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***A Judge's Duty to do Justice:  
Assuring the Accused's Right to the Effective Assistance of Counsel***

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by

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# A JUDGE’S DUTY TO DO JUSTICE: ENSURING THE ACCUSED’S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

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## I. INTRODUCTION

Every judge takes an oath, similar to the oath federal judges take, to “administer justice” and to “do equal right to the poor and to the rich.”<sup>1</sup> In addition, the American Bar Association (“ABA”) Model Code of Judicial Conduct, which states have adopted,<sup>2</sup> requires a judge to “accord to every person who has a legal interest in a proceeding . . . the right to be heard according to law.”<sup>3</sup> While a judge’s oath and the Code of Judicial Conduct provide some general guidance about a judge’s duty to do justice, the ABA Criminal Justice Standards Regarding Special Functions of the Trial Judge provide more specific guidance about what it means to “administer justice” by stating “[t]he trial judge has the

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1. The oath for justices and judges in the federal court system states: “I, \_\_\_\_, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as \_\_\_\_ under the Constitution and laws of the United States. So help me God.” 28 U.S.C. § 453 (2012). “Each state has a similar oath.” Mary Sue Backus, *The Adversary System Is Dead; Long Live the Adversary System: The Trial Judge as the Great Equalizer in Criminal Trials*, 2008 MICH. ST. L. REV. 945, 967 & n.122 (commenting on the federal oath and citing to several state oaths).

2. As of August 22, 2016, thirty-five states have adopted amendments to their codes of judicial ethics based on the 2007 ABA Code of Judicial Conduct. See *Chronological List of States Adopting Amendments Based upon the 2007 ABA Model Code of Judicial Conduct*, A.B.A., [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/chronological\\_status\\_judicial\\_code.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chronological_status_judicial_code.authcheckdam.pdf) (last updated Aug. 22, 2016).

3. MODEL CODE OF JUDICIAL CONDUCT r. 2.6 (AM. BAR ASS’N 2007).

responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice.”<sup>4</sup> The ABA Criminal Justice Standards further explain this duty: “The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial.”<sup>5</sup>

When a judge’s oath to administer justice is read together with a judge’s ethical obligations and ABA Criminal Justice Standards’ guidance concerning the responsibility of a trial judge to safeguard the rights of the accused, these admonitions inform every trial judge that she has an affirmative obligation to see that justice is done. A trial judge “does not serve his purpose or function by being merely an umpire, a referee, a symbol, or an ornament.”<sup>6</sup> Rather, “legal discretion has been vested in the trial judge to do or cause to be done . . . all things reasonably necessary as the particular cause requires to promote the ends of justice.”<sup>7</sup>

In criminal cases, a judge’s duty to do justice must include ensuring that the accused has a meaningful Sixth Amendment right to the effective assistance of counsel,<sup>8</sup> because effective legal representation is essential to a fair trial.<sup>9</sup> As the Supreme Court has stated: “Without counsel, the right to a trial itself would be ‘of little avail,’”<sup>10</sup> and “the right to counsel is the right to the effective assistance of counsel.”<sup>11</sup>

If both substantive and procedural justice are the objectives of our criminal justice system, a judge who fails to ensure effective assistance of counsel is actually a negative actor working against the interests of justice and the rights of the accused.<sup>12</sup> Judge William W. Schwarzer, at

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4. STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-1.1(a) (AM. BAR ASS’N 2000).

5. *Id.*

6. Alfred Gitelson & Bruce L. Gitelson, *A Trial Judge’s Credo Must Include His Affirmative Duty to Be an Instrumentality of Justice*, 7 SANTA CLARA L. REV. 7, 8 (1966). Lara Bazelon has argued that this duty to do justice includes using shaming sanctions against prosecutors during oral arguments in wrongful conviction cases to correct miscarriages of justice. Lara Bazelon, *For Shame: The Public Humiliation of Prosecutors by Judges to Correct Wrongful Convictions*, 29 GEO. J. LEGAL ETHICS 305, 351-52 (2016).

7. Gitelson & Gitelson, *supra* note 6, at 9.

8. See U.S. CONST. amend. VI.

9. The U.S. Supreme Court recognized 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.” *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

10. *United States v. Cronin*, 466 U.S. 648, 653 (1984) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

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

12. “The objective and sole justification of our law and courts being justice, a trial judge

the time a federal district court judge, maintained that when a defense lawyer's ineffectiveness prejudices the accused's rights, "the adversary process has effectively ceased to function,"<sup>13</sup> and the judge's responsibility for the administration of justice means that a judge "cannot be indifferent to events which diminish the quality of justice in his court."<sup>14</sup>

In *McMann v. Richardson*, the U.S. Supreme Court recognized this duty to justice and the need for trial judges to ensure effective assistance of counsel:

[W]e think the matter [as to whether defense counsel is providing adequate representation], for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of the incompetent counsel, and that *judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.*<sup>15</sup>

Several other federal and state courts have similarly recognized that in the face of ineffective assistance of counsel, trial judges have an obligation to protect the rights of accused and not sit by idly.<sup>16</sup>

In reality, though, too many judges abdicate their duty to administer and do justice by failing to ensure that trial counsel is providing effective assistance of counsel.<sup>17</sup> This occurs when a trial judge fails to give proper attention to the issue of a defense lawyer's ineffectiveness whether raised by the defendant, a defense counsel overburdened by heavy caseloads, or through the judge's own observations and experiences with the lawyer's objectively unreasonable performance.<sup>18</sup>

By neglecting instances of ineffective assistance of counsel at the trial level,<sup>19</sup> the issue of possible Sixth Amendment violations of the

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cannot be negative." Gitelson & Gitelson, *supra* note 6, at 8.

13. William W. Schwarzer, *Dealing with Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633, 637 (1980).

14. *Id.* at 638.

15. *McMann*, 397 U.S. at 771 (emphasis added).

16. See Schwarzer, *supra* note 13, at 641 n.42 (citing several federal and state trial court and court of appeals decisions).

17. See *id.* at 637-38.

18. See David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 6, 17 (1973); see also Schwarzer, *supra* note 13, at 634 ("[S]urveys indicate that judges rate the overall performance of around one-tenth of the lawyers appearing before them as less than adequate and prejudicial to their client's cause. . . . Because of the pressures of staggering case loads and limited resources, the criminal justice system frequently produces marginal performances by counsel." (footnote omitted)).

19. The phrases "trial level" or "trial" in this Article refer not just to the trial itself but to all

right to counsel is left to courts through post-conviction proceedings. As I will discuss later, these post-conviction proceedings into ineffective assistance of counsel claims routinely excuse objectively substandard legal representation because of the requirement that the defendant must also prove prejudice.<sup>20</sup> As a result, we have a criminal justice system that officially excuses substandard legal representation in criminal cases when defense lawyers are ineffective because trial judges often do not ensure the rights of the accused.

In this Article, I contend that a trial judge needs to be committed to a duty to do justice by ensuring the accused's right to effective assistance of counsel. Instead of continuing to pigeon-hole ineffective assistance of counsel claims as a post-trial inquiry, there are some circumstances when a trial judge's duty to do justice requires an inquiry into whether defense counsel is providing effective assistance of counsel at the trial level. Part II analyzes resistance to recognizing ineffective assistance of counsel at the trial level and in post-conviction proceedings.<sup>21</sup> Part III examines the crisis in public defense and how case overloads and funding practices for public defense create disincentives to effective assistance of counsel.<sup>22</sup> Then, Part IV analyzes how the rights of the accused differ when the accused has a publicly provided lawyer compared to privately retained counsel.<sup>23</sup> Part V describes the situations that trigger a trial judge's duty to conduct an effective assistance of counsel hearing,<sup>24</sup> and Part VI recommends both the type of hearing and the standard the judge should apply in evaluating counsel's effectiveness.<sup>25</sup> Part VII concludes by arguing that to do justice a trial judge must ensure the accused's right to the effective assistance of counsel.<sup>26</sup>

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proceedings at the trial level, which include pretrial proceedings and defense preparations for trial or a plea. Pretrial proceedings and defense preparations include, but are not limited to: meeting with the client and communicating with the client regularly; investigating the case, including interviewing potential witnesses; conducting discovery; and researching applicable law to the offenses charged and possible defenses. As noted, trial level includes pleas, which are extremely important, because "criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

20. *See infra* Part II.

21. *See infra* Part II.

22. *See infra* Part III.

23. *See infra* Part IV.

24. *See infra* Part V.

25. *See infra* Part VI.

26. *See infra* Part VII.

## II. RESISTANCE TO INEFFECTIVE ASSISTANCE OF COUNSEL: TURNING A BLIND EYE

Trial judges are often passive and either assume that the accused's lawyer is providing effective assistance of counsel, or simply do nothing in the face of obvious substandard representation. A few examples demonstrate that even when a trial judge faces obviously unprepared or inept defense counsel, some trial judges will not act to ensure that the defendant has effective assistance of counsel.<sup>27</sup>

For example, James Fisher was convicted of first-degree murder and sentenced to death in Oklahoma.<sup>28</sup> The trial transcript shows that his court-appointed lawyer, E. Melvin Porter, had failed to conduct discovery prior to trial,<sup>29</sup> was ill-prepared,<sup>30</sup> inept, and disloyal to his client.<sup>31</sup> After reviewing the trial transcript, the Tenth Circuit Court of Appeals stated:

[T]he nature of the trial itself indicates a singular lack of preparation on Mr. Porter's part. The trial transcript reveals that throughout most of Mr. Porter's examination of witnesses, including his own client, he had no idea what answers he would receive to his questions and was not pursuing any particular strategy of defense.<sup>32</sup>

The trial transcript also demonstrated that the defense lawyer "exhibited hostility to his client and sympathy and agreement with the prosecution in ways that put his actions directly at odds with his client's interests."<sup>33</sup> The Tenth Circuit's review of the trial record convinced it "beyond question that Mr. Porter's representation . . . was not objectively reasonable."<sup>34</sup> Although there were ample examples of poor defense lawyer performance in the trial record,<sup>35</sup> the trial judge did nothing to promote justice by protecting the defendant's right to effective assistance of counsel by intervening in some way when it was apparent, from the start of the trial, that Fisher's court-appointed lawyer was not prepared.<sup>36</sup>

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27. See *infra* notes 28-46 and accompanying text.

