A Measure of Our Justice System: A look at Maine's Indigent Criminal Defense Delivery System

Ronald W. Schneider Jr.
University of Maine School of Law

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A MEASURE OF OUR JUSTICE SYSTEM: A LOOK AT MAINE’S INDIGENT CRIMINAL DEFENSE DELIVERY SYSTEM

I. INTRODUCTION ........................................ 336
II. SETTING SAIL: THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL .......................................... 339
III. A JOURNEY INTO NIGHT: THE LEGAL STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL ............... 342
   A. Decoster v. United States ........................................... 343
   B. Strickland v. Washington ............................................. 349
IV. THE CAPE OF NO HOPE: INEFFECTIVE ASSISTANCE DEFINED IN THE COURTS .................................. 356
   A. The Procedure for Post-Conviction Review ...................... 357
   B. Maine Cases ............................................................ 359
      1. Kimball v. State ....................................................... 359
      2. State v. Toussaint ..................................................... 359
      3. Vaughan v. State ...................................................... 360
      4. Levesque v. State ..................................................... 361
   C. Federal Cases ............................................................ 362
      3. Lockhart v. Fretwell ................................................ 367
V. A PORT IN A STORM: INEFFECTIVE ASSISTANCE DEFINED OUTSIDE THE COURTS ............................ 370
VI. DRIFTING IN THE BREEZE: MAINE’S COURT APPOINTMENT “SYSTEM” ................................................. 374
   A. Is Maine’s “System” Constitutional? ......................... 375
   B. Is Maine’s “System” Properly Funded? ..................... 376
VII. A NEW CAPTAIN AT THE HELM: A PUBLIC DEFENDER PROGRAM IN MAINE? ........................................... 379
VIII. THE GREEN BREAST OF A NEW WORLD: WHAT IS THE BEST WAY TO PROVIDE INDIGENT CRIMINAL DEFENSE SERVICES? ................................................................. 384
    A. Professional Independence ........................................ 387
    B. Support Services ...................................................... 389
    C. Training and Professional Development .................... 390
    D. Funding .................................................................... 392
IX. CONCLUSION ..................................................... 394
A MEASURE OF OUR JUSTICE SYSTEM: A LOOK AT MAINE'S INDIGENT CRIMINAL DEFENSE DELIVERY SYSTEM

I. INTRODUCTION

In January 1995 the United States criminal justice system treated court observers to a study in contrasts. In a Mineola, New York, courthouse, Colin Ferguson, charged with the murder of six commuters and the attempted murder of nineteen others aboard the Long Island Railroad, proceeded pro se, despite attempts by the judge and his advisors to dissuade him. Meanwhile, across the country in Los Angeles, California, O.J. Simpson, charged with the murders of his ex-wife and her friend, proceeded with so many attorneys that it was hard to keep track. At times, each case offered scenes from the theater of the absurd. Ferguson said in his opening statement that "[t]here were 93 counts to that indictment, 93 counts only because it matches the year 1993. If it had been 1925, it would have been a 25-count indictment." In the Simpson trial, the defense was unable to start its opening statement as scheduled because the camera in the courtroom inadvertently caught a split second glimpse of an alternate juror. The judge was so enraged that he recessed court for the day to consider how to handle the situation.

Perhaps more than anything else, the two cases illustrate the importance of attorneys in the criminal justice process. On October 10, 1995, Simpson was found not guilty. He got the best defense that money could buy. His attorneys fought the prosecutors every inch of the way. The guilty verdict in Ferguson's case was, how-

4. Id.
ever, a foregone conclusion. If Ferguson had allowed attorney William Kunstler to continue to represent him, he very well could have been found not guilty by reason of insanity and been committed to a mental institution. Although both of these cases are strange for many reasons, the odd disparity of representation is especially striking: The Simpson case is as odd for the plethora of lawyers as the Ferguson case is for the dearth of them.

Somewhere between these two cases lies the reality of the practice of criminal law in the courts of this country, where as many as ninety-three percent of the defendants are indigent and appointed an attorney by the court. Through television cop shows and courtroom dramas the right to have a court-appointed attorney has become so well known and accepted that one sometimes forgets that the right is but thirty-two years young.

8. Victims came one after the other, answered Ferguson's questions, and identified him as the perpetrator. Pat Milton, *Train Shooter Found Guilty: Accused Who Acted as Own Attorney Convicted on Six Counts of Murder*, S.F. EXAMINER, Feb. 19, 1995, at A1. “The first person shot on the train, Maryanne Phillips, coolly told Ferguson: 'I saw you shoot me'—a surreal scene that was repeated over and over in the Long Island courtroom.” *Id.*


10. Ferguson revealed his defense when he said, “‘The evidence will show that Colin Ferguson was in fact a well-meaning passenger on the train. . . . Like any other passenger he dozed off—having the weapon in a bag. At that point someone . . . took the weapon out of the bag and proceeded to shoot.’” Van Biema, *supra* note 3, at 66.


12. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that state courts must provide counsel to indigent criminal defendants). Judge Bertelsman of the United States District Court for the Eastern District of Kentucky provides some insight into the practice of court appointment around the time *Gideon* was decided:

The present writer, who came to the bar in 1961, was appointed to defend many of the criminal cases in the court in those years. The custom was for the Clerk of the Court to get on the telephone and call all of the young attorneys on the first day of the term with the message, “The judge wants to see you.” When the young attorney arrived, instead of engaging in a tete-a-tete with the eminent occupant of the bench, he was told to stand with one or more defendants and defend them, and that the cases were going to trial that afternoon or the next morning. No compensation or expenses of the attorney were paid.

This Comment will examine briefly the history of the right to counsel and the accompanying right to the effective assistance of counsel in this country. At the time the Sixth Amendment was included in the Bill of Rights, the United States rejected the English practice of denying the right to counsel to those accused of felonies while granting the right to those charged with misdemeanors.\textsuperscript{13} People in the United States have enjoyed the right to counsel in all criminal cases, felonies and misdemeanors, since 1791.\textsuperscript{14} Yet in a very real and dangerous sense, the courts have reversed the course of history and adopted the upside-down English view of the right to counsel.\textsuperscript{15} Just as the English denied counsel when the charge was serious—when counsel was most necessary—now in the United States, the courts deny the protection of the right to effective assistance of counsel when the case is strong against the defendant—when counsel is most necessary. A criminal defendant is more likely to be protected from having an incompetent attorney if the case against him is weak.

This Comment is concerned primarily with analyzing Maine's indigent criminal defense delivery system and with seeking a working definition of effective assistance of counsel. Unfortunately, the courts are not helpful in this attempt, largely because the courts differentiate between \textit{constitutionally effective} assistance of counsel and \textit{adequate or competent} assistance of counsel.\textsuperscript{16} At times the courts consider incompetent counsel constitutionally effective. Because the courts are not helpful in guiding the behavior and performance of criminal defense attorneys, one must look to other sources to determine how a criminal defense attorney should provide quality representation for criminal defendants. This Comment will turn to the American Bar Association (ABA) and other commentators for guidance.

What follows from knowing how an adequate defense attorney performs is an inquiry into the type of delivery system that will best ensure such behavior on a consistent basis. This Author accepts as true that society should seek to eliminate the possibility that criminal defendants, the vast majority of whom are indigent, may be subject to the assistance of incompetent lawyers. This Comment will look at the ABA's guiding principles for establishing an effective defense delivery system. It also will look at the well-respected New

\textsuperscript{13} For a historical treatment of the right to counsel in Anglo-American law, see William M. Beaney, \textit{The Right to Counsel in American Courts} 8-26 (1955) and Powell v. Alabama, 287 U.S. 45, 60-66 (1932).

\textsuperscript{14} The Bill of Rights was ratified effective December 15, 1791.

\textsuperscript{15} It is worth remembering the words of Blackstone, ""For upon what face of reason . . . can that assistance [of counsel] be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?"" Powell v. Alabama, 287 U.S. at 60-61 (quoting 4 Blackstone 355).

\textsuperscript{16} See \textit{infra} part III.
Hampshire Public Defender’s Office. Maine’s court appointment “system” will be measured against these two guideposts.

This Comment will urge Maine to reexamine its method of providing indigent criminal representation and urge the adoption of a public defender program, or, at the very least, a more structured court appointment system. Maine’s “system” does not adequately protect a criminal defendant’s right to effective counsel. Mostly poor and limited in education, criminal defendants have no voice of their own. Moreover, society considers criminal defendants enemies of an orderly and peaceful society. Society’s natural instinct is to destroy its enemies. Created by a people determined to limit the power of the majority of society over the individual, the United States Constitution provides the individual with protection from this natural instinct. The defense attorney is that primary protection; he is the voice of the defendant. It is his responsibility to ensure that the power of the government is checked vigilantly and vigorously through competent testing of the Government’s case. If the lawyer is muted by his own incompetence, the defendant will have no voice and the government will remain unchecked. The courts’ complicity in this muting should be rejected by a people determined to protect the individual from the tyranny of the society. The bare minimum that the United States Supreme Court and the Maine Supreme Judicial Court say the United States Constitution requires is not consistent with the principles of liberty and justice on which this country was founded. Maine must adopt a system that, by design, will ensure the consistent provision of quality representation for indigent criminal defendants, who represent the overwhelming majority of criminal defendants making their way through the justice system.

II. SETTING SAIL: THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the U.S. Constitution provides, “In all criminal prosecutions, the accused shall enjoy the right to... have

18. Perhaps only convicted criminals should be considered enemies of society. While the Constitution recognizes a world of difference between defendants and the convicted, society and the Supreme Court do not. Cf. Bell v. Wolfish, 441 U.S. 520, 533 (1979) (“The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials... But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.”).
20. This Author maintains that our adversarial criminal justice system was established upon the assumption that the objective truth of an allegation will most often be arrived at through a process of partisan advocacy. There are times, however, when the objective truth will not be produced. If one submits to this
the Assistance of Counsel for his defence." While defendants in this country have had the right to the assistance of a lawyer since 1791, for the longest part of our history, access to that right depended upon the ability to afford an attorney or the luck of finding one who would work for free. It was not until 141 years after the ratification of the Sixth Amendment that the U.S. Supreme Court, in *Powell v. Alabama*, recognized that a defendant "requires the guiding hand of counsel at every step in the proceedings against him." In *Powell*, three black defendants charged with rape were appointed counsel in a cursory fashion and were represented similarly. The Court reversed the convictions based on a violation of the Due Process Clause of the Fourteenth Amendment. The defendants were found to have been denied a fair trial, and thus due process, because they were denied "an effective appointment of counsel." The appointment was not "effective" because the counsel did not represent the defendants from the time of arraignment through to the beginning of their trial. The Court held that in a capital case against an ignorant, feeble-minded, or illiterate defendant "it is the duty of the court . . . to assign counsel for him as a necessary requisite of due process of law . . . ."

Therefore, this Author defines "justice" as the result achieved when the process works according to these rules. A "fair trial" can be achieved only through the proper execution of the system using these rules. If the system is not adversarial, the truth of the allegation cannot be discovered. Courts do not always act as if they accept these definitions, although at times they speak as if they do.

Stephen B. Bright, Director of the Southern Center for Human Rights, said:

The suggestion that the most precious rights that we have—the right to be free from search and seizures of our persons and our homes, the right to remain silent, the right to a fair trial by an impartial jury, and the other provisions of the Bill of Rights—are just technicalities is another sad aspect of the crime debate today. . . .

Process is important. Fairness is important. The way in which society selects those who will live and those who will die is important.

Bright, *supra* note 17, at 490.

21. U.S. Const. amend. VI.
22. 287 U.S. 45 (1932).
23. Id. at 69.
24. Id. at 58. "One of the lawyers was a drunk and the other was senile." Bright, *supra* note 17, at 482.
26. Id. at 57.
27. Id. at 71.
Six years after Powell, the Supreme Court, in Johnson v. Zerbst, stated that "the Sixth Amendment withholds from the federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." The Court continued the message of Powell, which planted the seeds of the assumption existing today that a lawyer is necessary for justice, when it said:

The purpose of the constitutional guaranty of a right to counsel is to protect an accused from convictions resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protections of the Constitution.

Just four years after Johnson, however, in Betts v. Brady, the Supreme Court explicitly denied this protection to defendants in state courts. The Court held that the right to counsel was not a fundamental right and therefore should not be imposed on the states through the Fourteenth Amendment.

It was not until 1963, in Gideon v. Wainwright, that the right to court-appointed counsel was extended to defendants in state courts. Charged with breaking and entering, Clarence Earl Gideon stood before a state court judge, asked for the assistance of a lawyer, and was denied. He filed a writ of habeas corpus in the Florida Supreme Court and helped change the course of the United States criminal justice system. The Gideon Court overturned Betts and held that "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." This "obvious truth" was recognized 172 years after the ratification of the Sixth Amendment.

Since Gideon, the Supreme Court has clarified that the right to a court-appointed counsel extends to any case in which a person may

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28. 304 U.S. 458 (1938) (remanded to determine if defendant met his burden, in habeas corpus action, of showing that he had not knowingly and intelligently waived his right to counsel).
29. Id. at 463.
30. Id. at 465.
31. 316 U.S. 455 (1942).
32. Id. at 473.
34. The judge said:
   Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.
35. Id. at 337.
36. Id. at 344.
be imprisoned, without regard to the class of the crime.\(^{37}\) In 1970, in *McMann v. Richardson*,\(^{38}\) the Court held that the right to counsel is concomitantly the right to effective assistance of counsel.\(^{39}\) The Court stated that "if the right to counsel . . . is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel . . . ."\(^{40}\) Twenty-six years after this statement defendants have yet to receive the protection promised; if the case against them is strong, courts abandon defendants to the mercy of incompetent counsel.\(^{41}\)

### III. A Journey into Night: The Legal Standard for Ineffective Assistance of Counsel

At one time, courts uniformly applied a "farce and mockery" standard to claims of ineffective assistance of counsel.\(^{42}\) Maine adopted that standard in *Bennett v. State*.\(^{43}\) By 1976, only three circuits still required a defendant to demonstrate that his counsel was "so inept that the trial [was] a 'farce and a mockery of justice.'"\(^{44}\) This doctrine was replaced by the "reasonably competent attorney" standard,\(^{45}\) which required that "[t]he claimed inadequacy must be a serious incompetency that falls measurably below the performance ordinarily expected of fallible lawyers."\(^{46}\) While the burden to meet this standard is lower than that for the "farce and mockery" standard, the standard remains as vague as any reasonableness test. Only through the application of the test by the courts to specific case situations will the standard take on any meaning.

Maine abandoned the "farce and mockery" standard in 1981. In its place, the Law Court applied the "reasonably competent assistance" standard in *Lang v. Murch*.\(^{47}\) Representing a man charged with unlawful sexual contact, defense counsel failed to challenge four jurors who had sat on a jury the previous day that had found

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\(^{37}\) *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (reasoning that simply because the Sixth Amendment had exceeded common law principles, the Sixth Amendment was not intended to eradicate them).


\(^{39}\) *Id.* at 771.

\(^{40}\) *Id.*

\(^{41}\) See infra part IV.

\(^{42}\) *See* Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir. 1945).

\(^{43}\) 161 Me. 489, 214 A.2d 667 (1965).

\(^{44}\) United States v. Decoster, 624 F.2d 196, 219 (D.C. Cir. 1976) (*Decoster III* (MacKinnon, J., concurring)) (quoting Diggs v. Welch, 148 F.2d at 670). At the time that *Decoster III* was decided, only the First, Second, and Tenth Circuits still followed the "farce and mockery" standard.

\(^{45}\) *Id.* at 206.


\(^{47}\) 438 A.2d 914, 915 (Me. 1981) (adopting the language of United States v. Decoster, 624 F.2d at 206, and United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978)).
another defendant guilty of the same offense. Defense counsel’s error occurred despite ample opportunity to discover the possible problem. The court concluded that the new standard was required by both state and federal constitutions. The Law Court accepted the habeas justice’s finding that the “representation falls short of the lower parameter of ‘the range of competence demanded of attorneys in criminal cases.’” Despite such a finding, the case was remanded to determine if the “prior jury service of the four jurors had a likelihood of affecting the outcome of the . . . trial.”

A court’s finding of inadequate service by a criminal defense attorney does not end the inquiry. The Law Court in Lang adopted a two-prong test: “(1) Has there been a serious incompetence, inefficiency or inattention of counsel . . . ? (2) Has such ineffective representation by counsel likely deprived the defendant of an otherwise available substantial ground of defense?” The burden of persuading the court on both of these questions falls on the defendant.

The Lang standard remains the law in Maine. It is, however, necessary to examine the federal standard for ineffective assistance for at least two reasons. First, convicted defendants have the right to file habeas corpus petitions in federal court after they have exhausted state remedies. Second, state courts must follow Supreme Court precedent when deciding cases based on the Sixth Amendment of the U.S. Constitution. It is useful to begin by looking at the Decoster decisions from which Maine borrowed the standard. The case offers a framework for understanding attitudes to the entire issue of the right to effective counsel and the protection against ineffective counsel. Following the discussion of Decoster is an examination of Strickland v. Washington in which the U.S. Supreme Court established a stringent standard that would make it all but impossible to succeed on a claim of ineffective assistance of counsel.

