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THE RELATIONSHIP OF THE COURT AND DEFENSE COUNSEL: THE IMPACT ON COMPETENT REPRESENTATION AND PROPOSALS FOR REFORM†

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INTRODUCTION

This Article examines the impact of the trial court upon the quality of legal assistance provided the indigent criminal defendant. The court, when confronted with public defenders so overburdened with cases that they have not had the time to adequately prepare, all too often exacerbates the situation by refusing to permit counsel additional time for investigation and preparation. The trial judge may be affected by administrative pressures to dispose of cases, move the calendar, and get pleas. The defender's overload is therefore compounded by the court's overload, and the situation results in the sacrifice of the indigent defendant's right to competent representation. As both counsel and court attempt to minimize the amount of time expended on each case, the defendant's claim to a just proceeding and fair trial is forfeited.

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If indeed "[i]t is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial,"¹ then the court must abandon its emphasis on production figures and become instead a guarantor to the accused that his counsel will provide diligent and effective assistance. It is properly the court's responsibility to ensure that the counsel it appoints to represent the indigent acts in accordance with professionally accepted standards of competent representation.² This Article proposes judicial monitoring of the level of attorney preparation through a pretrial conference or a defense counsel pretrial worksheet as a means of improving the quality of assistance offered the indigent defendant.

I. THE CASELOAD PROBLEM AND THE DEFENDER'S INABILITY TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL

The primary hardship that confronts attorneys in a public defender office³ is an excessively heavy caseload which does not permit them time to adequately represent all their clients. A recent survey by the National Institute of Justice found that public defenders identified excessive caseloads as their major problem and that the most critical need of the criminal justice system was to improve the quality of representation in felony cases.⁴ Inadequate funding creates the situation where there are just not enough lawyers in defender offices to provide competent representation. The Final Report of the National Study Commission on Defense Services concluded that "the unavailability of adequate funding for the provision of defense services for the training of lawyers who perform defense services for the poor has been the major cause of the totally inadequate services being delivered today in many, if not most U.S. jurisdictions."⁵

¹ *Lakeside v. Oregon*, 435 U.S. 333, 341-42 (1978).

² The law does not require that counsel be infallible, *Williams v. Beto*, 354 F.2d 698, 705 (5th Cir. 1965), or even exceptional, *Moore v. United States*, 543 F.2d 730, 737 (3d Cir. 1970), or to be as skilled as Clarence Darrow, *Wise v. Smith*, 735 F.2d 735, 738 (2d Cir. 1984), or to have attained perfection, *Eldridge v. Atkins*, 665 F.2d 228, 235 (8th Cir. 1981), *cert. denied*, 456 U.S. 910 (1982), or to be as eloquent as Daniel Webster or Rufus Choate, *Boswell v. State*, 290 Ala. 349, 356, 276 So. 2d 592, 598 (1973), or to be errorless in performance, *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960), *modified on reh'g*, 289 F.2d 928 (5th Cir. 1961) (en banc), *cert. denied*, 368 U.S. 877 (1961).

³ This Article focuses primarily on the public defender because, as of 1986, public defender offices are the primary forum for delivering defense services to 65% of Americans. AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, AN INTRODUCTION TO INDIGENT DEFENSE SYSTEMS 11 (1986).

⁴ NATIONAL INSTITUTE OF JUSTICE, ASSESSING CRIMINAL JUSTICE NEEDS 4 (1984). Six times as many public defenders mentioned excessive caseloads as those who selected the next highest ranking need. It was not just defenders who perceived the problem. The Institute's survey of 1400 criminal justice officials in all fifty states revealed that the system's most urgent needs included "more effective representation for indigent defendants." *Id.* at 1.

⁵ NATIONAL STUDY COMM'N ON DEFENSE SERV., GUIDELINES FOR LEGAL DEFENSE SYS. IN THE U.S., FINAL REPORT 242 (1976). The Report observed that, "[i]nadequate funding is perhaps the single most significant problem facing defense services today." *Id.* After reviewing the data on caseload numbers, the Report concluded that, "[t]he message is all too clear; for the nation as whole, defender offices are handling too many cases each year, resulting in an inability to represent their clients with full effectiveness." *Id.* at 407. See also Fairlie, *Gideon's Muted Trumpet*, 69 A.B.A. J. 172 (1984) (insufficient funding is one of the key factors that has elevated the problem of indigent defense to a "national crisis"); Tyler, *Competent and/or Effective: How Breakdowns Occur*, 33 NLADA

The problem of ineffective assistance is becoming more severe as state and local governments reduce the funding available for representing the indigent at the same time that the number of arrests and, therefore, the need for public defenders increases.⁶ The American Bar Association Standing Committee on Legal Aid and Indigent Defendants, in cooperation with the Criminal Justice and General Practice Sections of the American Bar Association (A.B.A.) and the National Legal Aid and Defender Association (NLADA), conducted hearings in 1982 to examine funding of indigent defense services. The findings revealed that indigent defense caseloads are increasing, funding for defense services is inadequate and becoming increasingly unpopular, and that nationwide, public defenders have too many cases.⁷ The Committee's Report concluded that "[i]t is clear

BRIEFCASE 75, 77 (1976) (inadequate funding creates an excessive burden on public defenders). Nationwide, the cost of defending the indigent constitutes, on a per capita basis, less than 3% of all criminal justice expenditures. BUREAU OF JUSTICE STATISTICS, UNITED STATES DEP'T OF JUSTICE, SPECIAL REPORT, CRIMINAL DEFENSE SYSTEMS 7 (1984). Prosecutors receive almost four times the amount spent by state and local governments for the defense of indigents. BUREAU OF JUSTICE STATISTICS, UNITED STATES DEP'T OF JUSTICE, 1980 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 11 (1981).

⁶ In New York City, for example, the number of cases filed annually in the criminal courts increased by 42% between 1981 and 1985, but the number of lawyers employed by the Legal Aid Society to represent indigent defendants increased only 10% in the same time period. Schneider, *You Can't Afford a Lawyer if You Don't Have a Dime*, BLIND JUSTICE, Feb. 1987, at 1, col. 3. In 1983, the Governor of California vetoed approximately one half of the budget of the state public defender office and the legislature was unable to obtain sufficient votes to override the veto. The speaker of the California assembly commented:

If it had been for law enforcement and for prosecution and for expanding the opportunity to catch people and prosecute them, the moneys would be there because the politics would dictate that this is a good place to spend the money. If it is for the purpose of trying to protect the integrity of the defense system and trying to protect the integrity of the criminal justice system on behalf of everybody, the money is not there to do that.

Meeting the Challenge: A Panel Discussion of Political Leaders, 19 LOY. L.A.L. REV. 417, 423 (1985) (remarks of the Honorable Willie L. Brown at the Conference for Financing the Right to Counsel in California). The Attorney General of California has reported that claims by defendants that they are not receiving competent counsel have been increasing. Van de Kamp, *The Right to Counsel: Constitutional Imperatives in Criminal Cases*, 19 LOY. L.A.L. REV. 329, 330 (1985). In December 1986, the Phoenix, Arizona county board of supervisors turned down the public defender's request for forty-four additional lawyers. By mid-February 1987, the average felony caseload had reached 192 per attorney in that public defender office. *Arizona Court Orders Phoenix Defender to Limit Caseload*, CRIM. JUST. 22 (1987). The Chief Justice of Oregon has recently lamented that state legislature's refusal to provide adequate funds for the escalating costs of indigent defense. Arango, *Oregon Faces \$12 to \$14 Million Deficit in State Indigent Defense Budget*, CRIM. JUST., Fall 1986, at 27, 28. Money allocated to defense services has declined in some states due to a reduction in revenues resulting from lower oil and gas prices, agricultural depression in the farm belt, and the termination of federal revenue sharing with the states. Spangenberg, *Why We Are Not Defending the Poor Properly*, CRIM. JUST., Fall 1986. Cutbacks resulting from the Gramm-Rudman Act in fiscal year 1986 led to a 4% reduction in appropriation for federal public defender programs. *Id.* See also NATIONAL STUDY COMM'N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES FINAL REPORT 406 (1976) (caseloads have increased faster than staff size; resources insufficient to do the work).

⁷ THE AMERICAN BAR ASS'N AND THE NAT'L LEGAL AID AND DEFENDER ASS'N, GIDEON UNDONE, THE CRISIS IN INDIGENT DEFENSE FUNDING 1 (1982) [hereinafter GIDEON UNDONE]. As states in recent years have enacted legislation to deal more harshly with those accused of certain types of

that unless positive steps are taken to address these problems, the promise of *Gideon v. Wainwright*⁸ will indeed be undone."⁹

An example of ineffective representation resulting from an exceedingly heavy caseload is illustrated in *Cooper v. Fitzharris*, a case that involved the San Francisco County Public Defenders Office.¹⁰ The district court found, after an evidentiary hearing, that counsel's failures were "the product of an overwhelmingly heavy caseload carried by Deputy Public Defenders at that time, which allowed counsel very little time for the preparation of each case."¹¹ Counsel testified that she had conducted no legal research, and that she collapsed in court a few months after the defendant's conviction, her health seriously threatened by carrying a caseload of approximately 2,000 different cases per year.¹² She resigned from the Public Defender Office after concluding that she was "actually doing the defendants *more harm by just presenting a live body than if they had no representation at all.*"¹³

crimes, defending those arrested and charged under the new laws is all the more demanding and time-consuming. The public defender for Santa Clara County, California described the situation he confronted in obtaining adequate funding:

[W]e got the Death Penalty Initiative, which, according to the Public Defenders association, would require an addition of twenty-five percent of the staffing of every public defender office in this state in order to keep up with the work.

And then on top of that, we got the Determinate Sentencing Law, and we got the drunk driving law, and we got the serious felony, and the rape laws. And we got all this horrendous state legislation on a yearly, almost monthly, basis. And there we are being cut to the bone and beyond the bone, having to go and beg our supervisors not to cut.

Portman, *Financing the Right to Counsel: A View from a Local Public Defender*, 19 LOY. L.A.L. REV. 363, 367 (1985).

⁸ 372 U.S. 335 (1963). In *Gideon*, the Supreme Court held that all criminal defendants have the right to counsel. *Id.* at 344.

⁹ GIDEON UNDONE, *supra* note 7, at 1. Perhaps the most critical assessment of the quality of the representation that is provided indigent criminal defendants is that of the former Chief Judge of the Court of Appeals for the District of Columbia Circuit:

[W]hat I have seen in 23 years on the bench leads me to believe that a great many — if not most — indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6th Amendment

There are no statistics to illustrate the scope of the problem because . . . the criminal justice system goes to considerable lengths to bury the problem. But no one could seriously dispute that ineffective assistance is a common phenomenon. A very able trial judge described some of the counsel coming before the courts as "walking violations of the sixth amendment."

I come upon these "walking violations" week after week in the cases I review.

Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973).

¹⁰ 551 F.2d 1162 (9th Cir. 1977), *aff'd on reh'g*, 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979).

¹¹ 551 F.2d at 1163 n.1.

¹² *Id.* (emphasis added).

¹³ *Id.* (emphasis added). Other courts have also addressed this problem. The Court of Appeals for the Fourth Circuit, in *Coles v. Peyton*, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968), stated that "[p]erhaps the burden of representing so many persons accused of felonies explains the woefully inadequate services rendered to petitioner." *Id.* at 226. In *United States ex rel. Green v. Rundle*, 434 F.2d 1112 (3d Cir. 1970), the Third Circuit noted that:

The testimony discloses that at the time of the state conviction, trial attorneys for the Voluntary Defender Association were carrying a caseload of from 600 to 800 cases

The perception that overburdened public defenders merely supply a "live body" in court was shared by the National Advisory Commission *Task Force Report on the Courts*:

Indeed, in a substantial number of jurisdictions, it would appear that no more than token representation is being provided for the indigent citizen accused of crime. The failure to allocate adequate resources for the defense of the indigent accused has all too often compelled defender staff attorneys to handle caseloads well in excess of the maximum for which effective representation can be provided¹⁴

The Report called for a fivefold increase in the number of lawyers providing defense services, explaining that "justice itself" was at stake.¹⁵

It is difficult to compare the performance of appointed counsel with those privately retained because assessing the quality of representation entails significant subjectivity. Studies that do attempt such comparisons, therefore, are directed at the end result of the representational process, i.e., what happens to the defendant-client. An Indiana study found that, whereas 70% of the clients of court appointed counsel who went to trial were convicted, only 49% of the defendants who retained private counsel were convicted; 49% of all defendants with court appointed counsel received a prison sentence as contrasted to 23% for defendants with private attorneys.¹⁶ Even though the public defenders had a higher percentage of their clients in jail, they filed motions to reduce bail in only 19% of their cases whereas privately retained counsel filed such motions for 42% of their clients.¹⁷

An analysis of criminal cases in Pennsylvania concluded that as a result of the extra attention private lawyers provided, their clients were much less likely to be convicted or receive jail sentences than were defendants represented by public defenders.¹⁸ The Pennsylvania study found that private attorneys were more aggressive than the public

a year, and often handled 40 to 50 cases a day. This might explain but not mitigate a critical departure from the standard of normal competence.

Id. at 1115. See also Notice of Amendment of Complaint at 17, *Cannon v. Harris*, No. C86-297R (N.D. Ga. filed July 9, 1987) ("Indigent criminal defense services in Georgia function without regard for, and in violation of, these accepted minimum standards [of workload, resources, and training.]").

¹⁴ NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE REPORT ON THE COURTS 77 (1973) [hereinafter TASK FORCE REPORT]. See also L. BANNER & B. NEARY, *THE OTHER FACE OF JUSTICE* 36 (1973) (the ability to provide effective defense services is seriously undermined where defenders are compelled to operate under excessive caseloads).

¹⁵ TASK FORCE REPORT, *supra* note 14, at 77.

¹⁶ Bodensteiner, Bork & Moskowitz, *Unequal Justice Under Law: An Analysis of Indigents in the Criminal Justice System — The Indiana Experience*, 6 W. NEW ENG. L. REV. 263, 296 (1983).

¹⁷ *Id.* at 296-97. At the time of the Indiana study, the defendant had an opportunity for an automatic change of venue from the judge originally assigned to the case. Of the four full-time judges in Lake Superior Court, Criminal Division, two of them sentenced defendants to prison to an appreciably greater extent, and 85% of all venue motions, therefore, were directed at those two judges. Of all the change of venue motions filed, the public defenders filed only 9% and private lawyers filed the remaining 92%. *Id.* at 325-26.

¹⁸ Wettick, *A Study of the Assignment of Judges to Criminal Cases in Allegheny County — The Poor Fare Worse*, 9 DUQ. L. REV. 51, 65 (1970). A study in Los Angeles found that defendants who were represented by public defenders were "less satisfied" with their lawyers than were those with either court appointed or privately retained lawyers. B. Bohne, *The Public Defenders As Advocate: An Organizational Perspective on Public Defender Representation*, Ph.D. Dissertation, University of Wisconsin 41 (1979).

defenders in arranging for their cases to be heard by the most lenient judges.¹⁹ A similar study in Little Rock, Arkansas, found that appointed counsel pled their clients guilty 64.2% of the time whereas privately retained counsel did so in only 41.9% of their cases.²⁰ Defendants with appointed counsel received probation or a suspended sentence in 29.3% of the cases, whereas defendants with private counsel received such dispositions 52.6% of the time.²¹ A Denver study also revealed that public defenders pled their clients guilty in a higher percentage of cases than did private counsel.²² The researchers explained that the public defender's limited resources do not allow them to prepare as many cases for trial.²³

A survey of municipal court judges in San Diego which evaluated defense services provided by public and private counsel found that the private attorneys were judged: (1) to be more effective in negotiating the best possible disposition for their clients when not going to trial; (2) to obtain the best possible sentences for their clients after guilty findings; (3) to have greater apparent client satisfaction with their defense services; and (4) to have "handled their clients" in a more satisfactory manner.²⁴ A 1970 study of the clients of the Denver public defender's office found "widespread skepticism and cynicism about the effectiveness of the defender's office in general."²⁵ Client criticism focused on the defenders' staggering caseloads; a typical complaint was: "I don't have any confidence in the PD [Public Defender] because they are overloaded."²⁶

There currently are widely accepted guidelines for the maximum number of felony cases that a full time public defender can represent adequately. Those numbers, however, are not the result of careful, painstaking analysis and documentation, but rather can be traced to the 1966 *Report of the Conference on Legal Manpower Needs of Criminal Law*. The Report stated: "On the basis of a crude survey of present practice, it is estimated that a public defender . . . can efficiently appear in 150 felony cases per year, although some thought that optimally this figure should be substantially lower."²⁷ This estimate was

¹⁹ Wettick, *supra* note 18, at 61.

²⁰ Gitleman, *The Relative Performance of Appointed and Retained Counsel in Arkansas Felony Cases — An Empirical Study*, 24 ARK. L. REV. 442, 448 (1971).

²¹ *Id.*

²² Note, *Comparison of Public Defenders' and Private Attorneys' Relationships with the Prosecution in the City of Denver*, 50 DEN. L.J. 101, 123 (1973).

²³ *Id.* See also Banfield & Anderson, *Continuances in the Cook County Criminal Courts*, 35 U. CHI. L. REV. 259, 276, 302 (1968) (private lawyers in the Chicago criminal courts went to trial two and a half times as often as did public defenders).

²⁴ HUGHES, HEISS & ASSOCIATES, *A PLAN FOR PROVIDING INDIGENT DEFENSE SERVICES IN SAN DIEGO COUNTY* 70-71 (1977).

²⁵ Wilkerson, *Public Defenders as Their Clients See Them*, 1 AM. J. CRIM. L. 141, 143 (1972). Some judges characterize criticism of the representation provided indigent defendants as mere sour grapes. "You complain about the umpire when you lose the ball game, and you complain about the lawyer when you lose the case," opined a Kansas City trial judge. *Lawyers' Competence at Courtroom Work Stirs Growing Debate*, Wall St. J., Feb. 24, 1975, at 1, col. 1.

²⁶ *Id.* One client of a public defender office in Missouri was so disturbed by the "representation" he was given that he wrote to the presiding judge:

This is to advise you that I will represent myself. I strongly feel that the Public Defender's Office is unable to represent me or anyone else on their present staff situation. Mr. McFadden is representing an unknown amount of indigent clients and he is without the benefit of any assistant public defenders. Such a caseload is detrimental to all clients and the legality is very questionable.

White v. White, 602 F. Supp. 173, 177 (W.D. Mo. 1984).

²⁷ Report of the Conference on Legal Manpower Needs of Criminal Law, *reprinted at* 41 F.R.D.

adopted by the President's Commission on Law Enforcement and the Administration of Justice the following year.²⁸

In 1973, the National Advisory Commission accepted this 150-case figure, and also adopted a 400-case annual maximum for attorneys that exclusively handle misdemeanors.²⁹ NLADA then cited these sources in proposing a similar standard, and in 1984 issued new guidelines and comments for awarding indigent legal defense contracts, once again adopting the 150-case figure while recommending a maximum of 300 misdemeanors per year.³⁰ In August 1985, the ABA House of Delegates passed a resolution urging all jurisdictions to accept the NLADA Guidelines.³¹

Setting any national standard for a maximum caseload is quite difficult. The prosecutor's charging practices vary from locality to locality, as do policies concerning offering reduced charges in order to get pleas (which affects case turnover), the openness of discovery (which affects the amount of investigation and number of motions needed), local court procedures (which affect the time spent in court awaiting action on cases), the quality of investigative and paralegal help the defender's office provides, and the amount of time the defender is required to work on institutional assignments such as arraignments.³²

A recent study by the National Institute of Justice found that only several public defender offices in the country complied with the National Advisory Commission's recommended maximum caseload limits, and that a majority of offices had no standards regarding caseloads.³³ Not even the most able, industrious, and committed attorney can provide effective assistance if she has too high a caseload. Appeals courts frequently have commented, as did the U.S. Court of Appeals for the Fifth Circuit, on the "oppressive caseloads in public defender offices" and the resulting negative impact on the quality of representation.³⁴

389, 393 (1966) (emphasis added). The average caseload, however, of an attorney with the Legal Aid Society in New York City in 1985 was 439. *Seeking Justice: How Public Defenders Deal With the Pressure of the Crowded Courts*, Wall St. J., July 5, 1985, at 1, col. 1.

²⁸ The President's Crime Commission Task Force suggested caseloads of 150 to 200 felonies per year, or 300 to 400 serious misdemeanors, or 1200 "social nuisance" cases per year. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 50 (1967).

²⁹ NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE REPORT: THE COURTS, Standard 13.12 (1973).

³⁰ NATIONAL LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING INDIGENT LEGAL DEFENSE CONTRACTS, Guideline III-6: Allowable Caseloads (1984).

³¹ Annual Summary of Action of the House of Delegates, Reports of Section 17 (1985).

³² In 1973, the public defender office in Washington, D.C. set the caseload standard at thirty felonies per attorney at any one time. With the average "life" of a felony case being approximately four months, this would mean that each public defender handled 110 to 120 cases annually. Of the thirty felonies, it was expected that approximately twenty would be active and the balance would be cases such as those awaiting sentencing after the guilty plea has been entered. LAW ENFORCEMENT ASSISTANCE ADMIN., UNITED STATES DEPT' OF JUSTICE, AN EXEMPLARY PROJECT: THE PUBLIC DEFENDER SERVICE OF THE DISTRICT OF COLUMBIA 14 (1975). An analysis of the effectiveness of public defender offices in seven cities — Chicago, Detroit, St. Louis, Oakland, San Francisco, Philadelphia, and Washington, D.C. — led the researchers to conclude that "a ratio of one lawyer to thirty-five cases per year would be a workable caseload." Wice & Suwak, *Current Realities of Public Defender Programs: A National Survey and Analysis*, 10 CRIM. L. BULL. 161, 182 (1974).

³³ See ABT ASSOCIATES, THE CRIMINAL DEFENSE GROUP, IMPROVING INDIGENT DEFENSE SERVICES IN SOUTH CAROLINA: A COST ESTIMATE 43 (1983).