28. Fisher v. Gibson, 282 F.3d 1283, 1287 (10th Cir. 2002).

29. *Id.* at 1297.

30. *Id.* at 1293-96. The state made certain items and officers who would testify available to the defense, but at the trial the defense attorney's lack of preparation was disclosed. *Id.* at 1293 n.5.

31. *Id.* at 1298.

32. *Id.* at 1294.

33. *Id.* at 1298.

34. *Id.* at 1293.

35. See, e.g., *id.* at 1295 (discussing defense counsel's failure to mitigate impact of damaging testimony).

36. At trial, Fisher's lawyer, Porter, claimed that he was unaware that a police officer was going to testify to incriminating statements made by Fisher and objected to the testimony, claiming

Another example is the case of Moises Catalan, who, along with his brother, was convicted of aggravated assault in Texas.<sup>37</sup> Catalan and his brother originally had the same lawyer, Joe Montemayor, but on the day the case was set for trial, the judge appointed Catalan a new lawyer, Thomas Grett, due to the conflict presented by Montemayor's joint representation of Catalan and his brother.<sup>38</sup> Grett did not seek to continue the trial, but rather consulted with Catalan and Montemayor for less than an hour, did no investigation, and relied on the decisions of Catalan's brother's lawyer, Montemayor, during the trial.<sup>39</sup> In reviewing the trial record, the Fifth Circuit Court of Appeals noted that Grett had failed to request time to prepare for the case, which was guaranteed by statute to be at least ten days,<sup>40</sup> and Grett was therefore unable to introduce evidence favorable to Catalan.<sup>41</sup> The Fifth Circuit stated, "Because of his reliance and ignorance of the facts of the case, Grett did not impeach the victim on cross examination with prior inconsistent testimony that Catalan was a mere bystander to the assault."<sup>42</sup> Even more important to the finding of ineffectiveness was Grett's reliance on Montemayor, whose conflict of interest had triggered his removal from representing Catalan.<sup>43</sup> The Texas state court denied Catalan post-conviction relief,<sup>44</sup> but the Fifth Circuit affirmed the federal district court granting Catalan relief, finding it "a clear case of deficient performance and prejudice."<sup>45</sup> Given the circumstances of the trial, a reasonable person could conclude that a trial judge committed to protecting the rights of Catalan would not have permitted the trial to go forward in the first place when Grett was so unprepared and unfamiliar with his client's case.<sup>46</sup>

Typically, a lawyer's poor performance at trial is overlooked on appeal as well due to the difficult standard of review. When the U.S.

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the state had failed to provide notice of the testimony. *Id.* at 1293 n.5. The state responded that Porter had been advised that he could review a videotape of Fisher's interrogation and interview the officers, and Porter failed to do so. *Id.* The court overruled Porter's objection, ruling that Porter had adequate notice of the testimony. *Id.* This interchange should have flagged for the trial judge that Porter had neither done thorough discovery nor had adequately prepared for the trial.

37. Catalan v. Cockrell, 315 F.3d 491, 492 (5th Cir. 2002).

38. *Id.*

39. *Id.*

40. *Id.* at 492 & n.1.

41. *Id.* at 492-93.

42. *Id.* at 492.

43. *Id.* at 492-93.

44. *Id.* at 492.

45. *Id.* at 493.

46. *See id.* at 492-93.

Supreme Court decided *Gideon v. Wainwright*,<sup>47</sup> which established the right to defense counsel in criminal cases when one is unable to pay for a lawyer,<sup>48</sup> most federal and state courts required that before a post-conviction finding of ineffective assistance of counsel, a lawyer's performance would have to be so deficient that "the circumstances surrounding the trial *shocked the conscience* of the court and made the proceedings *a farce and a mockery of justice*."<sup>49</sup> This "farce or mockery" standard not only imposed a very heavy burden on defendants, its vagueness meant that courts applied it inconsistently and relied almost wholly on the reviewing courts' subjective determinations.<sup>50</sup> During the era that this standard prevailed, Chief Judge David Bazelon of the District of Columbia Circuit Court of Appeals stated that the standard "is itself a mockery of the sixth amendment."<sup>51</sup>

In *Strickland v. Washington*,<sup>52</sup> the Supreme Court moved away from the farce and mockery standard and held that an ineffective assistance of counsel claim requires the defendant to prove both objectively unreasonable performance by the lawyer *and* prejudice.<sup>53</sup> The Court proceeded to define prejudice as a reasonable probability that the lawyer's inadequate performance adversely affected the outcome of the case.<sup>54</sup> In other words, but for the defense lawyer's poor representation, it is likely that the defendant would not have been convicted.

In considering the lawyer's performance, the Court stated it is "highly deferential" to defense counsel.<sup>55</sup> In cases subsequent to *Strickland*, the Court has stated that "[s]urmounting *Strickland's* high

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47. 372 U.S. 335 (1963).

48. *Gideon* established the right for the defendant facing felony charges in state court to have counsel provided when the defendant is unable to hire his or her own lawyer. *See id.* at 342-44. After *Gideon*, a series of Supreme Court decisions expanded the right to counsel for the poor. *See Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (recognizing right to counsel in probation revocation matters where incarceration is possible); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (recognizing the right to counsel in misdemeanor cases where incarceration is possible); *In re Gault*, 387 U.S. 1, 30-31 (1967) (extending the right to counsel to juvenile matters); *Douglas v. California*, 372 U.S. 353, 356-57 (1963) (providing right to counsel in the first state appeal as a matter of right).

49. *Diggs v. Welch*, 148 F.2d 667, 670 (D.C. Cir. 1945) (emphasis added), *cert. denied*, 325 U.S. 889 (1945); *see Maryland v. Marzullo*, 435 U.S. 1011, 1011 (1978) (White, J., dissenting) (citing cases using a "farce" or "mockery" of justice standard). Courts sometimes characterized the standard as a "farce and mockery of justice" standard. *See, e.g., Trapnell v. United States*, 725 F.2d 149, 151 (2d Cir. 1983) (citing cases from all circuits adopting the "farce and mockery" standard).

50. Mark R. Lee, *Right to Effective Counsel: A Judicial Heuristic*, 2 AM. J. CRIM. L. 277, 289 (1974).

51. Bazelon, *supra* note 18, at 28.

52. 466 U.S. 668 (1984).

53. *Id.* at 687-88, 691-92.

54. *Id.* at 687, 694.

55. *Id.* at 689-90.

bar is never an easy task.”<sup>56</sup> Combining a highly deferential view of defense counsel’s performance with the almost impossible prejudice standard results in some courts rejecting ineffective assistance of counsel claims even in capital cases where defense counsel has slept through portions of the trial,<sup>57</sup> or have been under the influence of alcohol, drugs, or otherwise mentally impaired at trial.<sup>58</sup>

The high bar *Strickland* sets is compounded by the very fact that a post-trial review of defense counsel’s effectiveness is extremely difficult because one does not know how the trial would have proceeded if counsel had performed better.<sup>59</sup> In his dissent in *Strickland*, Justice Thurgood Marshall predicted:

[I]t may be impossible for a reviewing court to confidently ascertain how the government’s evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. . . . [E]vidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.<sup>60</sup>

Justice Marshall’s prediction has proven true, and few defendants prevail with ineffective assistance of counsel claims due to the almost impossibly high *Strickland* standard.<sup>61</sup> In rejecting an ineffective assistance of counsel claim in a death penalty case, one appellate judge observed: “[T]he Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel. It requires representation only by a lawyer who is not ineffective under the standard set by *Strickland v. Washington*.”<sup>62</sup> The Judge stated that because of the *Strickland* standard, “accused persons who are represented by ‘not-legally-ineffective’ lawyers may be condemned to die when the same accused, if represented by *effective* counsel, would receive at least the clemency of a life sentence.”<sup>63</sup>

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56. *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

57. *See, e.g., Ex parte McFarland*, 163 S.W.3d 743, 748-49, 751-53 (Tex. Crim. App. 2005) (en banc) (rejecting ineffective assistance of counsel claims including defense counsel sleeping during trial).

58. *See* Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 455-60 (1996) (describing cases in which courts reject ineffective assistance of counsel claims when lawyers use drugs, alcohol, or are otherwise mentally impaired at trial).

59. *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting).

60. *Id.*

61. *See, e.g.,* Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2169-71 (2013) (describing how courts repeatedly excuse poor lawyering by presuming the lawyers were making strategic decisions or by not finding prejudice).

62. *Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

63. *Id.* The *Strickland* standard has the perverse effect of requiring courts to affirm

Donald Dripps has argued that due to the difficulty in meeting the *Strickland* standard for an ex post examination of defense counsel's effectiveness, trial courts should conduct "an *ex ante* inquiry into whether the defense is institutionally equipped to litigate as effectively as the prosecution."<sup>64</sup> Dripps calls this "an *ex ante* parity standard," and he suggests that it occur either in collateral civil proceedings challenging the effectiveness of the defense system as a whole, or in individual cases upon a pretrial motion asserting that the defendant cannot receive effective assistance of counsel due to deficiencies in the indigent defense system.<sup>65</sup> I agree that this is an alternative solution to the problem of the crisis in the public defense system, which I discuss in Part III of this Article.<sup>66</sup>

### III. THE CRISIS IN PUBLIC DEFENSE: CASE OVERLOADS AND DISINCENTIVES TO EFFECTIVE ASSISTANCE OF COUNSEL

Instead of continuing to relegate ineffective assistance of counsel claims to a post-trial inquiry only, there are circumstances when a trial judge's duty to justice requires an inquiry into whether defense counsel is providing effective assistance of counsel.<sup>67</sup> This is especially necessary when defense counsel is laboring under excessive caseloads and with few resources to provide effective assistance of counsel, and instead "practice triage as they attempt to represent more people than is humanly – and ethically – possible."<sup>68</sup>

If the defense lawyer is a public defender, it is likely that she will have a caseload that far exceeds recommended caseload standards.<sup>69</sup> The ABA Standards for Criminal Justice cite to a maximum annual caseload of 150 felonies, *or* 400 misdemeanors, *or* 200 juvenile cases, *or* 200 mental commitments, *or* 25 appeals per attorney.<sup>70</sup> In courts across the United States, most defendants are represented by public defenders with

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convictions when the legal representation was objectively ineffective but not "ineffective" as a matter of law.

64. Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 243 (1997).

65. *Id.* at 286-306.

66. *See infra* Part III.

67. *See* Dripps, *supra* note 64, at 277-78.

68. Bright & Sanneh, *supra* note 61, at 2152.

69. *See* Dripps, *supra* note 64, at 249.

70. *See* STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-5.3 cmt. at 72 (AM. BAR ASS'N 1992). The ABA Standards for Criminal Justice refer to the caseload standards first developed by the National Advisory Committee in 1973 as "hav[ing] proven resilient over time, and provid[ing] a rough measure of caseloads." *Id.*; *National Advisory Commission on Criminal Justice Standards and Goals, The Defense (Black Letter)*, NLADA, <http://www.nlada.org/defender-standards/national-advisory-commission/black-letter> (last visited Nov. 15, 2017).

caseloads that are double or triple the recommended levels.<sup>71</sup> The high caseloads likely lead some public defenders to cut corners such as failing to investigate the facts and law of their cases thoroughly, foregoing filing important pretrial motions, neglecting to explain collateral consequences of conviction to clients considering plea bargains, and failing to prepare adequately for trials.<sup>72</sup>

Disincentives to rendering effective assistance of counsel also plague public defense when there are appointed counsel who receive unrealistically low pay rates or provide public defense through low-bid or flat-rate public defense contracts.<sup>73</sup> Some lawyers taking public defense cases with low hourly rates or flat fees “are prioritizing speed in order to make representation more profitable,” which includes “clients pleading to the offense charged.”<sup>74</sup> As a result, low pay for appointed counsel and low-bid public defense contracts often lead to poor representation.<sup>75</sup>

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71. Hearings and studies reveal that these caseload limits are exceeded in almost every jurisdiction. *See, e.g.*, AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 18 (2004), [http://texaswcl.tamu.edu/reports/2004\\_ABA\\_Gideon%27s\\_Broken\\_Promise.pdf](http://texaswcl.tamu.edu/reports/2004_ABA_Gideon%27s_Broken_Promise.pdf) [hereinafter *GIDEON'S BROKEN PROMISE*] (reporting that testimony at ABA hearings demonstrated public defender caseloads in several states exceeded maximum caseload guidelines by more than 150%). The Department of Justice's Bureau of Justice Statistics found that approximately seventy-three percent of county-based public defender offices exceed caseload guidelines per attorney in 2007. DONALD J. FAROLE, JR. & LYNN LANGTON, U.S. DEP'T OF JUSTICE, BUREAU OF STATISTICS, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007, at 1 (2010), <https://www.bjs.gov/content/pub/pdf/clpdo07.pdf>; *see also* NAT'L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 68 & n.113 (2009), <http://www.constitutionproject.org/pdf/139.pdf> (finding six attorneys handled over 10,000 misdemeanor cases in Tennessee in 2006, and the average caseload for public defenders in Dade County, Florida was nearly 500 felonies and 2225 misdemeanors per lawyer in 2008).

72. *See* Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771, 779 (2010).

73. *GIDEON'S BROKEN PROMISE*, *supra* note 71, at 12, 18.

74. SIXTH AMENDMENT CTR., JUSTICE SHORTCHANGED: ASSIGNED COUNSEL COMPENSATION IN WISCONSIN 17 (2015), [http://sixthamendment.org/wp-content/uploads/2015/04/6AC\\_wjusticeshortchanged\\_2015.pdf](http://sixthamendment.org/wp-content/uploads/2015/04/6AC_wjusticeshortchanged_2015.pdf).

75. Wisconsin's hourly rate of forty dollars for appointed counsel and fixed-fee contracts for some public defense compromise the quality of legal assistance defendants receive. *Id.* at 5-13. Some states have prohibited low pay for appointed counsel and fixed fees contracting because they create financial conflicts of interest. *Id.* at 13. For example, the Idaho law that provides public defense contains a provision that prohibits contracts that “include any pricing structure that charges or pays a single fixed fee for the services and expenses of the attorney.” IDAHO CODE § 19-859(4) (2014). A Michigan law establishes minimum standards to guarantee the right to counsel which states, in pertinent part, that “[e]conomic disincentives or incentives that impair defense counsel's ability to provide effective representation shall be avoided.” MICH. COMP. LAWS § 780.991(2)(b) (2017). Ineffective assistance of counsel can also occur with privately retained defense counsel who are not sufficiently experienced, or who are only prepared to seek a plea bargain, sometimes to the offense charged, with little or no investigation and will not go to trial in the interest of maximizing the value of the fee they charged their clients. *See* Albert W. Alschuler, *Personal Failure*,

The problems with, and poor quality of, public defense are generally recognized,<sup>76</sup> even by top law enforcement officials. Former Attorney General Eric Holder observed:

As we all know, public defender programs are too many times underfunded. Too often, defenders carry huge caseloads that make it difficult, if not impossible, for them to fulfill their legal and ethical responsibilities to their clients. Lawyers buried under these caseloads often can't interview their clients properly, file appropriate motions, conduct fact investigations, or spare the time needed to ask and apply for additional grant funding.<sup>77</sup>

The substandard lawyering taking place raises legal issues about the de facto denial of the right to counsel, and triggers concerns about judges and publicly provided lawyers abdicating their ethical responsibilities to the accused. It also raises questions about what responsibility a trial judge has, or should have, to ensure that the accused has competent representation.

As Stephen Bright and Sian Sanneh have observed, in state and local courts responsible for over ninety-five percent of all criminal prosecutions,<sup>78</sup> “[t]he right to counsel is not enforced. Many judges tolerate or welcome inadequate representation because it allows them to process cases quickly.”<sup>79</sup> Underlying this indifference to, if not a preference for, inadequate representation is a widespread belief among judges “that most criminal defendants are guilty anyway” resulting in a “‘guilty anyway’ syndrome.”<sup>80</sup> Contrary to this “guilty anyway syndrome,” there have been 350 DNA exonerations in the United States since 1989, which conclusively demonstrate guilt should not be

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*Institutional Failure, and the Sixth Amendment*, 14 N.Y.U. REV. L. & SOC. CHANGE 149, 150 (1986). More than thirty years ago, Albert Alschuler explained the practice of some defense lawyers who, once a fee is collected in advance, find “[their] economic interests lie in disposing of the case as rapidly as possible” which “is usually to enter a bargained plea.” *Id.*

76. Substandard legal representation springs from excessive caseloads, lack of funds for expert witnesses and investigators, and low pay rates for court-appointed lawyers and contract defense services; these problems are well-documented. See Norman Lefstein & Georgia Vagenas, *Restraining Excessive Defender Caseloads: The ABA Ethics Committee Requires Action*, CHAMPION, Dec. 2006, at 10, 10-11; James M. McCauley, *Excessive Workloads Create Ethical Issues for Court-Appointed Counsel and Public Defenders*, VA. LAW., Oct. 2004, at 2, 2-4. See generally NAT'L RIGHT TO COUNSEL COMM., *supra* note 71.

77. Eric Holder, Att'y Gen., Address at the Department of Justice National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000-2010 (Feb. 18, 2010), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-addresses-department-justice-national-symposium-indigent>.

78. Bright & Sanneh, *supra* note 61, at 2153.

79. *Id.* at 2154.

80. Bazelon, *supra* note 18, at 26.

assumed, even after conviction, in every case.<sup>81</sup> When exonerations for all reasons, including DNA exonerations, are considered, there are more than 2120 documented cases of persons wrongfully convicted since 1989.<sup>82</sup> Rather than failing to take the accused's right to truly adequate and effective assistance of counsel, trial judges should recognize that they have an affirmative duty to do justice by assuring the accused's rights. This is especially necessary when the defendant is indigent and has no choice of counsel, as is discussed in the next Part.<sup>83</sup>

#### IV. HOW THE RIGHTS OF THE ACCUSED DIFFER: PUBLIC DEFENSE VERSUS PRIVATELY RETAINED COUNSEL

##### A. *The Hobson's Choice Facing Indigent Defendants*

Imagine a defendant facing charges for grand theft. At arraignment, the trial judge appoints a public defender to represent him. Well before the trial date, the defendant requests that he be permitted to represent himself because he believes his appointed public defender has too many other cases. Initially, the trial judge rules that the defendant may proceed pro se, but later reverses this ruling and appoints the same public defender. The judge also denies the defendant's repeated requests for the appointment of a lawyer other than the overburdened public defender. At trial, the judge requires the public defender to conduct the defense. The jury finds the defendant guilty as charged, and the judge sentences him to prison. The defendant appeals through the state court system, and both the court of appeals and state supreme court affirm that the defendant had no federal or state constitutional right to represent himself. The Supreme Court grants certiorari and rules that there is a constitutional right to conduct one's own defense.

The defendant was Anthony Faretta, and the Supreme Court case recognizing that the Sixth Amendment contains the right of self-representation is *Faretta v. California*.<sup>84</sup> Imbedded in the *Faretta* decision, though, is the Hobson's choice Anthony Faretta faced: accept an overburdened and ineffective lawyer or argue for the right of self-

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81. *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states> (last visited Nov. 15, 2017).

82. *See Exonerations by State*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> (last visited Nov. 15, 2017).

83. *See infra* Part IV.

