NOTES

REVISITING *THE T.J. HOOPER*: STATING WHAT IS CONSTITUTIONALLY REQUIRED OF DEFENSE ATTORNEYS UNDER THE *STRICKLAND* EVALUATION OF ATTORNEY PERFORMANCE

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Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

—Judge Learned Hand[1]

You've seen the alarming statistics. And some of you have experienced this harsh reality firsthand, in the communities where you live and practice. So I don't need to tell you that this represents a crisis . . . .

—U.S. Attorney General Eric Holder[2]

I. INTRODUCTION

The story has become all too familiar. Facing felony charges, an indigent defendant is appointed a public defender to represent him. Working under a crushing caseload of 500 felonies per year, the public defender has around an hour to dispose of the case. He meets with the defendant once, quickly advises him to accept the plea deal offered by the prosecutor, and moves on to the next defendant. No investigation; no interviewing potential witnesses—just take the plea.

The case described above was appealed to the Washington State Supreme Court in 2010, and involved the prosecution of a boy who was a mere twelve-years old.[3] The boy's case, combined with pressure from state defense organizations and local media, convinced the state supreme court to take action in 2012 and enact mandatory performance standards, including strict caseload limits, that all defense attorneys in Washington must comply with beginning September 2013.[4] The standards were adopted after a long struggle with underfunding and overwhelming caseloads among Washington public defender offices, a problem not unique to that state.

"It becomes assembly-line justice," Ed Olexa, a public defender in Pennsylvania, reported in June 2012.[5] "It's like a McDonald's drive-

1. The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

2. Eric Holder, Attorney Gen., Speech at the American Bar Association's National Summit on Indigent Defense (Feb. 4, 2012), *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html.

3. State v. A.N.J., 225 P.3d 956, 958 (Wash. 2010) (en banc).

4. Order, *In re* Adoption of New Standards for Indigent Def. & Certification of Compliance, No. 27500-A-1004 (Wash. June 15, 2012) [hereinafter Washington State Order], *available at* http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1004.pdf.

5. John Rudoff, *Pennsylvania Public Defenders Rebel Against Crushing Caseloads*, HUFFINGTON POST (June 16, 2012, 11:18 AM), http://www.huffingtonpost.com/2012/05/30/pennsylvania-public-defenders_n_1556192.html.

through—just moving the bodies along."[6] Olexa was referring to the current state of indigent defense systems nationwide, in which drastic underfunding has resulted in attorneys struggling to process caseloads that are at three to four times the national advisory limits. Public defender offices are reaching the breaking point; Olexa's supervisor, chief public defender Al Flora Jr., filed a class action suit in spring 2012 seeking an injunction that would force the county to provide additional resources to his office.[7] In Florida, a pending lawsuit has pitted the Miami-Dade public defender's office against the county, with public defenders asking the state supreme court to rule that the county cannot force them to take on more cases.[8]

In many states, indigent defendants have nowhere to turn. Their court-appointed attorneys do not have the time or resources to investigate their cases and provide them with meaningful representation. On appeal, they are unable to overturn or lower their sentence based on these grounds—the only way to do so is to demonstrate a violation of the Sixth Amendment right to counsel. This is a near impossible feat because to raise a successful claim under the Sixth Amendment, a defendant must prove that his attorney's performance fell below an "objective standard of reasonableness" based on "prevailing professional norms."[9] The problem? No one knows what that means.

Since developing the Sixth Amendment standard for ineffective assistance of counsel in *Strickland v. Washington*, the Supreme Court has declined to adopt specific standards detailing a defense attorney's constitutional duties to clients into its review of attorney performance. Though the Court has stated that the American Bar Association's ("ABA") professional standards are guides as to what is "reasonable," it consistently reiterates that these standards are only guides; in other words, they are not mandatory. Reasoning that attorneys must be given "wide latitude" to make tactical decisions about how best to defend a client, the Court crafted the *Strickland* test in a manner that gives broad deference to the judgment of attorneys, without imposing mandatory standards. As a result, the ABA standards, including national caseload limits, remain largely unenforceable, and the systemic deficiencies plaguing indigent defendants continue to grow.

6. *Id.*

7. *Id.*

8. Editorial, *Florida Defense Attorneys Overloaded*, TAMPA BAY TIMES (June 6, 2012, 6:09 PM), www.tampabay.com/opinion/editorials/florida-defense-attorneys-overloaded/1233955.

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

Significantly, judicial review of attorney performance departs from the standard of review applied to almost every other industry. Within tort law, decisions by professionals are not granted judicial deference based on the principle that an industry should not be permitted to set its own standard of care. First developed in the renowned Second Circuit case *The T.J. Hooper*, this nondeferential standard of review is utilized because otherwise "a whole calling may have unduly lagged" behind standards that are crucial to the protection of the public.[10]

The T.J. Hooper, which was decided in 1932, involved a barge owner who was sued for negligence after he failed to maintain working radios on his barge, leading to a grave accident.[11] The owner attempted to argue that he was not negligent, because the prevailing custom in the barge industry was not to have radios. Rejecting this argument, Judge Learned Hand reasoned that "in most cases[,] reasonable prudence is in fact common prudence; but strictly it is never its measure . . . . Courts must in the end state what is required."[12] This principle has become well-established, and is applied to the decisions made in the majority of professions, with the exception of the medical and legal fields. However, in 2010, the Washington State Supreme Court relied on *The T.J. Hooper* to overturn the twelve-year-old boy's conviction and issue mandatory standards stating what is required of Washington defense attorneys.[13]

This Note argues that in order to provide meaningful representation to indigent defendants and ensure that they receive their constitutional right to effective counsel, the U.S. Supreme Court should follow the analysis of *The T.J. Hooper* and adopt mandatory performance standards and caseload limits similar to those enacted by the Washington State Supreme Court. Moreover, the Court should revise the *Strickland* evaluation of attorney performance to ensure that these standards are enforceable on appeal, thereby eliminating the deferential standard of review for attorney performance.

Part II of this Note explores the origins of the Sixth Amendment right to counsel, describing the landmark cases that serve as the basis for this fundamental right and examining the adoption of the current *Strickland* test for ineffective assistance of counsel. Part III analyzes recent Supreme Court decisions that have incorporated individual duties for defense

10. The T.J. Hooper, 60 F.2d 737, 740 (2d Cir.1932).
11. *Id.* at 738.
12. *Id.* at 740.
13. State v. A.N.J., 225 P.3d 956, 965–66, 970–71 (Wash. 2010) (en banc).

attorneys into the *Strickland* test, while declining to adopt comprehensive standards as a whole. After detailing the ABA standards that the Court consistently refers to as guides to evaluating attorney performance under *Strickland*, Part IV concludes that public defense systems are in violation of these standards and unable to provide meaningful representation to indigent clients. Part V examines the Washington State Supreme Court's new standards for indigent defense, along with limitations to these standards. Part VI argues that the Supreme Court should follow the Washington model and adopt mandatory standards detailing what is required of defense attorneys, in addition to modifying the evaluation of attorney performance under *Strickland* in order to ensure that these standards are enforceable on appeal.

II. ESTABLISHING THE RIGHT TO COUNSEL

A. ORIGINS OF THE SIXTH AMENDMENT RIGHT TO COUNSEL

The constitutional right to counsel has long been of crucial importance for indigent defendants, reaching as far back as its early development in the seminal case *Powell v. Alabama*.[14] Decided in the early 1930s, the case involved nine black men accused of raping two white girls.[15] Trapped in the bitter racism of the South, the men were hurried through the white-dominated Alabama court system and brought to trial just six days after they were indicted.[16] The men had no lawyers and were unable to contact any family.[17] In an illusory attempt to comply with procedural rules, the judge appointed the entire local bar to represent the men, none of whom actually assumed the role of representative.[18] The men were convicted and sentenced to death after a one-day trial before an all-white jury, even after the alleged victims were impeached at trial.[19]

On appeal, the Supreme Court reversed, ruling that the men had not been provided with aid of counsel in any meaningful way.[20] Declaring the Sixth Amendment right to counsel to be of vital importance, the Court explained that unrepresented, a defendant

14. Powell v. Alabama, 287 U.S. 45 (1932).
15. *Id.* at 49–51.
16. *See* ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE: INVESTIGATION 12–14 (2d ed. 2008) (describing the procedural history of *Powell v. Alabama*).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Powell*, 287 U.S. at 73.

> lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[21]

The Court thus held that in capital cases, defendants must be provided with counsel, and the woefully inadequate counsel assigned the men was a denial of this right.[22]

Thirty years later, the Court expanded on the right to counsel in *Gideon v. Wainwright*,[23] one of its most important decisions to date. Recognizing that defense lawyers are essential to due process and a fair trial even in noncapital criminal proceedings, the Court incorporated the Sixth Amendment right to counsel under the Due Process clause, making it applicable to the states. By doing so, it held that all individuals facing a felony charge must be provided a lawyer by the court if they cannot afford one.[24] In reaching its decision, the Court emphasized that the government and nonindigent defendants hire lawyers to represent themselves in criminal lawsuits, serving as a strong indication that lawyers in criminal courts are necessities, not luxuries.[25]

Powell and *Gideon* stand as important reminders that absent a meaningful right to counsel, there is a strong likelihood that defendants will be treated unfairly and held accountable for crimes they did not commit.[26] The right to counsel thus plays a critical role in ensuring that cases are decided fairly, maintaining the perception that the criminal justice system operates in a just and reliable manner.[27]

B. DEFINING THE SIXTH AMENDMENT RIGHT TO COUNSEL

Though *Gideon* required states to provide counsel to indigent defendants, many key questions lingered over the level of representation required under the Sixth Amendment. In *McMann v. Richardson*, the Court noted that "the right to counsel is the right to effective assistance of counsel."[28] However, the Court did not define what qualified as "effective"

21. *Id.* at 69.
22. *Id.* at 71–72.
23. Gideon v. Wainwright, 372 U.S. 335 (1963).
24. *Id.* at 342–43.
25. *Id.* at 344.
26. CHEMERINSKY & LEVENSON, *supra* note 16, at 14–15.
27. *Id.*
28. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

assistance. Left without guidance, subsequent courts struggled to develop an adequate standard.[29]

Reflecting the prevalent skepticism at the time toward defendants and their attorneys, courts imposed a very restrictive standard under which a defendant was deemed to have been denied effective assistance only in cases "'where the circumstances surrounding the trial shocked the conscience . . . and made the proceedings a farce and a mockery of justice.'"[30] Under the "farce and mockery" standard, defendants were rarely able to overturn their convictions on the basis of ineffective assistance of counsel, which created significant problems with the quality of representation indigent defendants received.[31] Indeed, this test frequently placed "shockingly poor representation beyond the reach of courts to remedy."[32]

In the midst of the ongoing debate among state courts, Chief Judge Bazelon of the District of Columbia Circuit formulated a new standard in *United States v. DeCoster* ("*DeCoster I*") for evaluating counsel's performance, which focused on providing specific guidelines to both lawyers and judges.[33] *DeCoster I* involved a defendant, Willie DeCoster, appealing his conviction for robbery. After DeCoster was taken into custody, his attorney filed his bond review motion in the wrong court, and did not file the motion in the correct court until a month later.[34] As a result, DeCoster remained in jail for the months preceding trial, even though he could have been released on bond.[35] At the beginning of trial, DeCoster had no choice but to ask the judge to subpoena his two codefendants to testify, because he had been unable to meet with his attorney before trial to discuss doing so.[36] DeCoster's attorney told the judge he had been unable to locate the codefendants' addresses, at which point DeCoster volunteered that one of the men was in jail with him, while the other had recently been placed under probation by the same judge.[37] On top of it all, DeCoster's attorney utterly failed to interview the robbery victim, the police officers present at

29. Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1, 13 (2009).

30. *Id.* (quoting Diggs v. Welch, 148 F.2d 667, 669, 670 (D.C. Cir. 1945)).

31. *Id.* at 17.

32. John H. Blume & Stacey D. Neumann, "*It's Like Deja Vu All Over Again":* Williams v. Taylor*,* Wiggins v. Smith*,* Rompilla v. Beard *and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 AM. J. CRIM. L. 127, 131 (2007).

33. United States v. DeCoster (*DeCoster I*), 487 F.2d 1197, 1203 (D.C. Cir. 1973).

34. *Id.* at 1999–200.

35. *Id.* at 1200.

36. *Id.*

37. *Id.*

the scene of the crime, or anyone connected to the incident.[38] Indeed, he did not give an opening statement at trial.[39]

Emphasizing that "'reasonably competent assistance' is only a shorthand label, and not subject to ready application,"[40] Judge Bazelon set forth specific duties that an attorney owes to a client, following the principle of *The T.J. Hooper* by stating exactly what was constitutionally required of defense attorneys.[41] The court also held that attorneys were required to follow the ABA Standards for Criminal Defense in representing a client,[42] and remanded the case for supplemental hearings on the attorney's performance in light of these new requirements.[43]

After remand, the case again made its way to the D.C. Circuit in *United States v. DeCoster* ("*DeCoster III*").[44] This time, the D.C. Circuit, sitting en banc, reversed Judge Bazelon's ruling and held that the proper measure of review of an attorney's performance was reasonable competence, under which an attorney's error must demonstrate "serious incompetency that falls measurably below the performance" of other lawyers in the profession.[45] The panel rejected Bazelon's standard-based approach, explaining that attorney decisions must be given deference and that ABA standards are "aspirational" only.[46] Under the court's deferential standard of review, DeCoster's attorney was deemed to have provided adequate representation.[47]

In a despairing dissent, Judge Bazelon observed that the majority's holding in *DeCoster III* "denied [DeCoster] the effective assistance of counsel guaranteed by the Sixth Amendment because [DeCoster] could not afford to hire a competent and conscientious attorney."[48] He continued:

> [DeCoster's] plight is an indictment of our system of criminal justice, which promises "Equal Justice Under the Law," but delivers only "Justice for Those Who Can Afford It." . . . Underlying the majority's [standard] . . . is a disturbing tolerance for a criminal justice system that consistently provides less protection and less dignity for the indigent. I

38. *Id.* at 1200–01.
39. *Id* at 1201, 1203.
40. *Id.* at 1203.
41. *Id.*
42. *Id.*
43. *Id.* at 1204–05.
44. United States v. DeCoster (*DeCoster III*), 624 F.2d 196 (D.C. Cir. 1979) (en banc).
45. *Id.* at 208.
46. *Id.* at 205.
47. *Id.* at 217.
48. *Id.* at 264 (Bazelon, J., dissenting).

