The judicial underpinnings of the American Bar Association's *Ten Principles of a Public Defense Delivery System* & their use in defining non-representation under *United States v. Cronic*, 466 U.S. 648 (1984)

***

By David Carroll, Phyllis Mann & Jon Mosher

America's chronic public defense problems

In the case of *Gideon v. Wainwright,* 372 U.S. 335 (1963), the United States Supreme Court concluded that "reason and reflection require us to recognize 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." Declaring it an "obvious truth" that "lawyers in criminal courts are necessities, not luxuries," the Court ruled that states must provide counsel to indigent defendants in criminal cases. That mandate has been consistently extended to any case that may result in a potential loss of liberty.[1]

Unfortunately, the Court's "obvious truth" has been obscured or lost at the hands of many state governments in the intervening nearly fifty years. Across much of the country, defendants count themselves among one of several hundred who are all vying for the attention of a single lawyer – a lawyer who lacks the time or resources to adequately advocate on their behalf. States neglect to provide any type of meaningful supervision or accountability for the work of these public defense lawyers and refuse to make available on-going training to keep attorneys abreast of ever-evolving criminal justice sciences. And, public attorneys are often beholden to the trial judge and/or the county administration for their pay check, creating a direct conflict between the lawyer's own personal financial well-being and his ethical duty to advocate solely on behalf of his client.

---

[1] *Gideon* was widely understood to apply only to felonies. Subsequent cases clarified that the right to counsel applies to: misdemeanors involving possible imprisonment, *Argersinger v. Hamlin*, 407 U.S. 25 (1972); suspended/probated sentences, *Alabama v. Shelton*, 535 U.S. 654 (2002); juvenile delinquency proceedings, *In Re Gault*, 387 U.S. 1 (1967); probation revocation proceedings to some extent, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); parole revocation proceedings to some extent, *Morrissey v. Brewer*, 408 U.S. 471 (1972); and direct appeals, *Douglas v. California*, 372 U.S. 353 (1963). Most recently, the Roberts Court found that indigent defendants who plead guilty do not give up their right to counsel on appeal to challenge their sentencing. *Halbert v. Michigan*, 545 U.S. 605 (2005). The high court has also identified certain critical stages of cases when counsel must be provided: custodial interrogation both before and after institution of prosecution, *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Brewer v. Williams*, 430 U.S. 387 (1977); at the initiation of the adversarial process, without regard to the involvement of a prosecutor, *Rothgery v. Gillespie County, Tex.,* 554 U.S. 191 (2008); arraignment, *Hamilton v. Alabama*, 368 U.S. 52 (1961); line-ups and show-ups after institution of prosecution, *United States v. Wade*, 388 U.S. 218 (1967), and *Moore v. Illinois*, 434 U.S. 220 (1977); critical stages pretrial such as preliminary hearings, *Coleman v. Alabama*, 399 U.S. 1 (1970); and in plea negotiations, *Brady v. United States*, 397 U.S. 742 (1970), and *McMann v. Richardson*, 397 U.S. 759 (1970).

People in need of defender services have little ability to obtain redress for these constitutional violations. Far too often, the same overwhelmed, untrained, unqualified and financially-conflicted lawyer who failed to adequately advocate for a client at trial is also appointed to represent that same client on direct appeal (the court procedure to review the fairness of the trial and raise issue with, among other things, whether the trial lawyer did a good job). Chances are low that these lawyers will raise concerns about the quality of their own lax work or conflicted financial interests. Unfortunately, the next opportunity to question the attorney's effectiveness occurs during what is known as a post-conviction proceeding – a court proceeding in which a defendant no longer has a constitutional right to the assistance of counsel.

Why chronic systemic indigent defense deficiencies cannot be addressed through ineffective assistance of counsel (IAC) claims

Twenty-one years after *Gideon*, in *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court created a two-pronged test to determine whether a lawyer provided effective representation to a client. First, courts assess whether the counsel's representation was reasonable, measuring the performance against prevailing professional performance standards. Second, if counsel's representation was deficient, then a conviction will only be set aside if that deficient performance calls into question the fundamental fairness of the proceedings.