³⁴ O'Berry v. Wainwright, 546 F.2d 1204, 1221 (5th Cir. 1977); see also United States v. DeCoster,

As the number of clients an attorney represents increases, the number of court appearances does as well. The increased amount of time that counsel must spend *in court* reduces the amount of *out of court* time available for investigation and preparation, and this results in a sharp decrease in quality of representation provided.³⁵ The Eighth Circuit Court of Appeals, in *McQueen v. Swenson*,³⁶ observed that even the most competent lawyer cannot render effective assistance if he has not prepared adequately enough to uncover the facts needed to mount a legitimate defense.³⁷

The caseload issue has plagued the civil side of legal service programs,³⁸ and the following description of that problem and the disastrous results could apply with equal force to criminal defense offices:

There are just too many cases to give any one of them the time and attention it deserves; the individual case is necessarily secondary to the demands of the mass-production processing that envelops the office. It is equally easy to discover the impact on the attorneys . . . good, competent lawyers process people like machines, rarely doing more than placing their problem into a category to be recorded and mechanically dealt with . . . the same attorneys lose their enthusiasm, their creativity, their commitment. People are dealt with and described in statistic terms, in general rather than in particular, and as part of a stream of problems rather than as human beings.³⁹

Courts must ensure equal justice for the indigent, and must not exploit the institutional pressures on public defenders. Even dedicated, conscientious defenders confronting an overwhelming caseload may succumb to the temptation to "get rid of the case" by a quick plea even when it is not in the client's best interests.⁴⁰ The court, in its

624 F.2d 196, 280 n.89 (D.C. Cir. 1976) (en banc) (Bazelon, J., dissenting) ("caseload problems often impair the ability of public defender organizations to provide effective assistance"); *Gaglio v. Ulibarri*, 507 F.2d 721, 722 (9th Cir. 1974) (noting the "heavy caseloads of public defenders' offices"); *Maloney v. Bower*, 113 Ill. 2d 473, 498 N.E.2d 1102, 1104-05 (1986) ("many places of the [Illinois] offices of the public defender are now overburdened and struggle to fulfill their statutory obligations to provide representation for the indigent"); *People v. Johnson*, 26 Cal. 3d 557, 572, 606 P.2d 738, 747, 162 Cal. Rptr. 431, 441 (1980) (commenting on the "assignment of heavy caseloads to understaffed offices").

³⁵ See, e.g., Levin, *Delay in Five Criminal Courts*, 4 J. LEGAL STUD. 83, 93 (1975) (the inadequate staffing of the public defender offices in Chicago, Pittsburgh, Washington, D.C., and Minneapolis leads to each attorney carrying such a caseload that "they try to minimize their time per case").

³⁶ 498 F.2d 207 (8th Cir. 1974).

³⁷ *Id.* at 217 (quoting *Goodwin v. Swenson*, 287 F. Supp. 166, 182-83 (W.D. Mo. 1968)).

³⁸ See, e.g., Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 J. URB. L. 217, 224 (1968-69) (various public defender offices have developed at least nine different methods for limiting caseloads); Bellow, *Reflections on Case-Load Limitations*, 27 LEGAL AID BRIEFCASE 195 (1969) ("Few issues in legal services are more difficult, more emotional, and more ignored or avoided than limitation of caseload."); Carlin, *Legal Representation and Class Justice*, 12 UCLA L. REV. 381, 416 (1965) (a Russell Sage Foundation study revealed large caseloads permitted Legal Aid attorneys to provide only routine, perfunctory services); Bellow, *The Legal Aid Puzzle: Turning Solutions into Problems*, WORKING PAPERS 52, 56 (Spring 1977) (high caseloads have led to routine, cautious, and detached representation and discouraged new lawyers from desiring to work in legal services offices).

³⁹ Bellow, *Reflections of Case-Load Limitations*, *supra* note 38, at 196. The situation in public defender offices in many parts of the country is worsening. Los Angeles, for example, has seen the average caseload per staff public defender increase almost 50% in the 10 years from 1973-1983. *New L.A. Chief Warns of Bad Times*, N.Y. Times, Dec. 12, 1983, at B1, col. 3, at B11, col. 4.

⁴⁰ An investigative team representing the ABA Standing Committee on Legal Aid and Indigent Defendants studied the operations of the San Francisco Public Defender Office in 1980. The

own desire to move its calendar more quickly, must not add to that pressure.⁴¹ Defenders must have sufficient preparation time in order to counter the prosecutor's easy access to the police officer's investigative work. And when the court forces the defender to proceed to trial without having adequately prepared his client's case, it is the counsel who risks disciplinary action by the bar⁴² and a malpractice suit by the client.⁴³

Committee's Report, concluding that the defenders were suffering with excessive caseloads, noted that: "During interviews, public defender attorneys acknowledged that sometimes, due to lack of time, cases that probably should be tried terminate with the client pleading guilty on the advice of counsel." ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING 35 (1982) (emphasis added). A study of defendants in the Connecticut courts concluded that the tremendous caseload carried by public defenders precluded them from being able to spend all the time warranted on each case and led most defendants to plead guilty. J. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 108 (1972). A New York State Special Commission empaneled to study the causes of the inmate rioting at Attica State Prison in 1971 concluded that: "What makes inmates most cynical about their pre-prison experience is the plea bargaining system . . . [A]lmost 90% of the inmates surveyed had been solicited to enter a plea bargain. Most were bitter, believing they did not receive effective legal representation" *Report of the New York State Special Commission in Attica* 30-31 (1972).

⁴¹ See *United States v. Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966) (a judge's primary responsibilities include ensuring that the equal protection of the laws and the basic safeguards of a fair trial are upheld); *Downer v. Dunaway*, 53 F.2d 586, 589 (5th Cir. 1931) ("an accused who is unable by reason of poverty to employ counsel is entitled to be defended in all his rights as fully and to the same extent as is an accused who is able to employ his own counsel to represent him").

⁴² The criminal defense attorney who has not done all that was necessary to properly represent the defendant is subject to discipline for neglecting his client. The American Bar Association Model Code of Professional Responsibility (1981) provides in pertinent part:

Disciplinary Rule 6-101: Failing to Act Competently.

(A) A lawyer shall not:

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

Similarly, the *Model Rules of Professional Conduct*, adopted by the ABA House of Delegates in August 1983, provides as its first rule:

Rule 1.1 Competence:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The public defender's obligations and responsibilities to his client are the same as those of any privately retained lawyer; no "allowances" are made for counsel serving in a legal aid or public defender capacity. Standard 4-3.9 of the ABA *Standards Relating to the Administration of Criminal Justice* (2d ed. 1982) states: "Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program." Justice Powell, in *Polk County v. Dodson*, 454 U.S. 312 (1981), commented regarding this standard: "This view of the public defender's obligations to his clients has been accepted by virtually every court that has considered the issue." *Id.* at 318 n.6 (citing *Espinoza v. Rogers*, 470 F.2d 1174, 1175 (10th Cir. 1972) (per curiam), and *Brown v. Joseph*, 463 F.2d 1046, 1048 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973)). See also ABA Comm. on Professional Ethics, Formal Op. 347 (1981) (a lawyer's mandatory obligations to prepare adequately and to provide competent representation apply to all lawyers, including those in offices that employ counsel to represent the indigent).

⁴³ The Supreme Court, in *Ferri v. Ackerman*, 444 U.S. 193 (1979), held that a defender appointed in federal court to represent an indigent defendant is not entitled to immunity when the former client sues in state court. *Id.* at 205. For state court decisions holding that there is no immunity for public defenders from malpractice actions, see *Spring v. Constantino*, 168 Conn. 563, 576, 362 A.2d 871, 879 (1975); *Donigan v. Finn*, 95 Mich. App. 28, 31, 290 N.W.2d 80, 81 (1980); *Reese v. Danforth*, 486 Pa. 479, 486, 406 A.2d 735, 739 (1979).

II. COURT-INDUCED INEFFECTIVE ASSISTANCE OF COUNSEL: THE COURTS' RESPONSE TO THE OVERBURDENED DEFENDERS' REQUESTS FOR CONTINUANCES

This section will examine in what ways courts have responded to the public defenders' claim that they were unable to proceed because they had not yet prepared or investigated the case adequately.

The Supreme Court clearly enumerated the trial judge's responsibilities toward the defendant in *Glasser v. United States*.⁴⁴ The *Glasser* Court stated: "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused"⁴⁵ Almost thirty years later, in *McMann v. Richardson*,⁴⁶ the Court again emphasized the import of the judge's function: "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."⁴⁷ In *Estelle v. Williams*,⁴⁸ the Court further noted that in order to implement the presumption of innocence, "courts must be alert to factors that may undermine the fairness of the fact-finding process."⁴⁹

The American Bar Association places similar demands on the trial judge in its *Standards for Criminal Justice — Special Functions of the Trial Judge*. Standard 6-1.1 states that the trial judge

has the responsibility for safeguarding both the rights of the accused and the interest of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on her own initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial.⁵⁰

The commentary that accompanies the Standards specifically notes that the courts have an "obligation to supervise the performance of defense counsel to ensure that adequate representation is provided."⁵¹

Given the Supreme Court guidelines and professional mandates regarding the judge's role as a safeguard of a defendant's rights, one would expect trial courts to be sympathetic when confronted with an attorney seeking a continuance to complete preparation of the client's defense. The Supreme Court in *Ungar v. Sarafite*⁵² held that although trial courts do indeed have broad discretion concerning requests for continuances,⁵³ an arbitrary "insistence upon expeditiousness in the face of a justifiable request

⁴⁴ 315 U.S. 60 (1942).

⁴⁵ *Id.* at 71.

⁴⁶ 397 U.S. 759 (1970).

⁴⁷ *Id.* at 771; *see also* *Braxton v. Peyton*, 365 F.2d 563, 564 (4th Cir.), *cert. denied*, 385 U.S. 939 (1966) ("Courts have a duty of vigilance to assure that appointed counsel shall give proper professional service to their indigent clients.").

⁴⁸ 425 U.S. 501 (1976).

⁴⁹ *Id.* at 503.

⁵⁰ ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE — SPECIAL FUNCTIONS OF THE TRIAL JUDGE (1980), Standard 6-1.1.

⁵¹ *Id.* at 471.

⁵² 376 U.S. 575 (1964).

⁵³ *Id.* at 589 (citing *Avery v. Alabama*, 308 U.S. 444, 446 (1940)).

for delay" violates a defendant's constitutional right to effective assistance of counsel.⁵⁴ Moreover, the Eighth Circuit Court of Appeals recently noted that "the denial of a motion for continuance is fundamentally unfair when it results in a denial of a defendant's constitutional rights."⁵⁵

Yet Supreme Court holdings and professional standards may be ideals that are not often achieved in the face of the realities of an extraordinarily overburdened criminal system. A judge confronted with a calendar containing over 100 cases in a single day may have mere minutes to give to each case.⁵⁶ The judge's concern will be to finish with the matter and not even inquire into the quality of representation provided the defendant.⁵⁷ The President's Commission on Law Enforcement and Administration of Justice described the situation thus:⁵⁸

The Commission has been shocked by what it has seen in some lower courts. It has seen cramped and noisy courtrooms, undignified and perfunctory procedures, and badly trained personnel. It has seen dedicated people who are frustrated by huge caseloads, by the lack of opportunity to examine cases carefully, and by the impossibility of devising constructive solutions to the problems of offenders. It has seen assembly line justice.⁵⁹

The Commission specifically noted that "[i]nadequate attention tends to be given to the individual defendant, whether in protecting his rights, sifting the facts at trial, deciding the social risk he presents, or determining how to deal with him after conviction."⁶⁰

Little v. Superior Court illustrates the problem.⁶¹ In *Little*, the public defender told the court that he was totally unprepared to proceed to the preliminary hearing as he had just been assigned the case and was unfamiliar with the facts.⁶² The presiding magistrate denied the request for a continuance and, even after the defender informed the court that he would remain silent and not participate, the magistrate ordered the hearing to

⁵⁴ *Id.*; see also *White v. Ragen*, 324 U.S. 760, 764 (1945) (habeas corpus relief held proper if petitioner could show that he was forced to trial "with such expedition as to deprive him of the effective aid and assistance of counsel").

⁵⁵ *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986).

⁵⁶ A study by the Office of Court Administration in New York found that judges devote an average of 3.4 minutes to each case in the New York City Criminal Court, 4 minutes in Nassau County District Court, and 3 minutes in Suffolk County. *State Court Officials Recommend Creation of 28 More Judgeships*, N.Y. Times, Mar. 2, 1986, at 41, col. 1. The California legislature, in a 1978 amendment to the penal code, noted that "the criminal courts are becoming increasingly congested with resulting adverse consequences to the welfare of the people and the defendant." Amicus Curiae Brief for the Public Defender of Los Angeles County at 6 n.3, *People v. Johnson*, 26 Cal. 3d 557, 606 P.2d 738, 162 Cal. Rptr. 431 (1980) (en banc) (No. A-332323).

⁵⁷ A 1983 Committee Report of the Association of the Bar of the City of New York observed: "Another by-product of congestion itself is that judicial performance is measured by the ability to move cases . . . [T]he intense pressure on judges to keep pace with volume leads sometimes to injustice." CRIMINAL COURTS COMM. OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, SAVING THE CRIMINAL CODE: A REPORT ON THE CASELOAD CRISIS AND ABSENCE OF TRIAL CAPACITY IN THE CRIMINAL COURT OF THE CITY OF NEW YORK 17 (1983).

⁵⁸ PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

⁵⁹ *Id.* at 128.

⁶⁰ *Id.*

⁶¹ 110 Cal. App. 3d 667, 168 Cal. Rptr. 72 (Cal. Ct. App. 1980).

⁶² *Id.* at 670, 168 Cal. Rptr. at 73.

proceed.⁶³ The California Court of Appeal reversed the subsequent conviction, stating that "[w]hen the right of a defendant to representation by counsel is involved, the legislative policy in favor of prompt disposition of criminal cases, however commendable, must not be permitted to transcend any of the basic elements of due process of law."⁶⁴

Yet the trial court's desire to hold and quickly dispose of the preliminary hearing prevails, even at the cost of an inadequately prepared counsel.⁶⁵ If the calendared matter is a revocation of probation hearing, the court will try to push ahead on that as well. In *People v. Fontana*,⁶⁶ the defense counsel, who had recently finished two time-consuming trials, told the court he was not prepared to proceed with the hearing.⁶⁷ The court forged ahead, with counsel participating, but under protest.⁶⁸ The court of appeals reversed the trial court's revocation of the defendant's probation, holding that "when a denial of a continuance impairs the fundamental rights of an accused, the trial court abuses its discretion."⁶⁹

A court's desire to proceed in spite of counsel's protestations that he is unprepared, affects most notably the trial stage.⁷⁰ The trial courts' general antagonism to requests for continuances can be noted in several glaring instances.⁷¹ In *Aldrich v. Wainwright*,⁷² where the defendant faced the death penalty if convicted, the court denied a motion for a continuance even though the public defender told the court: "This case is not prepared. We are not in a position to provide competent legal representation."⁷³ Because of his heavy caseload, the lawyer knew nothing about the prosecution's case or the evidence that the state was likely to introduce at trial.⁷⁴ The defendant was subsequently convicted

⁶³ *Id.*

⁶⁴ *Id.* at 671, 168 Cal. Rptr. at 74 (citing *People v. Maddox*, 67 Cal. 2d 647, 655, 433 P.2d 163, 168-69, 63 Cal. Rptr. 371, 376-77 (1967) (en banc)).

⁶⁵ A study of the Cook County Public Defender Office revealed that the trial courts required a lawyer to proceed with the preliminary hearing on the same day they appointed the lawyer to represent the defendant. Gilboy & Schmidt, *Replacing Lawyers: A Case Study of the Sequential Representation of Criminal Defendants*, 70 J. CRIM. L. & CRIMINOLOGY 1, 13 (1979). The court is not inclined to grant continuances for the defender to conduct out of court investigations or contact any potential witnesses. *Id.* at n.63. Rather, "[a]fter a public defender is appointed to a case, the case is passed by the court for a few minutes so that the lawyer can confer with his client in the lockup or out in the courthouse halls." *Id.* at 13 n.62.

⁶⁶ 139 Cal. App. 3d 326, 188 Cal. Rptr. 612 (Cal. Ct. App. 1982).

⁶⁷ *Id.* at 330, 188 Cal. Rptr. at 614.

⁶⁸ *Id.* Counsel requested a one week continuance but the court granted only a 45 minute recess. *Id.* at 330-31, 188 Cal. Rptr. at 614.

⁶⁹ *Id.* at 333, 188 Cal. Rptr. at 616 (citing *People v. Locklar*, 84 Cal. App. 3d 224, 230, 148 Cal. Rptr. 322, 325 (Cal. Ct. App. 1978)). See also *In re Cassandra R.*, 139 Cal. App. 3d 670, 188 Cal. Rptr. 758 (1983) (juvenile defendant denied effective assistance when the juvenile court ordered counsel to proceed when counsel was unprepared to do so).

⁷⁰ See, e.g., Harris, *Annals of Law — Criminal Court*, NEW YORKER, Apr. 14, 1973, at 45, 46 (the Chief Justice presiding over the Boston Criminal Court consistently refused to grant motions made by the public defenders asking for more than a few minutes time to consult with their clients before commencing trial).

⁷¹ Courts frequently oppose defense motions for continuances even when the prosecuting attorneys do not. See, e.g., *United States v. Rodgers*, 755 F.2d 533, 539 (7th Cir. 1985); *Alford v. United States*, 709 F.2d 418, 424 (5th Cir. 1983).

⁷² 777 F.2d 630 (11th Cir. 1985).

⁷³ *Id.* at 643 (Johnson, J., dissenting).

⁷⁴ *Id.* (Johnson, J., dissenting).

and the court imposed the death sentence.⁷⁵ In *United States v. Ruiz*,⁷⁶ the defendant's lawyer was arrested, as the first step of extradition proceedings against him, during the defendant's trial.⁷⁷ Upon his release, the lawyer asked for a continuance because he was in a state of "emotional shambles" and could not possibly proceed.⁷⁸ The court refused to grant the continuance or to permit the lawyer to withdraw as counsel.⁷⁹

The attorney in *Stoehr v. State*⁸⁰ had filed motion papers with the court requesting a continuance because he had not completed the necessary pretrial discovery.⁸¹ The court, anxious to proceed, issued a writ of body attachment which ordered the sheriff to seize the lawyer and bring him to court.⁸² The judge denied the motion for a continuance and ordered the trial to begin.⁸³ In *United States v. Ploeger*,⁸⁴ the trial court denied counsel's request for a continuance and ordered the trial to begin on the same day that counsel first appeared on the case.⁸⁵ The attorney told the court:

I have never seen the indictment, I have not done what I feel is necessary relative to the investigation on the part of my client I know that the [c]ourt's time is of great value, but I do feel personally that if this case should go to trial today, . . . I would not be in a position to do the job that is desired of me and required of me under the law inasmuch as I am not fully prepared to proceed.⁸⁶

The next day the jury returned its verdict and the court immediately sentenced the defendant to twenty years in prison.⁸⁷

The right to effective assistance of counsel encompasses the right to have one's counsel adequately prepare and investigate the case.⁸⁸ The rationale for requiring ap-

⁷⁵ *Id.* at 639 (Johnson, J., dissenting). In another murder trial in which the defendant received the death penalty upon conviction, the trial judge refused to grant the defense request for a continuance even after counsel stated that he was incompetent to proceed because of three personal crises that occurred within the three months before the trial was scheduled to begin. *Dillon v. Duckworth*, 751 F.2d 895, 897 (7th Cir. 1984). The defense counsel asserted that his father's emergency heart surgery, his brother's motorcycle accident and resulting paralysis, and his wife obtaining a divorce against his wishes had prevented him from preparing properly. *Id.* Counsel had spent less than four hours with the defendant in a case that the state admitted involved "an immense amount of evidence . . . to go through." *Id.* at 900. The Seventh Circuit granted the habeas corpus petition, holding that the trial judge's arbitrary denial of the continuance request abrogated the defendant's right to effective assistance of counsel. *Id.* at 898-99.

⁷⁶ 533 F.2d 939 (5th Cir.) (per curiam), *cert. denied*, 429 U.S. 1002 (1976).

⁷⁷ *Id.* at 940.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ 263 Ind. 208, 328 N.E.2d 422 (1975).

⁸¹ *Id.* at 213, 328 N.E.2d at 426.

⁸² *Id.*

⁸³ *Id.* A more extreme example is presented in *Creed v. United States*, 156 A.2d 676 (D.C. 1959), where the trial judge refused to grant a continuance and ordered the trial to begin even though the defendant had been arrested that same day, less than eleven hours earlier. When the lawyer claimed he had had no time to investigate the charge, prepare for trial, or consult with his client, the judge responded: "Go into the hallway and discuss the case with the defendant." *Id.* at 677-78.

⁸⁴ 428 F.2d 1204 (6th Cir. 1970).

⁸⁵ *Id.* at 1205.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Judges are fully aware of the extreme importance of preparation. A survey of judges con-

pointment of counsel at an early stage of the proceedings⁸⁹ is to ensure that the attorney has adequate time to prepare the client's defense.⁹⁰ As a practical matter, however, the harm to the defendant is the same whether the lawyer is unprepared because he was appointed at the last moment, or because even though appointed promptly, he has not had time to prepare because of the demands of his other cases.⁹¹

The principle that a defendant facing possible loss of liberty is entitled to a counselor who is actually prepared, not just to counsel who has been given an adequate number of days to prepare,⁹² is not accepted by many courts. For example, a Missouri appellate court specifically held that "as far as a continuance on the ground that counsel is not adequately prepared for trial is concerned, that in itself offers no grounds if counsel had adequate *opportunity* to prepare."⁹³

ducted for the American Bar Foundation found that a majority of judges ranked preparation as the most important factor determining a trial advocate's competence. Maddi, *Trial Advocacy Competence: The Judicial Perspective*, 1978 AM. B. FOUND. RES. J. 105, 144. Commentary to Standard 11-1.1 of the A.B.A. Standards for Criminal Justice (1980 and Supp. 1986) emphasizes the necessity of investigation and preparation:

The realist knows that effectiveness at trial depends upon meticulous evaluation and preparation of the evidence to be presented at trial. When the necessary evaluation and preparation are foreclosed by lack of information, the trial becomes a pursuit of truth and justice only by chance rather than by design and generates a diminished respect for the criminal justice system, the judiciary and the attorney participants.