> cannot accept a system that conditions a defendant's right to a fair trial on his ability to pay for it. . . . The Constitution forbids it. Morality condemns it.[49]

Judge Bazelon went on to argue that a standard-based evaluation of attorney performance was necessary to "eliminate the gross disparities of representation that make a mockery of our commitment to equal justice."[50] In short, he was convinced that a standard-based approach would institutionalize and enforce attorney standards, ensuring adequate representation for indigent defendants.

C. ADOPTION OF THE *STRICKLAND* EVALUATION

Shortly after *DeCoster III*, the Supreme Court finally clarified the test for ineffective assistance of counsel by developing a two-pronged standard of review in *Strickland v. Washington*.[51] The first prong of the *Strickland* test requires defendants to show that their counsel's performance fell below an objective standard of "reasonableness under prevailing professional norms."[52] The Court refused to give more specific guidelines, reasoning that the Sixth Amendment "refers simply to 'counsel,' not specifying particular requirements for effective assistance. It relies instead on the legal profession's maintenance of standards."[53] The majority explained that the ABA Standards for Criminal Justice "are guides to determining what is reasonable, but they are only guides."[54]

In addition to the vague "objective standard of reasonableness," the Court raised the burden a defendant would have to meet to satisfy this prong of the test.[55] Explaining that hindsight should not be allowed to influence a court's evaluation of counsel's performance, the Court held that a defendant must overcome a strong presumption that counsel's conduct falls within the wide range of reasonably effective assistance.[56] Because defense counsel must be given wide latitude to make tactical decisions regarding trial strategy, counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."[57] The Court thus refused to state what

49. *Id.*
50. *Id.* at 266.
51. Strickland v. Washington, 466 U.S. 668, 687 (1984).
52. *Id.* at 688.
53. *Id.*
54. *Id.*
55. *Id.* at 689.
56. *Id.*
57. *Id.* at 690.

exactly was required of defense attorneys, veering away from the reasoning of *The T.J. Hooper* and granting broad deference to attorneys.

Even if defendants meet the extraordinarily difficult burden set by the first prong, they still must show that the attorney's error had an adverse effect on their defense to satisfy the second prong of the test.[58] Defendants must establish that they were prejudiced by the attorney's error, which requires them to prove there is a reasonable probability that, but for the alleged error, the result of the proceeding would have been different.[59]

Departing from the majority's opinion, Justice Marshall wrote a very accurate dissent describing how *Strickland* would affect the Sixth Amendment right to counsel. Arguing that the majority's two-pronged test would do nothing to improve ineffective assistance of counsel claims, Justice Marshall criticized the performance prong, describing it as

> so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied . . . . To tell lawyers and the lower courts that counsel for a criminal defendant must behave "reasonably" and must act like "a reasonably competent attorney" is to tell them almost nothing.[60]

Justice Marshall argued that while counsel must be given wide latitude in making tactical decisions, there are many areas of defense representation that are not tactical and should be subject to more specific guidelines, such as trial preparation and client communication.[61] Justice Marshall also lamented the Court's refusal to state what was required of defense attorneys, a measure he believed would ensure all defendants received their constitutional right to counsel.[62]

D. *STRICKLAND*'S AFTERMATH

In the aftermath of *Strickland*, lower courts' application of the test led many scholars to criticize the Supreme Court's refusal to adopt specific guidelines for defense counsel. The rigid *Strickland* standard resulted in "a doctrine of enormous proportions, but with little impact."[63] Reflecting the high burden placed on defendants under the *Strickland* test, the Court did not once find counsel to be ineffective in the sixteen years following the

58. *Id.* at 693.
59. *Id.* at 694
60. *Id.* at 707–08 (Marshall, J., dissenting).
61. *Id.* at 709.
62. *Id.*
63. Robert R. Rigg, *The T-Rex Without Teeth: Evolving* Strickland v. Washington *and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77, 78 (2007).

decision.[64] The test proved impossible for defendants to meet, barring all claims of attorney inadequacy and significantly diminishing the right to counsel.

The burden of this consequence fell upon indigent clients, leading Stephen Bright to document several egregious cases of inadequate representation deemed effective under the *Strickland* test in his essay, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*.[65] In the essay, he explains that in one case, a woman appealed her death sentence after being convicted of killing her husband, alleging ineffective assistance of counsel.[66] Her attorney had appeared drunk at her trial, was held in contempt of court, and sent to jail overnight.[67] The attorney then failed to introduce hospital records to corroborate her defense of spousal abuse, and did not bring an expert witness on battered woman's syndrome to meet with her until the night before the expert was scheduled to testify at trial.[68] Despite these inadequacies, the Alabama Court of Criminal Appeals upheld her sentence, as did many other courts faced with similar situations where counsel was asleep or absent at trial.[69]

Not only did *Strickland*'s test prove impossible to meet, it left vast discretion to judges, resulting in decisions that were inconsistent and conflicting among jurisdictions.[70] Lower courts, attorneys, and defendants were left "utterly without guidance" as to the level of representation required by the Constitution under what Justice Marshall referred to as the "debilitating ambiguity of an 'objective standard of reasonableness.'"[71] Instead of serving as an effective test, the *Strickland* test resulted in "a game of luck for convicted criminals attempting to prove ineffective counsel—a game that largely depended upon the state or federal court of appeals that reviewed the case."[72] By failing to state what was required of defense attorneys, *Strickland* allowed the quality of representation provided

64. Blume & Neumann, *supra* note 32, at 134.

65. Stephen B. Bright, Essay, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994).

66. *Id.* at 1835.

67. Haney v. State, 603 So. 2d 368, 377 (Ala. Crim. App. 1991).

68. Bright, *supra* note 65, at 1835–36.

69. *Id.* at 1843.

70. Blume & Neumann, *supra* note 32, at 135 ("[W]hat was supposed to be an objective test became a game of luck for convicted criminals attempting to prove ineffective counsel—a game that largely depended upon the state court or federal court of appeals that reviewed the case.").

71. Chhablani, *supra* note 29, at 41–42 (quoting Strickland v. Washington, 466 U.S. 468, 707–08 (1984) (Marshall, J., dissenting)).

72. Blume & Neumann, *supra* note 32, at 135.

by the public defense system to fall far below meaningful representation.

III. MOVING TOWARD A STANDARD-BASED APPROACH

In recent years, the Supreme Court has begun to move away from its extremely deferential review of ineffective assistance of counsel claims and has slowly mandated certain specific duties that defense attorneys must provide under the Sixth Amendment. The Court has incorporated these individual duties into the *Strickland* "reasonableness test," first finding a mandatory duty to investigate a client's background before capital sentencing,[73] followed by a duty to inform a client about the deportation consequences that may result from pleading guilty,[74] and most recently, a duty to inform a client about a plea offer.[75] These duties were incorporated into the *Strickland* evaluation through a series of ineffective assistance of counsel appeals that highlighted serious deficiencies in attorney performance, leading the Court to state what the Sixth Amendment requires, albeit on an individual, case-by-case basis.

A. BREAKING THE DEFERENTIAL APPROACH: *WILLIAMS*, *WIGGINS*, AND *ROMPILLA*

In 2000, the Supreme Court finally began to tighten up the *Strickland* "reasonableness" prong in a series of three capital sentencing appeals, paralleling reforms in its Eighth Amendment jurisprudence. In *Williams v. Taylor*, a defendant's attorney was deemed to have performed in an objectively unreasonable manner after he waited to prepare for a capital sentencing phase of the trial until less than a week before the proceeding, which resulted in a failure to investigate potential mitigating factors regarding the defendant's abusive childhood and poor mental health.[76] Asserting that a complete failure to investigate could not be classified as a "tactical decision" deserving a presumption of reasonableness, the Court held that defense attorneys must adequately investigate a client's case before capital sentencing.[77] Along similar lines, in *Wiggins v. Smith*, the Court held that an attorney's performance was inadequate after the attorney failed to investigate his client's background and social history before capital sentencing, despite the clear presence of several mitigating

73. Williams v. Taylor, 529 U.S. 362, 390, 399 (2000).
74. Padilla v. Kentucky, 559 U.S. 356, 368–69 (2010).
75. Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012).
76. *Williams*, 529 U.S. at 395–96.
77. *Id.* at 396.

factors.[78] Significantly, in reaching its determination that a failure to investigate before capital sentencing is unreasonable, the Court relied on the ABA Standards for Criminal Justice, which require all attorneys to adequately investigate a client's background.[79]

The Court expanded on the duty to investigate in *Rompilla v. Beard*, holding that the defendant's counsel was ineffective for failing to conduct a thorough investigation prior to sentencing.[80] *Rompilla* was an even greater departure from previous Sixth Amendment jurisprudence because, unlike the attorneys in *Williams* and *Wiggins*, the defense counsel in *Rompilla* made some efforts to investigate the defendant's background, including contacting family members and friends.[81] However, the attorneys did not pursue additional avenues that would have led to critical mitigating evidence and, most importantly, failed to examine the court's file on the defendant's prior convictions, despite being aware that the prosecution planned to use those past convictions to argue for the death penalty.[82] The *Rompilla* Court found this conduct unreasonable, emphasizing that "[t]he notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense. . . . [T]he American Bar Association Standards . . . describes the obligation in terms no one could misunderstand . . . ."[83] The Court further stated that "[i]t flouts prudence" to deny that defense counsel must abide by this duty, because "[n]o reasonable lawyer would forgo examination of the file thinking he could do as well by asking the defendant or family relations whether they recalled anything helpful or damaging."[84]

Though the Court stated that it was not changing the *Strickland* test in these cases, the specific duties mandated by its holdings—and the Court's reliance on the ABA standards to define those duties—suggests an approach far more similar to *The T.J. Hooper* and Judge Bazelon's approach than the original *Strickland* evaluation.[85] Indeed, the defense attorney in *Strickland* had conducted minimal investigation prior to his capital sentencing hearing, failed to request a psychiatric examination, and attempted only one unsuccessful meeting with the defendant's family

78. Wiggins v. Smith, 539 U.S. 510, 537–38 (2003).
79. *Id.* at 524–25.
80. Rompilla v. Beard, 545 U.S. 374, 383 (2005).
81. *Id.* at 381.
82. *Id.* at 383–84.
83. *Id.* at 387.
84. *Id.* at 389.
85. Blume & Neumann, *supra* note 32, at 143.

members, and never followed up.[86] Despite these errors, the *Strickland* Court deemed the attorney's conduct to be reasonable under prevailing professional norms. Similarly, most courts leading up to *Rompilla* deemed an attorney's decision regarding which avenues of investigation to pursue a "tactical" decision unchallengeable on *Strickland* review.[87] Thus, the Court seemed to be doing exactly what the Second Circuit did in *The T.J. Hooper* by stating what is required in investigating capital sentencing cases, demonstrating a clear shift in ineffective assistance of counsel review.[88]

B. EXPANDING THE COURT'S SHIFT—*PADILLA*, *LAFLER*, AND *FRYE*

1. *Padilla v. Kentucky*

While the original duties required by the Court involved capital sentencing issues, the Court has begun to define mandatory duties in other contexts in the past four years. In 2010, the Court surprised the legal community with its noteworthy decision in *Padilla v. Kentucky*,[89] a decision that "struck even veteran Court-watchers as a bolt from the blue."[90] For the first time, the right to counsel was extended to the substance of a guilty plea and its collateral consequences, leading even the concurring Justices to describe the decision as "a major upheaval in Sixth Amendment law."[91]

In the years leading up to *Padilla*, lower courts evaluating Sixth Amendment claims developed the "collateral consequences" doctrine, a rule that, under *Strickland*, an attorney did not perform unreasonably even if he failed to inform his client about potential collateral penalties resulting from a conviction or guilty plea.[92] Under this doctrine, lower courts believed a defense attorney had no constitutional obligation to advise clients that if convicted, they could be deported. Given the conflicting definitions of "collateral consequences" among states, courts varied greatly in their application of the doctrine.[93] Moreover, the ABA standards require that a defense attorney inform a client of all potential consequences of a

86. *Id.* at 148.

87. *Id.* at 140–41.

88. *See id.* at 150–51 (discussing the Court's shift toward a more "skeptical" review of defense counsel performance).

89. Padilla v. Kentucky, 559 U.S. 356 (2010).

90. Margaret Colgate Love, *Collateral Consequences After* Padilla v. Kentucky*: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 88 (2011).

91. *Padilla*, 559 U.S. at 383 (Alito, J., concurring).