84. *Faretta v. California*, 422 U.S. 806, 818-19 (1975).

representation.<sup>85</sup> When questioned by the judge about why he wanted to represent himself, Faretta stated that “he did not want to be represented by the public defender because he believed that the office was ‘very loaded down with . . . a heavy case load.’”<sup>86</sup> In other words, Faretta believed that the public defender’s heavy caseload meant that he would not receive adequate representation and that he would be better off representing himself.<sup>87</sup> After the trial court imposed the public defender on him the second time, Faretta moved three times for the court to appoint a lawyer other than the overburdened public defender, and each time the court denied his motions.<sup>88</sup>

Law students learn that *Faretta* stands for the proposition that the Sixth Amendment includes the right of self-representation, but it stands for something more. *Faretta* also stands for the proposition that if an indigent defendant raises concerns about the quality of his government provided lawyer with the court, the trial judge may give the defendant the same Hobson’s choice Faretta was given: accept your appointed defense counsel no matter how overburdened or inadequate the lawyer may be, or effectively waive your Sixth Amendment right to counsel and assert your right to proceed pro se.<sup>89</sup> This choice can, and often does, mask the fact that the trial judge who does not examine the defendant’s claims concerning the quality of defense counsel carefully is failing to ensure that the indigent defendant receives effective assistance of counsel guaranteed by *Gideon*.

### B. *The Unrestricted Choice for Defendants Who Can Pay*

Now, imagine a defendant facing charges for conspiring to distribute more than 100 kilograms of marijuana. His family hires an attorney to represent him. After his arraignment, the defendant calls a second attorney in another state because of that attorney’s reputation for being aggressive and successful. The defendant meets with the second

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85. *See id.* at 807-08.

86. *Id.* at 807 (alteration in original).

87. Other commentators have read Faretta’s concern about his public defender’s heavy caseload to mean that Faretta feared that he would not receive adequate representation. *See, e.g.*, Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 432 (2007) (“Anthony Faretta thought his court-appointed public defender was ‘too loaded down with . . . a heavy case load’ to represent him adequately, so he requested permission to represent himself.” (quoting *Faretta*, 422 U.S. at 807)); Janet Moore, *The Antidemocratic Sixth Amendment*, 91 WASH. L. REV. 1705, 1733-34 (2016) (noting that “Faretta wanted a government-paid lawyer” but not one “who he alleged was overworked, biased, and conflicted” (footnote omitted)).

88. *Faretta*, 422 U.S. at 810 & n.5.

89. *See* Hashimoto, *supra* note 87, at 465 & n.152.

attorney, hires him, and the second attorney initially works with the first lawyer in representing the defendant. The defendant then fires his first lawyer, and the second lawyer, who is from out of state, files a motion with the court for admission *pro hac vice* (temporary admission) to represent the defendant. The trial judge denies the motion without comment. A month later, the second lawyer again files a motion for admission *pro hac vice* to represent the defendant, and the trial judge again denies the motion without comment. The defendant's first lawyer withdraws from representing the defendant, and the defendant hires another lawyer already admitted to practice before the court. On the first day of trial, defendant's chosen lawyer, the second lawyer, again seeks admission to represent the defendant and the trial court denies his third request. The trial judge also prohibits the second lawyer from assisting the defendant's more recently retained lawyer during the trial. Defendant is convicted, he appeals, and the court of appeals reverses his conviction holding: "A non-indigent criminal defendant's Sixth Amendment rights encompass the right to be represented by the attorney selected by the defendant."<sup>90</sup> The Court grants the government's certiorari request, and the Court affirms the court of appeals and rules in favor of the defendant.

The defendant was Cuauhtemoc Gonzalez-Lopez, and the Supreme Court case recognizing that the Sixth Amendment guarantees the right to hire counsel of one's choice is *United States v. Gonzalez-Lopez*.<sup>91</sup> In affirming the Eighth Circuit's decision to reverse Gonzalez-Lopez's conviction, the Court explained that the right to hire counsel of one's choice is "regarded as the root meaning of the [Sixth Amendment's] constitutional guarantee."<sup>92</sup> The Court additionally held that if the Sixth Amendment right to hire counsel of one's choice is denied erroneously, no showing of prejudice is required to trigger reversal even if the defendant has been ably represented at trial.<sup>93</sup> In other words, the two-part *Strickland* test for analyzing ineffective assistance of counsel claims is not applicable, and the issue is viewed similar to a complete denial of the Sixth Amendment right to counsel.<sup>94</sup>

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90. *United States v. Gonzalez-Lopez*, 399 F.3d 924, 928 (8th Cir. 2005), *aff'd*, 548 U.S. 140 (2006).

91. *Gonzalez-Lopez*, 548 U.S. at 144, 147-48.

92. *Id.* at 147-48.

93. *Id.* at 146.

94. *Id.* at 146-48.

### C. Differences in the Right to Counsel Based on Ability to Pay

Legal rights in the United States often depend upon the amount of money one has,<sup>95</sup> and *Gonzalez-Lopez* and *Faretta* demonstrate that this is especially true when it comes to the Sixth Amendment right to counsel.<sup>96</sup> In contrast to the limited rights of indigent defendants who must accept the lawyer assigned to them, defendants who can retain defense counsel have more expansive rights.<sup>97</sup> When the accused can pay, the U.S. Supreme Court protects one's right to choose her own lawyer, and instructs the trial judge that denying the defendant's right to counsel of choice is reversible error even if another lawyer provided effective representation to the defendant: "Where the right to be assisted by counsel of one's choice is wrongfully denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation."<sup>98</sup> Such a denial results in structural error, which not only relieves the defendant of the burden of proving ineffectiveness of the lawyer who represented him but also is not subject to harmless-error analysis.<sup>99</sup>

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95. "[M]ore than 80 percent of the civil legal needs of the poor go unmet," and approximately "61 percent of the legal needs of middle-income households" go unmet because of the inability to find affordable lawyers. Peter A. Joy, *Rationing Justice by Rationing Lawyers*, 37 WASH. U. J.L. & POL'Y 205, 205 & n.2 (2011). Having a lawyer dramatically increases a person's ability to assert and succeed in pressing legal claims. See, e.g., Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 46-66 (2010) (finding that having a lawyer increased success rates in asserting legal claims). Due to the inability to afford lawyers, one or both parties in more than two-thirds of civil cases represent themselves. Martha Bergmark, *We Don't Need Fewer Lawyers. We Need Cheaper Ones.*, WASH. POST (June 2, 2015), [https://www.washingtonpost.com/posteverything/wp/2015/06/02/we-dont-need-fewer-lawyers-we-need-cheaper-ones/?utm\\_term=.63e62048753d](https://www.washingtonpost.com/posteverything/wp/2015/06/02/we-dont-need-fewer-lawyers-we-need-cheaper-ones/?utm_term=.63e62048753d). "Many people suffer crushing losses in court not because they've done something wrong, but simply because they don't have legal help." *Id.*

In *Powell v. Alabama*, the Court recognized the critical importance of defense counsel in criminal cases and explained:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

287 U.S. 45, 69 (1932).

96. See *Gonzalez-Lopez*, 548 U.S. at 152; *Faretta v. California*, 422 U.S. 806, 807-08 (1975).

97. See *Gonzalez-Lopez*, 548 U.S. at 144.

98. *Id.* at 148-51.

99. *Id.* at 150-52.

Courts privilege defendants with the ability to retain counsel in additional ways. When a defendant who has retained counsel is unhappy with her lawyer's performance, the defendant is able to fire her first lawyer and hire a new lawyer without the court's approval as long as the new lawyer is admitted to practice before the court and the change in lawyers will not cause a delay.<sup>100</sup> If a defendant who has retained counsel experiences a breakdown in the relationship and a loss of trust, the defendant is able to hire a new lawyer that she can trust without any court intrusion.<sup>101</sup>

The opposite is true if the defendant is among the approximately eighty percent of criminal defendants who must rely upon public defenders or other assigned counsel for legal representation.<sup>102</sup> If an indigent defendant is unhappy with defense counsel provided by the government, usually there is little recourse.<sup>103</sup> When defense counsel and an indigent defendant are at odds and there is a breakdown in the basic client-attorney relationship, the Court has stated that the Sixth Amendment right to counsel does not guarantee a meaningful relationship between the accused and counsel.<sup>104</sup> Additionally, the Court has stated that an indigent defendant cannot "insist on representation by a person who is not a member of the bar, or demand that a court honor his waiver of conflict-free representation."<sup>105</sup> The

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100. *See id.* at 151-52.

101. A defendant may replace retained counsel without a judge interfering in the decision as long as the lawyer is admitted to practice before the court, or capable of being admitted to practice, and hiring a new lawyer does not delay the trial. *See id.*

102. This estimate is based upon a study that found public defenders and assigned counsel representing 82% and 15% respectively, of state felony cases in the 100 most populous counties in the United States. *See* CAROL J. DEFRANCES & MARIKA F.X. LITRAS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INDIGENT DEFENSE SERVICES IN LARGE COUNTIES, 1999, at 1 (2000), <https://www.bjs.gov/content/pub/pdf/idslc99.pdf>. The 100 most populous counties accounted for 42% of the U.S. population in 1999. *Id.* at 2. A report released in 2000 states that approximately 66% of defendants in federal felony cases were represented by public defenders or assigned counsel. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), <http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf>. "Approximately 95% of criminal defendants are charged in State courts, with the remainder tried in Federal courts." *Id.* at 4.

103. If the defendant is represented by a public defender, the public defender service may consider a request to provide a substitute public defender if there is a breakdown in the relationship between the defendant and the original public defender. If the public defender service does not provide substitute counsel, the defendant either accepts the originally assigned lawyer or must ask the trial judge to provide substitute counsel. This is because the Court has held that there is no Sixth Amendment guarantee to a "meaningful relationship" between an accused and his counsel," *Morris v. Slappy*, 461 U.S. 1, 14 (1983), and "the trial court . . . has almost complete discretion regarding whether to grant a request for new counsel," Hashimoto, *supra* note 87, at 465 n.152.

104. *Morris*, 461 U.S. at 13-14.

