployed, not having a car, not having posted bail, and not owning a house. The judge enjoys wide discretion in determining indigency, and that determination is rarely reversed on appeal. A number of jurisdictions provide some guidance for judges to consider in determining indigency. Indigency therefore varies from one jurisdiction or judge to another. The American Bar Association (ABA) recommends the following standard: “Counsel should be provided to any person who is financially unable to obtain adequate representation without substantial hardship to himself or his family.” It adds that a lawyer should not be denied “to any person merely because his friends or relatives have resources adequate to retain counsel or because he has posted or is capable of posting bond.”2 The method of appointing counsel for an indigent defendant also varies. In some jurisdictions, judges use a list containing the names of available and willing attorneys, who are then assigned to cases on a rotating basis. In others, judges make assignments at random, assigning any lawyer who may be available in the courtroom at the time of the appointment. Still other jurisdictions employ full-time public defenders to handle indigent cases. The decision to create a public defender’s office is usually driven by considerations of cost-effectiveness. From an economic perspective, the bigger the city or county, the more attractive the public defender model becomes. Much has been written about the lack of quality of legal representation provided by court-appointed counsel. Problems abound, including the lack of financial support, lack of training, insufficient support systems for investigation, and heavy case loads. In an issue brief for the American Constitution Society for Law and Policy, titled “Assessing the Indigent Defense System,” Professor Erica J. Hashimoto states that “At this point... we certainly have sufficient data to establish that defenders in some jurisdictions have unmanageable caseloads, and there appears to be no dispute that lawyers with those types of caseloads cannot provide effective assistance.” Reviewing data from the Bureau of Justice Statistics (BJS), she says that in 1999, from the 100 largest counties, “those offices received 719,660 non-capital cases; 1,612,046 misdemeanors; 13,053 appeals; and 277,000 juvenile cases. This means that each attorney received (in addition to any cases they had on their caseload at the beginning of the year) an average of 100 felonies, 225 misdemeanors, 2 appeals, and 39 juvenile cases, in addition to a slew of probation revocations and other types of cases.”3 Primarily due to lack of funding and sufficient political attention, legal representation for indigent defendants in the United States continues to suffer as it has in the past.

(Page 384 Proving Ineffective Assistance of Counsel is Difficult A defendant may challenge his or her conviction on the grounds that the lawyer at trial was so incompetent as to deprive the defendant of effective assistance of counsel. Although this claim is frequently raised, it is difficult to prove and therefore seldom succeeds. The meaning of “effective assistance of counsel” bothered lower courts for years because of the absence of a clear standard. However, in two 1984 cases, the Court clarified the issue by specifying the following criteria: ◆ A claim of ineffective assistance of counsel can be made only by pointing out specific errors made by the trial counsel. It cannot be based on an inference drawn from the defense counsel’s inexperience or lack of time to prepare, the gravity of the charges, the complexity of the defense, or the accessibility of witnesses to counsel (United States v. Cronic, 466 U.S. 648 [1984]). ◆ The Court assumes that effective assistance of counsel is present unless the adversarial process is so undermined by counsel’s conduct that the trial cannot be relied upon to have produced a just result. An accused who claims ineffective counsel must show the following: (1) deficient performance by counsel and (2) a reasonable probability that but for such deficiency the result of the proceeding would have been different (Strickland v. Washington, 466 U.S. 668 [1984]). In a 1993 case (Lockhart v. Fretwell, 506 U.S. 364 [1993]), however, the Court made the standard for reversal of conviction even more difficult: “To show prejudice under Strickland, a defendant must demonstrate that counsel’s errors are so serious as to deprive him of a trial whose result is fair or reliable, not merely that the outcome would have been different.” Under these standards, mere generalizations about the quality of the lawyer or the inadequacy of his or her efforts will not suffice. Specificity is required, and the burden is on the defendant to show a reasonable probability that if the lawyer’s performance had not been deficient, the results would have been different. This is difficult to establish, and, in most cases, the accused needs another lawyer who knows enough law to be able to prove this. For example, suppose that, after conviction, defendant Gary alleges that he had ineffective counsel because the lawyer assigned by the court to

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