92. Collateral penalties are consequences of a conviction not imposed by the court, including deportation and civil commitment. *See generally* Love, *supra* note 90.

93. *Id.* at 124 n.185.

guilty plea, including deportation, presenting a backdrop of controversy for the Supreme Court to address in *Padilla*.[94]

In *Padilla*, a defendant pled guilty to drug charges after his attorney informed him that his immigration status would not present an issue in the case because he had been in the country for decades.[95] After he was convicted, the defendant learned that deportation was actually a mandatory consequence from pleading guilty to those charges, and appealed.[96] Reasoning that deportation was a collateral consequence and thus the defense attorney had no constitutional obligation to adequately advise his client about deportation, the Kentucky Supreme Court rejected the claim.[97]

On appeal, the U.S. Supreme Court reversed, holding that a criminal defense attorney has a mandatory duty to give specific and accurate advice to noncitizen clients regarding the risks of deportation from a guilty plea.[98] Rejecting the collateral consequences doctrine, the Court stated that it had "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*."[99] Then, following in line with the *Rompilla, Wiggins,* and *Williams* reasoning, the Court refused to grant deference to the attorney's judgment and relied on ABA standards, stating that that all attorneys have a constitutional duty to inform their clients about the potential deportation consequences if convicted.[100]

Taking a colossal step toward stating what is required of defense attorneys, the Court rejected the prosecution's argument that defense attorneys should only be deemed ineffective where they give affirmative erroneous advice about the potential consequences of a guilty plea, not where they merely fail to warn.[101] Explaining that "[s]ilence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement,"[102] the Court held that even a failure to warn would be

94. MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 2 (2012) (requiring attorneys to inform clients about all the consequences of a guilty plea). *See also* McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 803 (2011) (noting that attorneys are required to warn clients about potential deportation consequences arising from a conviction).

95. *Padilla*, 559 U.S. at 359.

96. *Id.*

97. *Id.* at 359–60.

98. *Id.* at 373–74.

99. *Id.* at 365.

100. *Id.* at 367, 373–74.

101. *Id.* at 369–70.

102. *Id.* at 370 (quoting Libretti v. United States, 516 U.S. 29, 50 (1995)) (internal quotation

deemed ineffective in future Sixth Amendment claims. Moreover, though it stated that its holding was limited to advice about deportation consequences,[103] the Court's reasoning and firm rejection of the collateral consequences would seem to apply to advice about other collateral consequences of a conviction. However, the Court's insistence that *Padilla* only applies to deportation advice led many scholars to criticize that the decision "still falls short of attaining fundamental fairness and legal professional responsibility."[104] To attain fundamental fairness, it would be necessary for the Court to state what is required of defense attorneys in all areas of representation, not merely immigration.

2. *Missouri v. Frye*

The Court continued along the path toward the principle of *The T.J. Hooper*, overturning two convictions in 2012 on the basis of ineffective assistance of counsel. In *Missouri v. Frye*, the Supreme Court deemed a defense attorney ineffective after the attorney failed to inform his client of two separate plea agreements offered by the prosecutor.[105] Before the trial, the prosecutor sent the two plea offers to the defendant's attorney, one of which carried significantly less jail time than the sentence the defendant faced at trial.[106] However, the attorney did not inform the defendant that the offers had been made, and as a result they expired and the defendant proceeded to trial without any knowledge of them.[107]

In determining that the attorney had provided ineffective assistance of counsel, the Court recognized the importance of plea bargains for defendants in the modern day legal world, noting that plea bargaining "is not some adjunct to the criminal justice system, it *is* the criminal justice system."[108] The Court explained that, given the fact that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions" are disposed of through plea bargains,[109] "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a

marks omitted).

103. *See id.* at 365–66, 369 ("But when the deportation consequence is *truly clear*, as it was in this case, the duty to give correct advice is equally clear." (emphasis added)).

104. Maurice Hew, Jr., *Under the Circumstances:* Padilla v. Kentucky *Still Excuses Fundamental Fairness and Leaves Professional Responsibility Lost*, 32 B.C. J.L. & SOC. JUST. 31, 31 (2012).

105. Missouri v. Frye, 132 S. Ct. 1399, 1404, 1408 (2012).

106. *Id.* at 1404.

107. *Id.*

108. *Id.* at 1407 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

109. *Id.*

defendant."[110] Based on that reality, criminal defendants require effective counsel during plea negotiations, and counsel has an affirmative duty to advise a client about any formal plea offers received from the government.[111]

However, the Court declined the opportunity to reform the *Strickland* test and define comprehensive duties required of counsel during the negotiation of plea bargains. It reasoned that

> [t]his case presents neither the necessity nor the occasion to define the duties of defense counsel in [plea-bargaining]. Here[,] the question is whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both.[112]

In reaching the conclusion that the Sixth Amendment does require this duty, the Court relied on ABA standards yet again, citing the ABA requirement that counsel "promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney."[113] Thus, while the scope of an attorney's plea-bargaining duties will still be determined by looking to "prevailing professional norms," it is now constitutionally required that attorneys inform clients of any formal plea offers received.

3. *Lafler v. Cooper*

Lafler v. Cooper,[114] decided the same day as *Frye*, similarly left an attorney's duties during plea negotiations undefined. In *Lafler*, the defendant was convicted at trial of several felony and misdemeanor charges under Michigan law after shooting a woman several times.[115] On two occasions during pretrial plea-bargaining, the prosecution offered to dismiss two of the charges and recommend a sentence of fifty-one to eighty-five months for the remaining charges. The defendant's attorney incorrectly advised the defendant that because he had shot his victim below the waist, he could not be convicted at trial of assault with the intent to murder, leading him to reject both offers.[116] Subsequently, he was

110. *Id.*

111. *Id.* at 1408.

112. *Id.*

113. *Id.* (citing ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY 14-3.2(a) (3d ed. 1999)). *See also* MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 2 (2012) ("[A] lawyer who receives from opposing counsel . . . a proffered plea bargain in a criminal case must promptly inform the client of its substance . . . .").

114. Lafler v. Cooper, 132 S. Ct. 1376 (2012).

115. *Id.* at 1383.

116. *Id.*

convicted at trial on all counts and received the mandatory minimum sentence of 185 to 360 months, a sentence three and a half times longer than the one offered in the plea bargain.[117]

Reemphasizing the importance of plea-bargaining, the Court repeated that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."[118] It rejected the prosecution's argument that the fair trial had wiped clean any possible errors, explaining that this argument ignored "the reality that criminal justice today is for the most part a system of pleas, not a system of trials."[119] However, because both parties had conceded that the attorney's advice was deficient,[120] the Court did not address whether the erroneous advice fell below prevailing professional norms. Rather, it stated that "an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance" because an attorney must be given wide room to make tactical decisions.[121] Instead, the Court's focus was whether the defendant could demonstrate prejudice even though he had received a fair trial after the erroneous plea-bargaining advice—the Court concluded that he could.

Both *Frye* and *Lafler* left the legal community in the dark as to what is constitutionally required of defense attorneys, leading some critics to describe the holdings as "stopgap decisions, a half-hearted attempt to fix problems that should never exist."[122] Both cases highlighted serious deficiencies in the public defense system,[123] deficiencies that will not be solved absent mandatory standards that are enforceable on appeal.

IV. THE ABA STANDARDS FOR REPRESENTATION AND THE CURRENT STATE OF THE INDIGENT DEFENSE SYSTEM

A. THE ABA STANDARDS FOR REPRESENTATION

In contrast to the Supreme Court's Sixth Amendment jurisprudence, the ABA has long required specific, minimum duties that attorneys must provide in representing their clients. The ABA maintains both professional responsibility and criminal defense standards, and as inadequate

117. *Id.*
118. *Id.* at 1388 (citing Missouri v. Frye, 132 S. Ct. 1399, 1386 (2012)).
119. *Id.* at 1381.
120. *Id.* at 1386.
121. *Id.* at 1391.
122. Scott H. Greenfield, *Please Plea(se) Me*, SIMPLE JUST. (Mar. 22, 2012), http://blog.simplejustice.us/2012/03/22/please-please-me/.
123. *See infra* Part IV.B.

representation has dramatically increased within the public defense system, the organization has issued several ethics opinions on the problems plaguing the system.

The ABA standards are of critical importance for attorneys nationwide. All attorneys practicing law in the United States, including those within the public defense system, are subject to their state's rules of professional conduct, and most states directly adopt the ABA Model Rules for Professional Conduct.[124] Attorneys are subject to the rules for each representation they undertake, and if they wish to provide less than the minimum representation required, they must obtain the informed consent of the client.[125]

One of the most basic ABA duties requires attorneys to represent each client diligently.[126] Diligence means that a lawyer must "take whatever lawful and ethical measures . . . required to vindicate a client's cause or endeavor."[127] Significantly, the rules state that diligence requires a lawyer's workload to be controlled so that "each matter can be handled competently."[128] Where a lawyer has too many clients to represent, a conflict of interest exists.[129]

Another important duty is communication—the ABA standards direct lawyers to reasonably consult with clients and provide them with sufficient information to participate intelligently in making decisions.[130] In contrast to the new constitutional duty to inform a client of a plea offer embodied in *Frye*, the rules have required for over two decades that if lawyers receive a plea offer in a criminal case, they must promptly inform the client.[131]

Moreover, all attorneys are required to provide competent representation, defined as "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[132] Relevant to a lawyer's ability to provide competent representation is the level of preparation and study the lawyer is able to allocate to the matter. This includes "inquiry into and analysis of the factual and legal elements of the

124. THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 35 (2009) [hereinafter THE CONSTITUTION PROJECT].
125. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2012).
126. MODEL RULES OF PROF'L CONDUCT R. 1.3.
127. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1.
128. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 2.
129. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2).
130. MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 5.
131. MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 2.
132. MODEL RULES OF PROF'L CONDUCT R. 1.1.

problem . . . .[I]t also includes adequate preparation."[133] Where a lawyer's representation of a client violates the rules, the lawyer must seek to withdraw from the representation.[134]

In recent years, the Model Rules have been complemented by ABA Ethics Committee opinions. Because the ABA Ethics Committee is "undoubtedly the most important and influential ethics committee in the country, and its opinions often are cited in court decisions,"[135] these opinions are highly influential for judges and defense attorneys. In 2006, the ABA Ethics Committee issued an opinion focused on the excessive caseloads facing public defenders, and analyzed whether this violated the Model Rules.[136] The opinion concluded, "[t]he Rules [of professional conduct] provide no exception for lawyers who represent indigent persons charged with crimes."[137] Thus, even court-appointed attorneys struggling under excessive caseloads must provide competent and diligent representation to clients, and if this is not possible due to time constraints, new cases must be declined.

Another ABA ethics standard, *The Ten Principles of a Public Defense Delivery System*, defines ten criteria necessary to provide quality representation to criminal defendants.[138] It requires that "[d]efense counsel's workload is controlled to permit the rendering of quality representation,"[139] and specifies that the national caseload limits enacted by the National Legal Aid and Defender Association ("NLADA") should never be exceeded.[140] NLADA's advisory caseload limits require that a public defender not take on more than 150 felony cases, 400 misdemeanors, 200 juvenile court cases, or twenty-five appeals in a given year.[141] When lawyers have reached the maximum in one category, they cannot take on any cases from a different category.

The ABA Ethics opinions also conform to the standards promulgated in the ABA Standards for Criminal Justice, which defines the Model Rules

133. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5.

134. MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1).

135. NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 32 n.36 (2011).

136. *Id* at 32; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006).

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

138. ABA COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002).

139. *Id.* at 1.

140. *Id.* at 2.

141. NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS 276 (1973).

in the context of criminal proceedings.[142] The standards state that "[c]ourts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations."[143] Thus, the ABA's consensus seems to be that excessive caseloads do not excuse public defense organizations from ensuring that all court-appointed attorneys are able to meet the minimum standards for representation.

These standards and opinions represent specific guidelines stating what is required of defense attorneys. They do not leave significant room for attorneys to engage in tactical, strategic decisions; instead, they define basic duties that are essential for adequate defense.

B. THE FAILURE OF PUBLIC DEFENSE SYSTEMS TO PROVIDE EFFECTIVE REPRESENTATION

The recent cases involving claims of ineffective assistance of counsel, combined with the current state of the indigent defense system, point to the very stark reality that indigent clients are not being provided with their constitutional right to effective assistance of counsel. As a result of underfunding and overwhelming caseloads, representation for indigent defendants has become unconscionably deficient, leading critics to comment that the Sixth Amendment right to counsel "has proven to present one of the most disappointing and disturbingly low standards in our justice system."[144]

Drastic underfunding has made it nearly impossible for indigent defendants to obtain adequate representation. Facilitated by the wars on drugs and other anticrime campaigns, underfunding became significant during the 1980s as the number of people arrested and prosecuted increased dramatically, with sentences growing increasingly harsh.[145] Nevertheless, the budget for public defender offices did not grow with rising caseloads, a problem that did not plague law enforcement or prosecution agencies to nearly the same extent.[146] Public defender's offices have been subjected to

142. LEFSTEIN, *supra* note 135, at 37.

143. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Std. 5-5.3(b) (3d ed. 1992), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/providing_defense_services.authcheckdam.pdf.

144. Yolanda Vazquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 BERKELEY LA RAZA L.J. 31, 48 (2010).

145. Jeffrey H. Rutherford, Comment, Dziubak v. Mott *and the Need to Better Balance the Interests of the Indigent Accused and Public Defenders*, 78 MINN. L. REV. 977, 985 (1994).