Id. See also *Powell v. Alabama*, 287 U.S. 45, 57 (1932) (sixth amendment protections extend to the lawyer's pretrial performance when consultation, thoroughgoing investigation, and preparation are vitally important); *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986) ("[i]nvestigation is an essential component of the adversary process"); *Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir. 1984) ("[e]ffective representation hinges on adequate investigation and pre-trial preparation"); *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982) (effective representation includes the independent duty to investigate and prepare), *cert. denied*, 460 U.S. 1098 (1983).

⁸⁹ See *Chambers v. Maroney*, 399 U.S. 42, 54 (1970) ("Unquestionably, the courts should make every effort to effect early appointments of counsel in all cases."); see also *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.) ("[c]ounsel for an indigent defendant should be appointed promptly"), *cert. denied*, 393 U.S. 849 (1968). Some courts have instituted a per se rule that a rebuttable presumption of ineffective assistance exists whenever counsel has been appointed so close to the beginning of trial that he has not had sufficient time to prepare. See, e.g., *Garland v. Cox*, 472 F.2d 875, 879 (4th Cir. 1973).

⁹⁰ The Supreme Court, in *Avery v. Alabama*, 308 U.S. 444, 446 (1940), recognized that "the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." (citing *Powell v. Alabama*, 287 U.S. 45 (1932); *Moore v. Dempsey*, 261 U.S. 86 (1923)). See also *Reliford v. State*, 140 Ga. 777, 778, 79 S.E. 1128, 1129 (1913), where the Georgia Supreme Court interpreted the state constitutional requirement of "benefit of counsel" to mean that counsel must have a reasonable amount of time to prepare.

⁹¹ One court, when it denied an appeal claiming ineffective assistance due to the counsel's lack of preparation, inappropriately placed the responsibility on the *defendant* for the public defender's lack of preparation. See *State v. Settle*, 127 N.H. 756, 512 A.2d 1083 (1986). The New Hampshire Supreme Court affirmed the trial court's refusal to grant a significant continuance so that the lawyer could prepare, stating that it was the defendant who "failed to take any meaningful steps to contact the public defender or to ensure that his defense was prepared." *Id.* at 757, 512 A.2d 1083.

⁹² One exception to this may be when the defendant's willful failure to cooperate with his counsel thwarts all of counsel's attempts to prepare a defense. See *People v. Solomon*, 24 Ill. 2d 586, 590, 182 N.E.2d 736, 738 (1962) (because the defendant refused to cooperate with counsel, he cannot complain that the court's failure to grant a continuance led to a denial of a fair trial).

⁹³ *State v. Belleville*, 362 S.W.2d 77, 80 (Mo. Ct. App. 1962) (emphasis in original) (citing *State*

All too often the trial court insists on ordering to trial even the attorney who claims to be "totally unprepared to begin" the trial.⁹⁴ Perhaps one explanation for this is that courts tend to minimize the amount of work required to prepare a case for trial. In one case, defense counsel was appointed to represent, just two days before jury selection, a defendant who faced an eleven count indictment.⁹⁵ Testimony at trial included a civilian informant, an undercover agent with the United States Drug Enforcement Administration, and tape recordings of numerous phone conversations.⁹⁶ Even under such circumstances, the Seventh Circuit Court of Appeals found no abuse of discretion in the trial court's failure to grant a continuance because the lawyer's "primary tasks were to read and familiarize himself with the case file, and to prepare notes for trial."⁹⁷

The First Circuit Court of Appeals, in *Ranstrom v. Robbins*,⁹⁸ also minimized the importance of an attorney having time available for thorough preparation. The court noted that "[w]hile an experienced advocate would seldom wish to ready even a simple case for trial in a few hours, he might nevertheless — as many do — perform most competently."⁹⁹ Perhaps the prize for the most cavalier approach to this matter goes to the Seventh Circuit for its response to an ineffective assistance claim which asserted that the lawyer did not prepare properly for the case due to the demands of his other cases. In *Matthews v. United States*,¹⁰⁰ the court declared: "[W]e take *judicial notice* of the fact that those who are the busiest and under the greatest pressure often perform with the greatest skill, diligence and effectiveness."¹⁰¹

In most states, when the court appoints counsel to represent an indigent defendant, the attorney must submit a voucher requesting payment for the time he has spent on the case. Trial courts, however, may refuse to authorize payment for the out-of-court time that the counsel claims to have spent investigating and preparing the case, finding that such work was not needed. Obviously, such court action discourages attorneys who represent the indigent from engaging in extensive preparation. When the attorney who is refused reimbursement appeals, the appellate courts generally support the trial court's determination denying compensation.¹⁰²

v. Clary, 350 S.W.2d 809 (Mo. 1961); *State v. LeBeau*, 306 S.W.2d 482 (Mo. 1957)). In *Aldrich v. Wainwright*, 777 F.2d 630, 633 (11th Cir. 1985), the trial court, without finding that the public defender was *in fact* prepared, denied the request for a continuance because it held that counsel had had *ample time* to prepare. In that capital case in which the convicted defendant received the death penalty, the attorney told the court that due to the demands of the heavy workload, he was "totally unprepared" for trial. *Id.*

⁹⁴ *State v. Harvey*, 692 S.W.2d 290, 291 (Mo. 1985) (en banc) (counsel explained that he was unprepared to proceed because of his involvement in a just completed murder case). The Court of Appeals for the Eighth Circuit has recently emphasized the impropriety of forcing to trial an unprepared lawyer. In *Wade v. Armontrout*, the Eighth Circuit declared:

[T]he denial of a motion for continuance is fundamentally unfair when it results in a denial of a defendant's constitutional rights. Here, it appears that the denial of the motion may have denied [the defendant] his right to a fair trial since his attorney failed to adequately investigate the case and this may have prejudiced his defense.

798 F.2d 304, 307 (8th Cir. 1986).

⁹⁵ *United States v. Rodgers*, 755 F.2d 533, 538 (7th Cir. 1985).

⁹⁶ *Id.*

⁹⁷ *Id.* at 540.

⁹⁸ 440 F.2d 1251 (1st Cir.), *cert. denied*, 404 U.S. 863 (1971).

⁹⁹ *Id.* at 1253-54.

¹⁰⁰ 518 F.2d 1245, 1246 (7th Cir. 1975).

¹⁰¹ *Id.* at 1246 (emphasis added).

¹⁰² See, e.g., *Hulse v. Wifvat*, 306 N.W.2d 707, 710 (Iowa 1981) (trial court's failure to approve

The defense lawyer's duty to investigate the facts and circumstances of the client's case is well established.¹⁰³ Indeed, courts have recognized that monies must be provided for investigative assistance to indigent defendants in order to assure the constitutional guarantee to an effective defense.¹⁰⁴ When a court appointed investigator fails to provide "reasonably competent investigative assistance," that failure could constitute a violation of the defendant's sixth amendment right to effective assistance of counsel.¹⁰⁵

Yet inequities persist in the quality of representation and case preparation provided wealthy as contrasted to indigent defendants. The Texas Court of Appeals decision in *Hudson v. State* illustrates that courts may close their eyes and pretend, or even insist, that such is not the case.¹⁰⁶ The court appointed counsel representing the indigent defendant reported to the appellate court reviewing the conviction: "I very sadly suspect that had I been *retained* at my normal rate, I'd have spent a great deal more time in preparation."¹⁰⁷ The appellate court nevertheless denied the appeal,¹⁰⁸ and seemed more concerned with counsel's inappropriate candor than with the prejudice the defendant suffered from the poor preparation of the case. The court stated: "We need not elaborate the damage to our system of justice caused by such assertions. Instead, we invite these assertions to the attention of the appointing judge for appropriate disciplinary action."¹⁰⁹

Immediately upon appointment to represent an indigent defendant, counsel may face the clear message that pleas, rather than preparation, are the goal. In Arkansas, all appointed counsel for indigents are presented with instructions from the state circuit courts that pleas are "recognized as an indispensable process in the orderly and efficient transaction of business in the criminal courts." Furthermore, the appointed counsel

reimbursement for counsel's many hours of out of court research and preparation did not constitute abuse of discretion); *In re Condemnation of Lands*, 261 Iowa 146, 153, 153 N.W.2d 706, 710 (1967) (counsel's view of the amount of preparation required to satisfy his own professional ethics does not bind court); *Conway v. Sauk County*, 19 Wis. 2d 599, 604, 120 N.W.2d 671, 675 (1963) (the ultimate responsibility for deciding what investigation and preparation was required rests on the court which is not bound by attorney's determination).

¹⁰³ See Standard 4-4.1 of the ABA Standards Relating to the Administration of Criminal Justice:

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of a conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities.

Id. See also *Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"); *Code v. Montgomery*, 799 F.2d 1481, 1484 (11th Cir. 1986) (counsel's failure to investigate deprived defendant of a fair trial); *House v. Balkcom*, 725 F.2d 608, 617 (11th Cir. 1984) (counsel's failure to investigate found "unconscionable" and violated defendant's sixth amendment rights); *United States v. DeCoster*, 487 F.2d 1197, 1204 (D.C. Cir. 1973) (counsel is obligated to "conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed").

¹⁰⁴ See *Smith v. Enomoto*, 615 F.2d 1251, 1252 (9th Cir. 1980); *Mason v. Arizona*, 504 F.2d 1345, 1351 (9th Cir. 1974) (citations omitted), *cert. denied*, 420 U.S. 936 (1975).

¹⁰⁵ *Subbs v. Thomas*, 590 F. Supp. 94, 100 (S.D.N.Y. 1984).

¹⁰⁶ 675 S.W.2d 320 (Tex. Ct. App. 1984).

¹⁰⁷ *Id.* at 322 (emphasis in original). Counsel added: "I know that if [appellant] had been wealthy and in a position to expend unlimited funds for fees and expenses, I'd have done much more by way of preparation." *Id.* at 323.

¹⁰⁸ *Id.* at 322.

¹⁰⁹ *Id.* at 323 n.1.

"should as soon as is practicable after the appointment, and in the proper case, contact the prosecuting attorney's office and negotiate in good faith for a plea arrangement and settlement."¹¹⁰ Whereas clearly a plea entered *because* counsel is unprepared for trial would be involuntary,¹¹¹ on appeal it is most difficult for the defendant to prove that he entered the plea solely because he feared going to trial with an unprepared attorney.

III. THE NEW SUPREME COURT STANDARD OF INEFFECTIVE ASSISTANCE FOR PLEAS OF GUILTY: THE IMPACT UPON INDIGENT DEFENDANTS

Perhaps the crucial reason appellate review is not an answer for defendants "assisted" by ineffective counsel¹¹² is that most criminal cases are disposed of by plea¹¹³ and are never appealed. The defendant who had no trial must, on appeal, rely upon a record that is unlikely to reveal counsel's failings. This record contains no accounting of the witnesses with whom the attorney should have conferred, the relevant legal research that was not done, or the investigations not conducted. The record typically reflects little more than the defendant's waiver of his right to trial,¹¹⁴ his admission of the factual allegations supporting the crime charged,¹¹⁵ that the plea was entered voluntarily,¹¹⁶ and

¹¹⁰ Instructions of the Arkansas circuit courts to counsel appointed to represent indigent defendants, section on negotiated pleas, reprinted in Note, *Criminal Law — Effect of Plea Bargaining on Withdrawal of Guilty Plea After Sentencing*, 23 ARK. L. REV. 281, 285 n.26 (1969) (emphasis added).

¹¹¹ *United States v. Moore*, 599 F.2d 310, 313 (9th Cir. 1979) (citing *Colson v. Smith*, 438 F.2d 1075 (5th Cir. 1971)).

¹¹² For a discussion of the obstacles to proving an ineffective assistance claim and the reluctance of courts to reverse convictions on such grounds, see 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, 632-38 (1986).

¹¹³ The Supreme Court, in *Brady v. United States*, 397 U.S. 742 (1970), upheld the constitutionality of the plea bargaining process. *Id.* at 753. The Court has recognized plea bargaining as an indispensable part of the criminal justice system. See *Blackledge v. Allison*, 431 U.S. 63, 71 (1977); *Santobello v. New York*, 404 U.S. 257, 260-61 (1971). Plea bargaining is now an accepted procedure and is regulated by the Federal Rules of Criminal Procedure (Rule 11), the Model Code of Pre-Arrestment Procedure (ALI, Model Code of Pre-Arrestment Procedure § 350.3), the Uniform Rules of Criminal Procedure (NCCUSL, Uniform Rules of Criminal Procedure 443), and the American Bar Association Standards Relating to the Administration of Criminal Justice (Chapter 14, Pleas of Guilty). In the Criminal Court of New York City, which in 1985 disposed of over 266,500 cases, only .5% of the dispositions resulted from trial verdicts. OFFICE OF COURT ADMIN., STATE OF NEW YORK, EIGHTH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 2-8 (1986). In California, during fiscal year 1983-84, 81% of all cases in the superior courts resulted in guilty pleas. JUDICIAL COUNCIL OF CAL., 1985 ANNUAL REPORT 119 (1984).

¹¹⁴ See *Boykin v. Alabama*, 395 U.S. 238 (1969).

¹¹⁵ Courts typically require the defendant to admit to the specific elements of the crime to which he is pleading. See AMERICAN BAR ASS'N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY, § 1.6 (even when the defendant indicates the desire to plead guilty, "the court should not enter a plea judgment upon such plea without making such inquiry as may satisfy it that there is a factual basis for the plea"); *United States ex rel. Dunn. v. Casscles*, 494 F.2d 397 (2d Cir. 1974) (a plea taken before the court determines whether a basis in fact exists is unconstitutional). But see *North Carolina v. Alford*, 400 U.S. 25 (1970) (plea was properly taken even though the defendant refused to admit to the facts of the crime with which he was charged).

¹¹⁶ See *Brady v. United States*, 397 U.S. 742, 750 (1970). In *Shelton v. United States*, 246 F.2d 571, 572 n.2 (1957), the Fifth Circuit declared that a plea is voluntary if it is not "induced by threats

that the defendant knew the elements of the crime to which he pled.¹¹⁷

The Supreme Court held in *Tollett v. Henderson*¹¹⁸ that once a defendant admits in court that he is in fact guilty of the crime with which he is charged, he may not subsequently raise claims alleging deprivation of constitutional or procedural rights that occurred prior to his guilty plea.¹¹⁹ Therefore, the defendant, by pleading guilty, will not be able to claim an illegal search or a coerced confession,¹²⁰ challenge the composition of the grand jury that indicted him,¹²¹ or challenge the sufficiency of the indictment on which he is charged.¹²²

The primary basis for an appeal after a guilty plea is a claim that counsel's incompetence interfered with the plea's truly "voluntary" and "knowing" nature.¹²³ If the defendant seeks to obtain collateral relief through a habeas corpus petition, the court could grant a hearing to afford the defendant-petitioner opportunity to go beyond the record. The defendant, however, has the burden of convincing the district court that the hearing is needed, and this burden is a very difficult one to meet when the defendant has pled guilty.

The burden has become even greater since the Supreme Court's decision in *Hill v. Lockhart*.¹²⁴ In *Lockhart*, the defendant's lawyer misinformed him that if he pled guilty he would become eligible for parole after serving one third of his sentence instead of correctly informing the defendant that one half of the sentence must be served before parole eligibility. The Court held that the district court did not err in declining to hold a hearing on the ineffective assistance of counsel claim.¹²⁵

It is hard to imagine counsel being more ineffective in the plea situation than, as in *Lockhart*, incorrectly informing the defendant about the period of mandatory incarcer-

(or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)."

¹¹⁷ See *Henderson v. Morgan*, 426 U.S. 637 (1976). The Appendix to Chapter 14, *Pleas of Guilty* of the ABA Standard Relating to the Administration of Criminal Justice, provides "Suggested Questions for the Court to Ask in Taking a Guilty Plea," which include the following:

1. Have you fully discussed the case with your attorney and explained to him (or her) everything you know about it?
2. Has your attorney discussed with you the defense that might be available to the charge(s) and has he (or she) given you the benefit of his (or her) advice?
3. Are you satisfied with Mr. [or Ms.]'s representation of you in this matter?

¹¹⁸ 411 U.S. 258 (1973).

¹¹⁹ *Id.*

¹²⁰ *Parker v. North Carolina*, 397 U.S. 790 (1970).

¹²¹ *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966).

¹²² *Russell v. United States*, 369 U.S. 749 (1962). But see *Haynes v. United States*, 390 U.S. 85 (1968) (Court found that defendant's challenge to the constitutionality of the statute to which he pled guilty was properly raised on appeal); *Menna v. New York*, 423 U.S. 61 (1975) (per curiam) (double jeopardy claim may be raised on appeal after a guilty plea).

¹²³ *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). For the plea to be "knowingly" entered, the defendant must understand the nature of the charges against him and the maximum sentence he would face if convicted; he must understand that by pleading guilty he is waiving his right to a trial by jury, his right to confront any witness that testifies against him, his right to subpoena witnesses to testify for him, his right to require the prosecution to prove his guilt beyond a reasonable doubt at a trial in which he cannot be compelled to testify.

¹²⁴ 106 S. Ct. 366 (1985).

¹²⁵ *Id.* at 371.

ation that would result from his guilty plea.¹²⁶ Justification for tolerating plea bargaining relies on the assumption that a knowledgeable defendant with the advice of competent counsel rationally compares the punishment he would receive if he pleads guilty with that he would be likely to receive if convicted.

An attorney who has assured his client that he would be eligible for release from prison at a time when he would in fact not yet be eligible, has prevented his client from making an informed and intelligent assessment of the consequences of the plea. The ABA's *Standards Relating to the Administration of Criminal Justice* instruct the court that it should not accept a guilty plea without first determining that the defendant understands the minimum amount of time that he must serve.¹²⁷

The Supreme Court had, in fact, stated in *Kercheval v. United States*¹²⁸ that in order to be valid a guilty plea must be "made voluntarily after proper advice and with *full understanding of the consequences*."¹²⁹ The Court added that a plea must be vacated if it was "unfairly obtained or given through influence."¹³⁰ Yet the *Lockhart* Court established a new standard, and one that will most certainly make it more difficult for an indigent defendant, represented by a public defender with too little time to provide proper counsel, to seek redress.

Before *Lockhart*, the standard for assessing counsel's effectiveness when entering a guilty plea for the client was that enunciated in *McMann v. Richardson*.¹³¹ The plea's validity depended on whether the counsel's representation "was within the range of competence demanded of attorneys in criminal cases."¹³² One would certainly expect attorneys to be sufficiently competent so as to inform correctly their clients of the amount of prison time they would serve if they enter a plea.¹³³ In *Lockhart*, the Court imposed

¹²⁶ See *United States ex rel. McGrath v. LaVallee*, 319 F.2d 308, 314 (2d Cir. 1963) ("a fair description of the consequences attendant upon the prisoner's choice of plea . . . [is] manifestly essential to an informed decision on the part of the prisoner").

¹²⁷ STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Standard 14-1.4(ii) (2d ed. 1982).

¹²⁸ 274 U.S. 220 (1927).

¹²⁹ *Id.* at 223 (emphasis added); see also *United States v. Lester*, 247 F.2d 496, 501 (2d Cir. 1957) (a plea is not "voluntary" unless the defendant is fully aware of the consequences of the plea).

¹³⁰ *Kercheval*, 274 U.S. at 224.

¹³¹ 397 U.S. 759 (1970).

¹³² *Id.* at 771. Such vague, generalized standards have prevailed in the federal appellate court decisions evaluating the overall representation provided by counsel. See, e.g., *Cooper v. Fitzharris*, 586 F.2d 1325, 1330 (9th Cir. 1978) (representation should be that of a "reasonably competent attorney acting as a diligent conscientious advocate"); *Marzullo v. Maryland*, 561 F.2d 540, 543 (4th Cir. 1977) (lawyers should demonstrate "range of competence demanded of attorneys in criminal cases"); *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977) (lawyers are required to "exercise the customary skill and diligence that a reasonable competent attorney would perform under similar circumstances").

¹³³ Misinforming one's client in a plea setting has been found to constitute ineffective assistance of counsel. See, e.g., *Cooks v. United States*, 461 F.2d 530 (5th Cir. 1972) (attorney told his client that if he did not plead he might be sentenced on conviction to a term of sixty years, but the maximum sentence allowed was only ten years); *Mosher v. LaVallee*, 351 F. Supp. 1101 (S.D.N.Y. 1973), *aff'd*, 491 F.2d 1346 (2d Cir.), *cert. denied*, 416 U.S. 906 (1974) (counsel told defendant that the judge had promised to sentence him to a maximum term of sixteen years, but the judge made no such promise and imposed a significantly harsher sentence); see also *Bell v. Alabama*, 367 F.2d 243, 247 (5th Cir. 1966), *cert. denied*, 386 U.S. 916 (1967) (counsel's advice to plead guilty without a full explanation of the plea's consequences requires reversal and is ineffective assistance per se).

the additional requirement that the defendant must show a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.¹³⁴

Justice Rehnquist's opinion of the Court makes clear that one intention of the *Lockhart* decision was to give notice to lower courts to be wary of finding ineffective assistance of counsel in plea bargaining.¹³⁵ Justice Rehnquist stated: "We believe that requiring a showing of 'prejudice' from defendants who seek to challenge the violation of their guilty pleas on the ground of ineffective assistance of counsel *will serve the fundamental interest in the finality of guilty pleas . . .*"¹³⁶ The Court also indicated that because the vast majority of criminal convictions result from pleas, the need for finality is especially great.¹³⁷

The *Lockhart* standard is an extraordinarily harsh one; its unfairness is barely tempered by the Court's desire for finality. The primary objective of our criminal justice system must be justice, not finality and judicial economy. It does not seem appropriate to tell the defendant who received incorrect information from an attorney so pressured with cases in a system "in which the need simply to dispose of cases has overshadowed everything else"¹³⁸ that he has no recourse because "of the fundamental interest in the finality of guilty pleas."¹³⁹

Public defenders often use plea bargaining not because it is in their client's best interests, but because it has become "a necessary technique to deal with an overwhelming caseload."¹⁴⁰ Public defender office managers often encourage plea bargaining as a means

¹³⁴ *Hill v. Lockhart*, 106 S. Ct. 366, 370 (1985). In *Hill*, the Court applied the *Strickland* standard for determining ineffective assistance of counsel, which it articulated a year earlier, to the plea bargaining context. For a discussion of *Strickland*, see *infra* notes 221-24 and accompanying text.