105. *Gonzalez-Lopez*, 548 U.S. at 152.

defendant may ask for substitute counsel, but the Court has stated that “a defendant may not insist on representation by an attorney he cannot afford.”<sup>106</sup> If the trial judge denies the request for new counsel, the indigent defendant is usually in a take it or leave it situation, like Anthony Faretta, when it comes to defense counsel—take the defense lawyer you have and go to trial, or give up your right to counsel and represent yourself.

#### V. THE DUTY TO CONDUCT AN EFFECTIVE ASSISTANCE OF COUNSEL HEARING

The right to the effective assistance of counsel is the cornerstone of a fair and just criminal trial or plea, and necessary for the accused to receive due process. Thus, a trial judge has an obligation, even on her own initiative, to inquire into the effectiveness of defense counsel when there is reason to do so.<sup>107</sup> The fact that a criminal trial is an adversary proceeding does not relieve the trial judge of this obligation.<sup>108</sup> A trial judge cannot be an effective arbiter of the trial process if the trial or plea itself is not fair due to the ineffectiveness of counsel.<sup>109</sup>

There are three distinct, but at times overlapping, situations that should prompt a trial judge to conduct a pre-trial inquiry into whether counsel for the accused is providing effective assistance of counsel.<sup>110</sup> First, and foremost, a pre-trial inquiry should be triggered whenever the defendant requests substitute counsel and complains to the court about defense counsel.<sup>111</sup> Second, a pretrial inquiry should be required whenever caseloads of defense counsel are so excessive that the caseload undermines defense counsel’s ability to provide effective assistance of counsel to the accused.<sup>112</sup> This may be triggered either by defense counsel raising the issue, or when the issue of excessive caseloads in a jurisdiction is otherwise known to the trial judge.<sup>113</sup> Third, there may be times when defense counsel performance appears to be so deficient that

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106. *Wheat v. United States*, 486 U.S. 153, 159 (1988); see *Gonzalez-Lopez*, 548 U.S. at 151 (“[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them.”); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989) (stating that a defendant who cannot afford to hire counsel is only guaranteed adequate representation).

107. See *supra* Part IV.A.

108. See *supra* notes 4-15 and accompanying text.

109. See Schwarzer, *supra* note 13, at 641.

110. See *infra* Part V.A–C.

111. See *infra* Part V.A.

112. See *infra* Part V.B.

113. See *infra* Part V.B.

it triggers a judge's inquiry into whether the lawyer is providing effective assistance of counsel to the accused.<sup>114</sup>

In each of these instances, the trial judge is apprised of the fact that the defendant's Sixth Amendment right to effective assistance of counsel may be in jeopardy. As discussed previously,<sup>115</sup> in *McMann v. Richardson*, the Supreme Court recognized that a trial judge has an affirmative obligation not to leave the defendant "to the mercies of the incompetent counsel."<sup>116</sup> Protecting the right to counsel requires a trial judge to inquire into the possible threat to a defendant's right to effective assistance of counsel.<sup>117</sup>

#### A. Defendant's Request for Substitute Counsel

In recent years, there has been some investigation into defendants who choose to represent themselves rather than be represented by a publicly provided lawyer.<sup>118</sup> Researchers have found that comprehensive data is lacking.<sup>119</sup> There are, however, two studies that provide some insight into pro se defendants. One, by Erica Hashimoto, is an empirical study into pro se defendants in federal and state courts in which she includes an examination of the reasons why some defendants choose to represent themselves.<sup>120</sup> Another empirical study, by Jona Goldschmidt and Don Stemen, focuses on pro se defendants in federal courts and examines trends in pro se representation.<sup>121</sup>

Due to limitations in the data, it is hard to say exactly how many defendants choose to represent themselves, especially in state courts.<sup>122</sup>

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114. See *infra* Part V.C.

115. See *supra* note 15 and accompanying text.

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

117. For example, when a trial judge is aware that defense counsel may have a conflict of interest, such as representing codefendants, the trial judge must inquire into the possible threat or the defendant will be deprived of assistance of counsel. *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978). When such a violation of the Sixth Amendment right occurs, reversal is automatic and no showing of prejudice is required. *Id.* at 487-89.

118. See, e.g., Hashimoto, *supra* note 87, at 438-76.

119. Jona Goldschmidt & Don Stemen, *Patterns and Trends in Federal Pro Se Defense, 1996-2011*, FED. CTS. L. REV., June 2015, at 81, 84.

120. Hashimoto, *supra* note 87, at 429 ("[F]elony [pro se] defendants choose to represent themselves because of legitimate concerns about, or dissatisfaction with, appointed counsel.").

121. See, e.g., Goldschmidt & Stemen, *supra* note 119, at 84 ("Anyone working in the area of research into pro se litigation knows that court data regarding the phenomenon is scant."). State court administrator offices do not report data on criminal pro se processing. *Id.* at 84-85. The databases that do exist usually have high rates of missing data. Hashimoto, *supra* note 87, at 441-46.

122. Hashimoto explains that the state court database contains data on only a fraction of criminal cases, and that fraction is not necessarily a representative fraction of felony cases in state courts. Hashimoto, *supra* note 87, at 442 n.82. The state court database is comprised of a sampling of cases from the seventy-five most populous counties, which excludes information on cases in

In federal courts, Goldschmidt and Stemen found felony pro se representation at a rate of more than 1 in 100 defendants in Georgia,<sup>123</sup> and nearly 1 in 100 in Louisiana and Oklahoma.<sup>124</sup> Hashimoto reported a lower overall rate of pro se representation in federal and state courts, and found that somewhere between 1 in 200 and 1 in 300 felony defendants choose to represent themselves.<sup>125</sup> An earlier Department of Justice Study found that in state courts, sampled felony defendants proceeded pro se at the rate of nearly 1 in 50 in the early 1990s.<sup>126</sup>

While the overall rate of defendants charged who proceed pro se appears to be relatively low in most instances, it appears magnified when viewed compared to the number of defendants who go to trial. Hashimoto found that approximately sixty-six percent of the federal felony pro se defendants went to trial, either before a judge or jury,<sup>127</sup> compared to the estimated overall rate of three percent of all federal defendants going to trial.<sup>128</sup>

Hashimoto's analysis of available data also dispels a popular belief held by many judges, defense lawyers, and prosecutors that defendants who proceed pro se have some type of mental illness.<sup>129</sup> She notes that one commentator who has written about pro se defendants begins his article "with the adage that 'he who represents himself has a fool for a client,'" and assumes, without any empirical evidence, "that people who represent themselves are either deeply misguided or mentally ill."<sup>130</sup> In

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more rural counties. *Id.*

123. The frequency of federal felony defendants proceeding pro se in Georgia was 1.4% during the period studied, 1996–2011. Goldschmidt & Stemen, *supra* note 119, at 96 tbl.5.

124. Federal felony defendants proceeded pro se in Louisiana and Oklahoma at the rate of 0.8% during 1996–2011. *Id.*

125. Hashimoto calculated the rate of self-representation in felony cases to be approximately 0.5% to 0.3%. Hashimoto, *supra* note 87, at 447.

126. The study analyzed data concerning type of counsel for felony defendants in state courts from the seventy-five largest counties in 1992, and found that 1.7% of defendants proceeded pro se. HARLOW, *supra* note 102, at 5 tbl.6.

127. Hashimoto, *supra* note 87, at 453. Hashimoto states that of 208 pro se defendants in the federal court database, 137 went to trial. *Id.*

128. See, e.g., *Sourcebook of Criminal Justice Statistics Online* tbl.5.22.2010, <http://www.albany.edu/sourcebook/pdf/t5222010.pdf> (last visited Nov. 15, 2017) (showing a total of 87,418 guilty pleas out of 90,164 cases were not dismissed prior to disposition); see also *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (stating that 97% of federal cases and 94% of state cases are resolved through pleas).

129. See Hashimoto, *supra* note 87, at 456-59.

130. *Id.* at 438 (quoting John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Fareta*, 6 SETON HALL CONST. L.J. 483, 485 (1996)). Hashimoto is referring to an article by John F. Decker, which argues that many defendants proceeding pro se are foolish or "so totally out of touch with reality that they believe they can do it all themselves." Decker, *supra*, at 487.

contrast to this belief held by many in the criminal justice system,<sup>131</sup> Hashimoto's analysis of the empirical evidence that does exist demonstrates that "the vast majority of felony pro se defendants in federal court do not exhibit overt signs of mental illness."<sup>132</sup> The lack of data prevented Hashimoto from drawing any conclusions about defendants in state courts, but there are also no data to suggest that defendants in state courts would exhibit any more or fewer signs of mental illness.<sup>133</sup>

Although there were insufficient data to determine the reasons why felony defendants in state courts proceeded pro se, Hashimoto found that approximately half of the federal felony defendants who proceeded pro se did so only after asking the court to appoint new counsel.<sup>134</sup> She states that "the data suggest that at least some defendants who represent themselves do so because of dissatisfaction with counsel."<sup>135</sup> Federal felony defendants with court-appointed counsel were also more likely to terminate their court-appointed lawyers and to proceed pro se than federal felony defendants on the whole.<sup>136</sup> After analyzing the available data, Hashimoto concluded:

Because indigent defendants with court-appointed counsel are the very people who are at risk of being confronted with choosing between inept counsel and self-representation, the fact that pro se defendants are more likely to be indigent tends to support the argument that defendants choose to represent themselves because of concerns about court-appointed counsel.<sup>137</sup>

Rather than assuming defendants expressing dissatisfaction with their appointed counsel is rooted in some form of mental illness or is misguided, trial judges should take these complaints more seriously. As discussed previously, problems with public defense are well-known.<sup>138</sup>

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131. See Hashimoto, *supra* note 87, at 434-35.

132. *Id.* at 428. Hashimoto found that of the more than 200 felony pro se defendants in federal court whose cases she reviewed for her article, judges ordered competency exams in just over twenty percent of the cases. *Id.* She explains that a federal district court judge will usually order a competency evaluation when a defendant manifests a sign of mental illness. *Id.* She concludes that the fact that no such examinations were ordered in close to eighty percent of cases "strongly suggests that the vast majority of these defendants did not exhibit signs of mental illness." *Id.*

133. *Id.* at 441-42.