146. *Id.* at 985–86.

a "vicious cycle of politically unpopular subject matter leading to lack of funding and, consequently, exhausting caseloads."[147] Indeed, court-appointed attorneys struggle under caseloads that are typically at three- to four-times the national advisory limits adopted by NLADA and the ABA. When confronted with overwhelming caseloads, even the best lawyers are unable to provide meaningful assistance to each client.[148] Without the time or necessary resources, court-appointed attorneys "are unable to perform essential tasks such as client interviews, legal research, drafting motions, requesting investigative or expert services, interviewing witnesses, and preparing for hearings."[149]

Emphasizing this problem, one of the most notable aspects of *Frye* is the reason behind the defense attorney's failure to convey the plea offers to the defendant. The defense attorney in that case was Michael Coles, a court-appointed public defender in the state of Missouri, where public defenders are so overburdened with cases that the average caseload has grown to 395 felonies per year, nearly two times the NLADA limit.[150] Coles has since indicated that his heavy caseload played a large part in his failure to convey the plea offer, informing the postconviction court that he "wracked [his] brain" attempting to remember any details of the case.[151] A study previously conducted in Missouri found that "excessive caseloads can and do prevent Missouri State Public Defenders from fulfilling the statutory requirements [for representations] and their ethical obligations and responsibilities as lawyers."[152] Though the Court did not address this issue in ruling in Frye's favor, there is no escaping the reality that Coles most likely did not convey the plea offer because he simply did not have the time to effectively manage his client's case.

Predictably, the defendant in *Lafler* was also indigent, represented by counsel appointed to him in a Michigan county.[153] In 2008, a study found that "the state of Michigan fails to provide competent representation to those who cannot afford counsel in its criminal courts."[154] Caseload levels

147. Nicole J. De Sario, *The Quality of Indigent Defense on the 40th Anniversary of* Gideon*: The Hamilton County Experience*, 32 CAP. U. L. REV. 43, 44 (2003).

148. *Id.*

149. Brief for the Constitution Project as Amicus Curiae in Support of Respondents at 22–23, Missouri v. Frye, 132 S. Ct. 1399 (2012) (No. 10-444), Lafler v. Cooper, 32 S. Ct. 1376 (2012) (No. 10-209) [hereinafter Brief for the Constitution Project].

150. THE CONSTITUTION PROJECT, *supra* note 124, at 70.

151. Scott Lauck, *Missouri Case Changes Plea-Bargain Law*, MO. LAW. MEDIA, Mar. 26, 2012.

152. Brief for the Constitution Project, *supra* note 149, at 23 (quoting THE CONSTITUTION PROJECT, *supra* note 124, at 69).

153. *Id.* at 24.

154. NAT'L LEGAL AID & DEFENDER ASS'N, A RACE TO THE BOTTOM: EVALUATION OF TRIAL-

in Michigan are so excessive that, in one county, attorneys have a mere thirty-two minutes to spend on each case.[155] The crisis led the ACLU of Michigan to publish a booklet in April 2011 titled *Faces of Failing Public Defense Systems*.[156] The booklet details the stories of thirteen innocent Michigan citizens who were convicted because their court-appointed attorneys did not have the time or the experience to adequately investigate their cases.[157]

States nationwide are suffering from this systemic problem. In 2005, the Chief Public Defender of Fairfax County in Virginia resigned after only ten months at the position.[158] Explaining that her office had so many clients and so few lawyers that the attorneys could not provide effective representation, she described how a mere twenty lawyers in her office defended more than 8000 clients in one year alone.[159] In Tennessee, a public defender's office recently sought permission to refuse to take any more misdemeanor cases, reporting that, in 2006, six attorneys had handled over 10,000 misdemeanor cases, averaging less than one hour per case.[160]

In Louisiana, the situation was dire even two decades ago. In 1993, the Louisiana Supreme Court, confronted with a series of egregious ineffective assistance of counsel claims, ruled that indigent defendants of all types were being provided with ineffective assistance of counsel.[161] To improve the situation, the court imposed a rebuttal presumption of ineffective assistance of counsel in cases in which a defendant was represented by a public defender, requiring trial courts to conduct individual hearings for each defendant if the public defenders claimed they did not have time to adequately represent the defendant.[162] However, this solution did not provide meaningful change to the system. In 2007, a Louisiana judge was faced with a public defender seeking permission to decline new cases.[163] After investigating the situation, the judge declared, "[i]ndigent defense in

LEVEL INDIGENT DEFENSE SYSTEM IN MICHIGAN, at i (2008).

155. *Id.* at 23.

156. ACLU OF MICHIGAN, FACES OF FAILING PUBLIC DEFENSE SYSTEMS (2011), *available at* http://www.aclu.org/files/assets/MI_failedjustice_bookletsm.pdf.

157. *Id.* at 5.

158. Tom Jackson, *Fairfax's Chief Public Defender Quits*, WASH. POST (July 8, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/07/07/AR2005070701933.html. *See also* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1033 (2006) (discussing the Chief Public Defender's resignation).

159. Jackson, *supra* note 158.

160. THE CONSTITUTION PROJECT, *supra* note 124, at 68.

161. State v. Peart, 621 So. 2d 780, 783–84 (La. 1993).

162. *Id.* at 791.

163. THE CONSTITUTION PROJECT, *supra* note 124, at 122–23.

New Orleans is unbelievable, unconstitutional, totally lacking the basic professional standards of legal representation and a mockery of what a criminal justice system should be in a western civilized nation."[164]

In a pending case before the Florida Supreme Court, the question has been raised whether public defenders' offices may obtain relief from excessive caseloads.[165] Assistant public defenders in the Miami-Dade County Public Defender's Office averaged 500 felony cases and 2225 misdemeanors per attorney in 2008,[166] more than three times the national limit and one that has caused Florida defenders to be unable to provide "more than a cursory defense to most clients."[167] Leading advocates for the case argue that "it is incumbent upon the justices to ensure that poor defendants get a lawyer who does more than simply show up."[168] In response, the state argues that public defenders cannot seek limits on their caseloads.[169]

Comparisons between prosecution and defense budgets for public agencies further emphasize the problem. In Tennessee, a study exposed that during 2005, total funding for prosecution of indigent cases amounted to between $130 and $139 million.[170] Indigent defense funding, on the other hand, totaled to $56.4 million, a difference of over $73 million.[171] Similarly, a comparison of budgets in California recently revealed public defense to be underfunded by at least 300 million dollars.[172] In New Orleans, prosecutors outnumber public defenders by three to one. Despite this discrepancy, the city of New Orleans granted $5 million to the District Attorney's Office in 2008, but not a single dollar to the public defender's office.[173]

When taken into consideration with the fact that 80 percent of defendants are appointed counsel through the public defense system, these numbers shock the conscience. This is the criminal justice system indigent defendants face every day.

164. *Id.* at 123.
165. *Florida Defense Attorneys Overloaded*, *supra* note 8.
166. THE CONSTITUTION PROJECT, *supra* note 124, at 68.
167. *Florida Defense Attorneys Overloaded*, *supra* note 8.
168. *Id.*
169. *Id*.
170. THE CONSTITUTION PROJECT, *supra* note 124, at 61.
171. *Id.*
172. *Id.*
173. *Id.* at 61–62.

C. STATE RECOGNITION OF THE CRISIS IN THE PUBLIC DEFENSE SYSTEM

Recognizing the desperate situation facing most public defense systems, several states employed task forces in recent years to analyze their programs and make recommendations on how to improve the system. However, the task forces have been unsuccessful at reforming the system to ensure all attorneys provide effective representation, either because states often do not follow the recommendations, or the recommendations do not go far enough toward implementing meaningful change.

For example, in 2001, Vermont's task force reported that its public defense system was understaffed by 43 percent, with public defender's handling over 260 felony cases a year.[174] The report stated that the primary causes were "shifted cultural and political expectations for punishment and protection, as expressed by the passage of laws making new crimes . . . . [and] significantly more punitive and longer jail sentences for many crimes."[175] Advising the state to focus on its constitutional mission to provide adequate representation to indigent clients, the report suggested that Vermont budget for increased costs in the public defense system, expand alternative justice programs, and enforce minimum qualification and training requirements for defense attorneys.[176] However, the state failed to implement these recommendations, and the public defense system remains unable to provide meaningful representation.[177]

Along similar lines, in 2000, Nevada commissioned a task force to report on its public defense system. The task force reported that overwhelming caseloads and inadequate representation were being provided to Nevada citizens and, moving further than the Vermont task force, recommended that the state promulgate minimum standards for public defense attorneys.[178] The recommendation was followed, and in 2008, the Nevada Supreme Court issued an order adopting performance standards for criminal defense attorneys,[179] leading NLADA to praise the order as "an enormous step forward for indigent defense, ... [as i]t is the

174. FEDERIC W. ALLEN ET AL., REPORT OF INDIGENT DEFENSE TASK FORCE 14 (2001), *available at* http://dgsearch.no-ip.biz/rnrfiles/IDTF.pdf.

175. *Id.* at 15.

176. *Id.* at 17–18.

177. THE CONSTITUTION PROJECT, *supra* note 124, at 169.

178. THE SPAGENBERG GRP., INDIGENT DEFENSE SERVICES IN THE STATE OF NEVADA, FINDINGS & RECOMMENDATIONS 70–83 (2000), *available at* http://www.spangenberggroup.com/reports/report_121301.pdf.

179. Order, *In re* Review of Issues Concerning Representation of Indigent Defendants in Criminal Cases and Juvenile Delinquency Cases, ADKT No. 411 (Nev. Jan. 4, 2008), *available at* www.nevadajudiciary.us/index.php/viewdocumentsandforms/func-startdown/70/.

first time a state Supreme Court has taken such bold, proactive steps to improve public defense services."[180] However, the order stopped short of adopting mandatory caseload limits or requiring compliance with the performance standards. Moreover, in a significant step backward, the Nevada Supreme Court restricted these standards, stating that they were not to be construed as overruling *Strickland*.[181] Instead, the standards were to serve as guides, not as any substantive or procedural requirements.[182] Thus, if an attorney failed to meet the standards, a defendant could not raise this as a ground for ineffective assistance of counsel.

Indeed, the website for the ABA Standing Committee on Legal Aid and Indigent Defense lists nineteen similar state task forces and reports, issued from 1993 to 2007.[183] Despite the findings and recommendations in these reports, the system has not improved. It cannot escape notice that, until the Washington State Supreme Court stepped forward in 2012, no state responded to the problem by adopting mandatory standards and ensuring that they were enforceable.

V. THE WASHINGTON STATE SOLUTION

In 2012, the Washington State Supreme Court responded to similar issues with its public defense system by taking an immense step that other states had previously declined to take. The state struggled for years to find an adequate solution to overwhelming caseloads and underfunding that caused its attorneys to be unable to provide meaningful representation to indigent defendants.[184] Faced with pressure from state defense organizations, public outcry, and media criticism, the state adopted mandatory performance standards in 2012, including strict caseload limits, which all defense attorneys must certify they are in compliance with

180. *Nevada Supreme Court Overhauls Indigent Defense System*, NAT'L ASS'N CRIMINAL DEF. LAW. (Jan. 4, 2008), http://www.nacdl.org/criminaldefense.aspx?id=13450.

181. Order, *In re* Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Cases, Ex. A at 1, ADKT No. 411 (Nev. Oct. 16, 2008), *available at* http://www.nevadajudiciary.us/index.php/viewdocumentsandforms/func-startdown/69.

182. *Id.*

183. *Reports & Studies: Indigent Defense/Public Defender Systems*, AM. BAR ASS'N, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/indigent_defense_systems_improvement/reports_studies.html (last visited Apr. 10, 2014).

184. Gene Johnson, *State High Court Limits Public-Defender Cases*, PENINSULADAILYNEWS.COM (June 16, 2012, 6:04 PM), http://www.peninsuladailynews.com/article/20120616/NEWS/120619989/state-high-court-limits-public-defender-caseloads. *See also Public Defender Standards Enacted by the Washington State Supreme Court*, CT. RECS. BLOG (Aug. 16, 2012), http://www.courtreference.com/court-reference-blog/2012/08/16/public-defender-standards-enacted-by-the-washington-state-supreme-court/.

beginning in September 2013.[185]

A. INFLUENTIAL MEDIA CRITIQUE OF THE WASHINGTON PUBLIC DEFENSE SYSTEM

The Seattle Times led the initiative for reform by presenting clear evidence that the public had reached its limits. In a highly publicized series titled *The Empty Promise of Indigent Defense*, the newspaper highlighted the failure of several counties to provide effective assistance of counsel to indigent defendants.[186] Describing in detail multiple instances of painfully inadequate representation, which resulted in the conviction of several innocent people, the series drew public attention to a system that had previously been largely ignored.

Organizations were quick to respond, with the director of the state's Office of Public Defense stating shortly after the series was published that "[t]here's been a lot of information in the past few years that many attorneys who are providing public defense are burdened by very high caseloads, and they haven't been able to give the proper amount of attention to their public-defense cases."[187] Within a few months, the ACLU filed a lawsuit against Grant County for its inadequate delivery of indigent defense.[188] Another lawsuit brought by the ACLU is currently pending against two cities in the state, alleging that the cities contracted with part-time lawyers to represent indigent defendants in misdemeanor cases, resulting in two lawyers handling over 2100 cases in 2010 alone.[189]

At first, the state responded in a conservative manner, amending a previous order that had advised counties that they "may" adopt the state bar professional standards as guidelines for public defense, to an order advising that they "should" adopt these standards.[190] Despite this effort, the standards remained largely unenforced, and the situation was not

185. *See* Washington State Order, *supra* note 4 (detailing the new compliance rules by which defense attorneys must comply).