A. United States v. Decoster

The plurality opinion from the United States Court of Appeals for the District of Columbia in United States v. Decoster is remarkable

49. Id. at 916 n.5 (quoting Lang v. Murch (Me. Super. Ct., 1980) (habeas corpus proceeding)).
50. Id. at 916.
51. Id. at 915 (citing Commonwealth v. Saferian, 315 N.E.2d 878, 883 (1974)).
54. See infra notes 137-139 and accompanying text.
56. 624 F.2d 196 (D.C. Cir. 1976).
reading for many reasons.\textsuperscript{57} In each of the four main opinions, the judges make statements that provide insight into why they fashioned the rule as they did. It is clear that the court struggled to create a standard and a test that would promote and preserve the integrity of the criminal justice system. The case is a treasure largely because it provides well articulated views of four possible approaches to the problem of incompetent counsel. The court's disagreements concern not the first prong of the test but rather the second prong, specifically the imposition of the burden of proving prejudice.\textsuperscript{58}

In the lead opinion, Judge Leventhal adopted a two-prong test:

The claimed inadequacy must be a serious incompetency that falls measurably below the performance ordinarily expected of fallible lawyers. And the accused must bear the initial burden of demonstrating a likelihood that counsel's inadequacy affected the outcome of the trial. Once the appellant has made this initial showing, the burden passes to the government, and the conviction cannot survive unless the government demonstrates that it is not tainted by the deficiency, and that in fact no prejudice resulted.\textsuperscript{59}

Judge Leventhal moderated his test by requiring a showing of a "likelihood" or probability that defense counsel's incompetence affected the outcome. The court declined to require a defendant to show a "substantial likelihood" or that the chances were "more likely than not" that the outcome would have been different. Judge Leventhal and the three judges joining him did not wish to impose "an undue burden on the defense. . . . [They did] not require that defendant bear the burden of proving actual prejudice."\textsuperscript{60} The defendant's burden was one of production, the ultimate burden of persuasion being on the Government.

Judge Leventhal based his approach on his recognition of the criminal justice system's failings and the desire to establish some middle ground that would allow for the maintenance of the adver-

\textsuperscript{57} Not the least remarkable thing about the case is its length, 150 pages in the Federal Reporter.

\textsuperscript{58} The court also was divided on the need for the development of articulated, specific duties to be imposed by the courts. United States v. Decoster, 624 F.2d at 215-16, 275-77.

\textsuperscript{59} Id. at 208. The Government had to demonstrate no prejudice in accordance with Chapman v. California, 386 U.S. 18 (1967) (holding that before a court can find that a constitutional error is harmless, that there was not a reasonable possibility that the error had contributed to the conviction, the court must declare that the error was harmless beyond a reasonable doubt). If the accused established a constitutional violation, "the government must show beyond a reasonable doubt that there has been no prejudice in fact." Id. at 208 n.74. However, if something less than a constitutional violation was perceived by the court, it could accept less than the Chapman requirement to find the error harmless. Id.

\textsuperscript{60} Id. at 215.
sary system as well as for the protection of constitutional rights. With humility, Judge Leventhal wrote that “[t]he adversary system, warts and all, has worked to provide a salutary protection for the rights of the accused.” While he recognized the problem of incompetent counsel, he responded in traditional “judicial restraint” fashion and called for the assistance from the legislature and the bar to cure the situation.

In a concurring opinion, Judge MacKinnon and the two judges joining him believed that the defendant should have to demonstrate “substantial unfair prejudice to his defense resulting from a substantial violation of duty owed him by his counsel.” The natural effect of such a test would be few reversals. Judge MacKinnon’s test required a showing of “actual injury” and not simply the likelihood of prejudice. Showing mere prejudice was insufficient; a showing of substantial unfair prejudice was required.

Judge MacKinnon’s proposed high standard intends its consequences, which is to say that he proposed a high standard that would produce few reversals because he wished to see few cases reversed. The intended consequences originated in the belief that “under the Criminal Justice Act most defendants in this court are as well, if not better represented than the Government.” Judge MacKinnon also stated, “[I]t is my view that Decoster’s lawyer concluded that he was guilty . . . [and] [u]nder such circumstances, an extensive investigation was not warranted.” Clearly, Judge MacKinnon developed his test while under the delusion that incompetent counsel was not a problem. Judge MacKinnon also seemed to award defense counsel the discretion to be judge and jury of his own client.

61. Id. at 216-17. Judge Leventhal did not like Judge Bazelon’s call for “categorical rules governing the assistance of counsel.” Id. at 216. He cautioned against any rule that would lead to “inevitable and increasing intrusion into the development and presentation of the defense case by the trial judge, and . . . by the prosecution.” Id.

62. Id. at 208 (emphasis added). Leventhal also wrote that “[c]ertainly there is need for the allocation of additional resources. Certainly there is need to cull out incompetent counsel.” Id. at 217.

63. Id.

64. Id. at 232 (emphasis added).

65. Id. at 245.

66. Id. at 244.

67. Id. at 233-34.

68. MacKinnon revealed himself more when he took umbrage at the dissent’s slamming of defense attorneys for the indigent and its concern for the poor:

We specifically resent the inference that appointed counsel scrimp on requesting investigative expense because of an alleged fear that their own fees would be lessened . . .

The dissent purports to be concerned with “equal justice” for the poor. But its myopic view of justice for the public overlooks justice for the public, and for that far larger number of poor Americans who are the victims of crime.
Judge Robinson, writing alone, believed that the effect of a lawyer's incompetence should not be an element of the claim of ineffective assistance of counsel.

I think the claim is established by a suitable showing that counsel defaulted on an obligation owed the accused, and that any asserted lack of injury therefrom is to be treated here just as... any other instance of curable constitutional error. This means... that the burden rests on the Government to prove [harmless error]... beyond a reasonable doubt.69

Judge Robinson also stated, "Proof of an actual or potential harm is not normally an element of the showing prerequisite to establishing a violation of a right specifically enumerated in the Constitution."70 This view is a grand, albeit logical, departure from the two-prong test. His test inevitably would result in more reversals.

Judge Robinson's view presents courts with a problem because no claim of ineffective counsel, if found to be constitutionally significant, can easily and honestly be found harmless beyond a reasonable doubt.71 Because the right to counsel is so important to the assertion of all other rights,72 if there is a finding of incompetence that amounts to a denial of the right to counsel, one would think that a court would be less likely to say, or the Government less able to prove, that the violation was harmless. Judge Robinson, however, did concur in the result because he believed that the record established harmless error.73 He believed that any efforts by the lawyer would have been unfruitful in light of the Government's proof.74

Although Judge Robinson's view is logical,75 his test presents the courts with another problem because it goes against the courts' pol-

69. Id. at 261 (footnotes omitted). The Supreme Court held that "constitutional error... casts on someone other than the person prejudiced by it a burden to show that it was harmless... Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967).
70. United States v. Decoster, 624 F.2d at 258.
71. Judge Robinson makes a distinction saying that "ineffective assistance is not far removed from total lack of assistance, which frequently calls for automatic reversal." Id. at 261.
72. Justice Stevens endorsed the view that "'[o]f all the rights that an accused person has, the right to... counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.'" United States v. Cronic, 466 U.S. 648, 654 (1984) (quoting Walter V. Schaefer, Federalism and State Criminal Procedure, 70 HARV. L. REV. 1, 8 (1956)).
73. United States v. Decoster, 624 F.2d at 262. Judge Robinson believed defense counsel's assistance to be "constitutionally ineffective." Id.
74. Id. at 263.
75. Judge Robinson's approach is logical because of the procedural posture of the case. Decoster appealed his case directly. Judge Robinson points out that normally
CRIMINAL DEFENSE

icy of awarding attorneys wide latitude and discretion. Judge Robinson's test would force courts to involve themselves in the uncomfortable task of criticizing lawyers' actions, conversely, the two-prong test does not because a claim can be dismissed under the prejudice prong without ever discussing the performance prong.

Judge Bazelon, dissenting, believed that courts should look at the attorney's performance. He wanted to establish a set of "articulated duties" that an attorney and the presiding judge should follow.

a defendant need not prove prejudice to establish a violation of the Constitution. Id. at 258-59. Judge Leventhal believed, however, that it did not matter whether the attack on the conviction was direct or collateral; the test should remain the same in either case. Id. at 207-08. Later, the U.S. Supreme Court weighed in on the debate when it said that "the right to effective assistance of counsel is recognized not for its own sake, but because of its effect on the ability of the accused to receive a fair trial." United States v. Cronic, 466 U.S. at 658. The Court ignores its own basic premise that a reasonably effective lawyer is the accused's key to all his rights in the process and is fundamental to the possibility of a fair trial. The Court essentially says that if the Government's case is strong enough, having a lawyer is better than having no lawyer, even if your lawyer "failed miserably in responding to his obligations ..." United States v. Decoster, 624 F.2d at 262.

A discussion of the different burdens imposed on defendants in a habeas or post-conviction proceeding in contrast to a direct appeal is beyond the scope of this Comment. Because a habeas proceeding is a civil proceeding and the defendant is like a plaintiff, requiring the defendant to show harm is perhaps appropriate. O'Neal v. McAninch, 115 S. Ct. 992, 996 (1995). This makes sense because the defendant must show that his continued confinement is in violation of the Constitution or the laws of the United States. 28 U.S.C. §§ 2241(c)(3), 2254(a) (1992). There is, however, a difference between recognition of a violation and the granting of relief. While one can understand the burden imposed to obtain relief, why a defendant is required to show prejudice to establish a constitutional violation on direct appeal remains unclear. Perhaps to avoid this question—as well as to provide for a proceeding that allows for testimony—the Maine Law Court strongly prefers that ineffective assistance claims be handled in a post-conviction proceeding. State v. Wells, 658 A.2d 654 (Me. 1995).

76. See supra Judge Leventhal's comments in notes 61-62 and accompanying text. 77. In Hill v. Lockhart, 474 U.S. 52, 60 (1985), the U.S. Supreme Court said that it was unnecessary for it to rule on counsel's performance "because in the present case we conclude that petitioner's allegations are insufficient to satisfy the ... requirement of prejudice." The New Hampshire Supreme Court encouraged reviewing courts to use the prejudice prong as a threshold question. State v. Wisowaty, 627 A.2d 572 (N.H. 1993).

78. In Decoster I, Judge Bazelon adopted an approach from the Fourth Circuit and stated:

(In General)—Counsel should be guided by the American Bar Association Standards for the Defense Function. They represent the legal profession's own articulation of guidelines for the defense of criminal cases.
(Specifically)—(1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client.
(2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them. ... Counsel should also be concerned with the accused's right to be released from custody pending trial, and be
He was not insensitive to the attorney's professionalism; he was, however, not afraid to have the courts take on the job of defining effective assistance. He stated that “[b]y focusing exclusively on the consequences of counsel’s dereliction, their [the majority] approach encourages an attorney who believes that his client is guilty to ‘cut corners’ . . . .” Believing as he did that “a great many—if not most—indigent defendants do not receive the effective assistance of counsel guaranteed them by the Sixth Amendment,” it is not surprising that Judge Bazelon states, “If the Sixth Amendment is to serve a central role in eliminating second-class justice for the poor, then it must proscribe second-class performances by counsel, whatever the consequences in a particular case.” This perspective

prepared, where appropriate, to make motions for pre-trial psychiatric examination or for the suppression of evidence.

3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed.


79. United States v. Decoster, 624 F.2d 196, 275-77 (D.C. Cir. 1976). Judge Bazelon’s dissent, which represented the majority view in United States v. Decoster, 487 F.2d 1197 (D.C. Cir. 1973), is a wonderfully liberal and impassioned approach to the incredible problem of incompetent criminal defense counsel. Judge Bazelon expresses his perspective when he states:

[T]he majority's decision ignores the sordid reality that the kind of slovenly, indifferent representation provided Willie Decoster is uniquely the fate allotted the poor . . . . I cannot accept a system that conditions a defendant’s right to a fair trial on his ability to pay for it. Like Justice Black, I believe that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” The Constitution forbids it. Morality condemns it. I dissent.

Id. at 264 (quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956)).

80. “The duties articulated herein are meant as a starting point for the court to develop, on a case by case basis, clearer guidelines for courts and for lawyers as to the meaning of effective assistance.” United States v. Decoster, 487 F.2d at 1203 n.23.

81. United States v. Decoster, 624 F.2d at 266 (emphasis added). Counsel believed that Decoster was guilty and failed to do any pre-trial investigation. Counsel did not even interview the state’s only witnesses, two police officers. He also failed to respond to the prosecution’s alibi-notice demand, even though counsel indicated, at trial, a possibility of relying on an alibi. Id. at 269 n.34. Decoster’s lawyer had been appointed, in 1971, in a purse-snatching case. In that case, counsel did no pre-trial investigation because presumably he believed his client guilty. The defendant was sentenced to two to six years despite “indisputable evidence” that he had been somewhere else, evidence that would have been discovered if any investigation had been done. Granted a new trial through other counsel, the charges were dropped, but the defendant spent a year in jail. Id. at 284 n.105.

82. David L. Bazelon, The Defective Assistance of Counsel, 42 U. CIN. L. Rev. 1 (1972). Judge Bazelon suggested that the number could be as high as 50%. Id. at 22-23.

83. United States v. Decoster, 624 F.2d at 275.
forms the basis for Judge Bazelon's test, which would not require the defendant to show prejudice.\footnote{84}

The Decoster opinions presented the range of attitudes towards the issue of the incompetent assistance of counsel, criminal defendants, and the criminal justice system. Although judges' attitudes about society and policy often direct their judicial opinions and the formulation of legal standards, the danger of doing this with the issue of effective assistance of counsel is that it involves a right so fundamental to the proper execution of the process by which the government deprives a person of his life or liberty. Logic is a more appropriate means by which to direct opinion. Judge Robinson correctly stated, "Ineffective assistance of counsel has a built-in potential for harm to the client. The right to effective assistance thus shares with most other constitutional guaranties a characteristic which normally obviates any need for proof of prejudice . . . ."\footnote{85} As the U.S. Supreme Court shows in \textit{Strickland v. Washington}, it believes that policy should triumph over logic and a constitutional right should depend on whether or not the government has a good case against a defendant.

\textbf{B. \textit{Strickland v. Washington}\footnote{86}}

To put to rest the controversy over a standard for determining ineffective assistance the U.S. Supreme Court granted certiorari in the case of David Leroy Washington. Against his attorney's advice, David Washington confessed and pleaded guilty to three capital murders. Washington's counsel became "immobilized by a 'hopeless feeling' upon learning that Mr. Washington had confessed . . . [He commented that] he did not feel that 'there was anything which [he] . . . could do which was going to save David Washington from his fate.'\footnote{87} Counsel conducted no pre-sentence investigation and failed to order any psychiatric testing or pre-sentencing reports, despite his belief that there was "an inexplicable difference" between Washington's personality and the crimes he committed.\footnote{88} Defense

\footnote{84. Judge Bazelon suggested that after the defendant showed a substantial violation of one of the "articulable duties," the government must establish that no prejudice resulted. \textit{Id}. He also recognized that a defendant might have trouble proving prejudice because of a lawyer's incompetence. \textit{Id}. at 267.}

\footnote{85. \textit{Id}. at 260.}

\footnote{86. 466 U.S. 668 (1984).}


\footnote{88. \textit{Id}. The lawyer's reaction flies in the face of the ABA command that "defense counsel in a capital case must, given this extraordinary penalty, make extraordinary efforts on behalf of the accused . . . [D]efense counsel should endeavor . . . to leave no stone unturned . . . ." \textit{ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard} 4-1.2 commentary at 123 (3d ed. 1993) [hereinafter \textit{ABA STANDARDS}]. The ABA reminds lawyers that "advocacy is not for the timid, the meek or the retiring." \textit{Id}. at 122.}
counsel relied solely on his own sentencing argument and the substance of the plea colloquy between Washington and the judge. Washington’s lawyer threw his client on the mercy of the court and hoped that his life could be spared through the use of the state’s psychological report and the fact that his client had confessed his brutal crimes to a judge whose “views on the importance of owning up to one’s crimes were well known to counsel.”

In reversing the Fifth Circuit’s reversal of Washington’s murder conviction, the Court held that the “conduct of the respondent’s counsel . . . cannot be found unreasonable.” The Court established a two-prong test that requires the defendant to show that first, “counsel’s performance was deficient . . . Second, the defendant must show that the deficient performance prejudiced the defense.” The Court’s standard is higher than that of Judge Leventhal’s test in Decoster because it requires a showing that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” David Washington could have received relief if he had shown the Court that there was a “reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” David Washington could not do that and was put to death within the year of the Strickland opinion.