Over the years, *Strickland* has been criticized for setting too high of a threshold for a determination of ineffectiveness. *Strickland* requires that courts "must be highly deferential" and indulge a "strong presumption that counsel's performance was within the wide range of reasonable professional assistance." In short, the *Strickland* presumption of reasonable assistance of counsel is rooted in the mistaken belief that every client, and for our purposes in particular every indigent client, actually receives representation of counsel. In the majority of states throughout the country, this is not true for many clients.

Strickland must be read in conjunction with *United States v. Cronic*, 466 U.S. 648 (1984) – both cases were heard on the same day and both cases were hand down on the same day. In short, *Cronic* looks to decide whether a client received representation at all. It acknowledges that there are instances where a person with a bar card is nominally designated to represent a client, but nonetheless no representation is provided. Citing the text of the Sixth Amendment, the Court said: "If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated. To hold otherwise 'could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel The constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." *Cronic* explains the two situations where a client receives what we will call "non-representation," as contrasted with "ineffective representation" that is governed by *Strickland.* Under *Cronic*, a trial proceeding is unfair and the Sixth Amendment is violated where either of these types of non-representation

occur. In these situations, there is no inquiry into the attorney's "actual performance at trial" and prejudice is presumed.

The *Cronic* Court observed that the most obvious form of non-representation is the "complete denial of counsel" altogether. The complete absence of counsel is most glaringly obvious in this country's lower courts, where misdemeanor cases are heard and felony cases often begin. It is a common occurrence for these courts to attempt to save money and expedite the processing of cases by pressuring the accused to forego his right to legal representation without adequately informing him of the consequences of doing so (such as potential loss of public housing, deportation, inability to serve in the armed forces, and/or ineligibility for student loans). Other courts threaten to impose large fines and costs if a client insists on receiving legal representation, and some simply refuse to appoint an attorney in direct violation of the Sixth Amendment.

Cronic goes on to define a second form of non-representation that violates the Sixth Amendment. The Court said surrounding circumstances may render even a fully competent lawyer incapable of providing effective assistance, making "the adversarial process itself presumptively unreliable" and "the trial inherently unfair." The Court pointed to the systemic factors in *Powell v. Alabama*, 287 U.S. 45 (1932), as creating such as situation. This is the case of the Scottsboro Boys, in which a judge appointed unqualified attorneys who met their clients on the morning of trial and failed to devote sufficient time to zealously advocate for their clients in the face of the state court's emphasis on disposing of the cases as quickly as possible.[2]

States are charged with providing attorneys to indigent defendants facing loss of liberty, and states and their counties and cities provide these attorneys through their indigent defense systems. When a state fails to provide counsel for a person at all, or when the circumstances of the indigent defense system created by the state are such that the lawyers it nominally designates to represent clients are rendered incapable of providing effective

---

[2] Two state supreme court cases shed further light on the distinction between "non-representation" and "ineffective representation." On May 6, 2010, New York's highest court ruled that a class action lawsuit brought by the New York Civil Liberties Union (NYCLU) against five counties is an allegation "not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*." *Hurrell-Harring, et al, v. New York, et al.*, 930 N.E.2d 217 (N.Y. May 6, 2010). The Court declared that *Strickland v. Washington, 466 U.S. 688 (1984)* "is expressly premised on the supposition that the fundamental underlying right to representation under *Gideon* has been enabled by the State," in reversing an appellate court decision that would have stemmed the case. The Court observed that, where "counsel, although appointed, were uncommunicative, made virtually no efforts on their nominal clients' behalf during the very critical period subsequent to arraignment, and, indeed, waived important rights without authorization from their clients," this is at heart "non-representation rather than ineffective representation."