134. *Id.* at 429.

135. *Id.* at 455.

136. *Id.* at 429. Goldschmidt and Stemen found a lower rate of federal felony defendants proceeding pro se after terminating counsel than Hashimoto's study, but Goldschmidt and Stemen did not examine whether the defendants proceeded pro se after having first requested substitute counsel. Goldschmidt & Stemen, *supra* note 119, at 99-100.

137. Hashimoto, *supra* note 87, at 466.

138. See *supra* Part III.

By taking requests for substitute counsel and other complaints about publicly provided counsel seriously, trial judges will be fulfilling their duty to do justice. The type of inquiry they should conduct, as well as the standards for determining ineffective assistance of counsel prior to plea or trial, are discussed later in this Article.<sup>139</sup>

### B. Excessive Caseloads

Defense counsel carrying an excessive caseload can also trigger a judge's duty to inquire into whether the lawyer is providing effective assistance of counsel.<sup>140</sup> The issue of excessive caseload may be raised by the lawyer or public defender office, or it may be raised by a judge who is aware that the caseloads of public defenders, appointed counsel, or lawyers with public defense contracts exceed acceptable caseload limits.<sup>141</sup> When a lawyer is overburdened by excessive caseloads, the lawyer will not have the time to represent a client effectively as required by the Sixth Amendment.<sup>142</sup>

Excessive caseloads also trigger ethical concerns. In every jurisdiction, a lawyer is expected to provide competent representation.<sup>143</sup> The ethics rules also provide that "[a] lawyer's work load must be controlled so that each matter can be handled competently."<sup>144</sup> When a lawyer has so many clients that her "representation of one or more clients will be materially limited by the lawyer's responsibilities to another client," a conflict of interest exists.<sup>145</sup>

The issue of excessive caseloads is so acute that the ABA Standing Committee on Ethics and Professional Responsibility recognized the problem and issued an ethics opinion addressing the responsibilities of defense lawyers with excessive caseloads.<sup>146</sup> The opinion includes language stating: "If a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the

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139. See *infra* Part VI.

140. See *Pub. Def., Eleventh Judicial Circuit of Fla. v. State*, 115 So. 3d 261, 277 (Fla. 2013).

141. See *supra* notes 70-72 and accompanying text (discussing caseload limits).

142. Bright & Sanneh, *supra* note 61, at 2166.

143. The ABA Model Rules of Professional Conduct, upon which states model their own ethics rules, provides in the first ethics rule: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2016).

144. *Id.* r. 1.3 cmt. 2.

145. *Id.* r. 1.7(a)(2); see *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Def.*, 561 So. 2d 1130, 1135 (Fla. 1990) (per curiam) ("When excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created.").

146. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006).

representation of a client, she must not continue the representation of that client or, if representation has not yet begun, she must decline the representation.”<sup>147</sup> Courts addressing this issue, as well as state ethics opinions, share the ABA’s view that a lawyer with an excessive caseload must decline to accept new cases and, if the representation has already begun, seek relief from the trial court.<sup>148</sup>

An example of a trial court doing this occurred in Florida in 2009.<sup>149</sup> An Assistant Public Defender, Jay Kolsky, assigned to represent Antoine Bowens, sought to withdraw from the case due to his excessive caseload of 164 pending felonies.<sup>150</sup> Bowens was “facing a first-degree felony charge” and a potential “life sentence as a habitual offender.”<sup>151</sup> The trial court found:

Kolsky had been able to do virtually nothing in preparation of Bowens’ defense, had not obtained a list of defense witnesses from Bowens, had not taken any depositions, had not visited the scene of the alleged crime, had not looked for defense witnesses or interviewed any, had not prepared a mitigation package, had not filed any motions, and had to request a continuance at the calendar call.<sup>152</sup>

There was also expert testimony that the excessive caseload leading to Kolsky’s inability to represent Bowens properly was prejudicing Bowens, and the trial court found that Bowens’s constitutional rights had been prejudiced and granted Kolsky’s motion to withdraw.<sup>153</sup>

An earlier example of a trial judge considering the issue of the effect of excessive caseloads on a defendant’s constitutional rights led to the Louisiana Supreme Court decision, *State v. Peart*.<sup>154</sup> An Orleans Parish trial court appointed Rick Teissier, one of two public defenders in Orleans Parish, to represent Leonard Peart on the charges of armed robbery, aggravated rape, aggravated burglary, and attempted armed robbery.<sup>155</sup> Tessier filed a motion seeking relief due to his excessive caseload.<sup>156</sup> The trial court held a hearing, and at the hearing the court found that “between January 1 and August 1, 1991, Teissier represented

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147. *Id.*

148. *See, e.g.,* Joy, *supra* note 95, at 217-19 & nn.74-85 (identifying state ethics opinions and court cases addressing the ethical obligations of publicly provided lawyers with excessive caseloads).

149. *State v. Bowens*, 39 So. 3d 479, 480-81 (Fla. Dist. Ct. App. 2010).

150. *Id.*

151. *Id.*

152. *Pub. Def., Eleventh Judicial Circuit of Fla. v. State*, 115 So. 3d 261, 275 (Fla. 2013).

153. *Id.*

154. 621 So. 2d 780, 784-85 (La. 1993).

155. *Id.* at 784.

156. *Id.*

418 defendants. Of these, he entered 130 guilty pleas at arraignment. He had at least one serious case set for trial for every trial date during that period.”<sup>157</sup> The Louisiana Supreme Court found that, due to excessive caseloads and lack of support for Teissier and the other public defender in Orleans Parish, clients of the public defenders were “generally not provided with the effective assistance of counsel.”<sup>158</sup> As a remedy, the court created a rebuttable presumption that indigent defendants were not receiving effective assistance of counsel, and required the state to prove that defense counsel was effective before that judge could permit a case to proceed to trial.<sup>159</sup>

When a publicly provided defense lawyer raises the issue of excessive caseload either preventing the lawyer from taking on a new case assignment or negatively affecting the representation of a current client, a trial judge’s duty to do justice requires the trial judge to consider the claims seriously, hold a hearing, and determine whether the defendant is entitled to relief.<sup>160</sup> If the representation has not yet begun, the relief may be permitting the defense lawyer to decline taking the case.<sup>161</sup> If the representation has already begun, the relief may be permitting the lawyer to withdraw and to appoint another lawyer with a manageable caseload who is able to represent all clients effectively.<sup>162</sup>

### C. Judge’s Own Inquiry Based on Ineffective Representation Prior to Trial

At times, the poor performance of a defense lawyer may trigger a judge to conduct an inquiry of defense counsel to ensure that the accused has effective assistance of counsel.<sup>163</sup> Such an inquiry by the judge acting on her own initiative and not responding to a complaint by the defendant, or by the request of an overburdened defense lawyer, should be rare, but there are times when such an inquiry will be necessary.<sup>164</sup>

One such inquiry occurred in 2016, when a Wisconsin trial judge removed the defense lawyer representing a man accused of first-degree

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157. *Id.* (footnote omitted).

158. *Id.* at 790.

159. *Id.* at 791.

160. *See infra* Part VI.

161. *See Peart*, 621 So. 2d at 784, 787.

162. *See Pub. Def., Eleventh Judicial Circuit of Fla. v. State*, 115 So. 3d 261, 270 (Fla. 2013).

163. *See United States ex rel. Darcy v. Handy*, 203 F.2d 407, 427 (3d Cir. 1953); *Monroe v. United States*, 389 A.2d 811, 816 (D.C. 1978), *cert. denied*, 439 U.S. 1006 (1978).

164. *See Schwarzer, supra* note 13, at 639 (“When it appears in the course of litigation that a lawyer’s performance is falling short, it should be the trial judge’s responsibility, as the person responsible for the manner in which justice is administered in his court, to take appropriate action.”).

murder.<sup>165</sup> At a pretrial hearing approximately a month before the scheduled trial date, the judge became concerned when the defense counsel “didn’t understand what was meant by certain legal terms and concepts,” and gave incorrect answers to questions about various evidentiary and procedural matters such as the admissibility of various types of evidence and presenting an alibi defense.<sup>166</sup> The trial judge also found that the defense lawyer had not met with her client.<sup>167</sup> The judge cited to several Wisconsin ethics rules including lack of competence, failing to represent her client diligently, and failing to communicate with him.<sup>168</sup> In the face of such poor performance, the trial judge found the lawyer “grossly incompetent” and removed the lawyer from the case.<sup>169</sup>

As the case from Wisconsin demonstrates, there are times when a trial judge committed to doing justice should intervene and remove defense counsel who is not providing effective assistance. The Third Circuit Court of Appeals concluded that a trial judge should intervene when there is “gross incompetence or faithlessness of counsel as should be apparent to the trial judge,”<sup>170</sup> and the District of Columbia Court of Appeals has stated “that, the trial court also has the duty to ensure that the assistance thereby rendered to an accused comports with at least the minimum level of competence consistent with our standards of the fair administration of justice.”<sup>171</sup> When faced with obvious evidence of ineffective assistance of counsel, a judge’s duty to do justice should trigger an inquiry.

At the same time that there may be instances when a trial judge should intervene *sua sponte*; it should only occur when the record is sufficient to demonstrate that the trial counsel is not providing effective assistance of counsel. There is a history of some trial judges who use their discretion to intervene to penalize a lawyer the judge does not like, to influence the verdict, or perhaps to undermine the defense lawyer’s relationship with the client.<sup>172</sup> Bennett Gershman has discussed how some trial judges can, and do, use the judge’s broad discretion to

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165. Ed Treleven, *Murder Trial Postponed After Judge Removes Defense Attorney for Being ‘Grossly Incompetent’*, WIS. ST. J. (Sept. 28, 2016), [http://host.madison.com/wsj/news/local/crime-and-courts/murder-trial-postponed-after-judge-removes-defense-attorney-for-being/article\\_05160c11-7ccb-5de8-a743-9fce298d50d4.html](http://host.madison.com/wsj/news/local/crime-and-courts/murder-trial-postponed-after-judge-removes-defense-attorney-for-being/article_05160c11-7ccb-5de8-a743-9fce298d50d4.html).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *United States ex rel. Darcy v. Handy*, 203 F.2d 407, 427 (3d Cir. 1953).