The Court reasoned that “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” This test allows a finding of a “just result” despite a showing that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Given the Supreme Court’s proclamations that the right to counsel is a funda-

90. Id. at 698. In fact, the trial court said that “the argument and memorandum given to the sentencing judge were ‘admirable’ in light of the overwhelming aggravating circumstances and absence of mitigating circumstances.” Id. at 676. Of course, there were no mitigating circumstances because the lawyer the court admired did not look for any.
91. Id. at 687. Maine’s test, established in Lang, also placed the complete burden of production and persuasion on the defendant. Lang v. Murch, 438 A.2d 914, 916 (Me. 1981).
93. Id. at 695.
96. Id. at 687.
mental right and the key to proper access to all other rights, this result, which occurs regularly, is extraordinary.

The Court also claimed to be concerned with preserving the adversary process to achieve "reliable" results, yet it acted contrary to that objective. The Court believed that a "reliable result" can be achieved when defense counsel is not participating as an adversary, as "counsel" as the Constitution intended. According to the Court, reliable results can be achieved when the Government has overwhelming evidence against a defendant; it does not matter that the evidence goes unchallenged. Under the Court's test in *Strickland*, defense counsel is only necessary when the courts are unsure of the defendant's guilt. The Court turns a blind eye to a dereliction of duty by defense counsel if the Court is comfortable with its belief that the defendant is guilty. This, of course, contravenes the foundational principle of the adversary system; the "truth," a "just result," and a "reliable result" can be achieved only when all three participatory parties (the judge and jury, the prosecutor, and the defense counsel) do their jobs well.

The stated rationale for the first prong of the test is the courts' reluctance to second-guess lawyers, who are after all members of their own profession. "Because of the difficulties inherent in making the evaluation [of counsel's performance], a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." In *Decoster*, Judge Leventhal also expressed this reluctance.

The rationale for the requirement of the prejudice prong is less clear. The Court began its discussion of the need for the second

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97. See supra note 72.
98. According to a study of Federal Circuit opinions, 41% of all ineffective assistance claims brought after *Strickland* were denied for lack of prejudice. Only 4% of post-*Strickland* claims were upheld. Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?*, 22 Rutger's L.J. 361, 426 (1991). A more recent study indicated that, in the nine states and their corresponding federal district courts studied, only 1% or less of ineffective assistance claims were granted. Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 Cal. W. L. Rev. 237, 259-60 (1995).
99. As in *Strickland*, this test is especially harmful to a criminal defendant's rights when defense counsel is responsible for the fact that the Government's evidence seems so overwhelming. While the O.J. Simpson trial was unusual, it is a clear example of how good lawyering can overcome overwhelming evidence.
100. The Court stated, "Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland* v. Washington, 466 U.S at 696.
101. Id. at 689. The Court also said: "[T]he purpose of the effective assistance guarantee . . . is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial." Id.
102. Justice Marshall, however, is very clear in his dissent when he states:
prong by saying that an error by counsel does not warrant overturning a conviction if the error had no effect. This, however, does not explain the requirement that the defendant show prejudice, instead of requiring the Government prove no prejudice. The Court goes on to say that because the "purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding," the errors of counsel "must be prejudicial" to rise to the level of a constitutional harm. Should it not be assumed that the proceeding is unreliable if defense counsel is not "counsel" as the Constitution intended? The Court does not think so. The Court explains its "logic" by saying that it cannot and/or will not infer prejudice from all errors by counsel. Justice O'Connor wrote:

The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid.

Justice O'Connor incorrectly attempts, on behalf of the government, to evade responsibility for the performance of lawyers. All attorneys are officers of the court; appointed attorneys are sanctioned and paid by the courts; the courts are the means by which the government takes away life and liberty. Also, the possibility that errors may be harmless as well as prejudicial does not explain the

[I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.

Id. at 710.
103. Id. at 691.
104. Id. at 691-92.
105. The Court need not infer prejudice from all errors. But when the errors are substantial and counsel's performance is grossly inadequate, prejudice could very easily be inferred.
107. One of the beautiful things about our form of government is that, at least in theory, the government is responsible for assuring that criminal defendants are adequately represented by counsel who are not under the influence of the government. Our form of government illustrates a commitment to the idea that it must protect us from itself, so deep in the foundation of our system is the respect for the individual and his liberty.
prejudice requirement or the allocation of the burden. Further, the lack of specificity of a standard is not an ample justification for a prejudice prerequisite to a constitutional violation. Shouldn't an attorney know what conduct falls below that of the "prevailing professional norms?" 108 Nothing in the opinion answers the question why prejudice must be shown, or why the defendant must show prejudice if the court thinks an attorney error is wholly egregious, and may leave a defendant without "counsel" as the Constitution intended.

Because the Strickland Court is not as free with expressing its personal feelings as was the Decoster court, one must look to the logical results of the opinion, assume that the court intended the logical results, and determine the court's rationale from that. The logical result of the Strickland test is very few reversals. 109 The majority in Strickland presumably intended those results.

There are unpleasant possibilities for why the Court would want to establish a test that would make reversals very rare. First, many people, including judges, believe that most defendants are "actually guilty." Second, people also believe that the Constitution was meant to protect only the innocent from being convicted. Third, courts know that the quality of representation for many, if not most, criminal defendants is inadequate and a lower hurdle would result in more reversals that would use already precious judicial resources. Why waste the taxpayers' money and the courts' precious time with a new trial that will only effect the same result?

First, many people find it easy to discount the impact of inadequate representation with the belief that most defendants are guilty. 110 That one is presumed innocent until a fair trial proves him guilty does not concern them. Judge Bazelon offered a perspective of this attitude when he stated:

It is the belief—rarely articulated, but, I am afraid, widely held—that most criminal defendants are guilty anyway. From this assumption it is a short path to the conclusion that the quality of representation is of small account. . . . [T]his "guilty anyway" syndrome underlies much of the current push for greater "efficiency" in the criminal courts. . . . [W]hy allow men who are "guilty anyway" to clutter the courts with all sorts of difficult legal and constitutional questions? 111

To what else could Justice O'Connor be referring when she says that a "just result" could be reached when the defense counsel was not the "counsel" guaranteed by the Constitution? 112 The belief that

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109. See Feeney & Jackson, supra note 98.
110. This Author has encountered this sentiment in numerous conversations about the issue. Such views are aired unabashedly in law school classes by some law students.
111. Bazelon, supra note 82, at 26.
most criminal defendants are "guilty anyway" allows the Court to engage in a balancing of policies and values, instead of adhering logically to the Constitution.

Second, related to the "guilty anyway" syndrome is the idea that the Constitution is meant to protect only the "actually innocent" from being convicted incorrectly, and not also to protect the "actually guilty" from being convicted improperly. The Constitution surely requires both. Written to limit the power of government, the Constitution requires that the system ensure that the guilty are properly convicted also. 113 Justice Marshall declared in dissent in Strickland:

[The assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures.] 114

Justice Black wrote eloquently, "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' " 115 Justice Brennan wrote, "The constitutional rights of criminal defendants are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt." 116 Denied the protection of such a fundamental and important constitutional right, a person cannot, and should not, be considered convicted properly.

The third possible rationale for the Court's test is that the Court certainly must be aware of the problem of inadequate assistance of counsel and fears an onslaught of ineffectiveness claims. 117 The rate of incompetence among trial lawyers has been estimated as high as seventy-five percent. 118 Chief Justice Warren Burger believed that "from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation." 119 Ramsey Clark, U.S. Attorney General under Lyndon

113. In Herring v. New York, 422 U.S. 853, 862 (1975), the Court seemed to agree when it said that "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."
117. Ineffective assistance claims on habeas petitions account for almost half of the claims raised. Flango & McKenna, supra note 98, at 247.
118. Feeney & Jackson, supra note 98, at 427. Nevertheless, "[f]rom the beginning the claims of widespread incompetence have been sharply disputed." Id. at 397.
119. Id. at 396.
Johnson, said, "In my judgment, from having been involved in a number of those cases [of death row inmates] and reviewed many more transcripts, seventy-five percent were deprived of the effective assistance of counsel."120 Because of this belief and in spite of it, the courts allow people to go to jail and to death when the key to all of their rights, their lawyer, was for reasons of incompetence unavailable to them.121

The Supreme Court must have been aware of these sentiments and feared encouraging the "proliferation of ineffectiveness challenges"122 if it established a test that allowed only an examination of the performance of defense counsel. The Court stated:

Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.123

Instead of addressing the true constitutional question, the Court goes straight to the prejudice prong.124 While these fears possibly could justify a healthy deference to counsel's actions, they do not justify establishing a test that regularly ignores truly poor performances. Through the creation of this test, the Court injures the system more deeply than if it created a test that allowed the system to crash. The Court seems to believe that the system should be preserved even at the expense of its principles.

Instead of acting consistently with the theory of the system, the Supreme Court is ruled by its concerns for the courts' ability to handle cases and the attitude that few people will be hurt because most defendants are guilty anyway. This Comment's primary purpose is

121. Not more than 16% of ineffective assistance claims are upheld, and usually the number is closer to 4 or 6% Feeney & Jackson, supra note 98, at 426.
123. Id.
124. Id. at 697. The real question should be whether the defendant received counsel as the Constitution intended. The Court's two-prong test means that a finding of a deprivation of a constitutional right, which usually is considered a constitutional violation, is insufficient to constitute a violation of the Constitution. It would be as if the Court said that a defendant had to show prejudice before the Court would recognize that the defendant's Fourth Amendment rights were violated when the police entered his home without a warrant. While it may make sense to allocate the burden of showing prejudice to the defendant before he may obtain relief it makes little sense that the recognition of a constitutional violation depends on a showing of prejudice.
not to propose a solution to the problem with the *Strickland* test.\textsuperscript{125} The test indicates that the courts are unable or unwilling to fix the problem of incompetent counsel. Nevertheless, this Author proposes that the Supreme Court and the Maine Law Court abandon the current requirement that a defendant show prejudice before a constitutional violation is found to exist. This proposition rests not only in the belief that the courts are wrong but also in the practical consideration that the courts must preserve the system of justice and ensure truly “just results.” The legislatures and many lawyers are unwilling to fix or are uninterested in the problem of proper representation; they cannot be relied on to solve the problem alone. The courts should recognize their responsibility for the lawyers that they admit to the bar and that they appoint to represent indigent defendants. The courts do not need to invade the role of defense counsel completely, but neither should they abandon defendants to attorneys whose only qualification is their willingness to serve.\textsuperscript{126} As Judge Bazelon said:

> That the ultimate solution does not lie exclusively within the province of the courts does not justify our ignoring the situation nor our accepting it as immutable. The people have bestowed upon the courts a trust: to ensure that the awesome power of the State is not invoked against anyone charged with a crime unless that individual had been afforded all the rights guaranteed by the Constitution. We fail that trust if we sit by silently while countless indigent defendants continue to be deprived of liberty without the effective assistance of counsel.\textsuperscript{127}

The courts cannot be timid about telling attorneys that they have acted irresponsibly. The courts cannot continue to make excuses for poor performances. If the courts are going to assign the term “tactical” to a lawyer’s decision, the courts must do so only when the lawyer is capable of making such a decision.

IV. THE CAPE OF NO HOPE: INEFFECTIVE ASSISTANCE DEFINED IN THE COURTS

While it is clear that criminal defendants have a Sixth Amendment right to effective counsel, it is anything but clear in the courts what it means to have effective counsel. What will satisfy the first


\textsuperscript{126} In Maine, there is no application process for court-appointed counsel. Also, willingness is not the primary motive for some who take court appointments. With the poor state of the job market, necessity has become a motivation for court-appointed attorneys.

\textsuperscript{127} United States v. Decoster, 624 F.2d 196, 300 (D.C. Cir. 1976).
prong of the Strickland test? 128 What is the measure of a lawyer conducting a proper defense? The Strickland Court said that "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." 129 A vice-president of the Georgia Trial Lawyers Association said that, according to the Strickland standard, if "you put a mirror under the court-appointed attorney’s nose, and if the mirror clouds up, that’s adequate counsel." 130 A lecturer at Loyola University said that providing effective assistance of counsel “means you provide the best defense in order to obtain the best result for your client.” 131 In Maine, effective counsel is defined by what it is not: seriously incompetent, inefficient, and inattentive. 132 The Maine Law Court defers to an attorney’s tactical decisions unless they represent “manifest unreasonableness,” which is found if the defendant is denied a “substantial ground of defense.” 133 The more one examines the cases dealing with effective representation the more one understands that, although the courts may desire defense counsel who can do more than cloud up a mirror, the courts are willing to tolerate lawyers who do little more in the courtrooms of the United States. What follows is a look at cases dealing with claims of ineffective assistance of counsel. One quickly realizes that the courts give attorneys no direction and defendants little hope.

A. Procedure for Post-Conviction Review

In Maine, claims for ineffective assistance of counsel may be brought either on direct appeal or collaterally pursuant to Rule 37 or Rules 65 through 78 of the Maine Rules of Criminal Procedure. The Law Court states that ineffective assistance claims are “better suited for post-conviction review.” 134 “When [such a claim] is raised

128. Of course, more important for the defendant is what will satisfy the second prong of the Strickland test.
130. Stephen B. Bright, et al., Keeping Gideon from Being Blown Away, CRIM. JUST., Winter 1990, at 10, 11. This quip was prompted by a defense attorney’s failure, until the second day of trial, to recognize that the person sitting next to him was not his client. Other instances that shock the conscience include the attorney that had handled a number of capital cases and named Dred Scott and Miranda as the two criminal cases with which he was most familiar. Yet another included the defendant who was sentenced to death even though the first day of his trial was cut short when the judge sent his lawyer to jail for the night because the lawyer was drunk in the courtroom. Finally, there was the third year law student, who asked for a moment to compose herself because she had never been in court before. She was representing a defendant whose life was at stake. Id.
on direct appeal, we will not consider the claim unless the record reveals, beyond the possibility for rational disagreement, that the defendant received inadequate representation.\textsuperscript{135} Whether the claim is brought directly or collaterally, the defendant must prove prejudice.\textsuperscript{136}

At the federal level, a state or federal prisoner may file an appeal or file a petition for a writ of habeas corpus.\textsuperscript{137} Like the Law Court, the First Circuit "has repeatedly held that collateral attack is the preferred forum for such claims, since there is often no opportunity to develop the necessary evidence where the claim is first raised on direct appeal."\textsuperscript{138} State prisoners first must exhaust state remedies before federal courts will entertain the petition.\textsuperscript{139}

The procedural posture of the normal ineffective assistance of counsel claim greatly alters the substantive right to effective assistance of counsel. Habeas (called post-conviction in Maine) petitioners normally file their petitions pro se.\textsuperscript{140} After review of the petition by a judge the petitioner may be appointed counsel, but not necessarily.\textsuperscript{141} While petitioners have access to law books, they are unqualified to recognize or adequately state a claim that is likely to get past the reviewing judge.\textsuperscript{142} The solution to the problem seems to be the provision of habeas forms, which lead the petitioner through the process even to the point of listing possible grounds for relief.\textsuperscript{143} Whether the habeas forms really solve the problem is open to debate. The fact remains that the courts relegate ineffective assistance claims to a procedure where attorneys are not available in the first stage of drafting the claim, which is arguably the most important step. It is irrelevant that courts do this largely for the practical reason that such claims require evidence to be adduced in a hearing, a procedure unavailable at the direct appeal level. Those wronged by an incompetent attorney hit a procedural brick wall. What follows is an examination of what happens once the petitioner climbs over the procedural wall; a substantive barbed wire fence awaits.

\textsuperscript{135} Id.

\textsuperscript{136} Id.


\textsuperscript{138} Knight v. United States, 37 F.3d 769, 774 (1st Cir. 1994).


\textsuperscript{140} Flango & McKenna, supra note 98, at 261.

\textsuperscript{141} Id. at 261 n.63; ME. R. CRIM. P. 69.

\textsuperscript{142} Maine Rules allow the reviewing justice to dismiss the petition summarily. ME. R. CRIM. P. 70. In their study, Flango and McKenna found that about 75% of state court petitions were dismissed or denied summarily without a reason. Flango & McKenna, supra note 98, at 262. Maine Rule 70(b) requires that reasons be given for a summary dismissal. ME. R. CRIM. P. 70.

\textsuperscript{143} Model Form for Use in Applications for Habeas Corpus Under 28 U.S.C. § 2254; Model Form for Motions Under 28 U.S.C. § 2255. The forms tell petitioners that they must state facts that support the claims.