On November 24, 2010, the Iowa Supreme Court reached much the same conclusion. *Simmons v. State Public Defender*, 791 N.W.2d 69 (IA Nov. 24, 2010). The court unanimously decided that a rigid fee cap of $1,500 per appellate case would "substantially undermine the right of indigents to effective assistance of counsel" because " [l]ow compensation pits a lawyer's economic interest … against the interest of the client." In reaching this conclusion, the Iowa Court went to great lengths to carefully analyze *Strickland*. The Court determined that "the *Strickland* prejudice test does not apply in cases involving systemic or structural challenges to the provision of indigent defense counsel." The Iowa Supreme Court firmly acknowledged that, "[w]hile criminal defendants are not entitled to perfect counsel, they are entitled to a real, zealous advocate who will fiercely seek to protect their interests within the bounds of the law."

assistance, then a presumption of prejudice is presumed under *Cronic*. Under these circumstances, the indigent defense *system* is ineffective.

So what is the objective measure by which courts can determine the effectiveness of an indigent defense system? In *Wiggins v. Smith*, 539 U.S. 510 (2003), *Williams v. Taylor*, 529 U.S. 362 (2000), and all the way back to *Strickland v. Washington*, 466 U.S. 668 (1984), the Court has continually recognized that national standards are the guideposts for assessing the reasonableness of performance. *Rompilla v. Beard*, 545 U.S. 374 (2005), echoes those sentiments, noting that national standards describe the obligations of defense counsel "in terms no one could misunderstand." National standards exist that define what every indigent defense system must do to ensure that the individual attorneys within those systems have what is necessary to effectively represent each individual client.[3] These foundational standards establish the floor below which no public defense system should fall, providing detailed guidance about the necessary components of a public defense delivery system that will ensure the individual attorneys within those systems can provide effective assistance of counsel to each client.

The American Bar Association's *Ten Principles of a Public Defense Delivery System* presents the most widely accepted and easily used summary of national standards for public defense systems. Adopted in February 2002, the ABA *Ten Principles* distill the voluminous national standards for indigent defense systems to their most basic elements, which officials and policymakers can readily review and apply. In the words of the ABA Standing Committee for Legal Aid & Indigent Defendants (ABA/SCLAID), the *Ten Principles* "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney."[4] United States Attorney General Eric Holder called the ABA *Ten Principles* the basic "building blocks" of a functioning public defense system.[5]

The ABA *Ten Principles* reflect interdependent standards. That is, the health of an indigent defense system cannot be assessed simply by rating a jurisdiction's compliance with each of the ten criteria and dividing the sum to get an average "score." For example, a jurisdiction may have a place set aside in the courthouse for confidential attorney-client

---

[3] A non-comprehensive list of indigent defense system standards includes: National Advisory Commission on Criminal Justice Standards & Goals, Task Force on Courts *Chapter 13: Standards for the Defense* (1973); National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976); ABA, *Standards for Criminal Justice: Providing Defense Services, Third Edition* (1992); Uniform Law Commissioners, *Model Defender Act* (1970); NLADA, *Guidelines for Negotiating and Awarding Indigent Defense Contracts* (1984); NLADA, *Standards for the Administration of Assigned Counsel Systems* (1989); NLADA, *Standards and Evaluation Design for Appellate Defender Offices* (1980); ABA, *Standards Relating to Appellate Courts* (1994); IJA/ABA, *Juvenile Justice Standards Annotated* (1996); ABA, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (2003); ABA, *Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons, 3rd ed.* (2004); NLADA, *Defender Training and Development Standards* (1997); and Administrative Office of the United States Courts, *Guide to Judiciary Policy – Volume 7: Defender Services*.

[4] American Bar Association. *Ten Principles of a Public Defense System*, from the introduction.

[5] United States Attorney General Eric Holder. *Address Before the Department of Justice's National Symposium on Indigent Defense: Looking Back, Looking Forward 2000-2010.* Washington, DC February 18, 2010.

discussions (*Principle 4*),[6] yet this does not make the delivery of indigent defense services any more adequate if the appointment of counsel comes so late in the process (*Principle 3*),[7] or if the attorney has too many cases (*Principle 5*),[8] or if the attorney lacks the necessary training (*Principles 6 & 9*),[9] as to render those conversations ineffective at serving a client's representation needs. In other words, a system must meet the minimal requirements of *each and every* of the *Principles* in order to be adequate.