186. *Public Defender Standards Enacted by the Washington State Supreme Court*, *supra* note 184 (discussing the newspaper series). *See also Supreme Court Adopts Standards for Indigent Defense; Case Limit Guidelines Effective in 2013*, WASH. CTS. (June 15, 2012), http://www.courts.wa.gov/newsinfo/?fa=newsinfo.internetdetail&newsid=2135 (discussing a 2004 series by the Seattle Times entitled *Unequal Defense: The Failed Promise of Justice for the Poor*).

187. Johnson, *supra* note 184.

188. *Public Defender Standards Enacted by the Washington State Supreme Court*, *supra* note 184.

189. *ACLU Joins Lawsuit Over Cities' Shockingly Deficient Public Defense System*, ACLU (Aug. 10, 2011), http://www.aclu-wa.org/news/aclu-joins-lawsuit-over-cities-shockingly-deficient-public-defense-system.

190. *Public Defender Standards Enacted by the Washington State Supreme Court*, *supra* note 184.

resolved.[191]

Undeterred, the Seattle Times continued to follow the situation, publishing an op-ed article by Washington State Supreme Court Justice Richard Sanders. In the article, Justice Sanders emphasized that when "lawyers . . . can't get the job done, the fundamental purpose of our government is defeated."[192] Criticizing the lack of enforceable standards, Justice Sanders pressed for the state supreme court to take action. Following the article's publication, proponents of reform argued that if the state supreme court enshrined performance standards, the standards would have more teeth and finally provide a meaningful remedy.[193] Mandatory standards would require that attorneys have the time and resources necessary to provide adequate representation. The state would also be forced to provide more funding to public defense or risk having to drop cases where a public defender did not have the time to meaningfully represent a client, which ultimately would result in less crimes that could be prosecuted.[194]

Finally, in 2010, an egregious case before the Washington State Supreme Court encouraged the court to take action.[195] In *State v. A.N.J.*, a twelve-year-old boy appealed his conviction for sexually assaulting his neighbor, alleging ineffective assistance of counsel.[196] His attorney, a public defender, operating under a caseload of about 400 that year,[197] had advised him to plead guilty without investigating any of the facts of the case.[198] The only effort the attorney was able to make was an attempted phone call to two potential witnesses—neither answered, and the attorney was never able to follow up.[199] Instead, the attorney advised the boy to accept the plea deal offered by the prosecution, never discovering that the prosecution did not have a strong case.[200]

Seemingly shocked by the situation, the court overturned the

191. *Id.*

192. Richard Sanders, *Justice Demands the State Provide Effective Lawyers*, SEATTLE TIMES (Apr. 3, 2009), http://seattletimes.com/html/opinion/2008981367_opinb04sanders.html.

193. Johnson, *supra* note 184.

194. *See* Sanders, *supra* note 192 (discussing the possibility that prosecutors will begin charging fewer cases, or charging more crimes as misdemeanors).

195. State v. A.N.J., 225 P.3d 956 (Wash. 2010) (en banc).

196. *Id.* at 958–59.

197. *See id.* at 961 ("The year he represented A.N.J., Anderson represented 263 clients under this contract. Additionally, he carried an average of 30–40 active dependency cases at any one time, and about another 200 cases.").

198. *Id.*

199. *Id.* at 965.

200. *Id.*

conviction, relying on the Washington State Bar Standards of Professional Responsibility to evaluate the attorney's performance.[201] The court shot down the government's argument that, because the court had not adopted them, those standards did not apply.[202] Quoting *The T.J. Hooper*, the court noted that "[c]ourts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission."[203] The court then held that attorneys have a mandatory duty to assist a defendant in evaluating a plea offer, meaning that, at a bare minimum, "counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty."[204] After deciding that the boy had been prejudiced by the plea advice, the court ordered a new trial.[205] At the new trial, the twelve-year-old boy was exonerated.[206]

The justices then began the process of adopting comprehensive standards defining duties that are required of defense attorneys in Washington. In so doing, the justices amended the specific rules of practice, requiring that all attorneys representing indigent clients meet basic professional requirements and have access to investigatory services in order to practice in the state.[207] Realizing that this was not enough, the justices sought input from organizations, including the Washington Office of Public Defense and the Washington Defense Association, regarding the best method of ensuring that meaningful representation was provided to indigent defendants.[208] After a year of debate and several notice-and-comment memos, the court adopted the Washington Standards for Indigent Defense in an order mandating compliance with these standards for all defense attorneys in the state.[209]

B. THE WASHINGTON STANDARDS FOR INDIGENT DEFENSE

The court's order details mandatory performance standards and caseload limits for all defense attorneys in the state. Modeled off the ABA Standards for Criminal Justice and the NLADLA caseload limits, the

201. *Id.* at 966.
202. *Id.* at 965.
203. *Id.* (internal quotation marks omitted).
204. *Id.* at 966.
205. *Id.* at 971.
206. Johnson, *supra* note 184.
207. *Public Defender Standards Enacted by the Washington State Supreme Court*, *supra* note 184.
208. *Id.*
209. Washington State Order, *supra* note 4.

standards require that attorneys "give each client the time and effort necessary to ensure effective representation."[210] No defense organizations are permitted to take on workloads that—due to their size—interfere with quality representation, which is defined as, "the minimum level of attention, care, and skill that Washington citizens would expect of their state's criminal justice system."[211]

In addition, the standards require attorneys to meet specific certain professional requirements in order to represent criminal defendants. Attorneys must be familiar with the statutes, court rules, constitutional requirements, and case law relevant to their practice area.[212] They must be familiar with the Rules of Professional Conduct and the Performance Guidelines for Criminal Representation published by the state bar.[213] Notably, attorneys are required to be familiar with the consequences of a conviction, including immigration consequences and the possibility of civil commitment proceedings.[214] Moreover, all court-appointed attorneys must have access to an office and the requisite resources necessary to adequately investigate a case.[215]

While the standards themselves became mandatory immediately, the caseload limits adopted by the order did not take effect until September 1, 2013, which gave the state enough time to obtain adequate funding.[216] Under the caseload limits, no attorney may take on more than 150 felony cases, 300 misdemeanor cases, 250 juvenile cases, or 36 appeals each year.[217] These are exclusive limits and an attorney who has reached the maximum in any one category may not take on more from another category. To ensure the caseload limits are adhered, attorneys must certify on a quarterly basis that they are in compliance with the limits, in addition to certifying they are in compliance with the standards.[218] Attorneys who fail to comply will not be allowed to represent any criminal defendants in

210. WASH. SUPER. CT. CRIM. R. 3.1, Std. 3.2 (2012), *available at* http://www.courts.wa.gov/court_rules/Word/supCrR3.1Standards.doc.

211. *Id*.

212. WASH. SUPER. CT. CRIM. R. 3.1, Std. 14.1 (2012), *available at* http://www.courts.wa.gov/court_rules/Word/supCrR3.1Standards.doc.

213. *Id.*

214. *Id.*

215. WASH. SUPER. CT. CRIM. R. 3.1, Std. 5.2 (2012), *available at* http://www.courts.wa.gov/court_rules/Word/supCrR3.1Standards.doc.

216. *See* Johnson, *supra* note 184 ("The caseload standards will take effect in September 2013 to avoid imminent hits to local budgets . . . .").

217. WASH. SUPER. CT. CRIM. R. 3.1, Std. 3.4 (2012), *available at* http://www.courts.wa.gov/court_rules/Word/supCrR3.1Standards.doc.

218. *See* Washington State Order, *supra* note 4, at 13 (providing certification procedures).

the state until they come into compliance.[219]

Moreover, the court adopted specific qualifications necessary to represent clients accused of certain serious offenses. For example, in order to represent a defendant facing the death penalty, an attorney must have at least five years of criminal trial experience and have served as lead counsel in at least nine jury trials of serious and complex cases that were tried to completion.[220] The defense team in such a case must include at least two attorneys, a mitigation specialist, and an investigator, with psychologists added as needed.[221] The standards require similar qualifications for appellate representation, sexual offense cases, juvenile adjudications, and civil commitments.[222]

The order was approved by seven of nine justices, and received widespread praise from defense organizations around the state.[223] It is a powerful recognition that deferring to prevailing professional norms will not provide a solution to the current crisis in indigent defense. Following the reasoning of *The T.J. Hooper*, the order also recognizes that courts must state what is required of defense attorneys in order to ensure that all criminal defendants receive their constitutional right to counsel.

C. LIMITATIONS TO THE WASHINGTON MODEL

While the adoption of mandatory standards and caseload limits is a necessary step forward for the criminal justice system, there are inevitable limitations to Washington's solution. Though the order states that the standards are mandatory for all defense attorneys in Washington, in reality, the state supreme court only has the power to enforce the standards against attorneys practicing in Washington state courts.[224] To enforce the standards in state courts, the court enacted court rules requiring that attorneys certify on a quarterly basis that they are in compliance with the standards. However, the court carefully clarified "[t]o the extent that certain Standards may refer to or be interpreted as referring to local governments, the Court

219. *Public Defender Standards Enacted by the Washington State Supreme Court*, *supra* note 184.

220. WASH. SUPER. CT. CRIM. R. 3.1, Std. 14.2 (2012), *available at* http://www.courts.wa.gov/court_rules/Word/supCrR3.1Standards.doc.

221. *Id.*

222. *See id.* (outlining the expectations for representation of indigents charged with varying types of offenses).

223. Johnson, *supra* note 184; *Public Defender Standards Enacted by the Washington State Supreme Court*, *supra* note 184.

224. WASH. SUPER. CT. CRIM. R 3.1, Preamble, *available at* http://www.courts.wa.gov/court_rules/Word/supCrR3.1Standards.doc.

recognizes the authority of its Rules is limited to attorneys and courts."[225] Thus, unless attorneys practice in state court, the standards and caseload limits cannot be enforced against them.

For attorneys practicing in Washington state court, the new court rules require them to file quarterly certifications in each court in which the attorney is appointed as defense counsel.[226] On the certification form, attorneys must certify that each standard related to their ability to provide effective representation has been met.[227]

Nevertheless, it is unclear yet how strictly the certification process will be enforced. The rules state that "[l]ocal courts and clerks are encouraged to develop protocols for procedures for receiving and retaining Certifications."[228] However, if courts vary in the procedures they develop for receiving certifications, the standards may not be enforced as strictly as the court envisioned. Moreover, it is unclear what the consequences will be for failing to file a timely certification, or for any misrepresentations contained in the certification. This is significant because the new process contains an inherent conflict of interest, as attorneys are allowed to certify themselves. Absent substantial oversight of the process by the courts and strict consequences for failing to adhere to the standards, attorneys could continue to take on enormous caseloads and fail to fulfill the standards required by the order without being subject to any repercussions.

Until courts and other bodies have demonstrated a commitment to enforcing the certification process and standards, it remains to be seen whether the Washington model is an adequate solution to the indigent defense crisis. Indeed, it is evident that if the model is ineffective at preventing attorneys from violating the standards and caseload limits, there will be no relief provided to indigent defendants that have received deficient representation, especially for those who have received inadequate advice in areas yet to be addressed by the Supreme Court's Sixth Amendment jurisprudence. While the standards are mandatory at all stages of the criminal process, certification is required only at the trial level.[229] If a defendant's attorney fails to fulfill the duties required by the standards, the defendant will be able to only challenge the attorney's conduct on

225. *Id.*

226. Washington State Order, *supra* note 4, at 13.

227. *Id.*

228. WASH. SUPER. CT. CRIM. R 3.1, Preamble, *available at* http://www.courts.wa.gov/court_rules/Word/supCrR3.1Standards.doc.

229. WASH. SUPER. CT. CRIM. R. 3.1(d)(4), *available at* http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=CrR&ruleid=supCrR3.1.

appeal under the original *Strickland* test. Certainly, under the current "reasonable under professional norms" evaluation, an indigent defendant will not be able to overturn or lower his sentence on appeal solely because his attorney failed to adhere to the new standards and caseload limits.

Though groundbreaking, the Washington State Supreme Court's Standards for Indigent Defense does not provide an entire solution to the current state of indigent defense systems. It is clear that an effective method of review is necessary at the appellate level to ensure that mandated standards are enforceable on appeal.

VI. REPLACING "REASONABLENESS UNDER PREVAILING PROFESSIONAL NORMS" WITH ENFORCEABLE STANDARDS

In an effort to guarantee indigent defendants their constitutional right to effective assistance of counsel, the Supreme Court must state what is required of defense attorneys. To do this, the Court should adopt standards similar to those adopted by the Washington State Supreme Court, including mandatory caseload limits. In addition, in order to ensure that these standards are enforceable on appeal, the Court should incorporate these standards into the *Strickland* review of attorney performance.