171. *Monroe v. United States*, 389 A.2d 811, 816 (D.C. App. 1978), *cert. denied*, 439 U.S. 1006 (1978).

172. Bennett L. Gershman, *Judicial Interference with Effective Assistance of Counsel*, 31 PACE L. REV. 560, 568-71 (2011).

administer justice to interfere with effective assistance of counsel.<sup>173</sup> Gershman cites to several cases where trial judges have impaired the ability of defense counsel to represent their clients effectively by hindering the defense through actions such as restricting examination of the defendant, limiting the number of witnesses the defense can call, limiting defense counsel's access to witnesses, imposing time limits on the defendant's direct testimony, taking over the examination of witnesses, demeaning defense counsel before the jury, and interfering with the defendant's ability to consult with counsel.<sup>174</sup> By requiring a trial judge to make a record of the defense counsel's ineffectiveness, a similar misuse of a judge's discretion to administer justice is unlikely to occur when it comes to requiring effective assistance of counsel.<sup>175</sup> As stated at the outset, I anticipate that most interventions by trial judges will be triggered by defendants' complaints or overburdened defense counsel raising the issue of ineffective assistance of counsel with the court.<sup>176</sup>

Another possible way to help ensure that the inquiry into ineffectiveness of counsel initiated by a trial judge is handled fairly would be to have a different trial judge review the record and conduct the hearing. A different judge could be requested by the original trial judge recusing herself on this issue, a request by the defendant, or a request by defense counsel.<sup>177</sup> Using a second judge would be similar to the procedure used in contempt hearings where a judge's impartiality might objectively be questioned.<sup>178</sup> Another analog is the federal recusal law, which requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned."<sup>179</sup> In considering the federal law, the Supreme Court stated that "what matters is not the reality of bias or prejudice but its appearance."<sup>180</sup> In an abundance of caution, a trial judge who is confronted with a defense

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173. *Id.*

174. *Id.* at 565-74.

175. *People v. Mendez*, 75 Cal. Rptr. 3d 162, 167 (Ct. App. 2008).

176. *See supra* Part V.A-B.

177. Although a trial judge would not be required to recuse herself, if the judge believes that her impartiality may be reasonably questioned, then there is support for the principle that the judge should recuse or disqualify herself from conducting the hearing. *See* MODEL CODE OF JUDICIAL CONDUCT r. 2.11 (AM. BAR ASS'N 2007) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . .").

178. When there is a question of the judge's impartiality in a contempt proceeding, the Supreme Court has stated that it is appropriate for another judge to preside over the contempt proceeding. *Offutt v. United States*, 348 U.S. 11, 14-15 (1954) (quoting *Cooke v. United States*, 267 U.S. 517, 539 (1925)).

179. 28 U.S.C. § 455(a) (2012).

180. *Liteky v. United States*, 510 U.S. 540, 548 (1994).

lawyer who appears to be ineffective to the point that the judge raises the issue sua sponte, the trial judge may ask a second judge to review the record and conduct the hearing.<sup>181</sup>

## VI. EFFECTIVE ASSISTANCE OF COUNSEL HEARINGS

When the effectiveness of counsel is raised at the trial stage, there are two basic questions. First, what is the nature of the hearing required?<sup>182</sup> Second, what standard should the trial judge apply in evaluating whether there is ineffective assistance of counsel?<sup>183</sup>

### A. Nature of the Hearing

A trial judge has a great deal of discretion in considering a defendant's request for substitute counsel prior to trial. State and federal courts use an abuse of discretion standard,<sup>184</sup> which means that a trial judge's decision to deny a request for substitute counsel will not be reversed unless it was arbitrary or capricious or exceeds the bound of law or reason.<sup>185</sup> Having such broad discretion, some trial judges give complaints about appointed counsel short shrift and deny an indigent defendant's request for substitute counsel without making a serious inquiry into the complaints.<sup>186</sup>

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181. The Court has stated that a trial judge considering holding a lawyer in contempt "may, without flinching from his duty, properly ask that one of his fellow judges take his place." *Offutt*, 348 U.S. at 14-15 (quoting *Cooke*, 267 U.S. at 539). Similarly, a trial judge who has concerns about a defense lawyer rendering effective assistance of counsel may call upon a judge not otherwise involved in a case to consider the matter.

182. See *infra* Part VI.A.

183. See *infra* Part VI.B.

184. See, e.g., *United States v. Burgos*, 539 F.3d 641, 645-46 (7th Cir. 2008) ("[T]he district court has substantial discretion on requests for substitute appointed counsel, and we review the court's decision only for an abuse of that discretion."); *Cox v. State*, 489 So. 2d 612, 622 (Ala. Crim. App. 1985) (ruling on motion for substitution of counsel is within the discretion of the trial judge and abuse of discretion is the standard on review); *State v. Paris-Sheldon*, 154 P.3d 1046, 1050 (Ariz. Ct. App. 2007) ("[R]eview[ing] a trial court's denial of a defendant's request for substitute counsel for a clear abuse of discretion."); *People v. Yascavage*, 80 P.3d 899, 903 (Colo. App. 2003), *aff'd*, 101 P.3d 1090 (Colo. 2004) (holding that the trial court's ruling on a motion for substitution of counsel is reviewed under the standard of abuse of discretion); *State v. Turner*, 37 A.3d 183, 190 (Conn. App. Ct. 2012) (stating the courts review refusal to appoint new counsel for abuse of discretion); *State v. Tejada*, 677 N.W.2d 744, 749-50 (Iowa 2004) (holding that standard of review is abuse of discretion).

185. See, e.g., *State v. Jasper*, 8 P.3d 708, 711-12 (Kan. 2000) (upholding the trial court's decision denying substitution of counsel and explaining abuse of discretion as follows: "Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only when no reasonable person would take the view adopted by the trial court").

186. Simply listening to the defendant's request, has been found to be sufficient. See, e.g., *State v. Smith*, 123 P.3d 261, 267 (Or. 2005) (holding that a trial court does not have "an affirmative

Although some trial judges may not take the request for substitution of counsel or other complaints about publicly provided lawyers seriously, in federal courts “all Circuits agree, courts cannot properly resolve substitution motions without probing why a defendant wants a new lawyer.”<sup>187</sup> This requires an on-the-record hearing and the trial judge to inquire into the defendant’s allegations sufficient to “permit[] meaningful appellate review” of the trial court’s exercise of discretion.<sup>188</sup> State courts generally follow this same requirement,<sup>189</sup> though some states have held that the inquiry may be limited or brief,<sup>190</sup> or that the nature of the hearing depends on the form of the defendant’s complaints.<sup>191</sup>

While there is a divergence among courts about the nature of the hearing that is required when there is a request for substitution of counsel, some states have developed clear minimum guidelines.<sup>192</sup> For example, a defendant requesting substitution of counsel in California is entitled to a *Marsden* Hearing,<sup>193</sup> which is based on a line of cases following *People v. Marsden*.<sup>194</sup> In *People v. Mendez*, a California appellate court summarized the four requirements of a *Marsden* hearing:

First, if [a] “defendant complains about the adequacy of appointed counsel,” the trial court has a duty to “permit [the defendant] to articulate his [or her] causes of dissatisfaction and, if any of them

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duty to conduct an inquiry and make a factual assessment in response to a defendant’s complaints about appointed counsel”). There is little data on the number of requests for new counsel and how often those requests are granted. *See* Hashimoto, *supra* note 87, at 460-61. In my experience, judges are usually reluctant to grant such requests, and, as Erica Hashimoto’s analysis of the federal docketing database indicates, “some judges, upon granting a motion for appointment of new counsel, will admonish the defendant that she will not entertain any further such motions.” *Id.* at 461-62 n.145. The admonishments Hashimoto notes suggest that judges are not prepared to consider valid requests for substitute counsel a second time.

187. *Martel v. Clair*, 565 U.S. 648, 664 (2012).

188. *Id.* (quoting *United States v. Taylor*, 487 U.S. 326, 336-37 (1988)).

189. *See Cox*, 489 So. 2d at 622; *State v. Munt*, 831 N.W.2d 569, 586 (Minn. 2013).

190. *See, e.g., People v. Porto*, 942 N.E.2d 283, 287 (N.Y. 2010) (holding that a court “must make at least a minimal inquiry” into a request for substitute counsel).

191. *See, e.g., State v. Hernandez*, 305 P.3d 378, 383 (Ariz. 2013) (holding that generalized complaints may not require a formal hearing), *cert. denied*, 134 S. Ct. 1283 (2014); *State v. Smith*, 123 P.3d 261, 267 (Or. 2005) (holding that not all complaints about counsel require the trial court to inquire and make a factual assessment); *Snow v. State*, 270 P.3d 656, 659 (Wyo. 2012) (holding that if the reasons stated on the record are not good cause for substitution the court is not required to inquire into the reasons).

192. *See People v. Mendez*, 75 Cal. Rptr. 3d 162, 166-67 (Ct. App. 2008).

193. *See id.*

194. 465 P.2d 44 (Cal. 1970).

*suggest* ineffective assistance, to *conduct an inquiry* sufficient to ascertain whether counsel is in fact rendering effective assistance.”

....

Second, if “a defendant states facts sufficient to raise a question about counsel’s effectiveness,” the trial court has a duty to “*question counsel as necessary* to ascertain their veracity.”

....

Third, the trial court has the duty to “*make a record* sufficient to show the nature of [a defendant]’s grievances and the court’s response to them.”

....