The judicial underpinnings of the "Ten Principles"

The balance of this paper will discuss the judicial underpinnings of the ABA *Ten Principles* and show that the *Principles* are the foundational standards that describe the obligations of indigent defense *systems* in terms no one could misunderstand, providing guideposts for assessing the reasonable performance of those *systems*. Where indigent defense systems fail to meet these standards, this should demonstrate that the indigent defense *system* is *ineffective* under *Cronic* because the attorneys provided by that system are rendered incapable of providing effective assistance of counsel. Where indigent defense systems do meet the standards of the ABA *Ten Principles*, then and only then is it appropriate to evaluate the representation actually provided by the appointed attorney under the performance and prejudice test of *Strickland.*[10]

For ease of discussion, the *Principles* are discussed in related groups rather than consecutively.

A. *Principles 4 & 5: Adequate time to meet with & competently represent defendants*

Each client is constitutionally entitled to be represented by a public defense attorney who has sufficient time and resources to fulfill the basic requirements of attorney performance on behalf of that client. In over-simplified terms, this means the attorney is able to, among other things: meet with, interview, and advise the client (*Principle 4)*; prepare and file necessary motions; receive and review the prosecution's responses to motions; conduct a factual investigation, including locating and interviewing witnesses, documents, and physical evidence; perform legal research; conduct motion hearings; engage in plea

---

[6] ABA *Principle* 4: Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

[7] ABA *Principle* 3: Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

[8] ABA *Principle 5*: Defense counsel's workload is controlled to permit the rendering of quality representation.

[9] ABA *Principle* 6: Defense counsel's ability, training, and experience match the complexity of the case. ABA *Principle* 9: Defense counsel is provided with and required to attend continuing legal education.

[10] This is precisely the instruction provided by *Cronic*. The *Cronic* Court first assessed whether representation was provided at all. The Court concluded that counsel was appointed, and that "[t]his case is not one in which the surrounding circumstances make it unlikely that the defendant could have received the effective assistance of counsel." The Court remanded the case to allow the defendant to "make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel," to be "evaluated under the standards enunciated in *Strickland v. Washington*." *Cronic*, 466 U.S. at 666, 666 n.41.

negotiations with the state; conduct status conferences with the judge and prosecutor; prepare for and enter a plea or conduct the trial; and prepare for and advocate at the sentencing proceeding when there is a guilty plea or conviction following trial.

Each attorney within a public defense system represents numerous clients, all at the same time, but the attorney owes the same full set of duties to each one of those clients. This is why, in May 2006, the ABA's Standing Committee on Ethics and Professional Responsibility issued *Formal Opinion 06-441*, stating that "[a]ll lawyers, including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently." If an attorney does not have any time and resources remaining to dedicate to the *next* client's case, then the attorney must not take that *next* case. And, this is why national standards, as reflected in ABA *Principle 5*, require that the public defense system must control the workload of each attorney within the system and of the system overall.

Though discussions of caseload often devolve into a debate about numbers, the heart of ABA *Principle 5* is about attorneys being able to spend an adequate amount of time on each and every case. That point is quite clearly made in *Powell v. Alabama.* Bemoaning the speed at which the defendants were processed through the system without proper investigation or preparation, the U.S. Supreme Court stated, "[t]he prompt disposition of criminal cases is to be commended and encouraged. But, in reaching that result, a defendant, charged with a serious crime, must not be stripped of his right to have *sufficient time* (emphasis added) to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob." Quoting *Commonwealth v. O'Keefe,* 298 Pa. 169, 173, 148 Atl. 73, the *Powell* Court went on to say, "[i]t is vain to give the accused a day in court with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case."