Such a measure would not only be consistent with the reasoning of the Washington State Supreme Court and *The T.J. Hooper*, but also the recommendations of national defense organizations that have heavily researched the issues present in the public defense system. Recently, the Constitution Project issued an advisory report on the indigent defense system, recommending that defense lawyers and postconviction organizations "urge the United States Supreme Court and state Supreme Courts to adopt a test for ineffective assistance of counsel that is substantially consistent with the ethical obligation of defense counsel to render competent and diligent representation."[230] Similarly, the ACLU has published several articles emphasizing that professional standards such as the ABA Model Rules should be enforced by the courts, not merely endorsed.[231] These organizations argue that the reasons justifying the Court's original adoption of the *Strickland* test are equally applicable to a standard-based evaluation of attorney performance. Moreover, a revised

230. THE CONSTITUTION PROJECT, *supra* note 124, at 15.

231. *E.g.*, Arlene Gilbert, *Michigan's Crumbling Defense System Continues to Lock Up Innocent People*, ACLU BLOG RIGHTS (May 31, 2011), https://www.aclu.org/blog/racial-justice/michigans-crumbling-public-defense-system-continues-lock-innocent-people ("The American Bar Association has established 10 principles . . . for achieving a well functioning indigent defense system. These principles must not only be endorsed but also enforced.").

test is necessary for protecting the interests of criminal defendants, providing meaningful guidance to attorneys about their constitutional duties to clients, and drawing closer to evolving standards of decency for criminal defendants, while simultaneously improving the public's perception of the criminal justice.

A. THE RATIONALE FOR THE *STRICKLAND* TEST APPLIES EQUALLY TO A STANDARD-BASED EVALUATION

The Supreme Court has declined to revise the *Strickland* evaluation of attorney performance, arguing instead that the "reasonable under prevailing professional norms" analysis is the most appropriate means of determining whether a defendant has received effective assistance of counsel. The Court has frequently reiterated the original reasons behind its adoption of the *Strickland* test as justification for upholding this standard of review.[232] However, developments in the criminal justice system indicate that these reasons equally support the adoption of a standard-based evaluation of attorney performance.

In maintaining the "reasonableness under prevailing professional norms" evaluation, the Court has consistently reaffirmed its position that strict standards would "restrict the wide latitude counsel must have in making tactical decisions."[233] This is because "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."[234] However, the standards enacted by the ABA and Washington State entail basic, minimum duties that attorneys should meet in all cases; they do not involve tactical choices or invade the realm of decisions about how best to represent a client.[235] Indeed, an attorney's failure to investigate a case before advising a client to plead guilty, to convey a plea agreement offered by the prosecutor to a client, or to inform a client about the possible deportation consequences of a guilty plea, cannot be considered tactical decisions warranting wide latitude on

232. *See, e.g.*, Missouri v. Frye, 132 S. Ct. 1399, 1408–11 (2012) (refusing to further define attorney duties in plea-bargaining because of a need to give wide latitude to attorneys to make tactical decisions).

233. Strickland v. Washington, 466 U.S. 668, 689 (1984) (citing United States v. Decoster (*DeCoster III*), 624 F.2d 196, 208 (1979)).

234. *Id.* at 688–89.

235. *See* Hew, *supra* note 104, at 40–41 (reasoning that an ABA standard about informing criminal defendants about deportation consequences cannot possibly be considered "tactical in nature").

review.[236] Incorporating basic standards into the "reasonableness" prong of the *Strickland* test will not hinder attorneys from making strategic decisions, but instead will enforce the minimum duties attorneys should provide in all cases.

In addition, the Court has supported the reasonableness evaluation by arguing that rigid requirements for defense attorneys would undermine the attorney-client relationship, diminish the "ardor" of defense attorneys, and make attorneys less willing to take on cases.[237] Contrary to this belief, enforceable standards would most likely lead to the opposite result: by specifically defining an attorney's duties to each client, they would cause both attorney and client to know what to expect of the attorney. Critics have astutely pointed out that

> it is equally likely that [under a standard-based evaluation] attorneys, especially those with little criminal defense experience, would be *more* willing to accept cases once the Court clearly delineates the elements necessary to satisfy the [S]ixth [A]mendment right to effective assistance of counsel, and would defend their clients with *more* ardor and confidence if they knew what was expected of them.[238]

Standards would therefore serve to improve the quality of representation received and the amount of diligence exhibited by defense attorneys.

Moreover, a standard-based evaluation would increase the level of trust between attorneys and their clients. In the present public defense system, attorney-client trust is greatly undermined by the struggle of attorneys processing excessive caseloads, which has resulted in minimal time to maintain contact with their clients. As a result, "client contact suffers and is sometimes virtually non-existent."[239] A client who has minimal contact with his attorney will undoubtedly have minimal trust in the attorney as a result. In contrast, an evaluation based on enforceable standards would require attorneys to meet minimum caseload limits and maintain communication with clients, thus increasing the level of trust between both parties and improving the attorney-client relationship.[240]

Proponents of the *Strickland* test have argued that a revised evaluation will lead to a flood of appeals.[241] However, stating what is required of

236. *Id.*

237. *Strickland*, 466 U.S. at 690.

238. Martin C. Calhoun, Note, *How to Thread the Needle: Toward A Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 436 (1988).

239. THE CONSTITUTION PROJECT, *supra* note 124, at 96.

240. *Cf. id.* (discussing some of the consequences that come from a lack of enforceable standards).

241. Derek Wikstrom, Note, *"No Logical Stopping-point": The Consequences of* Padilla v.

defense attorneys will not result in a flood of appeals, and in fact could result in more efficient review of ineffective assistance of counsel claims. Under the current reasonableness standard, defendants have no knowledge which duties an attorney must fulfill in representing them. Without any guidance in this area, the majority of defendants automatically appeal their convictions, alleging that almost every decision made by their attorney constitutes ineffective assistance.[242] A standard-based evaluation will provide more guidance to defendants as to which duties an attorney must provide in representing them, resulting in a diminished number of attorney decisions challenged on appeal.[243]

Furthermore, a standard-based review will allow courts to review ineffective assistance of counsel claims more expeditiously. Instead of struggling to analyze whether an attorney's performance is "reasonable under prevailing professional norms," courts will be able to look to the standards and quickly determine whether an attorney has fulfilled the required duties. Where an attorney has fulfilled those duties,

> relief would be warranted only if the exceptional circumstances of the case indicate that defense counsel's performance, although satisfying [the standards], was nevertheless not professionally reasonable. Consequently, a relatively cursory review of the record would reveal whether or not counsel's inadequacy was so unusual that [although the standards had been met, relief was warranted].[244]

In addition, a standard-based evaluation would likely cause attorneys to document their reasons for choosing a given strategy in order to protect themselves on a potential appeal, showing that they fulfilled their constitutional duties.[245] This would serve to eliminate the "common practice of courts 'racking their brains' to find a rational explanation for counsel's apparent error by creating a hypothetical 'tactical choice' that may never have even crossed the attorney's mind."[246] Finally, the prejudice prong of the *Strickland* analysis will still assist in quickly eliminating many claims, as it does under the current *Strickland* test. Where an attorney fails to fulfill a mandatory standard that obviously could not have affected the

Kentucky*'s Inevitable Expansion*, 106 NW. U. L. REV. 351, 366–67 (2012).

242. *See* Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 655 (1986) ("[T]he lack of specific standards makes it more difficult to evaluate the competency of the representation provided.").

243. *See id.* ("Particularized standards which guide lawyers through every stage of the criminal proceeding, might actually diminish the number of inadequate representation claims.").

244. Calhoun, *supra* note 238, at 442.

245. *Id*. at 435.

246. *Id.*

case, courts will be able to quickly dismiss the claim under the prejudice prong, while still stating whether an attorney fulfilled the duties that are constitutionally required, thus maintaining the enforceability of the standards.[247]

Finally, the Court reasoned that a standard-based evaluation is inappropriate because the purpose of the Sixth Amendment right to counsel is not to maintain standards for the legal profession and improve the quality of representation, but to ensure that defendants receive a fair trial.[248] However, this argument is persuasive only if "the present overall quality of legal representation is constitutionally adequate."[249] This is because a trial is fair only when a defendant, regardless of guilt, has the benefit of effective counsel.[250] Where the overall quality of legal representation is not constitutionally adequate, defendants do not receive a fair trial, and in this situation protecting the right to a fair trial under the Sixth Amendment requires improving the quality of legal representation.[251] In addition, despite the Court's reluctance to use the Sixth Amendment as a means of maintaining professional standards, it "may be inevitable that the norms of representation expressed in the Court's decisions inform the actions of lawyers."[252] When an attorney's conduct is deemed reasonable under the *Strickland* evaluation, attorneys will look to that decision in future cases to determine the level of representation they must provide to their own clients,[253] thereby affecting the standards of the legal profession. Taking into account the impact of the Court's ineffective assistance of counsel decisions on the level of representation provided by attorneys, enforceable standards are necessary in the *Strickland* analysis to ensure defendants receive their constitutional right to effective counsel.

B. ADDITIONAL REASONS DEMONSTRATE THAT A STANDARD-BASED EVALUATION IS NECESSARY

Additional reasons strongly indicate that a revised standard is necessary for ineffective assistance of counsel claims. Recent developments in the criminal justice system, along with the inconsistent guidelines created by the *Strickland* reasonableness evaluation,

247. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 737 (2002).

248. Strickland v. Washington, 466 U.S. 668, 689 (1984).

249. Calhoun, *supra* note 238, at 436.

250. *Id.* at 429.

251. *Id.* at 436.

252. Chin & Holmes, *supra* note 247, at 741.

253. *Id.* at 741–42.

demonstrate that mandatory performance standards must be adopted and incorporated into the *Strickland* test in order to protect the interests of indigent defendants. Moreover, several policy reasons require adopting a standard-based review that guarantees all defendants receive adequate counsel.

1. Deferring to "Professional Norms" Is No Longer Justifiable

Signaling that the *Strickland* test must be revised, developments in the criminal justice system indicate that deferring to the judgment of attorneys under the reasonableness evaluation is no longer warranted. Because defense attorneys' interests are no longer aligned with their clients' interest, there is no justification for deferring to professional norms. Doing so only results in a system in which defendants' interests are largely ignored and unprotected.

In *The T.J. Hooper*, the Second Circuit recognized that while industry custom may be relevant to determining what is reasonable, "strictly it is never its measure."[254] *The T.J. Hooper* stands for the proposition that an industry should not be allowed to set its own standard of care, the reason being that inherent conflict of interest arises from self-regulation.[255] Courts have customarily allowed two professions to escape this prohibition—medicine and law—and decisions made by professionals in these fields have traditionally been granted broad judicial deference.[256] Deferring to the judgment of doctors and lawyers has been justified by the fact that these professionals have traditionally acted in the best interests of their clients, placing the interests of their clients above all other considerations.[257] However, as these professions have evolved over time, it is evident that economic concerns have become more dominant than client interests, leading many courts to reject deference to physician judgment in reviewing medical decisions.[258] Similarly, the problems with self-regulation by attorneys, combined with the shift in focus from client interests to economic concerns, demonstrate that judicial deference toward attorney decisions should also be eliminated.

a. Eliminating the Deference Granted to Medical Decisions

Importantly, in reviewing the decisions of medical professionals,

254. The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

255. Philip G. Peters, Jr., *The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium*, 57 WASH. & LEE L. REV. 163, 164–65 (2000).

256. *Id.* at 165 & n.6.

257. *Id.* at 193–94.

258. *Id.* at 192–93.

courts have begun to eliminate their deferential review of physician performance. Traditionally, judges granted broad deference to the judgment of physicians, reviewing medical malpractice claims under an analogous test to the *Strickland* "reasonable under prevailing professional norms." Until recent years, the reasonableness of a physician's conduct was determined by looking to the customary practices among medical professionals,[259] essentially allowing physicians to set their own standard of care.[260] However, judicial deference to custom in the medical arena has diminished over the past two decades. Indeed, as early as 2000, courts in a "dozen states ha[d] expressly rejected deference to medical customs and another nine, although not directly addressing the role of custom, ha[d] rephrased their standard of" review for medical decisions.[261]

Similar to the Washington Supreme Court in *State v. A.N.J.*, those states rejecting deference to medical custom have usually done so on the principle that an industry should "not [be] permitted to set its own standard of care."[262] Indeed, many of the "opinions repeat . . . [*The T.J. Hooper*'s] argument that 'a whole calling may have unduly lagged in the adoption of new and available devices,"[263] thus custom should not be dispositive in reviewing physician decisions. In one medical malpractice case, the Colorado Supreme Court reasoned that deferring to professional norms means that "the profession itself [is] permitted to set the measure of its own legal liability, even though that measure might be far below a level of care readily attainable through the adoption of practices and procedures substantially more effective in protecting others against harm."[264] Other courts have similarly reasoned "that deference to customary standards [of physicians] . . . place[s] the profession above the law," and relied on the reasoning of *The T.J. Hooper* to argue that courts should instead enact standards to judge whether physician conduct is reasonable.[265]

Explaining the judicial shift away from deference to physician customs, scholars have argued the change has occurred because "the custom-based standard of care no longer is desirable."[266] One factor that has played a large role in this shift is a loss of faith in the "professionalism"

259. *Id.* at 165.
260. *Id.* at 163.
261. *Id.* at 164.
262. *Id.* at 191.
263. *Id.* (quoting The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932)).
264. United Blood Servs. v. Quintana, 827 P.2d 509, 520 (Colo. 1992).
265. Peters, *supra* note 255, at 191.
266. *Id.* at 192.

of medicine.[267] Previously, physicians were designated special legal privileges largely because of the profession's adoption of an ethical code "affirm[ing] the supremacy of patient interests over more base economic concerns."[268] Based on this code as well as years of professional training, many noted that doctors "should be free to operate in the best interests of the patient," and that "[p]ost-hoc judicial supervision . . . would interfere with that freedom and thus prevent doctors from practicing sound medicine."[269] Those courts that continue to defer to the custom of the profession have reiterated these principles, emphasizing that they will continue to "defer . . . to the collective wisdom of physicians,"[270] and a "faith" in "the medical profession's own recognition of its obligation to maintain its standards."[271]

However, over time, public trust in the medical profession has continued to decline, with surveys reporting that the level of confidence among Americans in medicine has dropped from 73 percent to 22 percent between 1966 and 1993.[272] The drop in confidence has been attributed to many factors, including an increased awareness of medical error, specialists with whom patients have no prior relationship, and increased medical costs, which result in increased skepticism of the profession's ability to maintain its promise to ensure that patient interests are the priority.[273] As the public has lost faith in the medical profession's ability to adhere to its own ethical code, courts have become less willing to defer to professional norms.[274] Indeed, despite the fact that medical expertise has advanced substantially, "[j]udicial scrutiny of medical decisions has never been more difficult."[275] This is a strong indication that expertise alone, without "a credible promise that the patient's interests will come first,"[276] cannot justify a deferential standard of review.

b. Judicial Deference Toward Attorneys Is No Longer Warranted

267. *Id.* at 192–93.