Fourth, the trial court must “allow the defendant to express any specific complaints about the attorney and *the attorney [is] to respond accordingly.*”<sup>195</sup>

The *Marsden* Hearing requirements demonstrate that for a hearing to be meaningful it has to be sufficient for the trial judge to make a well-reasoned and informed decision whether to request a change of counsel, and a sufficient record has to be developed so that the decision may be reviewed on appeal.<sup>196</sup> States that do not have similar, clearly defined expectations for trial judges considering motions for substitution of counsel should adopt a protocol similar to the *Marsden* Hearing in order to guarantee fundamental due process for the accused. Without an opportunity to state for the record the reasons for a request for new counsel, and without defense counsel having the opportunity to respond, a defendant’s request is not given serious consideration.

Similarly, when defense counsel raises with the court an issue about counsel’s ability to provide effective assistance of counsel, or when the court itself raises this concern, a hearing similar to a *Marsden* Hearing should take place. It is essential for the trial judge to consider the issues raised thoroughly and completely, and the trial judge must make a good record to support whatever decision is made.

### B. *Standard to Apply*

When an issue of adequacy of counsel is raised at the trial level, the trial judge should consider the claim of ineffectiveness as a basic denial of counsel under *Gideon*, and not ineffectiveness of counsel under *Strickland*, which would first require conviction.<sup>197</sup> The basic denial of

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195. *Mendez*, 75 Cal. Rptr. 3d at 166-67 (quoting *People v. Eastman*, 52 Cal. Rptr. 3d 922, 927-28 (Ct. App. 2007)).

196. *See id.*

197. *See, e.g.*, Pub. Def., Eleventh Judicial Circuit of Fla. v. State, 115 So. 3d 261, 278 (Fla. 2013) (finding excessive caseloads “involve some measure of non-representation and therefore a

counsel occurs not only when counsel is not provided at a critical stage of a case such as at arraignment,<sup>198</sup> but also when counsel has been appointed but is unavailable to their clients, unresponsive to their clients' requests, waives their clients' important rights without their clients' consent, or "ultimately appeared to do little more on their [clients'] behalf than act as conduits for plea offers."<sup>199</sup> A denial of actual assistance of counsel also occurs when excessive caseloads lead to defense counsel engaging in "meet and greet pleas," failing to adequately investigate cases, and often being unprepared for trial.<sup>200</sup>

The effectiveness prong of *Strickland* commands that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms," and whether counsel's assistance was reasonable considering all of the circumstances.<sup>201</sup> The Court in *Strickland* then cited to the ABA Criminal Justice Standards for the Defense Function<sup>202</sup> as "[p]revailing norms of practice."<sup>203</sup> Using the ABA Criminal Justice Standards for the Defense Function as guidance in evaluating claims for substitution of counsel or issues of effectiveness of counsel raised by defense counsel or the court sua sponte prior to trial, the trial judge should consider seriously issues such as: defense counsel's conflict of interest;<sup>204</sup> excessive caseload;<sup>205</sup> lack of diligence, promptness and punctuality;<sup>206</sup> failure to establish and maintain an effective client relationship;<sup>207</sup> failure to keep the defendant informed

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denial of the actual assistance of counsel guaranteed by *Gideon* and the Sixth Amendment"); *Hurrell-Harring v. State*, 930 N.E.2d 217, 224-25 (N.Y. 2010) (finding *Strickland* inapplicable when a complaint alleges the basic denial of counsel under *Gideon*); see also Emily Chiang, *Indigent Defense Invigorated: A Uniform Standard for Adjudicating Pre-Conviction Sixth Amendment Claims*, 19 TEMP. POL. & CIV. RTS. L. REV. 443, 460-64 (2010) (discussing several class actions employing this litigation approach).

198. *Hurrell-Harring*, 930 N.E.2d at 223.

199. *Id.* at 222.

200. *Pub. Def., Eleventh Judicial Circuit of Fla.*, 115 So. 3d at 278.

201. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

202. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION (AM. BAR ASS'N 2015).

203. *Strickland*, 466 U.S. at 688.

204. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-1.7; see *Holloway v. Arkansas*, 435 U.S. 475, 483-84 (1978) (holding that a trial court's failure to ascertain whether an alleged conflict of interest required new counsel is a deprivation of "assistance of counsel").

205. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-1.8 (prohibiting defense counsel from carrying an excessive caseload).

206. *Id.* Standard 4-1.9 (requiring diligence, promptness, and punctuality in defense representation). The Defense Function Standards also require defense counsel to take prompt and thorough actions to protect clients, which involves promptly seeking and reviewing information about the case and taking steps to have physical evidence preserved. *Id.* Standard 4-3.7.

207. *Id.* Standard 4-3.1 (setting expectations for defense counsel to establish and maintain an

and advised about the representation;<sup>208</sup> failing to conduct an adequate investigation;<sup>209</sup> compliance with discovery procedures;<sup>210</sup> lack of preparation for court proceedings;<sup>211</sup> failure to advise the defendant of collateral consequences;<sup>212</sup> and failure to advise a defendant about plea negotiations and offers.<sup>213</sup> When there is a sufficient showing that defense counsel is not providing effective assistance of counsel measured against prevailing norms of practice, the trial judge should arrange for new counsel.

Trial judges should also take some guidance from instances of ineffectiveness that have survived a post-trial analysis under *Strickland*. Gershman has identified failing to investigate potential defenses as a pervasive problem, and he cites a number of cases in which courts have found ineffective assistance of counsel on that basis.<sup>214</sup> In a trio of cases from 2010 through 2012, the Supreme Court has also found that defense counsel's bad advice to turn down a plea offer,<sup>215</sup> failure to advise a client of the collateral consequence of deportation,<sup>216</sup> and failure to communicate plea offers are all ineffective assistance of counsel.<sup>217</sup>

The Supreme Courts of Louisiana and Florida have considered the value of a trial court considering a claim of ineffectiveness of counsel prior to trial, and both have concluded that it is appropriate and necessary.<sup>218</sup> The Louisiana Supreme Court stated: "If the trial court has sufficient information before trial, the judge can most efficiently inquire into any inadequacy and attempt to remedy it."<sup>219</sup> In endorsing this

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effective client relationship).

208. *Id.* Standard 4-3.9 (requiring defense counsel to keep client informed and advised about developments and progress in the representation).

209. *Id.* Standard 4-4.1 (defining defense counsel's obligation to investigate in all cases and to engage investigators when necessary).

210. *Id.* Standard 4-4.5 (requiring defense counsel to comply with discovery procedures).

211. *Id.* Standard 4-4.6 (requiring adequate preparation for all court proceedings).

212. Defense counsel has an obligation to advise the client of collateral consequences, *id.* Standard 4-5.4, and must give special attention to immigration status and consequences, *id.* Standard 4-5.5.

213. Defense counsel also has various duties concerning negotiations around possible pleas. *See id.* Standard 4-6.1 (explaining the duty to explore disposition without trial); *id.* Standard 4-6.2 (explaining the duty to engage in and keep client informed of negotiated disposition discussions); *id.* Standard 4-6.3 (explaining duties about pleas agreements and other negotiated dispositions).

214. BENNETT L. GERSHMAN, CRIMINAL TRIAL ERROR AND MISCONDUCT § 3-3(b)(1) & n.150 (3d ed. 2015).

215. *Lafler v. Cooper*, 566 U.S. 156, 162-70 (2012).

216. *Padilla v. Kentucky*, 599 U.S. 356, 365-74 (2010).

217. *Missouri v. Frye*, 566 U.S. 133, 145 (2012).

218. *See Pub. Def., Eleventh Judicial Circuit of Fla. v. State*, 115 So. 3d 261, 277 (Fla. 2013); *State v. Peart*, 621 So. 2d 780, 787 (La. 1993).

219. *Peart*, 621 So. 2d at 787.

approach, the Florida Supreme Court agreed with the Louisiana Supreme Court's reasoning that "this approach furthers judicial economy, protects defendants' constitutional rights, and preserves the integrity of the trial process."<sup>220</sup>

## VII. CONCLUSION

The U.S. Supreme Court's jurisprudence concerning the rights of indigent defendants, which makes it clear that they do not have the right either to choose their lawyer, or to a meaningful relationship with their assigned lawyers,<sup>221</sup> fosters presumptions against taking effective assistance of counsel seriously, especially when concerns are voiced by indigent defendants prior to trial. It also leads trial judges to accept excessive caseloads on the part of public provided counsel, even when those excessive caseloads undermine a lawyer's ability to provide effective, ethical representation to each client. By failing to take a defendant's right to effective assistance of counsel seriously, a trial judge also fails to discharge the judge's duty to do justice and denies the accused's right to a fair trial.

More than forty years ago, Chief Judge Bazelon articulated the best argument for trial judges to become actively involved in ensuring effective assistance of counsel:

The real battle for equal justice, however, must be waged in the trenches of the trial courts. Although reversing criminal convictions can have a significant deterrent effect, an appellate court necessarily depends upon the trial courts to implement the standards it announces. No amount of rhetoric from appellate courts can assure indigent defendants effective representation unless trial judges—and ultimately defense counsel themselves—fulfill their responsibilities.<sup>222</sup>

Although the current state of the law does not guarantee an indigent defendant choice of counsel, it still promises every defendant effective assistance of counsel.<sup>223</sup> As Chief Judge Bazelon argued, our society can come closer to fulfilling that obligation if each trial judge takes the accused's rights seriously and fulfills the judge's duty to do justice by ensuring the accused's right to the effective assistance of counsel.<sup>224</sup>

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220. *Pub. Def., Eleventh Judicial Circuit of Fla.*, 115 So. 3d at 277.

221. *See supra* notes 103-06 and accompanying text.

222. *United States v. Decoster*, 624 F.2d 196, 296 (D.C. Cir. 1979) (Bazelon, J., dissenting).

223. *See McMann v. Richardson*, 397 U.S. 759, 771 (1970); *supra* note 106 and accompanying text.

224. *See Decoster*, 624 F.2d at 295-98 (Bazelon, J., dissenting).