¹³⁵ For an example of a district court relying on *Lockhart* to find that counsel did not provide ineffective assistance even though counsel failed to inform the defendant of collateral consequences of the plea, see *Hartman v. Lack*, 625 F. Supp. 786, 788-91 (W.D. Tenn. 1986).

¹³⁶ *Hill v. Lockhart*, 106 S. Ct. at 370 (emphasis added). Yet the Court twenty years earlier, in *Fay v. Noia*, 372 U.S. 391 (1963), and *Townsend v. Sain*, 372 U.S. 293 (1963), chose to emphasize the rights of the individual over the need for "finality." The *Fay* Court stated that "conventional notions of finality . . . cannot be permitted to defeat . . . constitutional rights of personal liberty." 372 U.S. at 424.

¹³⁷ *Hill v. Lockhart*, 106 S. Ct. at 370. The Court cited with approval its earlier decision in *United States v. Timmerreck*, 441 U.S. 780 (1979), which in turn quoted the dissenting opinion of then Circuit Judge Stevens in *United States v. Smith*, 440 F.2d 521, 528-29 (7th Cir. 1971) (Stevens, J., dissenting):

Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.

Lockhart, 106 S. Ct. at 370.

¹³⁸ CRIMINAL COURTS COMM. OF THE ASSOC. OF THE BAR OF THE CITY OF NEW YORK, SAVING THE CRIMINAL CODE: A REPORT ON THE CASELOAD CRISIS AND ABSENCE OF TRIAL CAPACITY IN THE CRIMINAL COURT OF THE CITY OF NEW YORK 2 (1983).

¹³⁹ *Hill v. Lockhart*, 106 S. Ct. at 370.

¹⁴⁰ S. BING & S. ROSENFELD, THE QUALITY OF JUSTICE IN THE LOWER CRIMINAL COURTS OF METROPOLITAN BOSTON 32 (1970) (describing the use of plea bargaining by the Massachusetts

of reducing caseload. Indeed, plea bargaining has become critical to the very survival of many public defender offices.¹⁴¹ Clients of such defender offices may be all too aware of the pressure on their attorneys to plead them guilty.¹⁴²

Given the sparseness of the record when a plea is taken, proving prejudice to courts that desire finality will be most difficult. The Court in *Lockhart* uses the example of the lawyer who fails to inform his client about a possible affirmative defense in order to illustrate how the prejudice test would operate: "[T]he resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial."¹⁴³ It is, however, virtually impossible for a state appeals court, relying

Defenders Committee). A Michigan study revealed that appointed counsel pled their clients guilty more than twice as frequently as did privately retained counsel. See Levine, *Preventing Defense Counsel Error — An Analysis of Some Ineffective Assistance of Counsel Claims and Their Implications for Professional Regulation*, 15 U. Tol. L. Rev. 1275, 1325 n.208 (1984). An analysis of a Louisiana public defender office revealed that, when first meeting with their clients, defenders conducted only a perfunctory interview which elicited no personal data from the defendant and failed to probe into the facts. AMERICAN UNIV. CRIMINAL COURT TECHNICAL ASSISTANCE PROJECT, AN EVALUATION OF INDIGENT CRIMINAL DEFENSE SYSTEMS IN THE UNITED STATES FINAL REPORT 408 (1976). "The interview was simply geared toward inducing the defendant to plead guilty, and this seems to be the general spirit of the . . . office." *Id.* See also D. OAKS & W. LEHMAN, A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT 158 (1968) (public defenders plead their clients guilty more often and take fewer of their cases to trial than do private attorneys); R. SPANGENBERG & P. SMITH, EVALUATION OF PARTIAL STATE FUNDING FOR PUBLIC DEFENDER SERVICES IN INDIANA 27 (1986) (in many counties insufficient funding and substantial caseloads lead counsel to plead their clients guilty rather than take cases to trial); L. SILVERSTEIN, DEFENSE OF THE POOR 55-56 (1965).

¹⁴¹ A study of 399 defender agencies revealed that as attorney caseloads increased, so did the rate of guilty pleas. NATIONAL LEGAL AID AND DEFENDER ASSOC., INDIGENT DEFENSE SYSTEMS ANALYSIS (1978), noted in AMERICAN BAR ASSOC. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING app. F-1 (1982). The situation in the Denver Public Defender Office was described as follows: "The overflowing dockets make it necessary that most of [the defenders'] cases be disposed of as quickly as possible." Note, *Comparison of Public Defenders' and Private Attorneys' Relationships with the Prosecution in the City of Denver*, 50 DEN. L.J. 101, 123 (1973).

¹⁴² A study of public defender clients in Denver concluded that pressure by their lawyers to plead guilty was a frequent complaint, and was responsible for clients failing to have confidence in their defenders. A typical client comment was: "The first thing that comes to the public defender's mind is to cop out." Wilkerson, *Public Defenders as Their Clients See Them*, 1 AM. J. CRIM. L. 141, 143-44 (1972). In *United States v. Tateo*, 214 F. Supp. 560, 563 (1963), the defense counsel urged his client to plead guilty by saying, "I can't gamble with your life. We can't go on with the trial; I won't let you."

¹⁴³ *Hill v. Lockhart*, 106 S. Ct. 366, 371 (1985) (citing *Evans v. Meyer*, 742 F.2d 371, 375 (7th Cir. 1984)). The test set out by the Court is not one that would satisfy a defendant's claim of "If I had known that, I would not have pled guilty." The Court elaborated:

In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is failure to investigate or discover potentially exculpatory evidence, the determination whether the evidence "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment in turn will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial . . . [T]hese predictions of the outcome at a possible trial, where necessary,

on the plea record, to evaluate "likely success." Even if the district court decides to grant the defendant's petition for a hearing, the court's conclusion is likely to be that cited by Justice Rehnquist as part of the Court's affirmative defense illustration: "It is inconceivable to us . . . that [the defendant] would have gone to trial . . . or that if he had done so . . . would have been acquitted."¹⁴⁴

The requirement that in order for a defendant to obtain relief from a plea in which he was not afforded the effective assistance of counsel he must show that he would have gone to trial and perhaps have been acquitted, overlooks the many serious ways a defendant suffers from inadequate counsel. Because true plea negotiation often is as adversarial as a trial itself, the lawyer must actively attempt to achieve the most advantageous plea bargain for his client.

The ABA Criminal Justice Standards clearly instruct the attorney that "[u]nder no circumstances should a lawyer recommend to a defendant acceptance of a plea unless a full investigation and study of the case has been completed, including analysis of controlling law and the evidence likely to be introduced at trial."¹⁴⁵ A lawyer acting in a competent manner, through speaking to both defense and prosecution witnesses, might well discover weaknesses in the prosecution's case that could lead to a reduction in the plea offered.

A thorough search for facts may be crucial to the lawyer's ability to present the most favorable information about the defendant and the charge to both the prosecutor and the court.¹⁴⁶ Yet the unfortunate defendant, assigned an overburdened public defender who does nothing more than convey the prosecutor's offer and thereby fails to discover what may be critical information, has no remedy. Counsel who is not able to guide his client with information pertaining to the likelihood of a conviction and the strength of the prosecution's case, is of little assistance at all.¹⁴⁷

IV. THE EMPHASIS OF THE JUDICIARY ON THE RAPID PROCESSING OF CASES

The unfortunate reality in the criminal courts today is that the judge's primary concern is not with the adequacy of the representation provided by overburdened defenders, but rather to convey the message with which the criminal justice system is most concerned: move the calendar and process cases as rapidly as possible.¹⁴⁸ A recent

should be made objectively, without regard for the "idiosyncracies of the particular decisionmaker."

Id. (citation omitted). The *Lockhart* Court fails to explain how a court could conclude that a different trial outcome would have occurred when no trial record exists to examine.

¹⁴⁴ *Id.*

¹⁴⁵ STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE § 4-6.1(b) (Supp. 1986). The "duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." *Id.* at § 4-4.1.

¹⁴⁶ A survey of 548 Chicago lawyers evaluated the "skills and areas of knowledge considered important to the practice of law." Of the survey's twenty-one items, two were rated the most important: "fact gathering" and "capacity to marshal facts and order them so that concepts can be applied." F. ZEMANS & V. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* 104-08, 125 (1981).

¹⁴⁷ See *McLaughlin v. Royster*, 346 F. Supp. 297, 300 (1972) (plea bargaining process "contemplates the pursuit by counsel of factual and legal theories in order to reach a conclusion as to whether a contest would best serve the attorney's client's interest").

¹⁴⁸ Sociologist Abraham Blumberg, in his analysis of urban criminal courts, concluded: "It is a basic fact of bureaucratic life [in the criminal courts] that production and production figures are a

newspaper account of a day in a New York State Supreme Court courtroom¹⁴⁹ reveals a remarkable example of the problem.¹⁵⁰ Rather than adjourning the case of one of two co-defendants who had no lawyer in a burglary case, the judge appointed a lawyer from those present in the courtroom waiting on other matters. Once the counsel came up, the judge informed counsel and defendant that the prosecutor's offer, in exchange for a plea, was a sentence with a minimum jail term of two years and a maximum of four. The judge then instructed the just appointed lawyer of the court's policy regarding the case: "After today, it's 3 to 6, after that it's 4 to 8." The judge then added: "If they are ever going to plead, today is the time to do it."¹⁵¹ So much for the ABA Standards which instruct the judge of his responsibility in plea cases: "[T]he court should not accept the plea where it appears that the defendant has not had the effective assistance of counsel."¹⁵² So much for the Supreme Court mandate that the defendant must be given reasonable opportunity to *consult* with counsel, "otherwise, the right to be heard by counsel would be of little worth."¹⁵³ So much for the ABA Standard instructing the lawyer that he must conduct a full investigation and study of the case, including the controlling law and evidence likely to be introduced at a trial, before giving any recommendation concerning a plea.¹⁵⁴

The judge's only concern was complying with the technicality that a human body with a Juris Doctor degree stand next to the defendant in court.¹⁵⁵ The presence of

fetish . . . and they are therefore almost blindly worshipped." A. BLUMBERG, CRIMINAL JUSTICE 50 (1957).

¹⁴⁹ *For One Zealous Judge, Hard Bargaining Pushes Cases Through the Courts*, N.Y. Times, Apr. 29, 1985, at B1, col. 1.

¹⁵⁰ Remarkable not in that it presents an unusual occurrence but in that it is so illustrative of the hypocrisy in the system.

¹⁵¹ *Id.* at B1, col. 2. The President's Commission on Law Enforcement and Administration of Justice, in its report, *The Challenge of Crime in a Free Society* (1967), concluded that plea bargaining practices "present the greatest potential abuse when the sentencing judge becomes involved in the process as a party to the negotiations, as in some places he does." *Id.* at 135.

¹⁵² STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, § 14-1.4(c) (Supp. 1986). The Commentary to Standard 14-1.3 states: "Because it is seldom possible to engage in effective negotiations minutes before the defendant is called upon to plea, a reasonable interval should elapse between assignment of counsel and the pleading stage." *See also* Gaines v. Hopper, 575 F.2d 1147, 1149-50 (5th Cir. 1978) ("Informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of counsel.").

¹⁵³ *Glasser v. United States*, 315 U.S. 60, 75 (1942); *see also* *Van Moltke v. Gillies*, 322 U.S. 708, 721 (1945) (in order for counsel to professionally advise the defendant about a plea he must make an independent investigation of the facts, circumstances, pleadings, and laws involved).

¹⁵⁴ *See supra* note 145 and accompanying text. *See also* *Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir. 1984) ("[A]s a general rule an attorney must investigate a case in order to provide minimally competent professional representation."); *Davis v. Alabama*, 596 F.2d 1214, 1217 (5th Cir. 1979) (there is no effective assistance if counsel does not investigate sources of evidence which may be helpful to the defense); *United States v. Simpson*, 475 F.2d 934, 939 (D.C. Cir. 1973) (Bazelon, C. J., dissenting) ("unless counsel has acquired a full grasp of the facts and law of the case before he counsels a client to enter a plea of guilty, his client cannot enter a knowing and voluntary plea").

¹⁵⁵ The lawyer who complies with the judge's demands may subject himself to disciplinary proceedings and a malpractice suit. *See supra* notes 42-43. *See also* *Holt v. Whelan*, 388 Mich. 50, 53, 199 N.W.2d 195, 196 (1972) (root problem which led to disciplinary proceedings against attorney was "the failure of the trial court . . . to observe the constitutional, statutory and court rule requirements in taking a guilty plea").

counsel was, in the court's eyes, merely a legal formality, a precondition for the court's efforts to obtain a plea. Yet the very reason for requiring counsel is to avoid just the type of perfunctory process this judge created. The *Argersinger v. Hamlin*¹⁵⁶ Court mandated counsel because of its concern that the heavy volume of cases where defendants could not afford counsel and therefore did not have a lawyer "may create an obsession for speedy dispositions, regardless of the fairness of the result."¹⁵⁷ The Supreme Court held in *Argersinger* that "[c]ounsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution."¹⁵⁸ To this, the Court should have added, "and by the judge."

The unique aspect of the New York State Supreme Court travesty was that four weeks before the newspaper report of the above incident, that same judge attended a colloquium on the ineffective assistance of counsel,¹⁵⁹ and after elaborating on the breadth of his experience with the system informed the audience that "I think plea bargaining is a *fair*, legitimate, necessity, and a good option for the criminal justice system."¹⁶⁰ The judge then cavalierly added: "Any defendant who wants to go to trial goes to trial,"¹⁶¹ as though the judge had not done a great deal to "persuade" the above defendant that it was certainly in his best interest to decide quickly to plead guilty. After that defendant refused to plead so hastily, the judge controlling the "fair" procedure then increased the punishment to be given the defendant for not succumbing to the judge's pressure. No longer would the judge continue to offer only "3 to 6" at the next court appearance. The judge told the defendant and his counsel: "We'll make it very easy. It's 4 to 8 after today. Let's play hardball."¹⁶²

It might well be that such court pressure violates the defendant's fifth amendment right against self-incrimination. It is clear to the defendant that if he exercises his constitutional right to remain silent, i.e., *to not plead guilty*, he will be punished later for that action.¹⁶³ Individuals generally can be forced to testify in ways that may incriminate themselves only if they are offered immunity from prosecution based on those state-

¹⁵⁶ 407 U.S. 25 (1972). See also *infra* note 168.

¹⁵⁷ 407 U.S. at 34.

¹⁵⁸ *Id.*

¹⁵⁹ See *Colloquium: Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise Been Fulfilled?*, 14 N.Y.U. REV. L. & SOC. CHANGE 1 (1986).

¹⁶⁰ *Id.* at 188 (remarks of Judge Harold Rothwax) (emphasis added).

¹⁶¹ *Id.*

¹⁶² *For One Zealous Judge, Hard Bargaining Pushes Cases Through the Courts*, N.Y. Times, Apr. 29, 1985, at B1. The judge's treatment of the proceeding would appear to violate standard 6-1.1(c) of the ABA *Standards for Criminal Justice, Special Functions of the Trial Judge* (1980): "The trial judge should be sensitive to the important roles of the prosecutor and defense counsel; and the judge's conduct toward them should manifest professional respect, courtesy and fairness." The conduct illustrated by this judge hardly enables the judiciary to "stand as a symbol of evenhanded justice." See *U.S. v. Gilligan*, 256 F. Supp. 244, 254 (1966).

¹⁶³ A coerced guilty plea is certainly one form of a coerced confession. The fifth amendment mandates that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The Supreme Court, in *Brown v. Mississippi*, 297 U.S. 278, 286 (1936), held that states were prohibited by the fourteenth amendment's due process clause from using coerced confessions against an individual. In *Malloy v. Hogan*, 378 U.S. 1, 6 (1963), the Court, declaring that the fifth amendment privilege against compulsory self-incrimination was the essential mainstay of the American system of criminal prosecution, explicitly held that the fourteenth amendment protected the privilege against abridgment by the states.

ments. It is only after granting such immunity that the state can penalize the noncomplying individual for remaining silent. Yet in the plea bargaining situation, the defendant is far from receiving immunity and will be convicted of the crime immediately upon acknowledging his guilt. The Constitution does not allow a suspension of constitutional rights in the name of judicial expediency or bureaucratic efficiency.¹⁶⁴

The judge-imposed pressure upon counsel to dispose of cases is a nationwide phenomenon.¹⁶⁵ Even the Supreme Court has noted that "crowded calendars throughout the Nation impose a constant pressure on our judges to finish the business at hand."¹⁶⁶

¹⁶⁴ The Supreme Court has never specifically addressed the issue of *judicial* coercion of a plea. In *Brady v. United States*, 397 U.S. 742 (1970), while upholding the overall constitutionality of plea bargaining, the Court stated:

We here make no reference to the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty. In *Brady's* case there is no claim . . . that the trial judge threatened *Brady* with a harsher sentence if convicted after trial in order to induce him to plead guilty.

Id. at 751 n.8. Nine years later, in *Ramsey v. New York*, 440 U.S. 444 (1979), the Court withdrew its initial grant of certiorari and did not, therefore, determine whether the defendant's due process rights were violated when the trial judge had induced the defendant to plead guilty by informing him that upon conviction, the judge would impose a sentence which was more than twice as great as the plea offer. Subsequent to *Brady*, the Court did hold that a plea is not involuntary because of *prosecution* threats to re-indict the defendant on more serious charges if he refused to plead guilty to the original indictment. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). But the Court's reasoning focused on plea bargaining as an integral part of the adversary system, and did not extend to judicial coercion:

Plea bargaining flows from the "mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial . . . [T]his Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty.

Id. at 363-64 (1978) (citations omitted).

¹⁶⁵ Such conduct by judges, in many cases, does little to encourage public respect for the administration of justice. Standard 6-1.3 of the ABA Standards for Criminal Justice states in full: "The trial judge's appearance and demeanor should reflect the dignity of the judicial office and enhance public confidence in the administration of justice. The wearing of the judicial robe in the courtroom will contribute to these goals." Not even the judicial robe will compensate for conduct which, at the very least, appears to emphasize rapid disposition rather than a careful consideration of the matter before the court. *See also* ABA Code of Judicial Conduct (1972) Canon 3A(3): "A judge should be patient, dignified and courteous to litigants . . . lawyers, and others with whom he deals in his official capacity."

¹⁶⁶ *Arizona v. Washington*, 434 U.S. 497, 516 (1978). *See also* Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 679 (1972) ("[M]any trial judges seem to have become [as] preoccupied with 'moving' cases as traffic policemen are with moving vehicles. Moreover, the techniques that they employ are not entirely dissimilar."); Harris, *Annals of Law — In Criminal Court*, NEW YORKER, Apr. 14, 1983, at 45, (Harris described the Chief Justice of the Boston criminal court as being concerned exclusively with clearing his calendar, with the result that "[h]is lawbook contains no Constitution, no rules of evidence, no legal niceties like presumption of innocence or due process."); Levin, *Delay in Five Criminal Courts*, 4 J. LEGAL STUD. 83, 90 (1975) (an analysis of criminal courts in Chicago, Minneapolis, Pittsburgh, and the District of Columbia revealed that coping with the court caseload was the most immediate pressure facing judges, and that "the judges tend to emphasize processing their caseload as an end in itself rather than as a means for achieving other goals"); *Bronx Bar Group Criticizes Judges*, N.Y. TIMES, Mar. 10, 1965, at 51, col. 1 (the bar association charged that "mass assembly-line" justice pressured defendants into pleading guilty in

A recent nationwide United States Department of Justice survey of judges and court administrators identified excessive caseloads as *the* major problem facing the criminal justice system.¹⁶⁷ In some instances, courts have even been found to inadequately advise defendants of their right to counsel¹⁶⁸ and to hastily coax a guilty plea and impose a sentence upon the lawyerless defendant.¹⁶⁹ Waiving the constitutional right to effective assistance of counsel is no less significant to an accused who must decide whether to plead guilty than it is to an individual standing trial.¹⁷⁰

It is, for most individuals, only an attorney who can explain properly the options available and the risks and ramifications of each, so that any decision by the defendant to plead guilty would be a "knowing" one.¹⁷¹ Attorneys from the Georgia Association of

violation of their legal rights, and that the judges were motivated by their desire to improve their record of quick dispositions).

¹⁶⁷ NATIONAL INSTITUTE OF JUSTICE, UNITED STATES DEP'T OF JUSTICE, *ASSESSING CRIMINAL JUSTICE NEEDS* 3 (1984). Three times as many judges mentioned excessive caseloads as mentioned the next highest ranking concern. *Id.* The presiding judge of the Cleveland criminal courts compared attempting to manage his caseloads to "trying to house the Sears, Roebuck & Co. operation in a neighborhood garage." *Criminal Court Pace Quickens; Backlog Cut*, *Cleveland Plain Dealer*, Apr. 3, 1968, at 11, col. 3.

¹⁶⁸ The Supreme Court, in *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), held that no one could be imprisoned for any offense, be it classified as petty, misdemeanor, or felony, unless the individual had been represented by counsel. The only exception was if the defendant had given a "knowing and intelligent waiver" of that right to counsel. *Id.*

¹⁶⁹ In 1980, an inspection team representing the ABA Standing Committee on Legal Aid and Indigent Defendants examined representation of indigent defendants in Saginaw County, Michigan. The final report found that "in a number of presentments observed by the inspection team, defendants in open court were inadequately advised of their right to an attorney, a guilty plea was accepted, and sentence was immediately imposed." AMERICAN BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *CRIMINAL DEFENSE SERVICES FOR THE POOR — METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING* 29 (1982). In *Tucker v. City of Montgomery Bd. of Comm'rs*, 410 F. Supp. 494 (M.D. Ala. 1976), the district court found that on occasion, trial courts took pleas from indigents without informing them that they could be represented by appointed counsel. *Id.* at 507. The court stated that "[t]his practice would, of course, tend to deprive indigents of the assistance of counsel in making the initial determination of whether or not to plead guilty." *Id.* A five volume study of nine municipal court systems, financed by the Law Enforcement Assistance Administration, found only token compliance with the Supreme Court ruling in *Argersinger* that without a knowing and intelligent waiver of the right to counsel, no one may be imprisoned. The study found wide misuse of the waiver rule. In some courts waivers were obtained in 95% of the cases, and it was "assumed that a defendant has waived counsel unless he aggressively asserts this right." *Right to Counsel Ruling Gets Token Compliance*, *L. A. Daily J.*, Nov. 17, 1975, at 1, col. 6. See also ABT ASSOCIATES, *CRIMINAL DEFENSE TECHNICAL ASSISTANCE PROJECT, IMPROVING INDIGENT DEFENSE SERVICES IN SOUTH CAROLINA: A COST ESTIMATE* 39 (1983) (representation for indigents in the magistrate/municipal court, where the maximum sentence is thirty days in jail, is virtually nonexistent).