Powell further underscores the importance of adequate time as the core of effective representation, stating: "The right of the accused … to have the aid of counsel for his defense, which includes the right to have sufficient time to advise with counsel and to prepare a defense, is one of the fundamental rights guaranteed by the due process clause of the Fourteenth Amendment." Subsequent cases invoking *Powell* drive home the point that having appropriate time is the cornerstone of a meaningful right to counsel. *Argersinger v. Hamlin*, 407 U.S. 25 (1972), which applied the right counsel to misdemeanor cases carrying potential jail time, noted: "An inevitable consequence of volume that large is the almost total preoccupation in such a court with the movement of cases. The calendar is long, speed often is substituted for care, and casually arranged out-of-court compromise too often is substituted for adjudication. Inadequate attention tends to be given to the individual defendant, whether, in protecting his rights, sifting the facts at trial, deciding the social risk he presents, or determining how to deal with him after conviction. The frequent result is futility and failure."

B. *Principle 1: Independence*

The U.S. Constitution, attorney performance standards, public defense system standards, and ethics opinions all ardently require that each client be represented by an attorney with adequate time and resources to provide an effective defense. Why is it then that so many clients are represented by public defense attorneys who are triaging professional services to their clients by taking on too many cases? Why don't the attorneys and the defender systems control workloads so as to allow appropriate time for each and every case? In most instances, the answer is that defense system attorneys reasonably fear they will lose their jobs if they challenge the court or the county administration or the governor who is telling them to represent more clients than they can effectively and ethically represent.

While the majority of judges strive to do justice in all cases, political pressures, publicity generated by particularly notorious crimes, or administrative priorities such as the need to move dockets quickly can all make it difficult for even the most well-meaning of judges to maintain their neutrality. In systems where judges predominantly control the appointment of counsel, attorneys quickly learn that filing motions will lengthen the life of a case, reduce the attorney's profit, and incur the judge's displeasure. If the attorney wants the judge to appoint them to any cases in the future, then keeping the judge happy takes precedence over zealously representing the client.

Again, it was in the *Powell* case that the Supreme Court explained why judges are unable to provide supervision over public defense attorneys. A judge cannot perform investigations or consult confidentially with a client to know whether or not an attorney is serving the best interests of the client. Or, as the Court stated, "how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused, which sometimes partake of the inviolable character of the confessional."

In 1930's America, in most instances it was the judiciary that exerted undue influence on defense counsel. In later years, the Court had cause to extend its reasoning to undue political interference as well. In *Polk County v. Dodson,* 454 U.S. 312 (1981), the United States Supreme Court found that states have a "constitutional obligation to respect the professional independence of the public defenders whom it engages," noting that a "public defender is not amenable to administrative direction in the same sense as other state employees." In fact, the Court noted, a "defense lawyer best serves the public not by acting on the State's behalf or in concert with it, but rather by advancing the undivided interests of the client."

C. *Principle 3: Early Appointment of Counsel*

The third of the ABA's *Ten Principles* addresses the obligation of public defense systems to provide for prompt appointment of counsel, which of necessity requires quick financial eligibility screening of defendants.

In *Gideon v. Wainwright,* the Court famously stated indigent defendants require "the guiding hand of counsel at every step in the proceedings against him." Through a long series of cases, the U.S. Supreme Court has defined when it is, between arrest and conclusion of a case, that an indigent person facing loss of liberty is entitled to have a lawyer be appointed and represent them – this is referred to as when the right of counsel attaches. In 2008 in *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), the Court made clear that the right to counsel attaches "at the initial appearance before a judicial officer," by whatever name that hearing is known in a given jurisdiction, but "generally the hearing at which 'the magistrate informs the defendant of the charge in the complaint, and of various rights in further proceedings,' and 'determine[s] the conditions for pretrial release.'"

When a person is arrested for a criminal offense, there are three different types of proceedings that typically occur before a prosecutor has made a decision about whether to proceed with prosecution of the person. These are: (a) a probable cause determination made by a judge either when issuing a warrant for arrest or promptly following arrest without a warrant; (b) a bail hearing; and (c) arraignment where the person is advised of the charges against them and of their right to counsel. In 1991, the Supreme Court held in *County of Riverside v. McLaughlin,* 500 U.S. 44 (1991), that states are free to combine these into a single proceeding if they wish, but in any event the probable cause hearing for a person arrested without a warrant should be held within 48 hours of arrest. Where states do choose to combine the arraignment and bail proceeding with the probable cause hearing, then under *Rothgery* counsel must also be available at that hearing.