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B. Maine Cases

1. Kimball v. State

In Kimball v. State, the Maine Law Court said that “[d]efense counsel has a duty to conduct a ‘reasonable amount’ of pre-trial investigation.”\(^{144}\) This duty, however, does not require a lawyer to turn over every stone. Recognizing that “[t]rial counsel had a limited budget for investigation,” the Law Court endorsed the post-conviction justice’s deference to defense counsel’s choice to pursue some evidence and ignore other.\(^{145}\) Despite the presence of a possible witness on a list of the victim’s acquaintances, the witness was not interviewed by defense counsel by the time of trial.\(^{146}\) A year after the conviction the witness, a fellow inmate of the defendant, came forward and claimed that he knew who had murdered the victim.\(^{147}\) Whether the witness was not contacted because of a lack of resources or because of defense counsel’s incompetence is not clear. Why the witness did not come forward on his own also is not explained. It is clear that, if the witness's story was not concocted with the aid of the defendant, the fact that the witness was not interviewed represents a break down in the process, which the court was unwilling or unable to fix.\(^{149}\)

2. State v. Toussaint

In State v. Toussaint,\(^{150}\) the Law Court found that defense counsel’s “failure to take any effective measures to protect his client from a potentially unduly suggestive photo-lineup identification is indefensible.”\(^{151}\) Nevertheless, because the defendant “was not deprived of a substantial ground of defense” the court affirmed his conviction for armed robbery.\(^{152}\) Defense counsel failed to file a motion to suppress the pre-trial photo identification and even failed to voir dire the victim to “pursue the possibility that the photo-lineup was unnecessarily suggestive.”\(^{153}\) In conducting the photo-lineup the police showed the victim five photos of “men of similar appearance [and then informed] . . . her that she had chosen the

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144. 490 A.2d 653 (Me. 1985).
145. Id. at 656.
146. Id. at 657.
147. Id.
148. Id. at 656.
149. In Kimball, the court held that the post-conviction court’s finding of competence was not clearly erroneous. Id. at 660. Whether the procedural posture of the case really makes a difference in the court’s standard is debatable. Also, the court did not find clear error in the lower court’s finding that it was “improbable that [the witness’s] testimony would have raised a reasonable doubt” with the jury. Id.
150. 464 A.2d 177 (Me. 1983).
151. Id. at 179.
152. Id. at 180.
153. Id. at 179.
‘right’ man”154 when she pointed out the defendant. Because the court determined the photo-lineup to be reliable in fact, the in-court identification was not tainted and the defendant was not prejudiced.155 Ironically, Toussaint’s lawyer was disbarred as a result of his actions in the case but not for his incompetent performance.156 The court stripped him of his title of lawyer only after he allowed Toussaint to lie on the stand.157 As merely a substandard defense lawyer, Toussaint’s lawyer could have stayed in business.

3. Vaughan v. State

Vaughan v. State158 presents an interesting view into how the Maine courts tolerate substandard representation of the indigent. In Vaughan, the defendant was charged with possession of a firearm by a felon, as well as drug trafficking. The trial judge and the State suggested a stipulation to the existence of a prior felony conviction for drug trafficking without revealing to the jury the nature of the conviction. Defense counsel refused to stipulate, not because he had a particular trial strategy in mind but because he did not understand the implications of revealing to the jury that the man before them on drug trafficking charges previously had been convicted of drug trafficking.159 The post-conviction justice found that there was no prejudice to the defendant because the court’s intervention prevented the jury from hearing about the nature of the prior conviction and the Law Court held that this finding was not clearly erroneous. While the result of the appeal can be fairly characterized as correct, it is disturbing that the Law Court declined to discuss the post-conviction court’s conclusion that the “earlier failure to stipulate was a permissible tactical decision.”160 Defense counsel’s decision can hardly be characterized as tactical when counsel, by his own admission, did not understand the pros and cons of the decision. The Law Court’s intentional silence on this issue is hard to accept. What happened in Vaughan does not represent an easy mistake by counsel or even poor judgment. Rather, it represents a lack of basic

154. Id. at 180.
155. Id.
157. Although Toussaint told Dineen that he had robbed the hotel, Dineen elicited an alibi from Toussaint on direct examination in violation of Maine Bar Rule 3.7(b), which prevents a lawyer from presenting false evidence to a court. Id. at 501.
158. 634 A.2d 449 (Me. 1993).
159. On the second day of trial, the proposed stipulation was again discussed, and defense counsel stated, “I don’t want to appear to be totally ignorant, but apparently I’m missing something on this.” Only after the court discussed in detail the implications of failing to stipulate to the felony conviction was counsel willing to discuss stipulation with his client.
160. Id. at 450. Defense counsel eventually agreed to the stipulation. Id.
understanding of criminal law and, at best, the effects of woeful inexperience.

Because of the trial court's admirable intervention in Vaughan, one is pressed to point precisely to an instance of how the defendant was prejudiced. One is left, however, with the nagging concern that if defense counsel was so inadequate on this point, he was perhaps inadequate on others that did not come before the post-conviction court. But despite the fact that all attorneys are sworn in by the courts and become officers of the courts, and despite the fact that Maine courts appoint counsel to secure a defendant's constitutional rights, the courts are reluctant to enter into an assessment of a trial counsel's performance. The courts award trial counsel deference and prefer to decide an ineffective assistance of counsel claim by determining whether or not the defendant has proven prejudice. The courts seem to prefer to keep the nagging concerns about defense counsel's overall performance out of their decisions.

4. Levesque v. State

In Levesque v. State the Law Court reaffirmed its commitment to a "substantially heightened deferential standard" when it reversed a post-conviction justice's finding of ineffective assistance of counsel. The court also made clear that "substantial and overwhelming" evidence presented by the state will excuse poor performance by an attorney. Levesque was convicted of gross sexual assault and misconduct. In what was essentially a swearing contest between Levesque and his accuser, his daughter, his attorney failed to attempt to impeach the daughter's credibility when he had the chance. He also failed to call another daughter, who would have contradicted the accusing daughter.

Justice Dana, joined by Justice Rudman, dissented and preferred to defer to the post-conviction justice's determination:

Research has not produced a single case within the last thirty years in which we have affirmed a Superior Court finding of ineffective "trial" counsel and only once during that period have we affirmed a finding of ineffective trial preparation. The reason for this almost unblemished record is the amount of ineffectiveness that we find acceptable. I do not quarrel with the words—"ordinary, fallible attorney"—what needs to be elevated, in my view, is our assessment of that attorney.

161. Even under Judge Robinson's test in Decoster, Vaughan's conviction would have withstood a harmless error inquiry.
162. 664 A.2d 849 (Me. 1995).
163. Id. at 852.
164. Id.
165. Id.
166. Id. at 853.
So rarely is ineffectiveness of counsel found by any judge, it is unfortunate that the Law Court found it necessary to reverse the superior court and thus deter judges from looking too carefully at a lawyer's performance.

C. Federal Court Cases

1. Kimmelman v. Morrison

In Kimmelman v. Morrison, Neil Morrison was charged with the rape of a fifteen-year-old girl. His conviction was based on the victim's testimony and evidence that was obtained without a warrant. At trial, in the middle of a detective's testimony, defense counsel moved to exclude the evidence that had been obtained without a warrant. The motion was denied because it had not been made within the time frame required by New Jersey rules. Defense counsel claimed that he had only discovered the day before the trial that the evidence had been obtained illegally. But it quickly became clear that the only reason that defense counsel was unaware of the facts was that he had not conducted any discovery.

Ordering New Jersey to retry Morrison or set him free, the district court referred to defense counsel's performance as "unmitigated negligence." Although concurring with this finding, the court of appeals vacated the holding of the district court case for a determination of prejudice under Strickland. The Supreme Court affirmed the decision of the court of appeals. To prove prejudice, Morrison needed to show that his unlitigated Fourth Amendment claim was "meritorious and that there [was] a reasonable probability that the verdict would have been different absent the excludable evidence . . . ."

168. Id. at 368.
169. Id.
170. Id. at 369.
171. Id.
172. The Court wrote:
   Asked repeatedly by the trial court why he had not conducted any discovery, respondent's attorney asserted that it was the State's obligation to inform him of its case against his client, even though he made no request for discovery. The judge rejected this assertion and stated: "I hate to say it, but I have to say it, that you were remiss. I think this evidence was there and available to you for examination and inquiry."
   Id.
173. Id. at 372.
174. The court of appeals referred to defense counsel as "grossly ineffective." Id. at 373.
175. The district court judge had used a harmless error standard because Strickland's standard had not been established yet. Id. at 372.
176. Id. at 375.
Morrison finally prevailed on remand in *Morrison v. Kimmelman*. The Government argued, as Justice Powell did in a *Kimmelman* concurrence, that the evidence was reliable and failure to attempt to suppress reliable evidence could not be prejudicial despite the fact that the evidence was unconstitutionally obtained. In his *Kimmelman* concurrence, Justice Powell said, "[I]t would shake that right [to effective assistance of counsel] loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall." The district court rejected this argument and held that the failure to attempt to suppress unconstitutionally obtained evidence was ineffective assistance of counsel. Morrison was fortunate that the case against him was not very strong, and virtually meritless without the illegally obtained evidence. If there had been other evidence available and the court had found the introduction of the evidence to be harmless error, Morrison's conviction would have been affirmed and another incompetent attorney would have gone his own way while his client went to jail.

2. *Mitchell v. Kemp*

*Mitchell v. Kemp* represents another example of the courts' refusal to relieve a person of the dire consequences of having a bad lawyer. Billy Mitchell was sentenced to death for the murder of a fourteen-year-old boy, Christopher Carr, during the robbery of a

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178. *Id.* at 802.


180. *Morrison v. Kimmelman*, 650 F. Supp. at 805. The court also denied the government's request to obtain testimony from the trial judge to see if he would have convicted Morrison absent the evidence.

181. In fact, Morrison did continue to suffer the effects of his attorney's incompetence. Morrison was tried and convicted of rape of another 15-year-old girl. *State v. Morrison*, 522 A.2d 473, 474 (N.J. Super. Ct. App. Div. 1987). That rape took place two months after the rape at issue in *Kimmelman v. Morrison*, 477 U.S. 365 (1986), in the back room of the seafood store operated by Morrison. *State v. Morrison*, 522 A.2d at 474. The same defense attorney Morrison had for the first rape charge filed an untimely motion to suppress potential illegally obtained pantyhose. The motion was denied. *Id.* at 475. Morrison then suffered at the hands of an appellate counsel who did not raise the issue of ineffectiveness of counsel on direct appeal. On post-conviction review, Morrison alleged ineffectiveness of appellate counsel. *Id.* Although the court determined that both appellate and trial counsel were incompetent under the first prong of *Strickland*, the court believed that Morrison had failed to show that the outcome of the trial would have been different. *Id.* at 478.

convenience store. Carr's mother was wounded, her eyesight damaged. Mitchell was arrested later in the day of the murder. He confessed shortly after being taken into custody. He pled guilty and was sentenced to death soon after.\textsuperscript{183}

Mitchell's defense counsel "filed \textit{no} pretrial motions"\textsuperscript{184} even though the police officer who was present during the interrogation and who signed Mitchell's waiver of his Miranda rights was Christopher Carr's cousin. Counsel did not even interview Officer Carr, because counsel did not like the man.\textsuperscript{185} Counsel did not challenge the confession even though Mitchell claimed that Officer Carr had held a gun to his head "to extract the confession."\textsuperscript{186} Defense counsel also failed to interview Mrs. Carr. He did not challenge her identification of the defendant even though her eyesight had been damaged. Counsel did interview Mitchell on four or five occasions.

The district court sanctioned defense counsel's actions by stating that "Miller [defense counsel] need only have investigated the case to the point where he was familiar with the facts and the state's case. He appears without a doubt to have done at least this much."\textsuperscript{187} That a court would accept and endorse such a cursory approach to the handling of a criminal case, not to mention a capital case, is appalling. The district court justified its response by saying that Mitchell failed to show what defense could have been utilized in his favor had defense counsel done more.\textsuperscript{188} This justification ignores the fact that the suppression of a coerced confession and the key witness's identification and testimony would have left the Government without a case.

The Eleventh Circuit's reasoning was equally specious when it downplayed the consequences of defense counsel's inaction. The court stated:

> Whether or not the confessions were voluntary, Mitchell admitted in his guilty plea that he killed Christopher Carr. Even if Mrs. Carr's identification should have been excluded because of the damage done to her eyesight by the wounds received in the robbery, there was no ground for excluding her testimony that the man who shot her son also shot her and robbed the store. Mitchell shows no prejudice.\textsuperscript{189}

The court's reasoning falls apart when one ponders the effects of the suppression of Mitchell's confessions. If Mitchell's confessions were

\textsuperscript{184} Id. at 1027.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id.
suppressed he would not have pled guilty.\textsuperscript{190} If he had not pled guilty, he would not have admitted to the court to killing Carr. If he had not admitted to killing Carr, there would be nothing to link him to Mrs. Carr's statements that the same man who shot her son also shot her.

Whether or not Mitchell committed the murder, Mitchell was entitled to a lawyer who would challenge the government's proof. The United States Constitution, established to limit the power of government, requires the state to convict a person properly. Without a competent lawyer and with an approving judiciary the Sixth Amendment right to effective assistance of counsel becomes no better than an insult.\textsuperscript{191}

Defense counsel's failures took on even greater significance at the sentencing phase of Mitchell's case. The State relied on Mitchell's confessions and Mrs. Carr's testimony to establish the aggravating circumstances that sent Mitchell to death row.\textsuperscript{192} Defense counsel compounded his failure to challenge the reliability of the State's proof when he "called no witnesses and presented no mitigating evidence."\textsuperscript{193} According to defense counsel he failed to rebut the Government's proof because Mitchell did not want him to,\textsuperscript{194} because counsel's conversation with Mitchell's father had not been helpful,\textsuperscript{195} because he thought there was nothing to find, and because he thought that he could foreclose the government's entry of a prior conviction in evidence by not "opening the door."\textsuperscript{196} One further explanation defense counsel gave for his lack of preparation was his incorrect belief that the State would not be able to introduce aggravating circumstances because the State had not provided him with

\textsuperscript{190} At least he would not have pled guilty in reaction to the Government's case against him.

\textsuperscript{191} Ramsey Clark, in a lecture on the duty of loyalty to clients, said that "[a] right that cannot be fulfilled is worse than no right; it can become an insult." Clark, \textit{supra} note 120, at 466.

\textsuperscript{192} Mitchell v. Kemp, 762 F.2d at 889. The aggravating circumstances proved by the state were murder during the commission of armed robbery and aggravated battery.


\textsuperscript{194} \textit{Id.} at 1030.

\textsuperscript{195} It is not clear just why counsel called Mitchell's father. But it seems that he was trying to withdraw from the case, not interview the man about his son. From the record, Justice Marshall established that "[c]ounsel apparently initiated these contacts for the purpose of requesting that the family hire an attorney to relieve him of his obligation to represent [Mitchell]." \textit{Id.} at 1027. The Eleventh Circuit noted that "[t]he father would not give definite answers on whether he was able to provide funds for or aid in Mitchell's defense." Mitchell v. Kemp, 762 F.2d at 888. Defense counsel had been appointed by the court. \textit{Id.}

\textsuperscript{196} Mitchell v. Kemp, 762 F.2d at 889-90.
written notice. The Eleventh Circuit approved defense counsel’s errors by labeling them “strategic choices.”

Defense counsel was flagrantly wrong when he thought he could foreclose the use of the prior conviction. But just as was seen in Vaughan, the court put a spin on counsel’s actions by saying it was reasonable to assume that “the presentation of good character evidence might motivate the State” to introduce the prior conviction. The court ignores the fact that such an assumption, if it is to be held reasonable, needs some basis in knowledge of which defense counsel was not possessed. He did not even know the facts and circumstances of the prior conviction, other than that it was a felony.

If defense counsel had taken some effort to go beyond his interview with Mitchell, he could have created 170 pages of affidavits from people willing to testify on Mitchell’s behalf: He would have found “family members, a city councilman, a former prosecutor, a professional football player, a bank vice president, and several teachers, coaches and friends.” Billy Mitchell was an above average student in high school; captain of his football team; an active member of his student council, school choir, church choir, track team; and a Boy Scout. When he was sixteen years old, his parents got divorced and he started getting into trouble. At eighteen, he was arrested for armed robbery and, even though he maintained his innocence, pled guilty because his father told him “things would go easier for him.” The charges against the co-defendants were dropped. While in jail, he was raped violently and repeatedly and lost thirty pounds. All this compelling mitigating testimony was lost for one reason and one reason only: Defense counsel for Billy Mitchell failed in his duty to his client and in his duty to the system, notwithstanding the appalling sanction by the courts of his wholly

197. Defense counsel supposedly believed written notice was necessary even though the statute did not require it and no court decision had ever required it. Mitchell v. Kemp, 483 U.S. at 1029.
199. Id. at 890.
200. Justice Marshall wrote, “If counsel in this case made any decisions at all, they were barren of even minimal supporting information or knowledge.” Mitchell v. Kemp, 483 U.S. at 1030 (Marshall, J., dissenting). He also stated, “[A]n attorney’s decision to advance a defense that is wholly unfounded in law, combined with a failure to investigate the merit of accepted and persuasive defenses, cannot be characterized as ‘sound trial strategy.’ Indeed, such a decision is not strategic at all; it is incompetent.” Id. (citation omitted).
201. Id. at 1029.
202. Id. at 1027. That is the length of the record of affidavits compiled by Mitchell’s new counsel.
203. Id.
204. Id. at 1028.
205. Id.
206. Id.
inadequate performance. Billy Mitchell was executed on September 1, 1987, thirteen years after the death of Christopher Carr.