¹⁷⁰ See *Williams v. Kaiser*, 323 U.S. 471, 475 (1945).

¹⁷¹ In *Boykin v. Alabama*, 395 U.S. 238, 242 (1969), the Court held that the waiver standard that applied to other constitutional rights, including the right to counsel, also applied to guilty pleas. The requirements for a knowing waiver of the right to counsel when a guilty plea is entered were enumerated in Justice Black's plurality opinion in *Von Moltke v. Gillies*, 332 U.S. 708 (1948):

To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Id. at 724.

Criminal Defense Lawyers, the American Civil Liberties Union of Georgia, and the National Legal Aid and Defender Association have brought suit in federal district court alleging in part that intense pressure from the Georgia courts to hurry cases to a guilty plea prevents defense counsel from having adequate time to prepare a defense.¹⁷² The suit alleges that "the pressures to enter guilty pleas make adequate representation of indigent clients nearly impossible."¹⁷³ Moreover, a National Science Foundation study of plea bargaining practices in eight states found that judicial participation in plea negotiations was especially prominent in those cases which the judges perceived would demand substantial time for a trial.¹⁷⁴ Their increased involvement arose from a desire to prevent already clogged court calendars from becoming hopelessly backlogged.

Judges may lose the appearance of objectivity and impartiality as they take on an advocate's role and pressure defendants to plead guilty and not contest the charges against them.¹⁷⁵ In one Ohio case, judicial pressure extended to the defendant's mother and sister.¹⁷⁶ At the judge's request, the black defendant's family met with the judge without the defendant or his counsel present. The judge told the family that if the defendant were to insist on a trial he would be tried before a predominantly white jury and that if convicted his sentence would be the electric chair.¹⁷⁷ The judge requested the family to ask the defendant to sign a paper indicating he would like to plead guilty. After his family begged him to plead guilty, the defendant met with the judge in chambers. In the absence of counsel but in the presence of the prosecutor, the plea bargain was arranged.¹⁷⁸

Even if the judge has no specific *intent* to coerce the defendant, the *impact* of the judicial persuasion may be sufficient to undermine the voluntariness of the defendant's plea. Indeed, the explicit reason for the Alaska Supreme Court's decision to impose a

¹⁷² Notice of Amendment of Complaint at 61-62, *Cannon v. Harris*, No. C86-297 (N.D. Ga. filed July 9, 1987).

¹⁷³ *Id.* at 62.

¹⁷⁴ Ryan & Alfini, *Trial Judges' Participation in Plea Bargaining: An Empirical Perspective*, 13 *LAW & SOC. REV.* 479, 498 (1979).

¹⁷⁵ Consider, for example, the actions of a Kansas City, Missouri, Municipal Court Judge. While arraigning defendants who are handcuffed and in leg chains, "the judge conducts his court at such a finger-snapping pace that many utter their pleas and are sentenced before they fully rise from their seats." *Just the Plea, Please*, *Kansas City Star*, Sept. 14, 1986, at 11, col. 2. The docket, which usually involves thirty to fifty defendants, some of whom face multiple charges, is generally finished within fifteen to thirty minutes. *Id.* The judge often sets bail which defendants cannot make in order to pressure them to plead guilty if they wish to be freed. *Id.* The judge was reported to have responded to defendants' failure to plead guilty by commenting: "'Not guilty,' says the judge. 'I guess you don't want to go home.'" *Id.* Canon 2A of the American Bar Association Code of Judicial Conduct (1972) requires the judge to "conduct himself at all times in a manner that promotes public confidence in the integrity and *impartiality* of the judiciary." (emphasis added).

¹⁷⁶ *State v. Byrd*, 63 Ohio St. 2d 288, 407 N.E.2d 1384 (1980).

¹⁷⁷ *Id.* at 290, 407 N.E.2d at 1386. The judge in fact had discretion to impose, after conviction, either prison or the death penalty.

¹⁷⁸ *Id.* It is most strange that the Ohio Supreme Court, while voiding the plea bargain because of the intense pressures placed on the defendant by the judge, used these facts and this case to retreat from its prior holding in *State v. Griffey*, 35 Ohio St. 2d 101, 113, 298 N.E.2d 603, 610 (1973) that under no circumstances should a judge be a party to plea negotiations. The *Byrd* rule required that the court carefully scrutinize, but in not all instances condemn, judicial participation in plea bargaining. See Comment, *Judicial Participation in Plea Bargaining — Fundamental Fairness?* 8 *OHIO N.U.L. REV.* 212 (1981).

complete ban on judicial participation in plea bargaining is the "policy decision to avoid the possibility that a defendant might feel any coercion."¹⁷⁹

Judges may attempt to mask coercion, but the message remains clear. Consider the trial judge in *United States ex rel McGrath v. LaVallee*,¹⁸⁰ who told the defendant that the plea offer was "very, very fair," that if he went to trial his chance of acquittal was "not too good," that if convicted he would not be entitled to any kind of favorable consideration, and that the judge "might have to send you away for the rest of your life."¹⁸¹ But the judge then added, "I emphasize that I am not telling you what to do, son."¹⁸²

It is certainly most difficult for the same judge who urges the defendant to enter the guilty plea to serve as the objective, disinterested arbiter required to determine the validity and voluntariness of the plea.¹⁸³ The Supreme Court in *VonMoltke v. Gillies*¹⁸⁴ emphasized that for a judge properly to determine the validity of a guilty plea, she must conduct "a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered."¹⁸⁵

Rule 11(e)(i) of the Federal Rules of Criminal Procedure categorically states that the court shall not participate in any plea discussions.¹⁸⁶ In addition, the ABA Criminal Justice Standards clearly inform the judge that judicial advocacy and pressure during plea negotiations is improper: "[T]he judge should never through the word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered."¹⁸⁷ In light of the above, the plea bargaining procedure ought to take place exclusively between the

¹⁷⁹ *Gordon v. State*, 577 P.2d 701, 705 (Alaska 1978) (emphasis added).

¹⁸⁰ 319 F.2d 308 (2d Cir. 1963).

¹⁸¹ *Id.* at 323.

¹⁸² *Id.* at 324.

¹⁸³ For a particularly strong denouncement of judicial participation in plea bargaining, see Judge Weinfeld's decision in *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 55 (S.D.N.Y. 1966) ("[A] bargain agreement between a judge and a defendant, however free from any calculated purpose to induce a plea, has no place in a system of justice.").

¹⁸⁴ 332 U.S. 708 (1948).

¹⁸⁵ *Id.* at 724.

¹⁸⁶ The Second Circuit has commented that Rule 11 "implicitly recognizes that participation in the plea bargaining process depreciates the image of the trial judge that is necessary to public confidence in the impartial and objective administration of criminal justice." *United States v. Werker*, 535 F.2d 198, 203 (2d Cir. 1976). See also *State v. Carlson*, 555 P.2d 269, 272 (Alaska 1976) (the Alaska Supreme Court noted with approval Federal Rule of Criminal Procedure 11(e)(1), adding that "a judge's involvement in plea negotiation would detract from the judge's neutrality."); *Mesmer v. Raines*, 351 P.2d 1018, 1020 (Okla. Crim. App. 1960) ("the court may not properly bargain with a prisoner to induce him to enter a plea of guilty").

¹⁸⁷ ABA Standards Relating to the Administration of Criminal Justice, Chapter 14 *Pleas of Guilty*, Standard 14-3.3(f) Responsibilities of the Judge at 14.77 (2d ed. 1986 Supp.). The first edition of the Pleas of Guilty Standards admonished the judge not to participate at all in plea discussions. This absolute prohibition was changed in the second edition which allowed the defense counsel and prosecutor, when unable to reach a plea agreement, to request a meeting with the judge. The commentary to the revised Standard 14-3.3, however, emphasizes that the role of the judge, if she agrees to meet with the parties, is to act only as "moderator" so as to avoid the coercion that may otherwise accompany judicial involvement. See also *United States ex rel. McGrath v. LaVallee*, 319 F.2d 308, 319 (2d Cir. 1963) (Marshall, J., dissenting) ("Our concept of due process must draw a distinct line between, on the one hand, advice from and 'bargaining' between defense and prosecuting attorneys, and, on the other hand, discussions by judges who are ultimately to determine the length of sentence to be imposed.").

prosecutor and defense counsel, attempting to arrive at a quasi-private form of agreement. The judicial role is properly one of approving or disapproving the negotiated settlement.

For the court itself to threaten to punish a defendant for exercising a constitutional right — i.e. the right to a trial by jury — most clearly violates due process.¹⁸⁸ The North Carolina Supreme Court, in remanding a case for resentencing because the trial judge stated in open court that the sentence imposed was induced by defendant's demand for a jury trial, forcefully stated the rationale for its decision:

No other right of the individual has been so zealously guarded over the years and so deeply embedded in our system of jurisprudence as an accused's right to a jury trial. This right ought not to be denied or abridged nor should the attempt to exercise this right impose upon defendant an additional penalty or enlargement of his sentence. The statement of the trial judge . . . we cannot condone.¹⁸⁹

Generally, however, the trial judge will not so clearly articulate *on the record* the connection between the sentence given after trial and the defendant's refusal to accept the plea offer.¹⁹⁰ This does not mean, however, that the defendant fails to receive the court's message. Most plea discussions take place at the judge's bench and rarely are transcribed by the court reporter.¹⁹¹ The defendant, therefore, is obviously at a disadvantage when attempting on appeal to show the extent of judicial coercion.

The clearly unequal positions of the judge and the defendant make any actual "negotiation" between them extraordinarily difficult. Even if the judge did not *intend* to coerce the defendant to plead guilty, the *impact* of such judicial involvement upon the

¹⁸⁸ The Supreme Court, in *United States v. Jackson*, 390 U.S. 570, 581 (1968), declared unequivocally that "due process forbids convicting a defendant on the basis of a coerced guilty plea." The *Jackson* Court held unconstitutional the Federal Kidnapping Act's death penalty clause which provided that the death sentence could be imposed only when the defendant refused to plead guilty and was convicted after a jury trial. The Court stated that "the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right." *Id.* at 583 (emphasis in original).

¹⁸⁹ *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977); *see also* *United States v. Stockwell*, 472 F.2d 1186 (9th Cir. 1973) (sentencing court cannot base the sentence in whole or in part on whether the defendant exercised his right to jury trial); *Johnson v. State*, 274 Md. 536, 336 A.2d 113 (1975) (any doubt as to whether or not the defendant's exercise of his right to trial was considered by the court in fixing sentence must be resolved in favor of the defendant). *But see* *Fermo v. State*, 370 So. 2d 930, 933 (Miss. 1979) (if the judge became involved because defendant's counsel initiated plea discussions with the judge, then the sentence will stand because the defendant cannot take advantage of an error which he induced the court to make).

¹⁹⁰ For an appellate decision holding that such punishment of the defendant for failing to plead can be shown both inferentially as well as through overt comments, *see* *People v. Dennis*, 28 Ill. App. 3d 74, 78, 328 N.E.2d 135, 138 (1975). In *Dennis*, the sentence imposed after trial was approximately twenty times greater than the judge had stated he would impose if the defendant had pled guilty and not gone to trial. *Id.*

¹⁹¹ For example, a study of plea bargaining in North Carolina criminal courts revealed that in almost two thirds of the cases, the court reporter does not record everything said by the parties at the bench when plea bargaining is discussed. Lefstein, *Plea Bargaining and the Trial Judge*, *the New ABA Standards, and the Need to Control Judicial Discretion*, 59 N.C.L. REV. 477, 505 (1981). Almost 85% of the time, the reporter rarely or never records what is said when the judge initiates or participates in plea discussions. *Id.* at 504.

defendant is the critical factor.¹⁹² The process of negotiation implies relatively comparable positions of power on both sides, but the judge with the power to imprison the defendant is all powerful vis-a-vis the defendant who desperately desires to avoid prison.

It can hardly be said that the defendant has "voluntarily" assented to the negotiated outcome in which the judge actively pressured, and impliedly threatened, the accused.¹⁹³ The defendant could not readily expect to receive a fair trial from a judge angry with him for not admitting guilt and accepting the judge's "offer."¹⁹⁴ The defendant often will assume correctly that the judge who has attempted to persuade him to plead guilty has in fact made up her mind that the defendant is indeed guilty. That judge would be conducting the trial, instructing the jury, and making rulings that may affect what the jury will be able to consider in its determination of the defendant's guilt or innocence. The defendant may therefore feel he has no choice but to take the plea as the lesser of two evils.

It is also possible that the court may desire to teach the defendant "a lesson" for rejecting the earlier judicial offer of leniency.¹⁹⁵ Such an occurrence can be noted in *Commonwealth v. Longval*,¹⁹⁶ where the trial judge told defendant's counsel, "I strongly suggest that you ask your client to consider a plea, because, if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison sentence. You know I am

¹⁹² See *United States v. Tateo*, 214 F. Supp. 560, 564 (S.D.N.Y. 1963).

¹⁹³ The exact impact of the judge's role on the defendant may be difficult to measure. As the district court in *Tateo* noted, determining the voluntariness of the plea "involves an evaluation of psychological factors and elements that may be reasonably calculated to influence the human mind." *Id.* at 565. At times, the coercive impact is clear. The transcript of the trial judge's comments to the defendant, as cited in *United States ex rel. McGrath v. LaVallee*, 319 F.2d 308, 323-24 (2d Cir. 1963), reveals the following:

As I see it, the likelihood of your being acquitted is not too good Or do you want to take a plea to robbery in the second degree and have some opportunity of receiving a shorter sentence? If I sentence you after a conviction of robbery in the first degree, you are going to be away until you are an old man.

Id.

¹⁹⁴ The trial judge's power to influence the trial's outcome can be used in many obvious and not so obvious ways against a defendant. As the Supreme Court noted in 1894: "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." *Starr v. United States*, 153 U.S. 614, 626 (1894) (citations omitted).

¹⁹⁵ Although the rationale for more leniently sentencing the defendant who pled guilty before trial may vary with the individual judge, the generally stated explanations include: 1) the extraordinary caseload of the courts requires rewards for those who help reduce the work; 2) the defendant who pleads guilty has shown repentance for his crime; and 3) the defendant who has saved the state the cost of a trial ought to benefit. See generally Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204 (1956) (discussing the results of a questionnaire sent by the Yale Law Journal to all 240 federal district court judges). In cases where the defendant has chosen to testify at the trial, the court may justify a far greater sentence upon conviction than what was offered during plea negotiations on the grounds that the defendant falsely testified as to his innocence. The Supreme Court, reasoning that the defendant's demeanor while under oath can be evidence of the small likelihood of rehabilitation, has supported the judicial consideration of false testimony in sentencing. *United States v. Grayson*, 438 U.S. 41, 50, 55 (1978). In *Euziere v. United States*, 249 F.2d 293, 294 (10th Cir. 1957), the trial judge told the defendants that if they insisted on pleading not guilty and were convicted at trial, they would receive the maximum sentence because they had put the government to the expense of a trial.

¹⁹⁶ 390 N.E.2d 1117 (1979).

capable of doing that"¹⁹⁷ Even though Longval's co-defendant agreed to plead guilty, Longval insisted on going to trial. The co-defendant received a prison sentence of three years. Longval received forty to fifty years.¹⁹⁸ Similarly, the trial judge in *People v. Moriarity*¹⁹⁹ told the defendant upon sentencing him after trial:

If you'd have come in here, as you should have done in the first instance, to save the State the trouble of calling a jury, I would probably have sentenced you, as I indicated to you I would have sentenced you, to one to life in the penitentiary. *It will cost you nine years additional*, because the sentence now is ten to life in the penitentiary.²⁰⁰

Just what is the proper punishment for a defendant who insists on exercising his constitutional right to a trial by jury? When appellate courts attempt to answer that question, the inequities and injustices inherent in the plea bargaining process are highlighted and create an embarrassment to the criminal justice system. The Illinois appellate court in *People v. Dennis*²⁰¹ concluded that the sentence imposed by the trial judge which was twenty times greater than the judge's pretrial offer created an inference of constitutional deprivation.²⁰² The court, therefore, reduced the sentence *not* to what was offered during the plea negotiations, even though the judge's plea offer was made after he was informed at the pretrial conference of the prosecutor's evidence as well as the defendant's criminal record, but to a sentence of six to eighteen years which, "in the interests of justice," was only *three* times the pretrial offer.²⁰³ Why is punishing a defendant with a sentence three times greater than what he was initially offered appropriate, constitutional, and fair, while a sentence twenty times greater is not?

Judges become highly regarded by their superiors,²⁰⁴ and therefore receive desirable assignments and even pay increases, by rapidly disposing of cases.²⁰⁵ Recently, adminis-

¹⁹⁷ *Id.* at 1118.

¹⁹⁸ *Id.* at 1119-20.

¹⁹⁹ 25 Ill. 2d 565, 185 N.E.2d 688 (1962).

²⁰⁰ *Id.* at 567, 185 N.E.2d at 688 (emphasis added).

²⁰¹ 28 Ill. App. 3d 74, 328 N.E.2d 135 (1975).

²⁰² *Id.* at 78, 328 N.E.2d at 138. The pretrial offer was a prison term of not more than two to six years, but after trial the judge sentenced the defendant to forty to eighty years. *Id.* at 75, 328 N.E.2d at 136.

²⁰³ *Id.*

²⁰⁴ See ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SAVING THE CRIMINAL COURT: A REPORT ON THE CASELOAD CRISIS AND THE ABSENCE OF TRIAL CAPACITY IN THE CRIMINAL COURT OF THE CITY OF NEW YORK 17 (1983) ("Another by-product of congestion itself is that judicial performance is measured by the ability to move cases. That is inevitable, but the intense pressure on judges to keep pace with volume leads sometimes to injustice."); see also Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOLUTION 52, 55 (1967) (an analysis of the criminal trial courts in one California county revealed that the presiding judge would reprimand any criminal court judge who allowed his calendar to lag).

²⁰⁵ In New York, lower court judges are transferred by administrative decision to temporary appointments in the state supreme court, which processes felonies. The promotion is not only considered prestigious but also raises the judge's salary by \$11,000. The Chief Administrative Judge has stated that the criteria used for selecting these judges included "the needs of the respective courts and the individual judge's merit, competence, experience, performance and *special capacity to fill the identified needs of the courts.*" *New York Needs to Appoint Best Judges to Higher Court*, N.Y. Times, Nov. 9, 1985, at 31, col. 5 (emphasis added). But lest the judges believe that once assigned to the court they can focus their attention in depth on issues such as the effectiveness of the counsel assigned to the indigent defendant, the administrative judge noted that "judges' performances

trative judges in some courts have designed new procedures to "measure judicial productivity more effectively" and to hold judges "more accountable."²⁰⁶ The explicit purpose of one new system was to "speed dispositions,"²⁰⁷ and it was made absolutely clear to the judges what was expected. Perhaps redefining the word "quality,"²⁰⁸ there were to be "three appropriate objective measures of *quality*: reasonably prompt average disposition times, limited numbers of court appearances and manageable calendar sizes."²⁰⁹

The need for expeditious dispositions notwithstanding, two qualities that are among the most important attributes of a distinguished judge are patience and fairness. The jurist must be sufficiently patient with counsel in order to hear fully their arguments. Only then can the judge fairly and properly consider the claims of counsel and rule in a just manner on the issues.²¹⁰ The wisdom to ascertain what outcome would be most

would be reviewed at least annually." *Id.* The situation in Chicago has been described by defense counsel and prosecutors as one where the judge's value is determined by how quickly she can move cases, and that judges were so concerned about how rapidly they disposed of cases that they would greet each other with the inquiry, "How are your dispositions this month?" Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1100 (1976).

²⁰⁶ *State to Adopt One-Case, One-Judge System*, N.Y. Times, Sept. 11, 1985, at 1, col. 1.

²⁰⁷ *Id.* Appellate courts have frequently criticized judicial involvement in negotiating the plea. See *United States v. Werker*, 535 F.2d 198, 205 (2d Cir. 1976) ("fair and expeditious disposition of criminal cases is best achieved by the trial judge completely abstaining from any participation in any discussions or communications regarding sentence"); *United States v. Gallington*, 488 F.2d 637, 640 (8th Cir. 1973), *cert. denied*, 416 U.S. 907 (1974) ("Judges are not to participate in the bargaining; their role is to be limited to acceptance or rejection of agreements."); *Scott v. United States*, 419 F.2d 264, 273 (D.C. Cir. 1969) (the trial judge should not be the party to introduce inducements to the defendant to plead guilty); *Brown v. Beto*, 377 F.2d 950, 957 (5th Cir. 1967) (an agreement between the trial judge and the defendant may appear to be an unseemly bargain between a malefactor and justice); *State v. Johnson*, 279 Minn. 209, 216, 156 N.W.2d 218, 223 (1968) (the court should not participate in plea bargaining); *Mesmer v. Raines*, 351 P.2d 1018, 1020 (Okla. Crim. App. 1960) (the court may not properly bargain with the accused to induce him to plead guilty); *State v. Wolfe*, 175 N.W.2d 216, 221 (Wis. 1970) ("A trial judge should not participate in plea bargaining."). See also PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 136 (1967) (the proper role of the judge is not that of a party to the negotiation, but rather to verify that any plea by the defendant is the result of a knowing, intelligent, uncoerced choice).

²⁰⁸ WEBSTER'S ENCYCLOPEDIA OF THE ENGLISH LANGUAGE (1977) defines "quality," in relevant part, as "the level of excellence of something; as a product of high quality; superiority; moral characteristic . . ."