There are other types of proceedings that may occur before the formal institution of prosecution begins, referred to as "critical stages," at which a person also has a right to counsel under the Fifth Amendment. These include: custodial interrogations, *Miranda v. Arizona,* 384 U.S. 436 (1966); preliminary hearings, *Coleman v. Alabama*, 399 U.S. 1 (1970); and plea negotiations, *Brady v. United States,* 397 U.S. 742 (1970), and *McMann v. Richardson,* 397 U.S. 759 (1970).

D. *Principles 6, 9 & 10: Adequate Performance*

All national standards require that attorneys representing public defense clients in criminal proceedings have the appropriate experience to handle a case competently, including *Principle 6*.[11] Policymakers should not assume that a newly admitted attorney is skilled to

[11] *Principle* 6 of the ABA *Ten Principles* demands that "Defense counsel's ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.

handle every type of case or that an experienced real estate lawyer would have the requisite skill to adequately defend a person accused of an armed robbery or serious homicide.[12]

ABA *Principle 9*[13] requires systematic training for all attorneys. Newly barred attorneys have typically graduated law school without having learned how to interview a client; the level of investigation, legal research, and other preparation necessary for a competent defense; trial tactics; relevant case law; and ethical obligations – all of which are essential areas in which they must be trained. Effective training includes a thorough introduction to the workings of the public defense system, the district attorney's office, the court system, and the probation and sheriff's departments as well as any other corrections components. A competent training program also recognizes that most law schools fail to equip graduates with the expertise necessary to prepare for and conduct even the simplest trial. Such programs spend substantial time teaching new lawyers basic trial skills, making use of role playing and other mock exercises to teach direct and cross-examination, opening statements and closing argument, voir dire, client interviewing, plea bargaining, motions practice, and the wide range of practical skills needed to effectively represent a client.

Principle 9 also indicates that training should be continually provided to all indigent defense attorneys. Skills need to be refined and expanded, and knowledge needs to be updated as laws change and practices in related fields evolve. As the practice of law grows more complex, even the most skilled attorney practicing criminal law must undergo continual training to stay abreast of such changing fields as forensic sciences, including DNA technology, and police eyewitness identification procedures, and methods for recognizing signs of mental illness or substance abuse in a client.[14]

While training is critical to a proper defense, attorneys must not be limited to theoretical knowledge. Defense practitioners also must gain practical trial experience by serving as co-counsel in a mentoring situation on a number of serious crimes, and/or having competently completed a number of trials on less serious cases, *before* accepting appointments on serious felonies. And, the authority to decide whether an attorney has garnered the requisite experience and training to begin handling serious cases as first chair should be given to an experienced criminal defense lawyer who can review past case files

---

[12] ABA *Principle 6* acknowledges that attorneys with basic skills can effectively handle less complicated cases and those with less serious potential consequences. However, significant training, mentoring and supervision are needed to foster the budding skills of even the most promising young attorney before allowing her to handle more complex cases. For most public defender offices across the country, the training and practical experience gained by attorneys working on less serious criminal cases permits them, over time, to acquire the skills necessary to handle more serious cases. Consequently, public defender offices across the country generally assign misdemeanor charges, minor offenses and preliminary stages of a prosecution to newer attorneys. Over time – often measured in years – attorneys in these offices acquire the skills that support handling more challenging cases.

[13] *Principle* 9: Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.