3. Lockhart v. Fretwell

In *Kimmelman* a concurring Justice Powell verbally expressed what the Court had said with its actions in *Strickland*. Joined by Chief Justice Burger and Justice Rehnquist, Powell wrote that the admission of illegally obtained evidence at trial should not constitute prejudice under the second prong of the *Strickland* test. Powell reasoned that because the Sixth Amendment only guaranteed the defendant a *fair trial* or a *just result*, and because a *just result* could be achieved through the admission of *reliable* but illegally obtained evidence, the defendant should not be granted relief. “[T]he harm suffered by respondent in this case is not the denial of a fair and reliable adjudication of his guilt, but rather the absence of a windfall.” Clearly, Justice Powell and those joining him do not truly believe in the adversary system. In *Kimmelman* the adversary system could have produced a different “truth” if the illegally obtained evidence had been excluded. However, it would be the “truth” that the properly operating adversary system produced and the “truth” that those who live by the system are supposed to accept. Justice Powell cannot accept that the “truth” produced by the system might be different from some other “truth” that he believes is correct.

207. Those who believe that Billy Mitchell was “actually guilty” may say he got everything he deserved and not care about the result of this case. But anybody who cares about the integrity of the system by which we convict and sentence people should care that while Billy Mitchell may have received what he “deserved,” he did not receive what was his “right” to receive—effective assistance of counsel.

208. The day before he killed Carr he killed a man in Georgia, a crime for which he received a life sentence. This, however, is irrelevant to the issue. Ken Sugar, *Regional News*, UPI, Sept. 1, 1987, available in LEXIS, Nexis Library, Arcesnews file.

209. *Kimmelman* v. *Morrison*, 477 U.S. 365, 395-96 (1986) (Powell, J., concurring). Justice Powell concurred in the result only because the question of whether illegally seized but reliable evidence could constitute prejudice was not raised by the parties. *Id.* at 391.

210. *Id.* at 396-97.

211. *Id.* at 396.

212. Or at least they are unwilling to live with some of the unpleasant consequences that the system produces; the “actually guilty” may go free.

213. One commentator noted:

With some trepidation I should like to tender the suggestion that in actual practice the ascertainment of the truth is not necessarily the target of the trial, that values other than truth frequently take precedence, and that, indeed, courtroom truth is a unique species of the genus truth, and that it is not necessarily congruent with objective or absolute truth, whatever that may be.

Justice Powell's words and analysis carried the day in *Lockhart v. Fretwell*, when Justice Rehnquist, writing for the majority, stated, "To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." The Court reversed the Eighth Circuit which had reversed a state imposed death sentence because defense counsel had failed to object to the use of an aggravating factor, which duplicated an element of the crime for which the defendant had been convicted. At the time Fretwell was tried, such "double counting" was unconstitutional in the Eighth Circuit under *Collins v. Lockhart*. The Eighth Circuit therefore affirmed the decision to vacate Fretwell's death sentence because it believed that the trial court would have and should have followed the law of the circuit. The U.S. Supreme Court, however, reversed the Eighth Circuit because the Eighth Circuit had overruled *Collins in Perry v. Lockhart*, four years after Fretwell's conviction. The Court refused to give Fretwell what it considered the benefit of that window of four years; it "deprived him of the chance to have the state court make an error in his favor." In this case, the Court perpetuated the fallacy that a "just result" can be achieved when the adversary system breaks down. It further damaged the right to effective assistance of counsel when it said a "just result" can be achieved even if the outcome, but for counsel's errors, would have been different.

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215. Id. at 843. Justice O'Connor concurred but quickly pointed out that this case represented an exception to the *Strickland* test of prejudice which was "whether there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " Id. at 845 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).
216. Fretwell was convicted of committing murder in the course of a robbery. That the murder was committed for pecuniary gain was proved to establish an aggravating factor that allowed for the death sentence. This is called "double counting" and was not permitted in the Eighth Circuit at the time that Fretwell was sentenced to die. Id. at 841-42.
218. Lockhart v. Fretwell, 113 S. Ct. at 842. Despite its decision in *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir.), cert. denied, 493 U.S. 959 (1989), the Eighth Circuit said that "it would only 'perpetuate the prejudice caused by the original sixth amendment violation' to resentence . . . [Fretwell] under current law [(Perry)]." Lockhart v. Fretwell, 113 S. Ct. at 842 (quoting Fretwell v. Lockhart, 946 F.2d 571, 578 (8th Cir. 1991)).
220. Lockhart v. Fretwell, 113 S. Ct. at 843 (quoting the Amicus Brief for the United States).
221. Dissenting, Justice Stevens states, "Concerned that respondent Fretwell would otherwise receive the 'windfall' of life imprisonment, the Court today reaches the astonishing conclusion that deficient performance by counsel does not prejudice a defendant even when it results in the erroneous imposition of a death sentence." *Id.* at 846 (Stevens, J., dissenting) (citation omitted).
The Court in *Fretwell* seemed to limit further the right to effective assistance of counsel when it stated that in theory an "unreliable result" under the *Strickland* standard could be harmless error. "Harmless error analysis is triggered only after the reviewing court discovers that an error had been committed. . . . Since we find no constitutional error, we need not, and do not, consider harmless." Even though *Fretwell* was a habeas case, it is possible that the Court meant that harmlessness will be considered only on a direct appeal. Only three months after *Fretwell*, in an opinion also written by Chief Justice Rehnquist, the Court held that the *Chapman* standard of harmless error beyond a reasonable doubt does not apply to habeas petitions. The Eighth Circuit dealt with the "oblique intimation" in *Fretwell* by concluding:

> [T]he prejudice inquiry necessary to determine whether a criminal defendant has received constitutionally significant ineffectiveness of counsel . . . is analogous to the harmless-error analysis applicable to trial errors in habeas cases . . . . Absent more explicit direction from the Supreme Court, therefore, we hold that it is unnecessary to add a separate layer of harmless-error analysis . . . .

Whatever the Supreme Court meant in its footnote in *Fretwell*, that the Court even considered adding a new and duplicative level of inquiry is more evidence of the Court's intention to make it almost impossible to obtain relief from the effects of incompetent counsel.

The state and federal court decisions discussed above leads one to believe that the vice president of the Georgia Trial Lawyers' Association was correct in his assessment of what constitutes adequate counsel. If an attorney has a pulse and the government has a strong case against the defendant, the courts will deny the defendant any relief. Indeed, "[t]here are some indications that ineffective assistance of counsel . . . requires the lowest level of compliance with professional norms. (The Supreme Court has specifically said that defense counsel are not required to adhere to the American Bar Association's Standards for Criminal Justice, for example)."

Others believe that when the life and liberty of a client are at stake, to do anything less than providing "the best defense in order to ob-

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222. *Id.* at 842 n.2.
225. *Id.* at 838-39.
226. One might think that defense counsel could sleep through the entire trial. Fortunately this is not true. The Ninth Circuit found the performance of defense counsel who slept through much of the trial *per se* ineffective and did not require a showing of prejudice. *Javor v. United States*, 724 F.2d 831, 833 (9th Cir. 1984). One judge did dissent, believing that the defendant was not prejudiced by a sleeping attorney. *Id.* at 835 (Anderson, J., dissenting).
tain the best result for your client" is unforgivable. "If [defense counsel] does less, he has not earned the title of lawyer because he has failed to live up to the oath that he has taken." The courts, however, forgive and even endorse poor performances and continue to confer the title of lawyer on many who fail in their duties to their clients, the courts, and the system.

V. A PORT IN A STORM: INEFFECTIVE ASSISTANCE DEFINED OUTSIDE THE COURTS

Because the courts are unwilling or unable to provide the remedies to the problem of inadequate assistance of counsel, "responses are primarily required from the bodies that can supply resources—the legislature and the bar." Criminal defense attorneys must look to some other standards than those inadequately established by the courts. As Professor Klein wrote:

In light of the difficulties for a defendant who was represented by an ineffective counsel in obtaining appellate relief, it is crucial that substantial efforts be made to insure that counsel act effectively and competently at the trial level. If reviewing courts are going to presume competency, then the profession must clearly indicate to counsel what indeed must be done to provide competent representation.

Professor Klein was not satisfied with the attempts of the profession to establish particularized standards. He felt that the Standards for Criminal Justice were vague and largely unhelpful. But since Professor Klein wrote his article, the ABA has revised the Standards. They contain many principles that, if followed and accompanied by proper training, would ensure strong, effective representation for criminal defendants.

Although the Supreme Court stated that defense counsel was not constitutionally required to follow the ABA Standards for Criminal Justice, it endorsed them as "guides" which reflected "prevailing norms." While the Standards obviously do not have the force of law, they represent a high level of expectation for the practice of criminal defense; they require far more than the bare minimum allowed by the courts. Defense attorneys should strive to live up to

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228. Cotsirilos, supra note 131, at 470.
229. Id.
232. Id. at 650-51.
233. See ABA Standards, supra note 88.
the Standards rather than fall back on the bare minimum allowed in the courts. Attorneys who rely on the latter should seek another area of practice or another profession.

From the assumption that "[f]acts form the basis of effective representation," the ABA's Criminal Justice Standards Committee wrote:

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of the facts constituting guilt or the accused's stated desire to plead guilty.

The duty to investigate is perhaps the most important duty a lawyer has because without information the lawyer has nothing to argue. If defense counsel for Decoster, Mitchell, Washington, and Kimball had explored "all" avenues and proceeded without regard to counsels' belief in the guilt of their clients, the adversary process would have established a truly just result.

The duty to investigate, embodied in Standard 4-4.1(a) and its commentary, confronts and rejects the contentions of the United States Supreme Court and the Maine Law Court. The Strickland Court stated that "choices [by counsel] made after less than complete investigation" should be put to a test of reasonableness. Deferring heavily to the judgment of counsel, the Court said that counsel could make decisions that other investigation is unnecessary. The Court further noted:

[W]hat investigation decisions are reasonable depends critically on such information [supplied by the defendant]. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether.

David Washington's lawyer became hopeless and effectively dropped out. Billy Mitchell's lawyer relied almost entirely on information obtained through his client. Believing his client guilty, Decoster's lawyer refrained from conducting any investigation.

235. Id. Standard 4-4.1 commentary at 181.
236. Id. Standard 4-4.1(a) (emphasis added).
239. Id. Washington's defense counsel was immobilized by a "hopeless feeling" when Washington confessed. Id. at 672.
While the actions of these three lawyers were sanctioned by the courts, they violate Standard 4-4.1(a). The following commentary to Standard 4-4.1 illustrates the ABA's rejection of the "standards" of the courts:

In many criminal cases, the real issue is not whether the defendant performed the act in question but whether the defendant had the requisite intent and capacity. The accused may not be aware of the significance of facts relevant to intent in determining criminal responsibility. Similarly, a well-founded basis for the suppression of evidence may lead to a disposition favorable to the client. The basis for evaluation of these possibilities will be determined by the lawyer's factual investigation for which the accused's own conclusions are not a substitute.240

The need for a lawyer to conduct an investigation separate from the interviews of the client cannot be underestimated. The courts, however, do not hold defense attorneys to the same high standard of performance as the Standards do.

Recurring throughout the Standards is the belief that defense counsel's advocacy should not be affected by his belief or knowledge that the client actually committed the act for which the client is charged. Standard 4-7.6(b) states, "Defense counsel's belief or knowledge that the witness is telling the truth does not preclude cross-examination."241 While the ABA recognizes there are times when defense counsel should refrain from cross-examination, it states that, especially when the defendant has admitted guilt to the lawyer and when there is no defense to the crime, "to forgo vigorous cross-examination of the prosecution's witnesses ... would violate the clear duty of zealous representation that is owed the client."242 This recurring theme in the Standards differs significantly from the perspective the courts take on the issue. The Standards require a lawyer to act adversarially even when to do so may suppress or even confuse the "actual truth." The courts, however, forgive a lawyer the dereliction of his duty to act as an adversary if they believe in the defendant's "actual guilt." The ABA remains loyal to the idea that "actual guilt" should not be considered in the adversary process.243

Continuing on this theme are Standards 4-8.3(a) and (c) which state, "Appellate counsel should not seek to withdraw from a case solely on the basis of his or her own determination that the appeal lacks merit ... (c) If the client chooses to proceed with an appeal against the advice of counsel, counsel should present the case, so

240. ABA STANDARDS, supra note 88, commentary at 182.
241. Id. Standard 4-7.6.
242. Id. commentary at 225.
243. This, of course, is not entirely accurate. Prosecutors do have a duty not to charge somebody that they "know" is "actually innocent." See id. Standard 3-3.9(a).
The ABA never forgets that the attorney is a servant of the client, within the framework of the law. This does not mean the lawyer is a mere puppet but that the lawyer must serve the client with the goal of achieving the best results for the client. If the lawyer does not try to achieve the best results, then that lawyer has not done his duty.

Yet another instance of the Standards' demand to defense counsel to subjugate his interests and beliefs to those of the client appears in Standard 4-8.6(c), which states, "If defense counsel concludes that he or she did not provide effective assistance of counsel in an earlier phase of the case, defense counsel should explain this conclusion to the defendant and seek to withdraw from representation with an explanation to the court of the reason therefor." Vigorous representation and avoidance of conflicts of interest demand that the lawyer take such action. If defense counsel were to look to the courts to determine when he was ineffective, defense counsel would rarely be required to inform the client of his own incompetence; looking to the Standards, defense counsel would be required to so inform his client more often.

More than the courts, the ABA Standards adhere to the idea that, above all else, "[t]he basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation." The Standards demand that justice be achieved only when every member of the "tripartite entity" does his job correctly. The courts, however, hold defense counsel to his duty to the process only when the government or the courts are unsure of a defendant's guilt.

The courts are not comfortable with the ABA method of representation. In Morris v. Slappy, Chief Justice Burger, writing for the majority, stated, "Over 75 years ago, Roscoe Pound condemned American courts for ignoring 'substantive law and justice' and treating trials as sporting contests in which the 'inquiry is, Have the rules of the game been carried out strictly?' A criminal trial is not a 'game,' . . ." But it is a "game," a very real and serious one, played on the assumption that only through a strict adherence to the rules will justice be achieved. It is through the game that the system

244. *Id.* Standards 4-8.3(a), (c).
245. *Id.* Standard 4-8.6(c).
246. *Id.* commentary at 248.
247. *Id.* Standard 4-1.2(b).
248. *Id.* Standard 4-1.2(a). The prosecution, the judge (and jury), and defense counsel are the three legs to the stool of justice.
249. 461 U.S. 1 (1983) (holding that a defendant does not have the right to a meaningful relationship with his attorney).
trusts, the system will most often find "law and justice." Consider Simon Rifkind's words:

I have also formulated the conclusion that the object of a trial is not the ascertainment of truth but the resolution of a controversy by the principled application of the rules of the game. In a civilized society these rules should be designed to favor the just resolution of controversy; and in a progressive society they should change as the perception of justice evolves in response to greater ethical sophistication.251

Paradoxically, the courts seek to preserve a system that inevitably produces results with which they are uncomfortable. If the courts cannot act in a manner consistent with the belief that justice occurs through an adversary process, and if courts act as if justice can be done when one third of the entity is incompetent, then the courts are harming the system in ways more damaging than those that they are trying to prevent.

VI. DRIFTING IN THE BREEZE: MAINE'S COURT APPOINTMENT "SYSTEM"

There are three ways in which states provide indigent criminal defendants with counsel: a public defender's office, an assigned counsel system and a contract system. Except for the contract system in Somerset County252 Maine employs exclusively an assigned counsel

251. Rifkind, supra note 213, at 527. Another commentator, Marvin Frankel, wrote, "The 'adversary system'... is cherished as an ideal of constitutional proportions, not only because it embodies the fundamental right to be heard, but because it is thought (often) to be the best assurance of truth and sound results." MARVIN E. FRANKEL, PARTISAN JUSTICE 12 (1980). Yet another, Murray Schwartz, wrote, "In part, [the protection of human dignity] signifies that persons on trial should not be constrained in their efforts to avoid conviction: as previously stated, the full realization of the self depends on the untrammeled freedom to challenge the power and the resources of the state." Murray L. Schwartz, The Zeal of the Civil Advocate, 1983 AM. B. FOUND. RES. J. 543, 553.

252. The pilot contract system in Somerset County was started in 1991. Andrew Bloom, The Right to Counsel in Hard Times, U. ME. SCH. L. INDEPENDENT WRITING PROJECTS, 1993, at 53. By all accounts, the program saved the courts the time and energy of looking for lawyers to accept appointments. Id. at 60-64. Sue Bushey, one of the original Somerset County contractors, reports that the project continues to work well. Telephone Interview with Sue Bushey, Attorney in Somerset County Contract System (Apr. 4, 1996). She said that she believes that the "state still gets a good benefit" in terms of administrative costs and she is "quite confused about why they don't expand" the project to other counties, especially rural counties. Id. Bushey believes that because the lawyers in the project provide a unified front to the district attorney's office, they do well for their clients. Id. Unfortunately, the contract includes only attorney's costs and fees and does not provide for investigative or expert services. Id. Overall, the project seems to have been an improvement over the previous ad hoc court appointment system that continues to exist in the rest of the state. Concerns with contract systems in general include the fear that the state will award the contract to the lowest and not necessarily the best bidder. Another fear is that the contract lawyers, who do not practice criminal law exclusively, will be
system; Maine has no state or county funded public defender's office. 253 Rule 44(a)(1) of the Maine Rules of Criminal Procedure requires that "the court shall advise the defendant of the defendant's right to counsel and assign counsel to represent the defendant at every stage of the proceeding . . ." In Cumberland County District Court,254 attorneys are assigned by the clerks of the court from a list, which is formally adhered to for the most part. In Cumberland County Superior Court, attorneys are appointed, usually by the clerk, if they are in the courthouse or if a defendant requests a particular attorney. If the case is very serious (for example, murder), the judge will appoint an attorney who he thinks is qualified.255 The judge makes the formal appointment. To be eligible to accept court-appointed work an attorney need only give his name to the court. There is no application process.