268. *Id.* at 193.

269. *Id.* at 195 (quoting Alan H. McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 608 (1959)).

270. *Id.* (quoting Doe v. American Red Cross Blood Servs., 377 S.E.2d 323, 326 (S.C. 1989)) (internal quotation marks omitted).

271. *Id.* (quoting Natanson v. Kline, 350 P.2d 1093, 1107 (Kan. 1960)) (internal quotation marks omitted).

272. *Id.* at 196 (citing Robert J. Blendon et al., *Bridging the Gap Between Expert and Public Views on Health Care Reform*, 269 JAMA 2573, 2576 fig. 4 (1993)).

273. *See id*. at 197–99.

274. *Id.* at 199.

275. *Id.* at 201.

276. *Id*.

Similar to the medical profession, developments in the criminal justice system indicate that judicial deference toward the custom of attorneys is no longer warranted. Traditionally, courts deferred to attorneys' decisions in representing their clients because it is assumed that each side in an adversarial system will do its best to win.[277] Thus, a defense lawyer is deemed "the ally or agent of the defendant and can be assumed to have the defendant's best interests in mind."[278] However, where a defense lawyer is prevented from putting the client's interest first, the adversarial system no longer functions in this manner, and professional decisions should not be analyzed under a deferential approach.

Based on the belief that defense attorneys customarily place client interests first, it has been the Supreme Court's position that attorneys must be given wide latitude to make tactical decisions in defending their clients, essentially deferring judgment of the reasonableness of attorney performance to attorneys themselves.[279] Indeed, deference to the judgment of attorneys has made courts unwilling to find any attorney errors unreasonable, preferring instead to let the profession regulate itself. However, self-regulation in any industry is inherently flawed, one of the reasons why broad deference to customary practices is not permitted under the tort standard of care. Problems arise because self-regulators often do not enforce standards out of their own self-interest, which conflicts with their obligation to monitor themselves and their peers.[280] There are few incentives for lawyers to abide by professional standards, and when considered in the context of court-appointed attorneys, there are few incentives for the state to ensure that these attorneys have the time and resources to meet professional standards.

The problem of self-regulation is even greater in the legal profession because, unlike other professions that monitor self-regulatory abuse through outside review, hardly any oversight is exercised over lawyers.[281] The "disciplinary boards [that review lawyer conduct] consist mainly of lawyers, [and] it is hardly surprising that they tend to identify with accused [lawyers] and thus have limited the scope of their regulatory activity . . . . [Consequently,] [l]awyers usually escape disciplinary sanctions."[282]

277. Rebecca Kunkel, *Equalizing the Right to Counsel*, 18 GEO. J. LEGAL ETHICS 843, 853 (2005).

278. *Id*. at 852.

279. *Id.* at 852–53.

280. David L. Dranoff, Comment, *Attorney Professional Responsibility: Competence Through Malpractice Liability*, 77 NW. U. L. REV. 633, 646–47 (1982).

281. *Id.*

282. *Id.* at 647.

Moreover, disciplinary proceedings for lawyers focus on the lawyer's conduct, not the injury suffered by the individual bringing the action, and "[p]enalties are limited to a return of fee, reprimand, and suspension or loss of license."[283] Given that defendants cannot obtain relief from a wrongful conviction or unfair sentence by bringing such a suit, there are few incentives for defendants to initiate a disciplinary proceeding against an attorney who has failed to meet professional standards, leading further to a lack of regulation within the profession.[284]

Indeed, it seems the only reason to defer to professional norms in a profession that has few incentives to regulate itself is when the interests of the professional and the client are aligned, allowing professionals putting the interests of clients first. However, struggling under massive caseloads with limited resources, there is no doubt that court-appointed attorneys are unable to put the interests of their clients first. The very structure of the public defense system prevents court-appointed attorneys from doing so—"[s]ince the state sets the terms for hiring and paying court-appointed lawyers, it exercises a great deal of control over [how] these attorneys [represent clients,] even without issuing" any requirements of its own.[285] Given the state's power over court-appointed attorneys and the public defense system's reliance on the state for funding, it is irrational to reason that the decisions made by a court-appointed attorney are "certainly (or even probably) made with the defendant's sole interest in mind, rather than as the inevitable (or very likely) result of a government action."[286]

Indeed, public defenders in Miami-Dade County were forced to sue the state in order to obtain relief from overwhelming caseloads and ensure that they have enough time to fulfill their professional duties to clients.[287] Emphasizing the problem, counsel for the Miami-Dade County Public Defender argued that the Miami-Dade public defenders have no opportunity to brief clients before they enter a guilty plea due to massive caseloads, and somberly remarked that "the public defender has to deal with [this] reality."[288] Significantly, the attorney relied on the Court's decisions in *Frye* and *Lafler* to argue that the overwhelming caseloads facing Miami-Dade public defenders are not constitutional, since they

283. *Id.*

284. *See id.* ("Frustrated parties, however, have few incentives to utilize disciplinary processes to redress their grievances.").

285. Kunkel, *supra* note 277, at 853–54.

286. *Id.* at 855.

287. *Florida Defense Attorneys Overloaded*, *supra* note 8.

288. Cara H. Drina, Lafler *and* Frye*: Good News for Public Defense Litigation*, 25 FED. SENT'G REP. 138, 139 (2012) (internal quotation marks omitted).

prevent attorneys from fulfilling their duty, under the Court's new decisions, to inform a client of any plea offer received from the government. This argument is consistent with the prediction of defense organizations that, if the Supreme Court incorporates mandatory standards into the *Strickland* evaluation, state legislatures would understand that "indigent defense must receive the essential resources in order to implement a defense system consistent with the promise of *Gideon* and the Supreme Court's other right-to-counsel decisions."[289]

Allowing the profession to regulate itself has led to a complete lack of enforceable standards within the industry and to a criminal justice system in which defense attorneys are unable to put the interests of their clients first. Just as in *The T.J. Hooper*, this has led to a "whole calling [that has] unduly lagged . . . . Courts must in the end say what is required."[290] Enforceable standards and mandatory caseload limits are necessary to ensure that the interests of criminal defendants are finally protected.

2. The *Strickland* Evaluation Leads to Conflicting Guidelines

In addition, mandatory standards regulating attorney performance are necessary because the *Strickland* test has created inadequate guidelines for attorneys and lower courts as to what is required of defense attorneys, causing the right to counsel to be significantly diminished and rarely enforced. Lower courts analyzing ineffective assistance of counsel claims have applied the *Strickland* standard inconsistently, leading to conflicting guidelines for attorneys and other courts reviewing similar claims. Further lending to the development of insufficient guidelines, Supreme Court decisions evaluating appeals under *Strickland* have only incorporated individual duties on a case-by-case basis, and these holdings have been extremely narrow in reach. In order to provide more definite guidelines to attorneys and lower courts, the Supreme Court should adopt mandatory standards and caseload limits into the *Strickland* analysis.

Among lower courts analyzing ineffective assistance of counsel claims, there is a lack of consistent decisions regarding what constitutes unreasonable performance. Scholars have explained,

> By adopting the amorphous 'reasonable attorney' standard and adding language about the wide range of effective assistance and the strong presumption favoring attorney competence, the Court has given lower courts the power—without giving them adequate guidance—to interpret

289. THE CONSTITUTION PROJECT, *supra* note 124, at 213.

290. The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

> the all-important right to effective assistance of counsel on an ad hoc basis in a climate often hostile to defendants.[291]

This has led to a large disparity as to what reasonable performance entails, creating conflicting guidelines for courts reviewing ineffective assistance of counsel claims and attorneys fulfilling their duties to clients. This was readily apparent in *State v. A.N.J.*, where an attorney's failure to investigate his client's case before advising him to plead guilty was deemed unreasonable by the Washington State Supreme Court.[292]

Similarly, Supreme Court decisions applying *Strickland* have left defense attorneys and lower courts without adequate guidelines as to what is constitutionally required of attorneys. The vagueness of the "reasonable under professional norms" test was clearly demonstrated in *Lafler*, where the defendant's trial attorney provided inadequate plea advice, leading the defendant to reject a beneficial plea offer and receive a sentence three-and-half times longer than the one first offered by the prosecutor.[293] Because both sides had already agreed that this conduct was unreasonable, the Supreme Court declined to address whether it was in fact unreasonable, stating in equivocal language that erroneous plea advice "is not necessarily deficient performance."[294] Similarly, in *Padilla*, though the Court held that attorneys must inform their clients about the deportation consequences of pleading guilty, it narrowed the breadth of this duty by stating that it is only required where the consequences of a conviction are "truly clear" to the attorney after examining the relevant immigration statute.[295] The decision led critics to deem this a "vague half-way" test, because the many complicated and unclear immigration laws provided an easy excuse for attorneys to justify a failure to warn.[296]

Further adding to the conflicting guidelines provided by decisions analyzing the *Strickland* test, court decisions finding attorney performance "reasonable under prevailing professional norms" often contradict the ABA Standards. For example, the "collateral consequences" doctrine finally overruled in *Padilla* was a direct violation of ABA Model Rule 1.4, which requires attorneys to advise their clients of all the consequences of pleading guilty, including deportation.[297] Nevertheless, under the *Strickland* test,

291. Calhoun, *supra* note 238, at 428.
292. *See supra* notes 195–205.
293. Lafler v. Cooper, 132 S. Ct. 1376, 1383 (2012).
294. *Id.* at 1391.
295. Hew, *supra* note 104, at 32 (internal quotations omitted).
296. *Id.* at 32–33 (internal quotations omitted).
297. MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 2 (2012).

lower courts repeatedly held that a failure to advise a client about the "collateral consequences" of pleading guilty, such as deportation, did not fall below prevailing professional norms.[298] Courts deeming attorney performance reasonable in cases with clear ethical violations have resulted in blatant inconsistencies between Sixth Amendment jurisprudence and an attorney's ethical obligations.[299] This has led to "a huge chasm between what ethics rules demand and how lawyers actually represent indigent defendants,"[300] a chasm that must be eliminated to ensure that indigent defendants receive their constitutional right to effective counsel.

Thus, specific standards stating what is constitutionally required of attorneys are necessary in order to ensure that consistent guidelines are provided to attorneys and courts, ensuring that the right to counsel is enforceable.

3. The Unregulated Plea-Bargaining System Needs Mandatory Standards

Given the criminal justice system's modern focus on guilty pleas, mandatory standards are necessary now more than ever in order to ensure that the plea-bargaining process is governed by definitive guidelines. It is no coincidence that *Frye*, *Lafler*, *Padilla*, *State v. A.N.J.*, and the myriad of other Sixth Amendment appeals pending in courts involve issues regarding attorney performance during plea-bargaining, because this is now the dominant practice utilized by the government to prosecute defendants in an efficient manner.[301] In light of this, it is imperative that the Court conduct a "thorough re-examination of how [the criminal process] operates, mindful of what Justice Kennedy called 'the reality that criminal justice today is for the most part a system of pleas, not a system of trials.'"[302] When this reality is taken into account, it is difficult to justify maintaining the reasonableness evaluation, which creates inadequate guidelines for attorneys to follow

298. Love, *supra* note 90, at 88.

299. Vazquez, *supra* note 144, at 58 ("Currently, Sixth Amendment holdings are allowing defense attorneys to avoid counseling their clients on immigration consequences of their criminal conviction while fully acknowledging that noncitizen defendants are suffering increasingly harsh immigration penalties as a result of the lack of advisement during their criminal proceedings.").

300. Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1178 (2003).

301. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.").

302. Norman L. Reimer, Frye *and* Lafler*: Much Ado About What We Do—And What Prosecutors and Judges Should Not Do*, 36 APR CHAMPION 7 (2012) (quoting Lafler v. Cooper, 132 S. Ct. 1376, 1381 (2012)).

during the plea-bargaining process.

Currently, indigent defendants account for over 80 percent of individuals prosecuted, and they plead guilty 90 percent of the time.[303] However, despite its prevalence, plea-bargaining has remained almost completely unregulated, standing in stark contrast to the highly regulated and public trial system. Plea-bargaining "heavily favor[s] prosecutors, who have more power" and resources than defendants and the discretion to impose, or threaten to impose, lengthy prison sentences.[304] A leading Criminal Procedure textbook describes the right to counsel as "most needed in investigating the case and negotiating a settlement with the prosecutor."[305] However, recent cases such as *Frye*, *Lafler*, and *A.N.J.* signal that plea-bargaining is a stage where indigent clients are able to obtain only minimal advice.