[14] Commentary to the ABA *Standards for Providing Defense Services* views attorney training as a "cost-saving device" because of the "cost of retrials based on trial errors by defense counsel or on counsel's ineffectiveness."

and continue to supervise, or serve as co-counsel, as the newly qualified attorney begins defending her initial serious felony cases – as demanded by ABA *Principle 10*.[15]

Without supervision, attorneys are left to determine on their own what constitutes competent representation and will often fall short of that mark. To help attorneys, an effective performance plan should be developed – one that is much more than an evaluation form or process for monitoring compliance with standards. Evaluations should include: a) clear plan objectives; b) specific performance guidelines; c) specific tools and processes for assessing how people are performing relative to those expectations and what training or other support they need to meet performance expectations; and, d) specific processes for providing training, supervision, and other resources that are necessary to support performance success.

The use of performance guidelines to guarantee constitutionally adequate representation meets the demands of the United States Supreme Court. In *Wiggins v. Smith*, 539 U.S. 510 (2003), the Court recognized that national standards of attorney performance are the guideposts for assessing whether attorneys have provided effective assistance. *Rompilla v. Beard*, 545 U.S. 374 (2005), echoes those sentiments, noting that the national attorney performance standards describe the obligations of defense counsel "in terms no one could misunderstand."[16] Attorney performance standards and indigent defense system standards together define competency, not only in the sense of the attorney's personal abilities and qualifications, but also in the systemic sense that the attorney practices in an environment that provides her with the time, resources, independence, supervision, and training to effectively carry out her charge to adequately represent her clients.

Conclusion

The U.S. Supreme Court says, in every case addressing the right to counsel, "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel."[17] It was again in the *Powell* case that the Supreme Court first made clear the critical role of counsel:

---

[15] *Principle* 10: Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.

[16] Citation to national public defense standards in court decisions is not limited to capital cases. *See, for example*: *United States v. Russell*, 221 F.3d 615 (4th Cir. 2000) (court relied in part on the ABA Standards to assess the defendant's claim of ineffective assistance); *United States v. Blaylock*, 20 F.3d 1458 (9th Cir. 1993) (Defendant appeal arguing, in part, ineffective assistance of counsel. Court stated: "In addition, under the *Strickland* test, a court deciding whether an attorney's performance fell below reasonable professional standards can look to the ABA standards for guidance. *Strickland*, 466 U.S. at 688." And, "[w]hile *Strickland* explicitly states that ABA standards 'are only guides,' *Strickland*, 466 U.S. at 688, the standards support the conclusion that, accepting Blaylock's allegations as true, defense counsel's conduct fell below reasonable standards. Based on both the ABA standards and the law of the other circuits, we hold that an attorney's failure to communicate the government's plea offer to his client constitutes unreasonable conduct under prevailing professional standards."); *United States v. Loughery*, 908 F.2d 1014 (D.C. Cir. 1990) (court followed the standard set forth in *Strickland* and looked to the ABA Standards as a guide for evaluating whether defense counsel was ineffective).

[17] *See, e.g., McMann v.* Richardson, 397 U.S. 759, 771 n.14 (1970).

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. 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. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. 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.[18]

In *Cronic*, the Court went on to explain why mere nominal presence of counsel is not enough, and that the attorney provided must be capable of being effective and not merely present:

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases 'are necessities, not luxuries.' Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be 'of little avail,' as this Court has recognized repeatedly.
>
> 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.'
>
> The special value of the right to the assistance of counsel explains why '[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.' The text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of counsel to the accused, but 'Assistance,' which is to be 'for his defence.' Thus, 'the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor.' If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated. To hold otherwise 'could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.'[19]

---

[18] *Powell v. Alabama,* 287 U.S. at 68-69.

[19] *United States v. Cronic*, 466 U.S. at 653-55 (citations omitted).

Summing up the representation the Scottsboro Boys received, the *Powell* Court succinctly describes *Cronic*'s non-representation standard: "' . . . the record indicates that the appearance was rather *pro forma* than zealous and active . . . .' Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense."[20] Where America's indigent defense systems provide counsel in name only because the attorneys are rendered incapable of providing effective representation, they are in fact providing *non-representation* in violation of the Sixth and Fourteenth Amendments.

[20] *Powell v. Alabama,* 287 U.S. at 58.