A. Is Maine’s "System" Constitutional?

Given the current test for ineffective assistance of counsel, Maine’s system would survive a constitutional challenge. Because the courts make a determination of ineffectiveness on a case-by-case basis, it is inherently difficult to challenge a system in the courts. When constitutional challenges have been made, they have been based generally on a lack of funding and the resulting problem of excessive caseloads.256 At the present time, while "by any comparative standard the Maine Court system seriously lacks staff, technology, and funding,"257 Maine’s system for indigent criminal defense is not underfunded to the point where a court likely would find it un-
constitutional.\footnote{258} Of course, surviving a constitutional challenge is not a badge of honor; the courts have constitutionalized incompetence.

Even if Maine experienced such a shortfall that it could not pay attorneys and attorneys refused to take cases, the negative effects of inadequate funding in Maine would fall more on the “people” than on defendants because the State could not proceed with prosecutions.\footnote{259} Defendants would go free rather than be prosecuted. If the State were to press lawyers into service or press indigents to trial without effective appointment, a challenge could be successful because, traditionally, the need for individualized determination of prejudice has been unnecessary where the government has interfered with the right to counsel.\footnote{260} If lawyers accepted the appointments without pay or with delayed pay and then provided shoddy representation, challenges would require individualized, not systemic, inquiries.

### B. Is Maine’s System Properly Funded?

Perhaps because inadequate funding is pervasive and easy to recognize,\footnote{261} it is the main topic of concern in the literature regarding

\footnote{258. According to the State of Maine Judicial Branch Annual Report for fiscal year 1994, Maine had trouble paying the bills but the bills were paid—$4,305,462 to be exact. \textit{Id.} at 17. If attorneys had refused to work because the money was slow in coming, there would have been a big problem. In 1991 attorneys in Washington and Hancock Counties began refusing to take cases for the reduced rate of $30 per hour. Because the fees were not covering the attorneys’ overhead, the small number of attorneys doing court-appointed work were carrying the burden of budgetary shortfalls. \textit{Justice Delayed is Justice Denied}, \textit{MAINE SUNDAY TELEGRAM}, June 2, 1991, at 6C; Bloom, supra note 252, at 3-4. Bloom’s paper provides a good look at Maine’s attempts to keep costs low, including a project to screen non-indigents out of the program.

259. The state could not simply dump the cases on a public defender’s office because one does not exist. The state could ask attorneys to wait for their money, as happened in the last part of fiscal year 1993. \textit{Court-appointed Lawyers in Bind}, \textit{PORTLAND PRESS HERALD}, Feb. 14, 1994, at 2B. The state also could try to order all attorneys to take criminal cases as the courts in Knoxville, Tennessee, did when they ran out of money. \textit{Volunteers or Not, Tennessee Lawyers Help Poor}, \textit{N.Y. TIMES}, Jan. 17, 1992, at B16. Alternatively, the state could ask all lawyers to take a case for free. Such was the proposal of the Chief Justice of the Maine Supreme Judicial Court, Daniel Wathen, who considered asking all attorneys in the state to take one Class D criminal case on a pro bono basis. The proposal never got off the ground. Bloom, supra note 252, at 69-70.


261. Because budgets are clear and quantitative, solving funding problems is easier for judges than measuring and ruling on the quality of an entire system. When funding is cut at the same time that caseloads increase, a court could conclude that “budgetary limitations adversely affect the actual delivery of effective legal services to an accused person.” Blum, supra note 256, at A1 (quoting Kennedy v. Carlson, No. MC92006860 (Hennepin County, Minn., Dist. Ct. Apr. 24, 1995)). Such was a district court judge’s conclusions when he ruled a Minnesota district public defender
the indigent defense crisis.262 The impact of inadequate funding differs between court appointment systems and public defender systems.

One effect of inadequate funding for public defender's offices is an increase in caseloads.263 An enormous caseload can create a "rebuttable presumption . . . that indigents . . . are receiving assistance of counsel not sufficiently effective to meet constitutionally required standards."264 Such was the Louisiana Supreme Court's holding when presented with a challenge from a public defender who believed that he was incapable of providing his clients with effective representation.265 The attorney, Rick Tessier, had "represented 418 clients in the first seven months of 1991 and had 70 cases pending trial . . . ."266 Then he was assigned to represent Leonard Peart, who was charged with first-degree murder. "Before Mr. Peart's trial began, Mr. Tessier petitioned the trial court to find that he was providing ineffective assistance of counsel because of his caseload."267 The judge granted his petition and remarked, "Not even a lawyer with an 'S' on his chest could effectively handle this docket."268

In an assigned counsel system, the impact of inadequate funding is harder to recognize and measure.269 Because the immediate effect


262. If one reads the ABA's quarterly journal, Criminal Justice, in particular John Arango's regular column entitled "Defense Services," one will see that inadequate funding is a major concern among commentators and practitioners. See also Richard Klein & Robert Spangenberg, The Indigent Defense Crisis, 1993 ABA Sec. Crim. Just. Rep.

263. The repeated reduction of funding to public defender programs around the country threatens the very foundation of our system of justice—the Sixth Amendment right to effective assistance of counsel. The most devastating effect of this chronic underfunding has been the creation of an ever-growing case-load per attorney.

Patrick Noaker, It Doesn't Come With the Territory, 10 Crim. Just., Summer 1995, at 14.

264. State v. Peart, 621 So. 2d 780, 791 (La. 1993); see also supra note 261.

265. State v. Peart, 621 So. 2d at 791.

266. Klein & Spangenberg, supra note 262, at 1.


268. Klein, supra note 231, at 1.

269. One could argue that Maine should not adopt a public defender program because it would not have a large political base of support. Because so many lawyers are involved in the system now, there can be more pressure brought to bear on the legislature to avoid funding cuts. In response, this Author suggests that lawyers have little influence in the legislature—certainly no more than Chief Justice Wathen, who was unable to prevent $500,000 from being cut from the budget in 1992. Actually, a public defender program can more readily assure proper funding than an assigned counsel system because a challenge to a public defender system that has
of inadequate funding is felt by the lawyers who get paid (or do not get paid), the effect on the system depends on the reaction of the bar. Will talented and experienced lawyers become frustrated and disgusted and walk away from the system, leaving only inexperienced lawyers who have few other sources of income? Will the bar continue to accept cases and treat them in a cursory manner, preferring to spend more time on the cases that pay? Will the bar refuse to accept cases and, in effect, shut the system down? In the more populous counties, Maine's assigned counsel system avoids the problem of excessive caseloads. For most attorneys, the system provides a supplement to their regular income. In some of the smaller counties, however, where there are fewer attorneys, the problem of underfunding and increasing caseloads is more apt to occur.270

The issue of funding is undoubtedly important. The so-called "revolution" of 1994 continues to launch its "war on crime" by cutting funding for Post-Conviction Defender Organizations.271 States, including Maine, are cutting their funds to the criminal defense programs.272 Funding, however, is not the end of the debate; funding is a problem for all indigent criminal defense delivery systems. Although proper funding goes a long way in producing quality representation, it does not ensure competence by itself. The most important question is what type of system will best ensure the quality of the representation for indigent criminal defendants?
VII. A NEW CAPTAIN AT THE HELM: A PUBLIC DEFENDER PROGRAM IN MAINE?

In 1988 the subject of creating a public defender's office in Maine was studied by the Judiciary Committee. The committee found that "a statewide public defender system is not justified by the facts now available." Despite the title of the report, Study of the Financial Feasibility of a Public Defender Program, and Issues in Implementing a Cost Effective Program, the "major reason [that the committee voted against a public defender office] did not turn out to be financial." The committee believed the system's problems with funding would be solved by an increase in appropriations. There was inadequate information to determine what a public defender office in Maine would cost. Funding, fortunately and properly, was not a determinative factor in deciding whether Maine created a public defender program.

Cost-effectiveness should not be a dispositive factor in determining the proper delivery system for indigent criminal defense. When Tennessee ran out of money for indigent defense in 1991, a judicial decree ordered that all of Knoxville's lawyers be assigned to cases, regardless of their abilities or experience. Such a "system"

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273. MAINE LEGISLATURE, JOINT STANDING COMMITTEE ON JUDICIARY, STUDY OF THE FINANCIAL FEASIBILITY OF A PUBLIC DEFENDER PROGRAM, AND ISSUES IN IMPLEMENTING A COST EFFECTIVE PROGRAM, 114th Leg., 1st Sess. (Nov. 1988) [hereinafter JOINT STANDING COMM. ON JUDICIARY].
274. Id. at 14.
275. Id. at 21. The committee, however, was concerned with cost-effectiveness: If, when the data is available, it appears that Maine's system is not operating in as cost-effective a manner as it has appeared to do in the past, the Judiciary should consider the desirability of creating public defender offices of limited jurisdiction in the larger urban areas of the State as a cost-reducing option.
276. Id. at 15.
277. Id. at 22.
278. Id.
279. Of course, cost-effectiveness still plays a part in the decision to continue with the present system. Chief Justice Wathen "said he would not oppose a public defender program, but he is not a fan, primarily because the current system is cheap." Bloom, supra note 252, at 68.
280. Klein & Spangenberg, supra note 262, at 6. Knoxville's problems were solved temporarily when the court granted a motion to suspend indigent representation until the office was restructured and representation was improved. The motion was filed by the public defender. Noaker, supra note 263, at 18-19. In 1994, the Tennessee Supreme Court issued a rule that created a commission that will prepare
is certainly cost-effective but hardly professionally-effective, let alone ethical.\textsuperscript{281}

The committee gave three reasons for rejecting a public defender program: (1) a public defender office would not solve the problem with appointments that occurred in the rural parts of the state, because a public defender office would not necessarily serve those areas, (2) adequate representation was not a problem with the current system, and (3) there was very little support for the creation of a public defender office from those in the system.\textsuperscript{282}

First, the committee reasoned that a public defender's office would not solve the problem that exists in the rural parts of the state.\textsuperscript{283} This is not necessarily true; the presence of a public defender program could actually attract attorneys in the rural areas.\textsuperscript{284} In New Hampshire, the public defender's office handles all but four percent of the cases in the state.\textsuperscript{285} New Hampshire courts are relieved of the administrative duty of appointing attorneys except when caseloads exceed the pre-established limits or when a conflict of interest exists.\textsuperscript{286} The public defender's office handles the contracting or appointing of attorneys in rural areas where it does not have an office. There is no reason why a public defender in Maine

\begin{quote}

The primary benefit of a public defender system would be the better quality legal services that it would provide to indigent criminal defendants. All available evidence indicates that this is not a substantial problem under the current court-assignment system. Although indigent defendants may not receive the best quality representation in all cases, they certainly are receiving adequate representation.

\textit{Id.}
\end{quote}

\textsuperscript{282}JOINT STANDING COMM. ON JUDICIARY, supra note 273, at 14. The committee stated:

The primary benefit of a public defender system would be the better quality legal services that it would provide to indigent criminal defendants. All available evidence indicates that this is not a substantial problem under the current court-assignment system. Although indigent defendants may not receive the best quality representation in all cases, they certainly are receiving adequate representation.

\textit{Id.}

\textsuperscript{281}The ABA Model Rules of Professional Conduct state, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge . . . reasonably necessary for the representation." \textsc{Model Rules of Professional Conduct} Rule 1.1 (1983). Maine's Code of Professional Responsibility provides that a lawyer "shall not handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle . . . ." ME. BAR R. 3.6(a)(1).

\textsuperscript{283}Id.

\textsuperscript{284}If attorneys can be assured of payment and the proper support services, they might be more likely to offer their services.


\textsuperscript{286}The state assigns those four percent of cases that the Public Defender cannot handle. In 1986, the Judicial Council decided to contract out the work instead of assigning it on a case-by-case basis, because it felt that it would be cheaper. The Council interviewed 85 applicants and selected 43 for contracts to handle the work the Public Defender could not do. 1986 THE 21ST BIENNIAL REP. OF THE JUDICIAL COUNCIL OF THE STATE OF NEW HAMPSHIRE 3.
could not do likewise in Maine’s rural areas.\textsuperscript{287} The office simply would take over the role of the state in assuring that services would be provided in rural areas; offices in those areas would be unnecessary. The added benefits that a public defender's office would have for lawyers in rural areas, even if the state retained control over their compensation, include access to training through the office, computer records and pleading forms, expertise, and a place to call for assistance. These benefits were not discussed by the committee.

Second, the committee believed the current system provided adequate representation to criminal defendants.\textsuperscript{288} Apparently, most witnesses before the committee “agreed that the quality of appointed counsel did not differ appreciably from the quality of representation provided in cases where a defendant retained his own counsel.”\textsuperscript{289} Testifying before the committee, one justice attributed this to the fact that most attorneys who do retained criminal work also take appointed work.\textsuperscript{290} Others, however, disputed this testimony by pointing out that in the urban areas especially “a large portion of the indigent defenses [sic] cases [are] assigned to attorneys ‘just out of law school’ . . . .”\textsuperscript{291} The effect of new, inexperienced attorneys on the quality of the system was downplayed by testimony that “judges routinely search for more experienced attorneys to handle cases where the indigent defendant is charged with a more serious crime, particularly in murder cases.”\textsuperscript{292} This reasoning can be accepted only if one believes that the quality of liberty should be concerned with temporal considerations; that any jail time unjustly spent is acceptable.

The committee accepted data from the Attorney General’s office as further evidence that the present system is adequate. The data revealed that only two times in the three years prior to the report (the three years after \textit{Strickland}) had a defendant been granted relief for receiving constitutionally defective assistance of counsel.\textsuperscript{293} The committee stated, “In light of the fact that the State has prose-

\begin{itemize}
\item \textsuperscript{287} Maine’s size should not make that much of a difference even though Maine at 35,387 square miles is considerably larger than New Hampshire at 9351 square miles. \textsc{The World Almanac and Book of Facts} 664, 669 (1996).
\item \textsuperscript{288} \textsc{Joint Standing Comm. on Judiciary}, \textit{supra} note 273, at 2-3.
\item \textsuperscript{289} \textit{Id.} at 2.
\item \textsuperscript{290} \textit{Id.}
\item \textsuperscript{291} \textit{Id.} at 2-3. From my conversations with people who work in the system, the incidence of new lawyers in the system is growing. As jobs become harder to get, more lawyers go out on their own and take assigned counsel work to help pay the bills and build a practice.
\item \textsuperscript{292} \textit{Id.} at 3. The committee went on to say that “[t]estimony was unanimous that, regardless of their inherent abilities, appointed attorneys represented their clients in assigned cases just as zealously as they served their retained clients.” \textit{Id.} Although such ethical behavior is admirable, it is little comfort to the defendant represented by an incompetent zealot.
\item \textsuperscript{293} \textit{Id.}
\end{itemize}
cut out roughly 30,000 indigent individuals during that time, it is readily apparent that indigent criminal defendants in Maine are receiving an adequate defense. Perhaps if the committee had said "constitutionally adequate," one would have to accept its statement as true. But as written, the statement is not true. The committee failed to recognize that "constitutionally adequate" and "adequate" mean completely different things. Sadly, but truly, one can receive "constitutionally adequate assistance" while not receiving "adequate assistance." The incidence of judicial relief was, and remains, irrelevant to the determination of whether or not a system provides quality, or even adequate, representation.

The third reason the committee refused to recommend the creation of a public defender program was based on a surprising lack of support from those involved in the system. The Committee reported:

While the courts and prosecutors chose to adopt a publicly neutral stance before the [sub]committee, it appeared that they perceived no urgent need to depart radically from the present structure. Very few attorneys who spoke with the subcommittee endorsed a public defender system, and those who did speak in its favor often did so guardedly. As a whole, while several parties commented on the need for adjustments to the present system, very few were ready to make a wholesale change to a public defender system.

The committee justified its reliance on this sentiment as a factor in its recommendation because it believed that the quality of representation depended more on the support the system received within the state than on the system itself. This justification should be rejected for two reasons: (1) the lack of support could be self-serving, and (2) the committee was concerned with a lack of support for the present system.