²⁰⁹ *State to Adopt One-Case, One-Judge System*, N.Y. Times, Sept. 11, 1985, at 1, col. 1 (emphasis added). In a study conducted one year after the commencement of the new system, a bar association special committee concluded that judicial concern had indeed become focused on dispositions to the exclusion of concern for trying cases and deciding motions. The committee recommended that "[j]udges should not be asked to record dispositions before note of issue. If statistics must be kept, then hours on the bench, cases certified for trial, motions decided and cases awaiting trial after note of issue are the most important measures of judicial effectiveness." *IAS Committee Review System After One Year*, 34 NASSAU LAWYER 5 (1987). But those recommendations went unheeded, and by August 1987, court administrators were able to show that judges took 68% more guilty pleas than in the same period the year before. *Court Officials Call Summer Productive*, N.Y. Times, Sept. 4, 1987, at B1, col. 6.

²¹⁰ As the Georgia Supreme Court noted in 1913: "Undue haste in the administration of the criminal law is as much to be condemned as unnecessary delay." *Reliford v. State*, 140 Ga. 777, 778, 79 S.E. 1128, 1129 (1913) (quoting *Harris v. State*, 119 Ga. 114, 115-16, 45 S.E. 973, 974 (1903)).

fair can only be achieved after careful consideration of the merits of the positions of both sides. When an individual's liberty is at stake, such care is all the more mandated.

The independence of the American judiciary historically has been highly valued and prized. Judges need to be as free from pressure by administrative court personnel as they do from politicians or the public so that each case is decided fairly, impartially, and strictly on the merits. As a Massachusetts Supreme Judicial Court justice observed more than fifty years ago:

[T]he conclusive reason why judicial independence is necessary, is that without it there can be, properly speaking, no judgment and no judge. The moment a decision is controlled or affected by the opinions of others or by any form of external influence or pressure, that moment the judge ceases to exist. One who pronounces a decision arrived at even in part by other minds is not a judge, though he bear the title and wear the robe.²¹¹

Judges who feel pressured, overworked, and exhausted by the demands placed upon them may be unsympathetic to defense counsels' claims that *they* have too much work to be able to provide effective representation.²¹² One Florida District Appellate Court considered a public defender's motion to withdraw from the appeal of one case because the caseloads of the office "far exceed the maximum caseloads promulgated by the National Advisory Commission on Criminal Justice Standards and Goals, and the Florida Governor's Commission."²¹³ Excessive caseloads had delayed the filing of the appeals briefs with the result being that numerous appeals were dismissed by the courts due to the failure of the Office to file timely briefs.²¹⁴ The appellate court reversed the lower court and ruled that the defender could not be permitted to withdraw.²¹⁵ In justifying the ruling, the court commented: "We are influenced in this decision by the

²¹¹ H. LUMMUS, *THE TRIAL JUDGE* 10 (1937).

²¹² The Court of Appeals for the Sixth Circuit clearly indicated, in *United States v. Knight*, 443 F.2d 174 (6th Cir. 1971), that the trial court's calendar pressures should not interfere with the requirements of a fair trial:

While fully cognizant of the crowded condition of the dockets and the heavy workload carried by the experienced able District Judge who tried the present case, we are compelled to the conclusion that failure to grant a continuance to allow counsel at least some time to prepare for the trial constituted an abuse of discretion.

Id. at 178. One commentator has described the negotiated plea's appeal to judges:

[P]lea bargaining saves the judge some time and effort, and overall, serves to make his job easier. There is no need to prepare for a trial, to write instructions for the jury, to rule on legal issues at stake in a case. Accepting a guilty plea and asking the defendant the checklist of questions on the voluntariness of his plea is a much simpler process. And when an agreed recommendation is part of the negotiated disposition, one of the most vexing problems for a judge — sentencing — is also removed.

M. HEUMANN, *PLEA BARGAINING: THE EXPERIENCE OF PROSECUTORS, JUDGES AND DEFENSE ATTORNEYS* 144 (1978).

²¹³ Motion for Leave to Withdraw and for Appointment of Special Assistant Public Defender for Appellate Purposes, *State v. Ahumada*, No. 76-2493 (Cir. Ct. Dade Cty. filed Mar. 30, 1976). The motion can be found in N. ALBERT-GOLDBERG, *PERSPECTIVES RELATING TO CASE OVERLOAD IN DEFENDER OFFICES: DEVELOPING STRATEGIES FOR RESOLVING WORKLOAD PROBLEMS AND CONTROLLING CASELOADS*, Appendix C(1) (1981).

²¹⁴ *Id.*

²¹⁵ *Dade County v. Baker*, 362 So. 2d 151, 154 (Fla. Dist. Ct. App. 1978), *rev'd sub nom.*, *Escambia County v. Behr*, 384 So. 2d 147 (Fla. 1980).

fact that there are many offices of the judicial branch which consider themselves overworked."²¹⁶

However overworked the system as a whole may be, the constitutional rights of an individual charged with a crime cannot be sacrificed.²¹⁷ The longer the status quo continues, the more likely it becomes that ineffective representation will be the norm and, therefore, expected and tolerated.²¹⁸ Excessive caseloads may explain *why* defenders cannot provide competent assistance to their clients, but this explanation must never serve to justify and perpetuate our inadequate system for the delivery of defense services.

V. TWO PROPOSALS FOR INVOLVING THE TRIAL COURT IN MONITORING ATTORNEY COMPETENCE

Only a small possibility exists that a defendant can successfully appeal his conviction, not just when he has entered a plea,²¹⁹ but also when ineffective assistance of counsel is the basis for the appeal.²²⁰ The Supreme Court enunciated a new standard for reviewing such claims in its 1984 decision in *Strickland v. Washington*.²²¹ The Court declared that not only is there a presumption that the counsel acted competently, but even if the defendant satisfactorily shows that the representation was inadequate, no relief will be granted unless the defendant meets the additional burden of showing that *but for* the counsel's inadequacies the result of the trial would have been different.²²² *Strickland's*

²¹⁶ *Dade County*, 362 So. 2d at 154 (emphasis added).

²¹⁷ Excessive demands on "the system" are not new. Justice Sutherland, in his opinion in *Powell v. Alabama*, 287 U.S. 45 (1932), acknowledged the situation then extant but warned those who might be tempted to try too facile a solution:

It is true that great and inexcusable delay in the enforcement of our criminal law is one of the grave evils of our time The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to . . . prepare his defense.

Id. at 59.

²¹⁸ The sorry state of the criminal courts in this country has resisted reform for a long period of time. Professor Sheldon Glueck of Harvard Law School in his 1936 treatise, *CRIME AND JUSTICE*, described the inadequate personnel, inefficiency, and overall undesirable conditions in the courts. In 1963, Professor Glueck reflected on his hopes that his widely read and reviewed book would have led to reforms: "[W]ere I to write a new book to be entitled 'Crime and Justice Revisited,' it would have to be a very pessimistic jeremiad." Slovenko, *Attitudes on Legal Representation of Accused Persons*, 2 AM. CRIM. L.Q. 101, n.1 (1964) (quoting Glueck, *Law and the Stuff of Life*, 14 HARV. L. SCH. BULL. 3, 5 (1963)).

²¹⁹ See *infra* notes 254-73 and accompanying text.

²²⁰ See Amici Curiae Brief for Appellant at 22, *United States v. Cronin*, 466 U.S. 648 (1984) (research funded by the American Bar Association Bar Information Program of the Standing Committee on Legal Aid and Indigent Defendants revealed that only 3.9% of the 4,000 federal and state appellate decisions concerning ineffective assistance claims reported between 1970 and 1983 led to a reversal of the conviction). See also Craig, *Ineffective Counsel in Texas and the Federal Courts*, 1 AM. J. CRIM. L. 60 (1972). After surveying the lack of success of defendants in Texas in winning reversals on ineffective assistance grounds, Professor Craig concluded: "Practically, 'attorney incompetence' will remain an ineffective ground of appeal." *Id.* at 72.

²²¹ 466 U.S. 668 (1984).

²²² *Id.* at 687-96. The Supreme Court's reliance on the result, the verdict of guilty or not guilty, is as misplaced in *Strickland* as was the Court's requirement in *Lockhart* that the defendant show that there would have been no guilty plea but for counsel's ineffectiveness. In both instances, the "end" is emphasized and the "process" ignored. The Court in *Lockhart* refuses to consider instances wherein

impact on the ability of an ineffectively represented defendant to overturn the subsequent conviction is devastating.²²³ The presiding judge of the Pennsylvania Superior Court has realistically assessed the effect:

Strickland encourages incompetence. By its rule, the worst bumbler will have little fear of ever being found ineffective. The result, I suggest, will be a steady decline in the quality of representation afforded those accused of crime. The burden of that decline will fall upon the poor, for most of those accused of crime are poor In guaranteeing the assistance of counsel, the sixth amendment embodies our proudest aspiration — the achievement of equal justice. *Strickland*, by remitting the poor to representation by incompetent counsel, abandons that aspiration.²²⁴

Because the Court has imposed such a high burden of proof on the defendant seeking a post-conviction remedy for inadequate representation,²²⁵ the responsibility falls

an effective counsel would have negotiated a better plea for his client, and the Court in *Strickland* utterly ignores what every experienced trial attorney is fully aware of — that what happens during the course of the trial may well affect not only the verdict, but also may indicate the extent of the defendant's guilt and will therefore have an impact on the judge's sentence upon conviction. Inadequate performance during the trial may lead the court to assess a greater degree of guilt upon the defendant, thereby resulting in a harsher sentence than would have resulted were the defendant convicted at a trial where he had competent, diligent assistance of counsel. Yet *Strickland* prohibits the inadequately represented defendant from obtaining relief unless he can show that "but for counsel's unprofessional errors," the verdict itself would have been different. *Strickland*, 466 U.S. at 694. For a discussion of *Strickland v. Washington*, as well as the impact of two other recent Supreme Court cases, *United States v. Cronin*, 466 U.S. 648 (1984), and *Morris v. Slappy*, 461 U.S. 1 (1983), see 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, 640–49 (1986). See also Whitebread, *The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L.J. 471, 487–89 (1985).

²²³ In *Kimmelman v. Morrison*, 106 S. Ct. 2574 (1986), the Court, even though it found that trial counsel *totally* failed to conduct pretrial discovery, *id.* at 2589, and that the *complete* lack of pretrial preparation rendered the assistance of counsel constitutionally deficient, failed to find that the facts satisfied *Strickland's* prejudice prong. *Id.* at 2591. See also *Darden v. Wainwright*, 106 S. Ct. 2464 (1986) (public defender's failure to introduce mitigating evidence at the sentencing phase of a homicide case in which the defendant received the death penalty was reasonable and sound trial strategy); *Woratzek v. Ricketts*, 799 F.2d 1365, 1371 (9th Cir. 1986) (lawyer's failure to call witnesses was not unreasonable and was "entitled to deference as a strategic choice"). But see *King v. Strickland*, 748 F.2d 1462 (11th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985). *King* is the first post-*Strickland* decision by a United States Court of Appeals to find unreasonable professional performance and prejudice due to counsel's ineffectiveness and failure to produce mitigating character evidence to the trial court which had sentenced the defendant to death.

²²⁴ *Commonwealth v. Garvin*, 335 Pa. Super. 560, 589–90, 485 A.2d 36, 51 (1984) (Spaeth, J., concurring). The Court of Appeals for the Seventh Circuit, while also noting *Strickland's* potential affect, blithely (and, perhaps naively) opined: "We are hopeful, however, that defense attorneys will not view the *Strickland* prejudice test as an excuse to exert less than a full effort on behalf of criminal defendants facing apparently inevitable conviction [E]very criminal defendant deserves the best representation his or her defense counsel is able to provide." *McKinney v. Israel*, 740 F.2d 491, 492 n.2 (7th Cir. 1984).

²²⁵ One Texas judge has characterized the *Strickland* decision as "the death rattle for ineffective assistance of counsel claims by convicted persons." *Hernandez v. State*, 726 S.W.2d 53, 65 (Tex. Crim. App. 1986) (Tague, J., dissenting). Judge Tague called the *Strickland* opinion "dreadful and extremely horrifying," explaining that it was "horrifying to the extent of what dreadful consequences it will have when it comes to judging whether trial counsel was ineffective." *Id.* at 64.

upon the trial court to monitor defense counsel's performance.²²⁶ The trial judge has immense advantages over the appellate courts in observing the quality of representation;²²⁷ she may become aware of inadequate lawyering that would not be obvious by the mere review of the record. And as a federal district court noted when discussing the "farce and mockery" standard then in existence:

While this standard may well be suitable for purposes of appellate review and neatly serves the broader interest in the finality of judgments, it is undoubtedly informed by the *assumption that trial courts do not ordinarily permit obviously incompetent attorneys to practice before them*, and can hardly be thought to displace their power to exercise a proper degree of control over the competency of members of the trial bar.²²⁸

It is perhaps because of this assumption about trial court vigilance that, as Justices Brennan and Marshall have observed, even the Supreme Court "traditionally . . . resisted any realistic inquiry into the competency of trial counsel."²²⁹ Appellate courts consistently have ruled that although a defendant's claim on appeal that he was denied effective assistance may appear to have merit, the trial court was in a better position to have made that judgment.²³⁰ Moreover, appeals courts are reluctant to reverse because of the high

²²⁶ See *Monroe v. United States*, 389 A.2d 811, 819 (D.C. 1978) ("[T]he fundamental interests which the Sixth Amendment seeks to protect dictate that the trial courts apply a comprehensive standard of competence in reviewing pretrial claims of ineffectiveness, and that the standard need not be the same as that which applies to post-trial claims."); *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) (the trial courts must take strong measures to ensure that the balance is never weighted against the accused); *People v. McKenzie*, 34 Cal. 3d 616, 626, 668 P.2d 769, 775, 194 Cal. Rptr. 462, 468 (1983) (it is the trial judge's duty to ensure that the defendant receives competent, diligent advocacy); Kaufman, *Attorney Incompetence: A Plea for Reform*, 69 A.B.A. J. 308 (1983) (both collateral and appellate review provide inadequate safeguards for the problems posed by inadequate counsel).

²²⁷ See *People v. Fosselman*, 33 Cal. 3d 572, 581, 659 P.2d 1144, 1150, 189 Cal. Rptr. 855, 861 (1983) ("It is undeniable that trial judges are particularly well suited to observe courtroom performance and to rule on the adequacy of counsel in criminal cases tried before them."). Indeed, an appellate court finding of ineffective assistance of counsel may implicitly censure the trial court in that the trial court failed to act to correct the injustice that occurred in its presence.

²²⁸ *United States v. Rogers*, 471 F. Supp. 847, 854 (E.D.N.Y. 1979) (emphasis added). See also *United States v. Chatman*, 42 U.S.L.W. 2593 (1974) where the D.C. Superior Court said of the standard for appellate review:

While this standard may be an appropriate measure of review when a defendant mounts an appellate or collateral challenge to a conviction, it is hardly the proper criterion for a trial court to apply when discharging its obligation to insure that every defendant be provided with counsel capable of rendering effective representation

Id.

²²⁹ *Wainwright v. Sykes*, 433 U.S. 72, 117 (1977) (Brennan, J., dissenting).

²³⁰ See, e.g., *People v. Gourdin*, 108 Cal. App. 333, 334, 291 P. 701, 702 (1930) (the trial judge presumably did not find counsel as intoxicated as the defendant claimed on appeal, or the trial would not have proceeded); *O'Brien v. Commonwealth*, 74 S.W. 666, 669 (Ky. 1903) (if the lawyer were intoxicated to the extent the defendant claimed, the trial court surely would have suspended the trial); *State v. Bethune*, 93 S.C. 195, 199, 75 S.E. 281, 282-83 (1912) (if the lawyer's mental imbalance were as severe as the appellant claimed, "we feel sure that it would not have escaped the vigilance of the presiding judge, who would have taken the necessary steps to safeguard the defendant's rights"); *United States v. Butler*, 167 F. Supp. 102, 105-06 (E.D. Va. 1957) ("Undoubtedly narcotic drugs taken in the addict stage are sufficient to affect the mental processes of [the trial attorney] but, in the final analysis, the trial judge is better able to determine to what extent these processes may have adversely affected the conduct of a court trial.").

number of cases that would then have to be retried. As the former chief judge of Court of Appeals for the District of Columbia Circuit commented: "I have often been told that if my court were to reverse every case in which there was inadequate counsel, we would have to send back half the convictions in my jurisdiction."²³¹

In *United States v. Brown*,²³² the District of Columbia Circuit considered whether defense counsel's failure to submit a pretrial motion to suppress illegally obtained evidence constituted ineffective assistance of counsel. The court emphasized that in order for an attorney's representation to fall within the requisite range of competence in criminal cases, his judgments must be "based on adequate preparation and knowledge of the facts and applicable law."²³³ It is, I suggest, incumbent upon the trial judge to ascertain whether the attorney has indeed acquired the familiarity with the case that is required to represent properly the client.²³⁴

The Supreme Court in *Cuyler v. Sullivan*²³⁵ indicated the proper supervisory role for the trial judge: "[T]he Sixth Amendment does more than require the states to appoint counsel for indigent defendants. The right to counsel *prevents the States from conducting trials* at which persons who face incarceration must defend themselves without adequate legal assistance."²³⁶ The Court previously noted, in *Quercia v. United States*,²³⁷ that "[i]n a trial by jury in federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct"²³⁸

Inadequate representation demeans and undermines the reliability of any verdict. The "effective" assistance required by due process is counsel that is "reasonably likely to render, and render[s] reasonably effective assistance."²³⁹ Our adversary system of justice is premised on the expectation that each attorney is able to present to the court the most effective arguments for his client's cause. Each counsel must, "with partisan zeal, bring to the court's attention all the material favorable to that side, and therefore, no relevant

²³¹ Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 22-23 (1973).

²³² 663 F.2d 229 (D.C. Cir. 1981).

²³³ *Id.* at 231. In one of the few decisions that specifically has noted judicial responsibility to protect a defendant's pretrial rights even though counsel has not requested court intervention, the Court of Appeals for the Seventh Circuit declared that:

Certain alerting circumstances, such as a defendant's apparent abnormal mental or physical condition, obvious ignorance, or lack of awareness — all of which may reveal a dereliction in defense counsel's failure to object to the introduction of a confession — may, under due process standards, require a trial judge to investigate the necessity of conducting a hearing notwithstanding the absence of an objection.

United States v. Taylor, 374 F.2d 753, 756 (7th Cir. 1967).

²³⁴ See Justice Frankfurter's opinion in *Wilkerson v. McCarthy*, 336 U.S. 53 (1949), in which he stated, "[a] timid judge, like a biased judge, is intrinsically a lawless judge." *Id.* at 65 (Frankfurter, J., concurring).

²³⁵ 446 U.S. 335 (1980).

²³⁶ *Id.* at 344 (emphasis added). See also *McMann v. Richardson*, 397 U.S. 759, 771 (1970) ("if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel").

²³⁷ 289 U.S. 466 (1933).

²³⁸ *Id.* at 469. Edmund Burke described the judge's role as follows: "A judge is not placed in that high situation merely as a passive instrument of parties. He has a duty of his own, independent of them, and that duty is to investigate the truth." *quoted in* 3 WIGMORE, 151 (3d ed. 1940).

²³⁹ *In re Saunders*, 2 Cal. 2d 1033, 1041, 472 P.2d 921, 926, 88 Cal. Rptr. 633, 638 (1970) (emphasis in original).

consideration will escape its notice."²⁴⁰ The court must ensure that defense counsel has conducted the preliminary investigation and preparation that will enable him to provide effective representation so that the trier of fact can make an accurate determination.²⁴¹

The Supreme Court has, however, placed such great reliance on and expectation of the proper functioning of the adversary system that it has, unfortunately, at times relieved the trial courts of their responsibility to protect the rights of the defendants. In *Estelle v. Williams*,²⁴² the Court confronted a situation where the defendant, during his jury trial, was clothed in identifiable prison garb which included a white tee shirt stenciled with "Harris, County Jail" and white pants similarly stenciled down the legs.²⁴³ The prosecutor during *voir dire* examination stated: "This defendant is sitting in jail clothes. I am assuming he's been in jail to the time of this trial."²⁴⁴ Before the trial began, jail personnel refused the defendant's request for a change of clothes. Counsel in open court never objected to the prison uniform and the judge allowed the trial to proceed.²⁴⁵ The Supreme Court did acknowledge that the "defendant's clothing is so likely to be a continuing influence throughout the trial" and that "the constant reminder of the accused's condition . . . may affect a juror's judgment" and therefore the presumption of innocence was affected.²⁴⁶ The denial of the defendant's due process rights, however, did not lead the Court to overturn the conviction nor did the Court criticize the trial judge for conducting the trial in such a fashion. Rather, the responsibility for objecting, stated the Court, was counsel's alone:

Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system.²⁴⁷

Because the defendant's counsel failed to bring the issue to the court's attention, the Court held that the trial judge had no independent obligation to act even though a defendant has a constitutional right not to be tried in prison clothes.²⁴⁸

The extent of the ineffective representation problem confronting trial courts is revealed in an excerpt of an Advisory Committee report that examined the quality of practice in the federal district courts:

²⁴⁰ Golding, *On the Adversary System and Justice*, in *PHILOSOPHICAL LAW* 98, 106 (R. Bronaugh ed. 1978).

²⁴¹ See Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1065 (1975) ("the best way to ascertain the truth is to present to an impartial judge or jury a confrontation between the proponents of conflicting views, assigning to each the task of marshalling and presenting the evidence for its side in as thorough and persuasive a way as possible").

²⁴² 425 U.S. 501 (1976).

²⁴³ *Id.* at 515 n.1 (Brennan, J., dissenting).

²⁴⁴ *Id.* at 532 n.12 (Brennan, J., dissenting).

²⁴⁵ *Id.* at 502.

²⁴⁶ *Id.* at 504-05.

²⁴⁷ *Id.* at 512. *But see* United States v. McCord, 509 F.2d 334, 347 (D.C. Cir. 1974) (en banc), cert. denied, 421 U.S. 930 (1975) ("[t]he judge . . . is not a passive by-stander in the arena of justice, a spectator at a 'sporting event'"); Faretta v. California, 422 U.S. 806, 839 (1975) ("the trial judge is not simply an automaton who insures that technical rules are adhered to").

²⁴⁸ *Estelle v. Williams*, 425 U.S. 501, 512 (1976).