Moreover, plea-bargaining is the stage of criminal procedure with the least guidance as to what is constitutionally required of defense attorneys. With hardly any case law defining an attorney's Sixth Amendment duties in plea-bargaining, attorneys have only the ABA Standards as guidance, although the Court has consistently reiterated that these standards are only advisory.[306] Defense attorneys are thus left without any knowledge about which duties the Sixth Amendment requires them to fulfill during this critical stage of adjudication.

Indeed, the lack of mandatory duties in the plea-bargaining stage has resulted in abundant examples of deficient performance in this area.[307] In many states, pervasive patterns of "meet 'em and plead 'em" have developed, with defense attorneys entering guilty pleas for their clients upon first meeting them, largely because many defense attorneys have overwhelming caseloads and do not have the time or resources to investigate each client's case. [308] Thus, "[a]s a result of overwhelming workloads, there is increased pressure on defense attorneys representing indigents and, in turn, their clients to accept guilty pleas to expedite the movement of [the] case[]."[309] Additionally, "without appropriate resources

303. Backus & Marcus, *supra* note 158, at 1034.

304. Editorial, *A Broader Right to Counsel*, N.Y. TIMES (Mar. 23, 2012), http://www.nytimes.com/2012/03/23/opinion/a-broader-right-to-counsel.html?_r=0.

305. CHEMERINSKY & LEVENSON, *supra* note 16, at 553.

306. *Frye*, 132 S. Ct. at 1408; Padilla v. Kentucky, 559 U.S. 356, 366 (2010) ("We long have recognized that '[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . .'").

307. *See supra* text accompanying notes 76–104.

308. *See supra* text accompanying notes 76–104.

309. Brief for the Constitution Project, *supra* note 149, at 22.

and time to investigate, meet with the client, and conduct legal research, counsel cannot effectively advise a client whether to accept a plea offer."[310]

As the Washington State Supreme Court recognized, there is no way to remedy plea-bargaining practices without requiring attorneys to comply with minimum duties, such as investigation into every case before advising a client to plead guilty.[311] Incorporating enforceable standards into the reasonableness evaluation will provide clarity about what is required of attorneys in the plea-bargaining stage, eliminating inadequate plea-bargaining practices and deficient performance in this area.[312]

4. Evolving Standards of Decency for Criminal Defendants

In recent years, increased awareness of the deficiencies in the criminal justice system and widespread movements for reform demonstrate that standards of decency for criminal defendants are rapidly evolving. The *Strickland* test, developed in 1983, has not been revised to reflect these changes, and continues to enforce perceptions of criminal defendants that are no longer prevalent.

At the time of the *Strickland* decision, the legal world was entrenched in what has been referred to as the "guilty anyway" attitude—a belief that most criminal defendants are guilty and therefore whether they receive effective counsel is of limited significance.[313] Judge Bazelon explained that "[i]t 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."[314] Indeed, many scholars have pointed to this attitude as a contributing factor to the development of the pre-*Strickland* "farce and mockery" standard for ineffective assistance, a standard often deemed very similar to the *Strickland* evaluation, under which hardly any attorney errors are deemed to violate the right to counsel.[315]

However, in the years following *Strickland*, the prevailing attitude toward criminal defendants has visibly changed. The task forces employed

310. *Id.* at 26.

311. *See* State v. A.N.J., 225 P.3d 956, 965 (Wash. 2010) (en banc) ("While no binding opinion of this court has held an investigation is required, a defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence.").

312. Calhoun, *supra* note 238, at 455–57.

313. David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 26 (1973); Klein, *supra* note 242, at 635.

314. Klein, *supra* note 242, at 636 (quoting Bazelon, *supra* note 313, at 26).

315. *See supra* text accompanying notes 28–32.

by many states to assist in reforming public defense systems, the advisory reports issued by the ABA, the Constitution Project, and other criminal defense organizations around the country, and recent Supreme Court decisions demonstrate a growing sense of decency toward criminal defendants and an increased recognition that the current criminal defense system has serious inadequacies.[316] Indeed, the Court's decisions in *Padilla, Frye*, and *Lafler* expressly noted new areas of criminal law where defendants have the right to effective counsel, including plea-bargaining and advice on the collateral consequences of a conviction. Significantly, these areas involve defendants who are admittedly guilty, but attempting to lessen the impact of their sentence. Despite this, the Court has deemed it necessary to ensure that the Sixth Amendment right to counsel is enforceable in these areas, demonstrating a visible shift away from the "guilty anyway" attitude.

Similarly, changes in international principles prove that standards of decency for criminal defendants are evolving around the world. In early 2012, the United Nations Commission on Crime Prevention and Criminal Justice adopted the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, which will be submitted to the United Nations General Assembly for approval at the end of the year.[317] The document adopts international standards for criminal defense, including requirements that attorneys have the education, competence, and time necessary to prepare an adequate defense. As one of the cosponsors of the Commission, the U.S. Department of Justice stated in support of the Guidelines that the measure "affirm[s] the importance of legal aid at all stages of the criminal justice system."[318] Further emphasizing the United States' support of the Guidelines, Acting Associate Attorney General Tony West stated at a press conference in September 2012, "we . . . believe that establishing standards can be instrumental in raising the level of representation for defenders across the country . . . . We believe these comprehensive guidelines and principles can be effective tools in strengthening and expanding existing criminal legal aid systems throughout the world . . . ."[319]

Significantly, in response to the ACLU lawsuit filed in Washington

316. *See supra* Part IV.C.

317. *Adoption of First International Principles and Guidelines on Indigent Defense*, DEP'T JUST. (June 16, 2012), http://blogs.justice.gov/main/archives/2236.

318. *Id.*

319. Tony West, Acting Assoc. Att'y Gen., Address at the Permanent Mission of the Republic of South Africa High-level Breakfast Meeting on Access to Criminal Legal Aid (Sept. 26, 2012), *available at* http://www.justice.gov/iso/opa/asg/speeches/2012/asg-speech-120926.html.

against two counties for systemic inadequate representation, the Justice Department filed a statement of interest in the case in August 2013, "asserting that the federal government has a strong interest in ensuring that all jurisdictions are fulfilling their obligations under *Gideon* and endorsing limits on the caseloads of public defenders so they can provide quality representation to each client."[320] The filing urges the Western District of Washington to appoint an independent monitor in the counties to ensure that caseloads are controlled among public defenders.[321] After the filing, Attorney General Eric Holder wrote an unprecedented opinion in *The Washington Post*, stating that "[t]his shameful state of affairs [of the public defense system] is unworthy of our great nation . . . . The moral and societal costs of inadequate representation are too great to measure."[322]

Given its importance to maintaining a fair and modern criminal justice system, evolving standards of decency for criminal defendants must be taken into account in the *Strickland* test. The changing attitudes toward criminal defendants within this country and internationally indicate that the *Strickland* test should be revised to reflect this perspective.

5. Erosion of Public Confidence in the Criminal Justice System

Advocates of the current *Strickland* test reject reform largely because of a concern for the finality of convictions and a firm belief that a revised standard will flood the courts with appeals.[323] Though these fears are based on legitimate efficiency concerns, these concerns fail to take into account the significance of protecting fundamental rights in order to ensure the proper functioning of the criminal justice system.

Caring about the quality of representation provided under the Sixth Amendment should not be focused on efficiency; it should be focused on providing a constitutional right to individual citizens.[324] Ronald Dworkin has long argued that individual rights must trump efficiency in certain circumstances—most importantly, when a right is fundamental to our

320. Eric H. Holder, Jr., *Defendants' Legal Rights Undermined by Budget Cuts*, WASH. POST OP. (Aug. 22, 2013), http://www.washingtonpost.com/opinions/eric-holder-defendants-legal-rights-undermined-by-budget-cuts/2013/08/22/efccbec8-06bc-11e3-9259-e2aafe5a5f84_story.html.

321. *Id.*

322. *Id.*

323. *See, e.g.*, Lafler v. Cooper, 132 S. Ct. 1376, 1389–90 (2012); Gloria Padilla, Op-Ed, *Plea Bargain Ruling May Trigger Flood of Appeals*, SAN ANTONIO EXPRESS-NEWS (Mar. 30, 2012), http://www.mysanantonio.com/opinion/columnists/gloria_padilla/article/Plea-bargain-ruling-could-launch-flood-of-appeals-3448102.php. *But see* Jenny Roberts, *Proving Prejudice, Post*-Padilla, 54 HOW. L.J. 693, 742–43 (2011) (arguing that the "floodgate concern should not be exaggerated").

324. *See* Peter A. Joy, *Rationing Justice by Rationing Lawyers*, 37 WASH. U. J.L. & POL'Y 205, 206–07 (2011) (discussing the role of the criminal justice system for indigent defendants).

society.[325] Unequivocally, the right to counsel is a fundamental right, and it should not be diminished due to a fear of increased appeals.

Regardless, enforcing the *Strickland* standard is not efficient in the long-run because it allows attorneys to provide unethical representation, presenting the public with persuasive evidence that the system does not treat individuals justly. For any criminal justice system to efficiently function, there must be public confidence in its ability to successfully apply the law. As demonstrated in Washington, where multiple instances of clearly deficient representation were deemed constitutional, it "profoundly erode[s] public confidence in the criminal justice system."[326] In a February 2012 speech at the ABA Summit on Indigent Defense, Attorney General Eric Holder observed "[a]s Americans [come to] understand how their fellow citizens experience the criminal justice system, they will be shocked and angered."[327] Indeed, as citizens of Washington State came to understand the quality of representation fellow citizens were receiving through the Seattle Times articles, public criticism escalated and eventually led the state supreme court to adopt mandatory standards to ensure all defendants received their right to counsel.[328]

It is important to maintain public confidence in the criminal justice system, because the criminal justice system cannot be successful if there is no confidence in its decisions of guilt or innocence.[329] "[C]rucial to the public's trust in the legitimacy of" decisions is whether public defense programs are successful at providing adequate representation to those individuals who are prosecuted.[330] However, excessive caseloads create a perception among the public that assembly-line justice is all an indigent client can possess, greatly lowering confidence that court decisions are reliable.[331] Where attorneys have only a few hours to dispose of a case, there cannot be confidence that the defendant was able to adequately defend against the charges facing him, and thus there is no assurance that a convicted defendant was in fact guilty.[332]

When the public loses confidence in the criminal justice system, the

325. Ronald Dworkin, *A Special Supplement: Taking Rights Seriously*, N.Y. REV. BOOKS, (Dec. 17, 1970), *available at* http://www.nybooks.com/articles/archives/1970/dec/17/a-special-supplement-taking-rights-seriously/?pagination=false.

326. *Public Defender Standards Enacted by the Washington State Supreme Court*, *supra* note 184.

327. Gilbert, *supra* note 231 (internal quotation marks omitted).

328. *Public Defender Standards Enacted by the Washington State Supreme Court*, *supra* note 184.

329. Joy, *supra* note 324, at 207.

330. THE CONSTITUTION PROJECT, *supra* note 124, at 6.

331. LEFSTEIN, *supra* note 135, at 7–8.

332. *Id.* at 15–24.

law loses credibility and the capacity to deter people from committing crimes, creating an unsuccessful criminal justice system. People follow the law because they believe the law has moral credibility—it is a source of norms guiding how they should act.[333] Thus, Paul Robinson and John Darley argue that if the criminal law "has developed a reputation as a reliable statement of existing norms, people will be willing to defer to its moral authority in cases where there exists some ambiguity as to the wrongfulness of the contemplated conduct."[334] However, when the law develops a reputation for unreliability and fails to enforce norms, people become unwilling to follow it, causing a net loss in public safety and social utility, and an increase in crime.[335] It is therefore not more efficient to maintain a system that continues to erode public confidence in its ability to provide adequate representation and just convictions. The only way to enhance the law's moral credibility is to

> make clear to the public that its overriding concern is doing justice . . . . The criminal law must earn a reputation for (1) punishing those who deserve it under rules perceived as just, (2) protecting from punishment those who do not deserve it, and (3) where punishment is deserved, imposing the amount of punishment deserved, no more, no less.[336]

In short, these various concerns thus underscore the importance of the criminal justice system as a societal function.

If the Supreme Court adopts mandatory standards into the *Strickland* analysis, it will ensure that attorneys fulfill minimum, important duties to clients and meet national caseload limits. This will guarantee that the public retains confidence in the ability of defense programs to provide meaningful representation to all defendants and adequately protect the interests of those defendants, ensuring that decisions of guilt or innocence are reliable and maintaining the legitimacy and efficiency of the criminal justice system.

VII. CONCLUSION

The current crisis in the public defense system has caused many defense attorneys to be unable to provide effective representation to indigent defendants. Because the current deferential review of attorney performance does not provide defendants with a meaningful opportunity to

333. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468 (1997).

334. *Id.* at 474.

335. *Id.* at 474–75.

336. *Id.* at 477.

appeal or enforce professional standards to guarantee their right to adequate representation, it is necessary to revise the *Strickland* test and implement mandatory performance standards that are enforceable on appeal. Mandatory standards like those adopted by the Washington State Supreme Court will provide firm guidance to lower courts and attorneys about what is constitutionally required of defense attorneys, and a revised *Strickland* evaluation will ensure that those standards are enforceable on appeal, raising the quality of representation provided by the public defense system. The Supreme Court should thus conform to the reasoning of *The T.J. Hooper* and state what is required of defense attorneys, eliminating the deferential standard of review for attorney performance and protecting the constitutional right to counsel for all criminal defendants.