294. Id.
295. Without a doubt Maine has a very talented and dedicated criminal defense bar, which is very generous with its time for new attorneys. Because of Maine's small legal community, members of Maine's bar are very reluctant to criticize each other. Defense attorneys are already a besieged group. But a conversation with anyone who works in the system will reveal that the ability of Maine's court-appointed attorneys ranges widely from great to pathetic. What percentage of attorneys falls on each part of that spectrum is difficult to say. What is abundantly clear is that there is no method for weeding out the bad attorneys. There is nobody to make sure an attorney ever took a criminal procedure course or to tell an attorney that he made a mistake in superior court and should go back to district court to get more experience by accepting less complicated cases.
296. The committee was "surprised at the apparent lack of support . . . ." Joint Standing Comm. on Judiciary, supra note 273, at 12.
297. Id.
298. Id.
First, the lack of support could be self-serving. A change in the current system to a public defender system would affect the attorneys who accept court appointments; there would be a great deal of displacement. The present system now works as an equal opportunity employer, leaving each attorney to make the best of the opportunity given him. A public defender program would create a single entry program. Not everyone who wanted work would get it. If this is the reason behind the lack of support, reliance on the lack of support is not justified.

Second, the committee's concern for support for change seems even stranger given the fact that it later called for the judiciary to encourage greater support and participation in the current system. The committee stated, "If participation in the system continues to carry with it deleterious effects upon a participating attorney's private practice, we risk alienating these attorneys and exhausting the bank of good will and ethical responsibility upon which the system has for too long heavily drawn." The committee should not have rejected change based on a criteria that was not satisfied by the current system. Nevertheless, decisions of necessity should not be ruled by desire. A lack of a desire to change does not mean that the need for change does not exist. Nor does it mean that if a change occurred a new system would lack support from the people who did not think the change should take place. The kind of system matters more than the support that system has from the bar. The level of bar support should not rule the decision.

299. The committee recognized this possibility when it lamented the absence of indigent clients at the hearing and stated:

The committee acknowledged that the attorneys appearing before it were experienced, hard working individuals with the goal of seeing that justice is done. The committee notes, however, that these individuals would have a financial conflict of interest in appearing before the committee to advocate [for a] Public Defender System in that they would in some instances be advocating a system that would take money out of their pockets.

Id. at 23. There are, of course, attorneys, judges, and professors who believe in good faith that a public defender program is unnecessary. This Author has great respect for those with whom he has discussed the issue and does not wish to impugn the character of those people by intimating that they are self-serving. The point is raised only to show that the committee's focus was misdirected.

300. The New Hampshire Public Defender's Office has a very competitive application process. They receive over a thousand applications a year. They have 75 regular attorneys. Interview with Michael Scibbie, supra note 285.

301. A public defender's office might harm the quality of the defense bar, or at least reduce the number of qualified defense attorneys. Mr. Scibbie, Executive Director of New Hampshire's Public Defender's Office, is not convinced that New Hampshire has as high a level of private bar involvement as it should. Notwithstanding this, Maine should be concerned with achieving consistency in the quality of the system and not so much with the size of a private defense bar. Id.


303. Id.
There remains, however, the most important question of whether the type of delivery system matters at all. The answer, according to Floyd Feeney and Patrick Jackson, two law professors, is no, and yes. On one hand they state no: “The best research to date indicates that type of defense counsel—that is, whether defense counsel is a public defender, an assigned private attorney, or retained private counsel—is not an important determinant of case outcomes.”

On the other hand, they conclude that the crucial issue is the quality of representation itself. Their conclusion is that it is possible to have quality representation in any system, or with any lawyer. This is obvious but fails still to answer the question of what kind of system, by design, is more likely to provide, and is more capable of consistently providing, quality representation. While it may not be crucial to the success of a trial whether defense counsel is a private court-appointed attorney or a public defender, it is crucial that the lawyer in any system be properly funded, trained, supervised, and supported. What is the best way to ensure such funding, training, supervision, and support?

VIII. THE GREEN BREAST OF A NEW WORLD: WHAT IS THE "BEST" WAY?

The ABA Standards for Criminal Justice favor a “full-time defender organization when population and caseload are sufficient to support such an organization.” Maine’s population and caseload could support a public defender program, just as every other state besides North Dakota does. The ABA suggests a mixed system: a public defender program as the primary delivery system that involves the participation of the private bar. A public defender program is preferred because:

304. Feeney & Jackson, supra note 98, at 407. One problem with the studies that Feeney and Jackson analyzed is that they did not seem to consider the effect of funding on the ability of a public defender or the assigned counsel to do their job. They also make the mistake of measuring a system only by case outcome. One must not forget that defendants deserve proper representation and not necessarily an acquittal. Even great defense attorneys lose a majority of the time.

305. Id. at 413.

306. And as the moon rose higher the inessential houses began to melt away until gradually I became aware of the old island here that flowered once for Dutch sailors’ eyes—a fresh, green breast of the new world. Its vanished trees... had once pandered in whispers to the last and greatest of all human dreams; for a transitory enchanted moment man must have held his breath in the presence of this continent...

So we beat on, boats against the current....


307. ABA Standards for Criminal Justice Providing Defense Services 3 Standard 5-1.2(a) (3d ed. 1992) [hereinafter ABA Standards].

308. Id. Standard 5-1.2(b).
By devoting all of their efforts to legal representation, defender programs ordinarily are able to develop unusual expertise in handling various kinds of criminal cases. . . . By virtue of their experience, full-time defenders also are able to work for changes in laws and procedures aimed at benefiting defendants and the criminal justice system.309

The flip side of this benefit is the possible development of an “institutional” product that discourages creativity and creates “burn-out.”310

The Standards provide guidelines for the proper execution of a particular system. Notwithstanding the obvious fact that there are many highly qualified, talented, and dedicated attorneys working within Maine’s assigned counsel system, Maine’s system must be assessed in light of the fact that there is no assurance that every attorney in the system is qualified.311 There are no real systemic checks to protect defendants. The only check on competence is the judge, who witnesses the lawyers in action.312 But a lawyer’s dereliction

309. Id. Standard 5-1.2 commentary at 7.

310. Because public defenders see the same thing day in and day out it is conceivable that they might fail to see cases as individual cases. Also, heavy caseloads make it difficult to think too much about an individual case. Neaker, supra note 263, at 14, 16. In Maine defense counsel often knows more than the prosecutor about the case. This is true, at least in Cumberland County District Court, because the prosecutor does not see the file before the day on which the defendant appears for trial. The fear is that a public defender would become like the prosecutor, looking at the file as he shakes hands with the defendant for the first time. Usually this does not happen in Maine.

Burn-out can occur for many reasons. Public defenders are not well received by the public in general (and are often even resented by their own clients). They deal every day with people, many who have done terrible things, who are caught up in sad, tragic circumstances. They also are not paid as well as other attorneys. See generally Charles J. Ogletree, Beyond Justifications: Seeking Motivations to Sustain Public Defenders, 106 HARV. L. REV. 1239 (1993). As one practitioner in Maine said to this Author, working in the criminal justice system is like “managing misery.”

311. The fact is that the quality of all court-appointed counsel cannot be assured. The only official stamp of approval court-appointed attorneys have are their law school degrees and admission to the bar. There is no requirement that lawyers have any experience or training in criminal law, beyond that required in law school. Everybody knows that first year Criminal Law is not sufficient training to practice criminal law anymore than Property is enough to allow somebody to practice real estate law. As a small community, Maine criminal defense attorneys are reluctant to bad mouth each other. But in my conversations with practitioners, it was clear that the quality of court-appointed attorneys varies widely. One practitioner said to this Author that the system “doesn’t protect against people [attorneys] who are stupid enough or dishonest enough to not know that they are in over their head.” While a defendant could get the best lawyer in the state, he could also get the worst.

312. Judges, however, do not inquire into whether witnesses were contacted or whether a proper investigation was done. Nor do judges inquire into whether proper motions have been filed. This simply is not the proper role of the judge, especially in Maine where judges are in short supply and short on time. The judge deals with the courtroom and cannot be expected to do defense counsel’s pre-trial work.
before trial may not manifest itself in front of the judge. Even if it does, by the time the judge witnesses a lawyer's performance, it is really too late.313 Unfortunately, Maine's system fails to measure up to the ABA Standards. This failure, although constitutional, should not be taken lightly.

Maine's non-compliance with ABA Standards is nothing new. In 1974 a study was done to compare Maine's standards for criminal justice against those of the ABA and the National Advisory Commission on Criminal Justice (NAC).314 Maine was not in compliance with the NAC, which called for "community relations, office locations or police and community education."315 Maine also did not answer the call for a "formal plan [for the selection of attorneys or for] . . . a board of trustees to administer the plan . . . to assure the professional independence recommended by both the NAC and ABA."316 Nor was Maine in compliance with the requirement that there be some "staff to monitor, assist or train assigned counsel."317 Although Maine was in conformity concerning district attorneys, Maine was not in conformity with the NAC or the ABA preference for a public defender's office to confront the organization of the

313. The judge could call a mistrial, which is unlikely. The judge could also take over defense counsel's job but that would mean the judge is stepping out of his role. Moreover, judges are usually very busy, trying to clear their dockets, and do not have the time to decide whether the lawyers are doing their jobs as well as they should. Only the most egregious cases are likely to draw his attention. This Author observed a rather unpleasant scene in superior court, while a justice was taking pleas. The justice asked the defendant for a plea on a felony charge. The defendant looked up at his attorney in confusion and was told his plea was guilty. The same occurred on the second charge. Then the justice asked the defendant if he had had sufficient time to discuss these pleas with his attorney to ensure that they were in his best interest. The answer came, "No, not really your honor." The justice stopped the proceeding and told defense counsel to take the defendant outside and talk it over with him. To be fair, it is possible that the defendant played a role in not making himself available to his attorney. These charges were, however, felonies and involved jail time.

About an hour later, the attorney and the defendant were back in front of the justice to begin again. This time, when the justice asked the attorney, "I assume you have taken the time to go over the Rule 11 procedure with your client." Again, the answer came, "No your honor. Could I have a minute?" The attorney and client stepped aside for a moment while the court bided its time and tolerated the sad and awkward display.

314. A COMPARATIVE STUDY: STANDARDS FOR CRIMINAL JUSTICE OF THE STATE OF MAINE WITH THE NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE AND THE AMERICAN BAR ASSOCIATION (1974). These standards are guiding principles for whatever type of system that a state or county adopts.

315. Id. at 167.

316. Id. at 169.

317. Id. at 172. "There is no requirement that assigned counsel be experienced or active in criminal practice. There is no staff available to assist the judge in selecting counsel or determining eligibility. . . . One consequence is a reportedly uneven and sometimes inept level of representation." Id.
prosecution. In twenty-one years, not much has changed; Maine continues to be out of compliance with the ABA Standards.

The ABA looks at four general principles against which a system must be measured if it is to provide competent representation consistently: (1) professional independence, (2) support services, (3) training and professional judgment, and (4) funding. Against these principles, Maine’s system will be measured.

A. Professional Independence

Standard 5-1.3(a) states:

The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. . . . The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs.

Appointed counsel should be as free as retained counsel from pressure from the judiciary to act contrary to the best interest of a client. A 1993 study by the National Institute for Justice showed that sixty-three percent of the defense programs answered that increased caseloads increased the number of plea bargains. Of that sixty-three percent, eighty-four percent said that judges had placed some degree of pressure on them to settle cases. Of the same sixty-three percent, eighty-six percent said that supervisory staff placed no degree of pressure on attorneys to settle cases that otherwise would not have been settled. It is not clear from these numbers whether the presence of an organized public defender program allowed attorneys to resist judges’ pressure. What is clear is that judges were pressuring to some degree. A system that uses

318. Id. at 174.
319. ABA STANDARDS, supra note 307, Standards 5-1.3 to 5-1.6.
320. Id. Standard 5-1.3(a).
322. Id. Eighty-six percent said that the prosecutor was similarly pressured. Id.
323. Id.
324. While in the 1990 survey only two percent of the respondents were in a jurisdiction that had only a court-appointed counsel system, such a figure is not available for the 1993 survey. J. THOMAS McEWEN & ELAINE NUGENT, NAT’L INST. OF JUSTICE, SURVEY RESULTS FOR PUBLIC DEFENDERS 1 (1990).
325. In Maine, indirect pressures on defendants to plead came from the amendment to Rule 44(a)(1) of the Maine Rules of Criminal Procedure, which states that people who are charged with a Class D crime would be assigned counsel only if a prison sentence would be imposed. Before the amendment, Class D defendants were appointed a lawyer. ME. R. CRIM. P. 44(a)(1) Supreme Judicial Court note to 1991 amend., Me. Rptr., 576-588 A.2d LXI. Chief Judge Calkins said that the amendment was a “good idea, saving the state money, and making the process more
honor, professionalism, and ethics as the only buffer between the judge and the attorney, who relies on the court for appointments, risks, at the very least, the appearance of undue influence.\textsuperscript{326}

Although Cumberland County judges do not often appoint attorneys, the clerks of the court do. This practice violates the Standard. Maine's system has no completely impartial administrator of appointments. Getting an appointment can depend largely on whether or not the attorney is in the courtroom; for felonies, that system of assignment is the rule.\textsuperscript{327} Because the ABA Committee felt so strongly about keeping the judges and clerks out of the appointment process, it deleted the word "normally" from the last sentence of Standard 5-1.3(a). "The deletion emphasizes the notion that judges and other court personnel should not select lawyers for specific cases."\textsuperscript{328} Independence ensures that the lawyer will not be tempted to settle a case that he should not.

The problem in Maine is not that judicial pressure on the appointed bar exists or that attorneys succumb to it, but rather that there is no systemic check to prevent it from happening. In New Hampshire, the public defender does not depend on the court at all for the assignment of cases.\textsuperscript{329} The public defender gets all indigent cases unless there is a conflict of interest; a judge cannot refuse to assign a case because he does not get along with a public defender as can be done with individual attorneys. Neither does the public defender office assign attorneys to a specific courtroom. Because of this, attorneys do not practice before the same judge or prosecutor every day and are not afraid to alienate a judge if they must.

Because Maine judges must approve payment to attorneys, appointed counsel are subject to another possible attack on their independence.\textsuperscript{330} If the judge feels that some of the work performed by the lawyer was unnecessary, the judge can cut the amount that the lawyer will be paid.\textsuperscript{331} While it may be appropriate for a judge to

\textsuperscript{326} While the justice system could not operate without plea bargaining, judges do not need to encourage it. Both the prosecutor and the defense attorney have a sufficient interest in plea bargaining to ensure its continued practice. The independence of the defense attorney may be jeopardized if he senses that a judge might not appoint more cases to him if he does not "play ball."

\textsuperscript{327} Attorneys also can get appointments if people come to them in their offices or if they have represented the defendant before.

\textsuperscript{328} ABA STANDARDS, supra note 307, Standard 5-1.3 commentary at 14.

\textsuperscript{329} Interview with Michael Scibbie, supra note 285.

\textsuperscript{330} One must ask, "Why are judges responsible for approving payment anyway?" It should not be merely because court appointment funds are part of the judicial budget.

\textsuperscript{331} See Me. R. CRIM. P. 44(a)(1); Fee Schedules for Court-Appointed Counsel in the Superior and District Courts, Nos. SJC-318, SJC-406, at 3 (Me. July 1, 1991). As it is, defense attorneys do not get paid regularly by the state. Traditionally, when
rule on the failure of counsel to file a particular motion, it is inap-
propriate for a judge to control counsel's actions through the power
of the purse. When an attorney has his hours disapproved on the
payment voucher he presents to the judge, he is left with numerous
inevitable questions: "Which half hour should I have not talked to
my client? Which motions should I have not researched, written,
and filed? Which constitutional rights should I have not sought to
protect? Which leads should I have summarily ignored?" The chil-
ling effect of the judge's disapproval of hours cannot be underesti-
mated. In Maine, an indigent defendant can be assured that there
will be more oversight of his lawyer's bill to the state than of his
lawyer's performance.

New Hampshire insulates the public defender from such judicial
interference and avoids the embarrassing conclusion above because
the state pays the money in a lump sum. The program can make
day-to-day decisions to provide quality representation without hav-
ing to justify each expense. Public defenders do not have to petition
the state for more money if a particular case will take a lot of time,
as Maine attorneys do if the case hours are likely to exceed the limit
for that class of crime.

B. Support Services

Standard 5-1.4 states: "The legal representation plan should pro-
vide for investigatory, expert, and other services necessary to quality
legal representation. These should include not only those services
and facilities needed for an effective defense at trial but also those
that are required for effective defense participation in every phase
of the process." In Maine and New Hampshire attorneys must
petition the court for money to pay experts. It is difficult in Maine
to get an expert to work for court-determined fee amounts, often
because the expert would be coming from out of state. If defense
counsel cannot get an expert to appear for the amount the judge will
approve, the judge may rule that the expert is not needed. In Maine
no defense attorney wants to rely on the State's experts for a psy-
chological evaluation because the State's experts almost always find

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332. The appropriation for the public defender for 1996 is $7.5 million, for 1997
$7.9 million. 1995 N.H. Laws 307. The starting salary for public defenders is
1995).

333. Fee Schedules for Court-Appointed Counsel in the Superior and District
Courts, Nos. SJC-318, SJC-406, at 2. The maximum fees set by the Maine Supreme
Judicial Court are as follows: Class A, $2,000; Classes B and C (against person),
$1,500; Classes B and C (against property), $1,000; Classes D and E, $500. Id.