[T]he most startling testimony came from a former U.S. Attorney for Connecticut who stated that of the last twelve cases he tried as U.S. Attorney he was of the opinion that one-half of the defendants were convicted *because of* incompetency of their counsel. This so shocked him that he resigned his office to become the first head of the Connecticut Criminal Defense Committee.²⁴⁹

Federal judges frequently complain about the low quality of representation provided by counsel. The former chief judge of the Second Circuit Court of Appeals has written:

Judges have been exceedingly troubled by the increasing number of instances of poor legal representation that come to our attention . . . I shall not hazard a guess as to the exact percentage of cases that have suffered from inadequate advocacy, but I can say that in my view it is not insubstantial.²⁵⁰

²⁴⁹ *Final Report of the Advisory Committee on Proposed Rules for Admission to Practice*, 67 F.R.D. 159, 166 (1975) (emphasis added).

²⁵⁰ Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A. J. 175, 176 (1974). See also [former Chief Judge of the United States Court of Appeals for the District of Columbia] Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); [former Chief Justice] Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to our System of Justice?*, 42 FORDHAM L. REV. 227 (1973); [former Chief Judge of the United States Court of Appeals for the Second Circuit] Kaufman, *Attorney Incompetence: A Plea for Reform*, 69 A.B.A. J. 308 (1983); [Judge of the Northern District of California] Schwarzer, *Dealing With Incompetent Counsel — The Trial Judge's Role*, 93 HARV. L. REV. 633 (1980); [Judge of the United States Court of Appeals for the District of Columbia Circuit] Wilkey, *A Bar Examination for Federal Courts*, 61 A.B.A. J. 1091 (1975).

Commentators concerned with the inadequate representation provided defendants have recommended a broad range of solutions. Recommendations for requiring a lawyer to file a checklist of work done have been offered by Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811, 831 (1976); Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1248 (1970); and Tague, *The Attempt to Improve Criminal Defense Representation*, 15 AM. CRIM. L. REV. 109, 161-65 (1977). Suggestions for a pretrial conference whereby the judge reviews counsel's pretrial preparation have been made by Levine, *Preventing Defense Counsel Error — An Analysis of Some Ineffective Assistance of Counsel Claims and Their Implications for Professional Regulation*, 15 U. TOL. L. REV. 1275, 1432 (1984); and Schwarzer, *Dealing With Incompetent Counsel — The Trial Judge's Role*, 93 HARV. L. REV. 633, 665 (1980). Proposals for lawyer specialization and certification in specific areas of law have been suggested by the American Bar Association Standing Committee on Specialization, *Model Plan of Specialization*, (1980) reprinted in Mindes, *Proliferation, Specialization and Certification: The Splitting of the Bar*, 11 U. TOL. L. REV. 273, 296 (1980); and Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1116 (1973) (no lawyers should be able to represent criminal defendants unless they have passed a special examination in criminal procedure, evidence, and trial tactics). For an analysis of how a certification scheme could work and what procedures must be developed, see Levine, *supra*, at 1453-55. Increased funding of public defender offices through utilization of interest on lawyers' trust accounts or increased lawyer registration fees was advocated in Klein, *supra* note 222, at 683-92. A change in law school emphasis which would mandate an intern or residency program has been suggested by Kaufman, *The Court Needs a Friend in Court*, *supra*, at 177-78. A survey of bar association members revealed that 56% preferred continuing legal education (CLE) programs as the means for ensuring competence. Unterberger, *The Lawyers' 1976 View of Continuing Legal Education*, 22 PRAC. LAW. 71, 92-93 (Nov. 7, 1976). Improving grievance mechanisms so that more incompetent lawyers are detected and disciplined was suggested by Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 736-43 (1981). Raising fees for counsel assigned to represent the indigent was recommended by Bazelon, *The Realities of Gideon and Argersinger*, *supra*, at 835; and Finer, *supra*, at 1120.

The court which *appoints* counsel to represent the indigent defendant may have a special burden.²⁵¹ The court must notify the attorney about the appointment early enough in the process so that he has adequate time to prepare the defense.²⁵² The court must also ensure that the counsel appointed is qualified to deal with cases which raise complex and serious allegations against the defendant.²⁵³ Unlike the more affluent defendant who can pick and choose whatever attorney he desires, and perhaps to some degree ought to be held responsible for that choice, the indigent defendant is at the mercy of the court.

The court's "mercy" may not always lead to ensuring that the defendant has adequate counsel. In *United States v. Katz*,²⁵⁴ the trial judge refused to relieve the appointed counsel who told the judge that he "would rather walk out on this case and not be on it" and was "just doing a duty" and "not very happy about the entire thing."²⁵⁵ The court further refused to act even when, during the trial, counsel was observed sleeping on several occasions during examination of a witness. The Second Circuit upheld the conviction, noting the trial judge's statement that the times when the defendant's lawyer slept were not central to the defendant's case and that had the occasions of counsel's somnolence been central, the judge would have awakened the attorney.²⁵⁶

²⁵¹ The courts' failure to respond responsibly to the burden has compelled at least one state bar association committee to recommend guidelines for appointing counsel for indigents in capital cases so as to preclude representation by inexperienced and ill-prepared attorneys. OHIO STATE BAR ASSOCIATION, REPORT OF THE CRIMINAL JUSTICE COMMITTEE, 584 (Apr. 6, 1987).

²⁵² See, e.g., *Chambers v. Maroney*, 399 U.S. 42, 54 (1970).

²⁵³ See *United States v. Cronin*, 466 U.S. 648 (1984). Justice Stevens, delivering the opinion of the Court, stated:

We consider in this case only the commands of the Constitution. We do not pass on the wisdom or propriety of appointing inexperienced counsel in a case such as this.

It is entirely possible that many courts should exercise their supervisory powers to take greater precautions to ensure that counsel in serious criminal cases are qualified.

Id. at 665 n.38. The Court of Appeals for the Fifth Circuit, in granting a writ of habeas corpus due to the failings of inexperienced counsel, was not so reluctant to pass on a trial court's wisdom: "A genuflection in the direction of justice by the pro forma appointment of counsel such as MacKenna had is something less than adequate judicial guidance and the furnishing of effective counsel to an accused." *MacKenna v. Ellis*, 280 F.2d 592, 601 (5th Cir. 1960), *modified*, 289 F.2d 928, *cert. denied*, 368 U.S. 877 (1961). See also *Harris v. Housewright*, 697 F.2d 202 (8th Cir. 1982), where the court, upon reversing a murder conviction based on ineffective assistance of counsel, noted the youth and inexperience of the appointed counsel. The court added: "[a] major part of the responsibility for ensuring effective counsel, however, must inhere in the appointment itself. It is the duty of the courts to ensure that effective legal counsel are appointed to represent criminal defendants." *Id.* at 205. See also *Patton v. United States*, 281 U.S. 276, 312-13 (1930) (the judge's role in ensuring a proper trial increases in degree as the offenses dealt with increase in gravity); REPORT OF THE NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, NATIONAL LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SERVICES IN THE UNITED STATES (1976) (Guideline 2.16(b) states that the more serious and complex cases should be assigned to attorneys with a sufficient level of experience and competence to provide proper representation).

²⁵⁴ 425 F.2d 928 (2d Cir. 1970).

²⁵⁵ *Id.* at 931. The former Chief Judge of the District of Columbia Circuit Court of Appeals has commented that "we pretend to do justice by providing an indigent defendant with a lawyer, no matter how inexperienced, incompetent, or indifferent." Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 4 (1973).

²⁵⁶ *Katz*, 425 F.2d at 931. See also *United States v. Butler*, 167 F. Supp. 102, 105 (E.D. Va. 1957) ("While there is evidence that [the trial attorney] did, on occasions, place his head in his hands and that he may have been 'dozing' at the time, there is no suggestion that such action was prejudicial

Nor is the court's concern and mercy obvious when it explicitly disregards a defendant's claim of ineffective assistance of counsel. One New York Supreme Court judge told the defendant: "The law doesn't require that I assign you a lawyer that you love. Too bad. Try harder to like him."²⁵⁷ Courts have also refused to provide relief to defendants even in situations such as when the public defender told his client, in front of the judge: "I don't want to go to trial with you. I don't want to represent you. I am now asking the court to permit me to withdraw"²⁵⁸ In another instance, the exasperated defendant attempted to call a press conference to criticize his public defender in the hope that then he might be provided with new counsel.²⁵⁹

Any change of counsel causes delay and keeps the case on the judge's calendar for a longer period of time. That reality leads trial judges to ignore defendants' concerns as well as the proper responsibilities of the court. As the Eighth Circuit Court of Appeals stated:

[A]n accused who is forced to stand trial with the assistance of appointed counsel with whom he had become embroiled in an irreconcilable conflict is denied effective assistance of counsel. The trial court, when confronted by such an allegation, has an *obligation to inquire thoroughly into the factual basis of the defendant's dissatisfaction*.²⁶⁰

to the petitioner."). *But see* Javor v. United States, 724 F.2d 831, 833 (9th Cir. 1984) ("when an attorney for a criminal defendant sleeps through a substantial portion of the trial, such conduct is inherently prejudicial and thus no separate showing of prejudice is necessary"). That same court of appeals, however, in a post-*Strickland* case, found that there *was* a need to show prejudice when the defendant claimed that his counsel had fallen asleep, although perhaps not if the sleeping occurred for a substantial portion of the trial. *United States v. Petersen*, 777 F.2d 482, 484 (9th Cir. 1985).

²⁵⁷ *For One Zealous Judge, Hard Bargaining Pushes Cases Through the Courts*, N.Y. Times, Apr. 29, 1985, at B4, col. 3. In California, the *Marsden* rule, arising from the holding in *People v. Marsden*, 2 Cal. 3d 118, 465 P.2d 44, 84 Cal. Rptr. 156 (1970), requires the court to permit the defendant to explain why he believes his court appointed lawyer ought to be discharged. *See, e.g.*, *People v. Lewis*, 20 Cal. 3d 496, 499, 573 P.2d 40, 41, 143 Cal. Rptr. 138, 139 (1978) (the *Marsden* rule was violated when the judge cut off the defendant's attempt to explain his motion to relieve his lawyer and by the subsequent summary denial of the defendant's motion).

²⁵⁸ *White v. White*, 602 F. Supp. 173, 179 (W.D. Mo. 1984). The federal district court termed the situation a "complete breakdown in attorney-client relationship." *Id.* at 178. The defendant had previously written to the court alleging that his lawyer was neglecting his case, and the court itself was well aware of the Public Defender Office's excessive caseload. *Id.* at 180. *See also* *United States ex rel. Testamark v. Vincent*, 367 F. Supp. 14, 19 (S.D.N.Y. 1973), where the trial court repeatedly denied defendant's request for appointment of substitute counsel even after counsel himself acknowledged that the case was miserably prepared and that his representation bordered on the incompetent.

²⁵⁹ *Osborn v. Schillinger*, 639 F. Supp. 610, 615 (D. Wyo. 1986).

²⁶⁰ *United States v. Hart*, 557 F.2d 162, 163 (8th Cir. 1977) (citation omitted) (emphasis added); *see also* *Monroe v. United States*, 389 A.2d 811, 820 (D.C. 1978) (court is obligated to make factual findings on the record when defendant's allegations that his lawyer is unprepared rise to level of a claim of a sixth amendment deprivation); *United States ex rel. Martinez v. Thomas*, 526 F.2d 750, 756 (2d Cir. 1975) (court should have conducted an inquiry into defendant's justified claim that his attorney was utterly unprepared for trial); *Sawicki v. Johnson*, 475 F.2d 183, 185 (6th Cir. 1973) (there should be a thorough investigation when a defendant claims his lawyer has not consulted with him or prepared for a preliminary hearing); *United States v. Young*, 482 F.2d 993, 995 (5th Cir. 1973) (it is normally reversible error for the judge to fail to conduct an inquiry into the source and factual basis for the defendant's claim that counsel is not providing effective assistance); *United States v. Seale*, 461 F.2d 345, 359-60 (7th Cir. 1972) (it was an abuse of discretion for the trial

Furthermore, the Second Circuit aptly noted what ought to be obvious but is nevertheless often disregarded by the trial courts: "The courts cannot give with one hand an indigent defendant the right to appointed counsel and then, with the other hand, effectively take that right away by refusing to recognize the possibility that defendant's allegations of inadequate representation might prove correct after detailed inquiry."²⁶¹

Whereas a defendant with funds has the constitutional right to counsel of his own choice,²⁶² the indigent does not. But the court most certainly is obligated to respond to a defendant's ineffective assistance claim, for if there is no viable attorney-client relationship, the defendant cannot trust the appointed counsel and the open communication so vital to effective representation cannot occur.²⁶³ At the very least, the court should regard such a complaint as an indication that the lawyer may not be performing as a competent, thorough attorney. As the Supreme Court has observed: "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction."²⁶⁴

Two glaring instances illustrate the lack of judicial concern for the quality of representation provided indigent defendants. In *People v. Davis*,²⁶⁵ the defense counsel suffered from a nervous breakdown in the last two days of trial and told the jury in his

judge to have failed to look into the basis for defendant's dissatisfaction with his attorneys); *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970) (court improperly summarily denied defendant's four separate motions requesting appointment of another counsel). Former Chief Justice Warren Burger, when he was a District of Columbia Circuit Court Judge, proposed a broad mandate on the trial judge to respond to the defendant's complaint: "[W]hen, for the first time, an accused makes known to the court in some way that he has a complaint about his counsel, the court must rule on the matter If no reasons are stated, the court then has a duty to inquire into the basis for the client's objection to counsel and should withhold a ruling until reasons are made known." *Brown v. United States*, 264 F.2d 363, 369 (D.C. Cir.) (Burger, J., concurring), *cert. denied*, 360 U.S. 911 (1959).

²⁶¹ *United States v. Morrissey*, 461 F.2d 666, 669 n.6 (2d Cir. 1972). *See also United States ex rel. Testamark v. Vincent*, 367 F. Supp. 14, 22 (S.D.N.Y. 1973) (upon a showing of good cause an indigent is entitled to have his appointed counsel replaced); *Davis v. Stevens*, 326 F. Supp. 1182, 1183 (S.D.N.Y. 1971). The court must conduct an inquiry into a defendant's claim of inadequate representation because the defendant may well be aware of shortcomings of his attorney that the court may not know. For example, the defendant may wish to inform the court of counsel's utter failure to communicate with him, to investigate the case, to contact defense witnesses, or to pursue a certain affirmative defense. Indeed, the California Supreme Court has indicated that the trial judge ought not only afford the defendant the opportunity to be heard, but might also offer suggestions to aid the defendant in presenting his complaint of inadequacy of counsel. *People v. Marsden*, 2 Cal. 3d 118, 125-26, 465 P.2d 44, 49, 84 Cal. Rptr. 156, 161 (1970).

²⁶² *See Glasser v. United States*, 315 U.S. 60, 70 (1942) (denying the defendant his choice of counsel may amount to a denial of due process and violate the fourteenth amendment); *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (a financially able accused should be provided the opportunity to obtain counsel of his own choice); *United States v. Burton*, 584 F.2d 485, 488-89 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979) ("An essential element of the Sixth Amendment's protection of the right to the assistance of counsel is that a defendant must be afforded a reasonable opportunity to secure counsel of his own choosing.").

²⁶³ *See A.B.A. Standards for Criminal Justice* (2d ed. 1982 Supp.) (The Defense Function), Comment to Standard 4-31: "Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence" *See also People v. Wheeler*, 260 Cal. App. 2d 522, 529, 67 Cal. Rptr. 246, 250 (1968) (when it appears that there may have been a serious breakdown in communication between defendant and his counsel, the court is obliged to conduct an inquiry).

²⁶⁴ *Faretta v. California*, 422 U.S. 806, 820 (1975).

²⁶⁵ 48 Cal. 2d 241, 309 P.2d 1 (1957) (en banc).

closing argument that his client, despite having testified to the contrary, had indeed been at the scene of the crime.²⁶⁶ He told the jury that despite his vigorous cross-examination of prosecution witnesses, he now had concluded that the witnesses had been telling the truth. Although expert medical witness affidavits were presented to the trial court confirming that the counsel was "mentally ill" during the final days of trial and had indeed suffered a nervous breakdown, the court concluded the effect was not serious enough to justify a new trial.²⁶⁷ The court reached a similar conclusion in *United States v. Butler*,²⁶⁸ where although the attorney: a) was under indictment for violating narcotics laws; b) left the courtroom during the trial; c) may have been dozing during testimony; and d) may well have been taking narcotics while his client was on trial, the court sustained the conviction.²⁶⁹

If a wealthy defendant becomes displeased with counsel's performance, the defendant can readily replace one private attorney with another.²⁷⁰ Private attorneys operate in a competitive marketplace and, therefore, are likely to be concerned with client approval of their representation.²⁷¹ A satisfied client can lead to more business in the future.²⁷² A public defender has no such incentive. A study of the lawyers in the Los Angeles County Public Defender Office substantiates this conclusion. The report found that the reason attorneys did not regard client satisfaction as essential to their performance was that the defenders were freed from the necessity of attracting clients and obtaining payment for their services.²⁷³

In one aspect of client representation the Supreme Court has, in a series of decisions, placed the burden on the trial court to hold a hearing or conduct an inquiry to ensure that the defendant is receiving effective assistance. In the 1978 decision of *Holloway v. Arkansas*,²⁷⁴ the appointed counsel for three co-defendants had, by pretrial motions, represented to the court that due to information he had received from his clients, he was confronted with representing conflicting interests at trial and could not provide effective assistance to each client.²⁷⁵ The trial court denied his motions requesting the

²⁶⁶ *Id.* at 253, 309 P.2d at 7-8.

²⁶⁷ *Id.* at 257, 309 P.2d at 9-10.

²⁶⁸ 167 F. Supp. 102 (E.D. Va. 1957).

²⁶⁹ *Id.* at 105-06.

²⁷⁰ For this and many other reasons, most notably that a defendant with money can pay for many hours of his counsel's time and expenses for expert witnesses and investigations, the conclusion of Chief Justice Weintraub hardly seems warranted: "[J]udges tend to have a larger sense of responsibility for the performance of lawyers they assign than for the performance of counsel privately retained, and to the extent that this is true, there may be an advantage for the indigent accused." *State v. Rush*, 46 N.J. 399, 408, 217 A.2d 441, 445 (1966).

²⁷¹ Clients who have private counsel are often more satisfied with the representation they receive. *See, e.g., Acuri, Lawyers, Judges and Plea Bargaining: Some New Data on Inmates' Views*, 4 INT'L J. CRIMINOLOGY & PENOLOGY 177, 181 (1976) (inmates who were represented by private attorneys were two times as likely to believe that they had received a "good defense" than those who had appointed counsel).

²⁷² The Fifth Circuit Court of Appeals noted that "[a]ttorneys generally are greatly concerned with their professional reputations. They know that to lose a good reputation for faithful adherence to the cause of the client is not only to lose that which they should most highly treasure but is to lose their practice as well." *Williams v. Beto*, 354 F.2d 698, 706 (5th Cir. 1965).

²⁷³ B. Bohne, *The Public Defender as Advocate: An Organizational Perspective on Public Defender Representation*, Ph.D. Dissertation, University of Wisconsin 42 (1979).

²⁷⁴ 435 U.S. 475 (1978).

²⁷⁵ A lawyer confronts a conflict of interest "if the duty to one of the defendants may conflict

appointment of separate counsel for each defendant. The Supreme Court reversed the convictions, holding that the trial court had the obligation to at least conduct an inquiry or hearing to determine whether the conflict of interest risk was sufficient to warrant appointing separate counsel.²⁷⁶

The *Holloway* Court's reasoning extends to the situation where the lawyer tells the trial judge that he is unprepared to begin the trial and to do so would mean that he could not provide effective assistance to his client. The effect of an unprepared defense on the fairness of the trial is as significant as the representation of potentially conflicting interests. In accordance with *Holloway*, if the trial court cannot disregard counsel's claim regarding a conflict of interest, the court should be required, at a minimum, to conduct an inquiry or hearing to determine the validity of counsel's claim of unpreparedness.

Common sense tells us that the lawyer whose job it is to try the case knows best whether or not he is prepared to do so.²⁷⁷ Some might maintain that the lawyer may not tell the truth; that he may claim to be unprepared just to get an adjournment and delay. The *Holloway* Court addressed the concern of lawyer misrepresentation: "[A]ttorneys are officers of the court, and 'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.'"²⁷⁸ In any event, the Court did not mandate immediate compliance with counsel's request (although it indicated that most courts do routinely grant motions for appointment of separate counsel)²⁷⁹ but required that if the court chose not to do so, it must explore the basis of counsel's claim and take adequate steps in response.²⁸⁰

The Supreme Court's concerns regarding the risks inherent in representing conflicting interests at trial are directly applicable to the lawyer who has not conducted the

with the duty of another." A.B.A. Standards of Criminal Justice, Standard 4-3.5(b) (2d ed. 1980). A lawyer is prohibited from undertaking multiple representation if a possibility exists that the interests of the defendants may diverge at some time so that the attorney would have inconsistent and conflicting responsibilities to each client.

²⁷⁶ *Holloway*, 435 U.S. at 487.

²⁷⁷ The *Holloway* Court quoted *State v. Davis*, 110 Ariz. 29, 31, 514 P.2d 1025, 1027 (1973), that an "attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." *Holloway*, 435 U.S. at 485.

²⁷⁸ *Holloway*, 435 U.S. at 486 (citation omitted). The Court noted that "risks [of attorney deceit] are undoubtedly present; they are inherent in the adversary system. But courts have abundant power to deal with attorneys who misrepresent facts." *Id.* at 486 n.10. The A.B.A. *Code of Professional Responsibility* Disciplinary Rule 7-102(A)(5) and the *Model Rules of Professional Conduct* Rule 3(a)(1) both clearly state that it is a violation for a lawyer to make a false statement to the court.

²⁷⁹ *Holloway*, 435 U.S. at 485. See Justice Powell's dissent where he explained that "because the Court's opinion contains seeds of a *per se* rule of separate representation merely upon the demand of counsel, I respectfully dissent." *Id.* at 491 (Powell, J., dissenting). But even Justice Powell agreed that the trial court had the duty to inquire further into counsel's request. *Id.* at 492 (Powell, J., dissenting). Indeed, Justice Powell seemed particularly disturbed by the costs and hardships involved when separate counsel must be provided — i.e., each lawyer presents increased likelihood of delay and additional time involved in 1) selecting the jury, 2) disposing of pretrial motions, 3) conducting the trial — and also that additional lawyers may tend to enhance the possibility of trial errors. *Id.* at 494 n.2 (Powell, J., dissenting). But such concerns would not accompany the trial court's mere compliance with the lawyer's request for more time so as to conduct an adequate investigation and prepare for trial.