334. ABA STANDARDS, supra note 307, Standard 5-1.4.
the defendant sane. In New Hampshire the same problem is not reported. Nevertheless, the Executive Director of the New Hampshire program said that he dislikes requesting funding from a judge because there is a risk of tipping the defense's hand too early, and because the judge may not approve of the use of an expert in a certain context.\(^{335}\)

The major difference between the support services of Maine and New Hampshire appears in the area of investigators. In Maine court-appointed counsel must petition the court for funds for an investigator.\(^{336}\) If attorneys need more money, they must re-petition. The money available for investigators is limited.\(^{337}\) In Kimball, the court accepted defense counsel's limited budget for investigation as a natural consequence of a court appointment.\(^{338}\) Because investigation is essential to a proper discovery of the facts of a case, and, subsequently, to quality representation, insufficient funds for investigators create a severe impediment to effective assistance of counsel. The attorney, who usually is paid more per hour than an assistant is paid, should not fill this gap in the pretrial information gathering process. The comment to ABA Standard 5-1.4 states that "when an attorney personally interviews witnesses, the attorney may be placed in the untenable position of either taking the stand to challenge the witnesses' credibility if their testimony conflicts with statements previously given or withdrawing from the case."\(^{339}\) Reliance on a budget-constrained court for yet another essential part of quality representation further undermines confidence in Maine's present system.\(^{340}\)

C. Training and Professional Development

A law school education prepares attorneys for everything and nothing. Although the bar assumes otherwise, an attorney just out

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335. Interview with Michael Scibbie, supra note 285.
337. The expenditures for investigators in indigent defense cases did increase from $79,688 in fiscal year 1993 to $114,405 in fiscal year 1994. 1994 STATE OF ME. JUD. BRANCH ANN. REP. 17. The courts' budget problems and the resulting carry-over of debts from one year to the next make the size of the increase deceiving. According to one practitioner, his average case requires about $500 for an investigator, more for a sex assault case. The hourly pay for an investigator on a court-appointed case ends up being about $25 an hour. The practitioner said that the low pay means that the investigators are either new or doing the work as a professional courtesy.
339. ABA STANDARDS, supra note 307, Standard 5-1.4 commentary at 22.
340. By contrast, in New Hampshire, there is one investigator for every three attorneys. Interview with Michael Scibbie, supra note 285. The investigators work full-time for the Public Defender; there is no need to petition for funds from a court that is constrained by budgetary concerns. Id.
of law school usually does not have the knowledge to practice law effectively on his own without the benefit of some support system.\textsuperscript{341} In law firms, new associates can turn to partners for advice and assistance. When new attorneys are on their own, they can turn only to the bar in general to seek advice from experienced attorneys who have a moment to spare. That is how it works in Maine. New attorneys seek and get help from the veteran defense bar. The clerks are also helpful at first.\textsuperscript{342} The veterans will look over the new attorney's shoulder to see what type of case he has and will offer a bit of advice and a word of encouragement. Such is the extent of Maine's post-graduate training for criminal defense attorneys who perform assigned-counsel work as solo practitioners.\textsuperscript{343}

There has been an effort on the part of the defense bar to organize and improve the quality of representation. In 1991, five attorneys incorporated the Maine Association of Criminal Defense Lawyers (MACDL). MACDL publishes a quarterly newsletter entitled \textit{Maine Defender} and organizes seminars and Continuing Legal Education Programs on issues relevant to criminal defense work. MACDL also is considering the creation of an advisory committee to the Maine Supreme Judicial Court on indigent defense issues, which was recommended in 1989 by a commission of the Maine State Bar Association.\textsuperscript{344} The creation and growth of MACDL is a

\textsuperscript{341} Certainly, some new attorneys are qualified to be on their own and are very good. But even those attorneys seek out help from the rest of the bar, which generously provides assistance.

\textsuperscript{342} During this Author's first jury trial as a student defense attorney, everyone in the court, except the prosecutor of course, was very helpful. At one point during jury selection, the attorneys gathered at the bench to make challenges for cause after the judge had asked the questions to the jury pool. Unaware that this was the purpose of the "sidebar," this Author left his jury selection worksheet at the defense table. Noticing this, the clerk placed her sheet on the bench rail and nudged it his way. This Author glanced down and made his challenge for cause which was denied. The denial for the specific challenge was not a surprise because the judge earlier had denied a blanket challenge for the same reason. Nevertheless, after a while attorneys are on their own and should not expect to be saved by the clerks.

\textsuperscript{343} In the Judiciary Committee's report, the committee recognized the importance of defense attorneys staying current with the technological advances in criminal investigation. The committee also observed that while the District Attorney's office and the Attorney General's office can send its attorneys to seminars, private practitioners do not generally have the funds or the time to attend seminars to assist them with their professional development. \textit{See Joint Standing Comm. on Judiciary, supra} note 273, at 19-20. Continuing Legal Education programs are usually one day out of a year; such programs also do not offer a new attorney the same type of individualized training that should be available. This Author was told by a practitioner that defense attorneys would volunteer their time to train new attorneys. They also would be willing to work with apprentices, who would second-seat on a trial, as is the practice with murder cases. The same practitioner said that attorneys are too busy and are not unified enough to organize such training.

\textsuperscript{344} \textit{Report of the Maine State Bar Association's Commission to Evaluate Maine's Court Appointment System} 7 (1989).
promising sign that the defense bar is unifying and soon will be able to elicit needed improvements in the way that Maine provides indigent criminal defense.  

Maine’s approach to professional training and development, however, does not comply with the ABA Standard for Criminal Justice 5-1.5, which states: “The legal representation plan should provide for the effective training, professional development and continuing education of all counsel and staff involved in providing defense services. Continuing education programs should be available, and public funds should be provided to enable all counsel and staff to attend such programs.” New Hampshire, on the other hand, provides initial, structured training to its new attorneys, as well as continuing education for its veterans. New Hampshire hires new public defenders from a large pool of applicants; the hiring process is very competitive. New attorneys participate in a five-week training program, in which they do writing exercises, practice interviewing clients, discuss ethics, run through mock trial situations, observe senior attorneys demonstrating techniques, and talk with investigators. At their first trial, they are accompanied by a senior attorney. Throughout their first year, they participate in on-going training on Saturdays. Perhaps most importantly, they have the benefit of a law firm atmosphere; they practice in the same office with experienced attorneys from whom they can seek assistance. While one might argue that a public defender office training program creates a same-ness that stifles creativity, it cannot be questioned that a training program will ensure a higher level of performance at the beginning of a new attorney’s career and thus a better base from which to develop professionally.

D. Funding

ABA Standard 5-1.6 states: “Government has the responsibility to fund the full cost of quality legal representation for all eligible persons . . . . It is the responsibility of the organized bar to be vigilant in supporting the provision of such funding.” Maine’s court appointment system is underfunded. Most who look at the system recognize this fact. In 1995, the average cost per voucher presented to the State for payment for work done in the district court was 

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345. ABA STANDARDS, supra note 307, Standard 5-1.5.
346. The new attorneys are videotaped so that they may learn from watching and listening to themselves.
347. Interview with Michael Scibbie, supra note 285.
348. Whether an attorney becomes staid is a matter of personal and professional character.
349. ABA STANDARDS, supra note 307, Standard 5-1.6.
$165,350 less than the average tune-up. For work in superior court, the average cost per voucher was $425,351 less than the average new transmission. Maine is getting an exceptionally good deal.

The rate of $40 an hour has not changed since 1987, even though compensation for judges and prosecutors has risen.352 Dennis Mahar, the current Maine State Bar Association President, points out that $40 does not even cover overhead costs.353 Mahar states:

The State of Maine has been the beneficiary of an incredible bargain in court-appointed attorneys. It is the least expensive system in the country. . . . Studies by our Indigent Defense Committee conclude that no other model, such as public defenders, could do a better job for less or even equal cost. The solution is more money.354

To add insult to injury, Maine’s criminal defense attorneys are not getting paid even for the hours they work. If they present a voucher for twenty hours of work at forty dollars an hour, they are very likely to be paid for fifteen or fewer of those hours. The process of cutting fees is a sign either of judges working under budgetary constraints or of a disrespect for the professional judgments of defense counsel. If the latter were the case, it indeed would be ironic if one remembers that judges are loath to pass judgment on defense counsel’s decisions during a trial. Either way, the process is a signal that something is very wrong in the system. Judges should not be approving or disapproving of the hours a defense lawyer spends on his case.355 The chilling effects on representation are inevitable and un-
Maine defense lawyers, who are committed to and capable of providing quality representation to their clients, should not be treated as they are when it comes to paying them a reasonable wage.

Funding, however, is not everything. This Author cannot agree with Mr. Mahar when he says, "The solution is more money." Without more, money will not ensure quality representation. Because all the lawyers should get paid what they deserve, it does not follow that all lawyers deserve to get paid. In 1986 a Maine State Bar Association commission evaluated the court appointment system. The commission stated, "The 'quality' of legal services rendered by Maine's attorneys to indigent defendants is a subjective characteristic, difficult to define and which the Commission made no serious effort to study. . . . The Commission finds no cause for complaint with the quality of legal services rendered to indigent persons." Finding "no cause for complaint" without a serious effort to study the issue does not amount to much. Maine is left with the problem that there are, in company with all the talented and dedicated defense lawyers, lawyers appointed by the court who probably should not be practicing criminal law. Maine needs to do more than throw money at the problem to ensure proper and consistent representation. Even if Maine does not create a public defender program, if it had a structured program that provided for independent systematic assignment, an application process adopting qualification standards, and professional training, Maine would have a system that comes closer to ensuring consistent, quality representation.

IX. Conclusion

"Our system of justice is a reflection of our societal development, and the furnishing of adequate defense services a measure of our justice system." Sadly, the failure to provide adequate defense services has marked a societal regression, or perhaps more accurately, a societal reluctance to develop. Popular television courtroom dramas, such as Perry Mason and Matlock, illustrate that American audiences cling to the idea that only the innocent are worthy of being defended. None of those famous lawyers' clients ever

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Nancy Gist, Assigned Counsel: Is the Representation Effective, CRIM. JUST., Summer 1989, at 17, 46.


357. Id. at 2.

358. See, e.g., ABA STANDARDS, supra note 307, Standard 5-2.1.

359. See, e.g., id. Standard 5-2.2.

360. Id. Standard 5-1.6 commentary at 26.
did it. If criminal defense lawyers charged a dollar to every person who asked, "How can you defend somebody you know is guilty?" the funding crisis would end. Against this attitude stands the lonely belief that all people are entitled to a lawyer who will work competently to achieve the best results for all of his clients.

Unfortunately, the U.S. Supreme Court appears to side with those who watch *Perry Mason.* The Court accepts a guilty verdict as a fair and reliable result even when the defense lawyer performs shamefully. Through its decisions, the Court says that the Constitution does not entitle all people to a lawyer who will work for the client's best interests. Through the creation of the *Strickland* test, in effect the Court says that defendants are only entitled to a zealous and competent advocate when the Court has doubts about the defendant's "actual guilt." If the *Strickland* test does not misapprehend what effective lawyers do, it certainly does not appreciate what they do. As Michael Scibbie of the New Hampshire Public Defender Program says, "Effective lawyers do more than bring out factoids to throw into the bowl to see who gets more." When weighing the state's inculpatory evidence against the defendant's exculpatory evidence, the courts do not concern themselves with the fact that the scales of justice are not properly calibrated when defense counsel is incompetent.

Because the Constitution, as interpreted by the Supreme Court, says that incompetent counsel may be constitutionally acceptable, the argument for a public defender program—or at least a more structured court appointment system—must look beyond the bare

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361. Simon Rifkind wrote:

"How could you represent so-and-so?" is a question frequently put to me, sometimes by grey-haired ladies in sneakers and sometimes, more passionately, by campus revolutionaries. The tone of the voice which accompanies the question sufficiently discloses the questioner has consigned the client to some subhuman category of untouchables.

... If only the lay public understood that if the outcasts, the rejected ones, the deviationists, the unpopular ones are to be unrepresented, the adversary system would fail for everyone. If they comprehended how the engine of the adversary process is ignited and works, they would never ask to explain why a lawyer did take a particular case, but rather why he had rejected another. That, indeed calls for justification.

Recently a group of law students picketed a prominent Washington lawyer in order to give expression to their disapproval of his representation of a large corporation.

Rifkind, *supra* note 213, at 518-19. Rifkind's inclusion of a story about law students reminds one that the legal community is not immune from the lack of understanding Rifkind discusses.

362. "The legal profession and the judiciary and those who should be most concerned about safeguarding the integrity and fairness of the system are too often silent." Bright, *supra* note 17, at 483.

minimum required by the Constitution. One must look to policy considerations, the traditional American distrust of the power of the state, and the fact that proper criminal representation ensures that the system will work as it was originally intended.

A public defender program would ensure that the government's power to deprive people of their liberty would be appropriately checked. Essential to being a member of American society is a healthy distrust of the power of the state. Part of being a person in the United States means that one can challenge the government's power to take away one's liberty and life. When a person is denied the opportunity to challenge effectively the government's power, that person is denied some of what it means to be a person in our society.364 This threat to "personhood" should concern all people interested in preserving the values on which the country was founded. Howard Dana, Director of Legal Service Corp., said, "Anyone who values this society, values our fundamental liberties, has a stake in making sure that justice is available to everyone."365 Maine's court appointment system does not ensure its people the ability to challenge effectively the power of the state.

This threat to "personhood" is especially egregious because it falls to one segment of society, the poor.366 The indigent face a greater obstacle to obtaining adequate representation than those with the means to employ counsel.367 Judge Bazelon said:

The "street crime" that clogs our courts is bred by poverty and discrimination. It is committed by the dispossessed, the disadvantaged and the alienated of our society—those who most need the advice of a trained advocate.... [T]he cruel irony, of course, is that the indigent are the very people who are least able to obtain competent representation.368

Because we live in a capitalist society, we must accept some differences in the ability and cost of lawyers; not everybody can afford Johnnie Cochran. What we should not accept is a system that per-

364. Obviously, committing a criminal act cannot strip a person of the right to challenge the government. If it did, the right to challenge the state's power would be an empty right, available for only those who do not need it, just as the freedom to speak one's mind would be an empty right if it were available only to those people who nobody wished to silence.


366. "It is those who are the least among us—the poor, the members of minorities and the despised—that most need the protection of the Bill of Rights." Bright, supra note 17, at 483.

367. When one is paying for a lawyer, one can shop around. Indigent defendants cannot shop. Although they may request a particular lawyer, they are not assured of the lawyer of their choice.

mits more than a disparity of talent. The system existing in Maine today permits complete incompetence.

Maine's present system poses a great threat to the ability to challenge the State because not only does it deny relief to those who suffer at the hands of inadequate counsel, but it also denies those in the system adequate assurance that their lawyer is competent. Maine has no application process, no eligibility requirements, no training for new attorneys, no mandatory vehicle for continuing education, no administrator to ensure professional independence, and no other checks on the attorneys that it appoints to represent the poor. Shamefully, in Maine, a criminal defendant can be assured that the State and the people of the State are more concerned with the cost of his defense than the quality of it.

While Maine should develop a public defender program, if it does not, it should at least establish a more structured system. There should be standards to determine eligibility to serve. Maine's system should provide training for new attorneys. Judges and clerks should not appoint attorneys. Appointments should not depend on the attorney's mere presence in the courtroom. The budget for Maine's system should not be included in the budget of the judicial branch; there should be a separate administrator that oversees a separately budgeted plan. By appropriately funding a structured system, Maine would come closer to ensuring consistently effective representation.

In a report from a commission studying the future of Maine's courts, Chief Justice Wathen said, "The status quo is no longer a viable alternative." While this was not said in specific reference to the court appointment system, the statement was used as a blanket introduction to the report and it does apply. The Commission to Study the Future of Maine's Courts stated:

The indigent criminal defense system has significant deficiencies which require immediate attention. Adequate funding for the current court-appointment system should be the first and highest priority. The Judicial and Legislative Branches must join together to establish a planning process designed to remedy those defects. This process should consider local variations in the utilization of public defender, contracted services and the court-appointment system.

This Author is not optimistic that Maine's system will change any time soon. Maine is not a wealthy state; it is looking for many

369. See, e.g., ABA STANDARDS, supra note 307, Standard 5-2.2.
370. NEW DIMENSIONS FOR JUSTICE, supra note 365, at 23.
371. Id. at 34-35.
372. According to the World Almanac, the 1994 per capita income for Maine's 1.2 million people was $19,663, while New Hampshire's 1.1 million people had a 1994 per capita income of $23,434. THE WORLD ALMANAC AND BOOK OF FACTS 664, 669 (1996).
ways to cut government spending. Also, we have seen an increasing
desire to cut legal services and get tough on crime.\textsuperscript{373} While the
state may decide not to establish a public defender's office, the state
cannot avoid the proper provision of indigent defense services in the
interest of saving money. To do so violates the principles on which
the criminal justice system was founded. Maine's system must be
changed; how it will be changed is a matter known only to time.

\textit{Ronald W. Schneider, Jr.}

\footnotesize{\textsuperscript{373} See Coyle, \textit{supra} note 271; Noaker, \textit{supra} note 263.}