²⁸⁰ *Id.* at 487.

necessary investigations and is generally unfamiliar with and unprepared to try the case. The *Holloway* Court stated,

[T]he evil — it bears repeating — is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process . . . it would be difficult to judge intelligently the impact of a conflict on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible.²⁸¹

Two years after *Holloway*, the Supreme Court extended the trial court's obligation even further in *Cuyler v. Sullivan*.²⁸² There, the Court held that the trial court had the responsibility to initiate an inquiry if it knows or reasonably should know that a conflict exists — even if counsel had not raised the issue.²⁸³ The following year, in *Wood v. Georgia*,²⁸⁴ the Court held that even when there exists only a possibility of a conflict, the trial court has the duty to inquire even though counsel is silent.²⁸⁵ If the court is under such an obligation to scrutinize situations where one lawyer represents multiple defendants so as to ensure that no defendant is denied effective assistance, then the court should be similarly obliged to monitor *any* situation where it appears that counsel is not able to provide competent representation.

The trial court cannot, by merely appointing counsel, “wash its hands” of the requirement that the defendant have the *effective*²⁸⁶ assistance of counsel.²⁸⁷ The defendant's right to counsel is not formal but substantial.²⁸⁸ As the Supreme Court declared

²⁸¹ *Id.* at 490–91 (emphasis in original).

²⁸² 446 U.S. 335 (1980).

²⁸³ *Id.* at 347.

²⁸⁴ 450 U.S. 261 (1981).

²⁸⁵ *Id.* at 272–74.

²⁸⁶ As the Supreme Court noted in *McMann v. Richardson*, “[i]t has long been recognized that the right to counsel is the right to the *effective* assistance of counsel.” 397 U.S. 759, 771 n.14 (1970) (emphasis added).

²⁸⁷ See *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985) (“This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense.”); *Geders v. United States*, 425 U.S. 80, 87 (1976) (“If truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings.”); *Harris v. Housewright*, 697 F.2d 202, 205 (8th Cir. 1982) (it is the duty of the court when appointing counsel to ensure that such counsel are effective); *MacKenna v. Ellis*, 280 F.2d 592, 601 (5th Cir. 1960), *modified*, 289 F.2d 928, *cert. denied*, 368 U.S. 877 (1961) (“[A]n essential element of the fair trial of a defendant with court-appointed counsel is trial court sensitivity to protecting the defendant against hasty trials and against obvious mistakes of young, inexperienced, appointed counsel.”); *People v. Mason*, 22 A.D.2d 957, 958, 256 N.Y.S.2d 115, 116 (1964) (the court should hold a hearing to examine defendant's complaint against his attorney, since the responsibility for the selection of appointed counsel rests solely with the court).

²⁸⁸ *Johnson v. United States*, 110 F.2d 562, 563 (D.C. Cir. 1940); see also *Powell v. Alabama*, 287 U.S. 45, 58 (1932) (“The record indicates that the appearance was rather pro forma than zealous and active’ Under the circumstances disclosed, we hold the defendants were not accorded the right to counsel in any substantial sense. To decide otherwise, would be to ignore actualities.”); *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (“The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.”).

in *Strickland v. Washington*, "[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who *plays the role necessary to ensure that the trial is fair.*"²⁸⁹

If it appears to the court that counsel is not consulting with the client as required,²⁹⁰ conducting the necessary factual investigations,²⁹¹ interviewing witnesses to the alleged crime,²⁹² examining possible valid defenses to the charge,²⁹³ contacting potential expert witnesses to assist in preparing the case as well as possibly testifying at trial,²⁹⁴ and arranging for alternatives to incarceration if such may be warranted upon a plea or conviction,²⁹⁵ the court ought to intervene.²⁹⁶

²⁸⁹ 466 U.S. 668, 685 (1984).

²⁹⁰ See, e.g., *In re Ratzel*, 108 Wis. 2d 447, 449, 321 N.W.2d 543, 544 (1982) (per curiam) (the lawyer has a duty to communicate all material facts and problems which affect the client); ABA Criminal Justice Standard 4-3.8 ("The lawyer has a duty to keep the client informed of the developments in the case and the progress of preparing the defense.").

²⁹¹ See, e.g., *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1969) (counsel must conduct appropriate factual and legal investigations to determine what defenses can be developed and to allow for reflection and preparation for trial); ABA Criminal Justice Standard 4-4.1 ("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case. . .").

²⁹² See, e.g., *Eldridge v. Atkins*, 665 F.2d 228, 236 (8th Cir. 1981), cert. denied, 456 U.S. 910 (1982) (a presumption of ineffective assistance exists when, *inter alia*, counsel has failed to interview potentially crucial eyewitnesses); *Walker v. Caldwell*, 476 F.2d 207, 213 (8th Cir. 1974) (failure to question witnesses constituted ineffective representation).

²⁹³ See, e.g., *Brooks v. Texas*, 381 F.2d 619, 624 (5th Cir. 1967); *Jones v. Cunningham*, 313 F.2d 347, 353 (4th Cir.), cert. denied, 375 U.S. 832 (1963).

²⁹⁴ See, e.g., *The Report of the Commission of the State Bar of Georgia on Compensated Counsel, Assistance to the Indigent Person Charged with Crime*, 2 GA. ST. B.J. 197, 202 (1965) (assistance of an expert in some cases may be as crucial as that of the attorney himself).

²⁹⁵ The former Dean of the National College of District Attorneys has observed: "At sentencing, the ability of counsel to present the court a plan or program will in many instances result in a deferred or suspended sentence or probation, while the absence of such a program will often result in incarceration." *Wallace v. Kern*, 392 F. Supp. 834, 849 (E.D.N.Y. 1973) (quoting 57 F.R.D. 229, 302 (1972)). See also ABA Criminal Justice Standard 4-8.1 (the lawyer should be familiar with sentencing alternatives and present to the court any ground which may lead to a sentence most favorable to the defendant); Standard 18-6.3(e) (counsel should recognize that for many defendants the sentencing stage is the time at which the most important service of the entire proceeding can be performed).

²⁹⁶ See *MacKenna v. Ellis*, 280 F.2d 592, 600 (5th Cir. 1960) ("Fundamental fairness to a person accused of crime requires such judicial guidance of the conduct of a trial that when it becomes apparent appointed counsel are not protecting the accused the trial judge should move in and protect him."); *Harling v. United States*, 387 A.2d 1101, 1105 (D.C. 1978) (an attorney's gross incompetence may justify the court removing the attorney, even over the defendant's objection). One federal district court, confronted with an inexperienced, unprepared, and incompetent trial attorney, noted that:

A court cannot stand idly by while the poor are assigned lawyers too inexperienced or incompetent to be retained on a competitive basis in the open market [A] court must intervene when the quality of representation falls below the level necessary to achieve some semblance of the adversary process so essential to focusing issues of fact for enlightened resolution by a jury.

United States v. Williams, 411 F. Supp. 854, 857 (S.D.N.Y. 1976). See also *Monroe v. United States*, 389 A.2d 811 n.5 (D.C. 1978) (trial court has a duty to maintain appropriate standards of performance by defense counsel); *United States v. Garza*, 608 F.2d 659, 666 (5th Cir. 1979) (in circumstances such as when defense counsel has failed to object to improper comment by the prosecutor, the trial judge has the obligation to intervene to protect the defendant's right to a fair trial).

As the Supreme Court first noted in *Powell v. Alabama*,²⁹⁷ it is the trial court's duty to ensure that the defendant is "denied no necessary incident of a fair trial."²⁹⁸ And as the Court noted in *United States v. Cronin*,²⁹⁹ "[t]he right to effective counsel is recognized . . . because of the effect it has on the ability of the accused to receive a fair trial."³⁰⁰ As the Court stated in *People v. Medina*,³⁰¹ to insure that counsel's assistance is indeed effective, the "[t]rial [j]udges have a continuing duty, not to be lightly eschewed, to see to it that the proceedings are conducted with solicitude for the essential rights of the accused."³⁰²

The trial court must do its part to ensure that all defendants are accorded justice in criminal trials and prevent what allegedly has occurred in Georgia from happening in other states. The Georgia Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, and the American Civil Liberties Union of Georgia have claimed in a suit recently brought in federal district court against the state and federal courts of Georgia that indigent defendants routinely are denied a fair trial and "counsel are rendered ineffective, and the adversarial process is undermined and unreasonably skewed to favor the prosecution."³⁰³ The complaint specifically included judges as defendants because "the class of judges have failed to provide for an adequate indigent defense system within their respective jurisdictions."³⁰⁴

Trial courts must be mindful of Justice Brennan's observation in *Strickland v. Washington*³⁰⁵ that "counsel's incompetence can be so serious that it rises to [the] level of a constructive denial of counsel which can constitute constitutional error without any showing of prejudice."³⁰⁶ The trial court must respond and not just leave the issue of incompetent counsel for an appeals court to remedy, because "the burden, expense, and delay involved in a trial render an appeal from an eventual judgment an inadequate remedy."³⁰⁷

Two concerns, however, now arise. First, how is the court to evaluate the quality of the representation provided,³⁰⁸ and second, what form ought the intervention take? If

²⁹⁷ 287 U.S. 45 (1932).

²⁹⁸ *Id.* at 52; see also *Commonwealth v. De Christoforo*, 360 Mass. 531, 549, 277 N.E.2d 100, 112 (1971) (Tauro, C.J., dissenting) ("The trial judge has the ultimate responsibility . . . of guaranteeing the defendant a fair trial.").

²⁹⁹ 466 U.S. 648 (1984).

³⁰⁰ *Id.*

³⁰¹ 44 N.Y.2d 199, 375 N.E.2d 768, 404 N.Y.S.2d 588 (1978).

³⁰² *Id.* at 207, 375 N.E.2d at 772, 404 N.Y.S.2d at 592 (emphasis added); see also *Cooper v. Superior Court*, 55 Cal. 2d 291, 301, 359 P.2d 274, 280, 10 Cal. Rptr. 842, 848 (1961) (to ensure a fair trial, the trial judge possesses both statutory and inherent power to exercise reasonable control over all the proceedings).

³⁰³ Notice of Amendment of Complaint at 16, *Cannon v. Harris*, No. C86-297R (N.D. Ga. filed July 9, 1987).

³⁰⁴ Complaint at 20, *Newon v. Harris*, No. C86-297R (N.D. Ga. filed Oct. 24, 1986).

³⁰⁵ 466 U.S. 668 (1984).

³⁰⁶ *Id.* at 703 n.2.

³⁰⁷ *Brown v. Superior Court*, 34 Cal. 2d 559, 562, 212 P.2d 878, 880 (1949) (en banc).

³⁰⁸ Unfortunately, the court cannot always rely on the defendant to inform the court when counsel is not providing effective assistance. Defendants are reluctant to "squeal" on counsel and antagonize the one person in the system who is supposed to be primarily fighting for their cause. Additionally, as Justice Brennan recently pointed out: "[a] layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance [C]onsequently a criminal defendant will rarely know that he has not been represented competently." *Kimmelman v. Morrison*, 106 S. Ct. 2574, 2585 (1986).

the court takes seriously its responsibilities to ensure effective assistance of counsel, the court cannot wait until the trial has commenced, when it is simply too late to remedy counsel's failings.³⁰⁹ Whereas theoretically the court that discovers incompetency could abort a trial which has commenced,³¹⁰ it is far more likely that concerns with the expenses and hardship involved in any subsequent retrial would inhibit the court from proclaiming a mistrial.³¹¹

It seems logical, therefore, during the pretrial phase of the proceedings, that the judge should attempt to familiarize herself with the quality of the representation provided by counsel.³¹² The impact of ineffective assistance is as disruptive to proper court proceedings and the adversary system as are trial improprieties such as irresponsible

³⁰⁹ Although a judge confronted with an obviously incompetent attorney during trial may have several courses of action available, none can satisfactorily compensate for the damage done to the defendant. As the district court noted in *United States v. Williams*, 411 F. Supp. 854 (S.D.N.Y. 1976):

Ineptness and incompetence cannot be magically transformed to skilled advocacy during the course of a single trial. Nor can the unfairness inevitably resulting from an inept defense be cured or overcome by an instruction to the jury. We are also mindful of the potential prejudice to a defendant when a judge is continually forced to take over questioning of witnesses or to correct or admonish the defense attorney.

Id. at 858. In one district court trial, a juror expressed doubts to the court clerk about the abilities and competence of his obviously unprepared defense counsel and requested an opportunity to address the court. The court declared a mistrial and ruled that the attorney in question would be disqualified from representing the defendant at the retrial. *United States v. Rogers*, 471 F. Supp. 847, 849-50 (E.D.N.Y. 1979).

³¹⁰ For an example of a court declaring a mistrial due to counsel's incompetence, see *United States v. Williams*, 411 F. Supp. 854 (S.D.N.Y. 1976). The district court, after first conducting a hearing to assess the defendant's competency during which the defense counsel "did not seem to know what questions to ask, nor how to ask them, and the [expert] witness, manifestly without legal guidance, was almost totally unprepared to testify," let the trial commence but terminated it after the opening statements. *Id.* at 856. The court explained: "[O]nce it became clear to us that the lawyer assigned by the magistrate to represent the indigent defendant was too inexperienced, unprepared, and incompetent to present defendant's case to the jury, it became plain duty to abort the trial." *Id.* at 857. See also *Fitzgerald v. Beto*, 479 F.2d 420, 423 (5th Cir. 1973) (Morgan, J., concurring) (when it becomes apparent to the trial judge that defendant's attorney is incompetent and ineffective, the court is obligated to take steps to protect the defendant's constitutional rights).

³¹¹ If a judge carefully monitors the pretrial stage, she might be able to take steps to prevent the neglectful, unprepared counsel from bringing the case to trial. See *Smotherman v. Beto*, 276 F. Supp. 579, 588 (N.D. Tex. 1967) (lawyer who fails to probe, inquire, and search out the relevant facts is hardly prepared to do anything other than stand still at trial).

³¹² Judges might well begin the process at arraignment. A judge who informs the lawyer at first meeting that she will monitor the representation given may diminish the need for intense scrutiny later. The judge might also wish to alert the defendant as to what he can properly expect from his lawyer. For example, the judge could tell the defendant that the lawyer will be expected to attempt to contact any witnesses the defendant claims to have helpful knowledge regarding the alleged crime. Additionally, if any property was taken from the defendant which the prosecution plans to introduce into evidence against him, the lawyer should prepare with the defendant for a hearing on the motion to suppress. The former Chief Judge of the Second Circuit Court of Appeals has commented:

[I]t is possible to consider seriously the vital elements of a fair trial without concluding that it is the duty of the judge, and the judge alone, as the sole representative of the public interest, to step in at any stage of the litigation where his intervention is necessary in the interests of justice.

Kaufman, *Attorney Incompetence: A Plea for Reform*, 69 A.B.A. J. 308, 310 (1983).

repetition in the questioning of witnesses,³¹³ irrelevant questioning,³¹⁴ colloquy between counsel,³¹⁵ misconduct by defendant,³¹⁶ and unreasonable trial delay³¹⁷ — all of which the ABA Standards for the Trial Judge urge the judge to prohibit.

The judicial monitoring of counsel's preparation that I recommend ought to apply not only to those cases which go to trial, but also to those in which a plea is offered. It is during the plea negotiations where, in order to dispose of the case most rapidly, courts may actually exploit the defender's excessive caseloads and lack of preparation.³¹⁸ Because of this emphasis on speedy disposition, both the judge and counsel may violate professional and constitutional standards.

Due to the bareness of the record on appeal, the judge taking a plea may have a special responsibility to ensure that counsel has acted with the level of competence required. The Supreme Court, in *McMann v. Richardson*,³¹⁹ after specifying the proper standard of review for judging counsel's performance when the defendant has appealed from a plea alleging ineffective assistance of counsel, pointed out that "[w]e think the matter, for the most part, should be left to the good sense and discretion of the trial courts"³²⁰ The trial judge ought not accept the plea unless she has conducted a "penetrating and comprehensive examination of all the circumstances under which the plea is made."³²¹

A lawyer who has not properly prepared his client's case — who has not spoken with witnesses, examined police reports, or explored the likely success of motions to suppress the physical, testamentary, or identification evidence against the defendant — cannot properly advise his client concerning the strength of the case against him and the likelihood of conviction were the case to go to trial. The defendant, therefore, would not be receiving effective assistance of counsel.³²² The court must ensure that the attorney has not, because of his own desire to have the case "pled out," worn down the defendant's opposition and substituted his own will for that of the client's.

The trial court's proper role, before accepting any plea, is to determine to what extent the defendant's choice to plead guilty is an informed one, achieved with the full and competent representation of counsel. The court's inquiry ought to be fashioned as suggested in the following proposals for a pretrial conference or a pretrial worksheet. Additionally, the court should ensure that counsel has explored fully any possible legal

³¹³ AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE — SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Standard 6-2.3 (2d ed. Supp. 1982).

³¹⁴ *Id.*, Standard 6-2.3.

³¹⁵ *Id.*, Standard 6-3.2.

³¹⁶ *Id.*, Standard 6-3.8.

³¹⁷ *Id.*, Standard 6-1.4.

³¹⁸ See *supra* notes 140–42 and accompanying text.

³¹⁹ 397 U.S. 759 (1969).

³²⁰ *Id.* at 771.

³²¹ *United States v. Lester*, 247 F.2d 496, 500 (2d Cir. 1954); see also *United States v. Davis*, 212 F.2d 264, 267 (7th Cir. 1954) (even when a defendant is represented by the counsel of his choice, the court is mandated to ensure that the defendant has the knowledge and understanding essential to a valid plea).

³²² A.B.A. Standards for Criminal Justice, Chapter 14 *Pleas of Guilty*, Standard 14-3.2(b) instructs counsel that to "aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant in reaching a decision." (emphasis added). See also *Williams v. Kaiser*, 323 U.S. 471, 475 (1945) (a lawyer's advice and counsel is every bit as pertinent for a defendant in connection with a plea as it is for the conduct of a trial).

defenses to the charges and has clarified the applicable law and explained the significance of such defenses to the defendant.³²³

When the defendant enters a guilty plea, appellate review of the attorney's preparation of the case does not occur. The overburdened public defender, therefore knows that if his client pleads guilty, he will never be called upon to show what investigation and preparation he did or did not do on that client's case.³²⁴ External verification of effective assistance must therefore occur at the trial court level, the forum in which constitutional doctrine requires that no plea be accepted that was not knowingly and intelligently entered.³²⁵ If counsel is required to record the amount and results of the investigatory work he has done, and if the court is required to ensure that the defendant received informed, competent assistance before accepting any plea, the integrity of the bargaining process would be enhanced.

The Supreme Court has supported the requirement that the trial judge take firm action to protect a defendant's rights when pretrial publicity may represent a threat to a fair proceeding. As the Court declared in *Sheppard v. Maxwell*,³²⁶ "[t]he trial courts must take strong measures to ensure that the balance is never weighed against the accused."³²⁷ Timely judicial intervention is just as important during the pretrial stages in order to deter inadequacies of counsel that could violate the defendant's sixth amendment rights and prevent a fair trial.³²⁸ Conducting a pretrial conference or requiring the attorney to file a pretrial worksheet with the court may prove to be an effective means of encouraging competent representation.

A. The Pretrial Conference

Pretrial conferences are common in civil litigation, but are rare in criminal cases except for discussions focusing on the possibility of a plea bargain. Rule 16 of the Federal Rules of Civil Procedure makes case management and scheduling the express goals of pretrial procedure. One stated objective of judicial management is to improve "the quality of the trial through more thorough preparation."³²⁹ But whereas the conference's focus in civil cases is scheduling the various aspects of the litigation, in criminal cases I propose

³²³ See *Scott v. Wainwright*, 698 F.2d 427, 429 (11th Cir. 1983) (writ of habeas corpus was granted where counsel was ineffective due to failure to prepare a defense for the defendant prior to entering the guilty plea).

³²⁴ The overall reluctance of appeals courts to overturn guilty pleas can be noted in *Parrish v. Beto*, 414 F.2d 770 (5th Cir. 1969), where the plea of a young, unschooled boy who had been on death row for six months, threatened by the prosecutor with being "burned" on the electric chair, and pressured by both his lawyer and his family to plead a sentence of ninety-nine years, was held by the Fifth Circuit to have been voluntary.

³²⁵ *Boykin v. Alabama*, 395 U.S. 238 (1969).

³²⁶ 384 U.S. 333 (1966).

³²⁷ *Id.* at 362; see also *Chandler v. Florida*, 449 U.S. 560, 566 (1981) ("The judge has discretionary power to forbid [media] coverage whenever satisfied that coverage may have a deleterious effect on the paramount right of the defendant to a fair trial.").

³²⁸ Certainly the trial judge has the clear obligation not to let a trial proceed when it is clear that any conviction would be reversed due to the ineffective assistance of counsel. See *People v. McKenzie*, 34 Cal. 3d 616, 627, 668 P.2d 769, 776, 194 Cal. Rptr. 462, 469 (1983) (trial judge who permitted a trial wherein the defendant did not receive the effective assistance of counsel "virtually ensured an appeal, a reversal and a future retrial, thereby placing an unnecessary additional strain on an already overburdened judicial system").

³²⁹ FED. R. CIV. P. 16(a) comment to 1983 Amendment.

a monitoring session where the judge reviews with defense counsel, for example, what subpoena requests and motions for discovery he has made,³³⁰ why other motions have not been filed, how frequently he has met with the client, what legal issues have been researched in preparation for trial, and whether witnesses have been contacted and interviewed.³³¹

Unlike some other aspects of client representation, the degree of pretrial preparation can be objectively assessed and evaluated.³³² Because such conferences require time,³³³ they are likely to meet resistance in an already overburdened system. But it might well be the case, at least in some instances, that such pretrial conferences can actually reduce trial time and promote negotiated dispositions.³³⁴ In the federal courts, if the district court judges are unable to assume the burden of such a pretrial conference, magistrates might provide the supervision required.³³⁵ At the state level, special judges could be designated to conduct the pretrial conferences. An advantage of designating non-trial judges to supervise case preparation is that it would allay the concern that if the same judge presided over the pretrial monitoring as presided over the trial, the information gained from conferencing might affect her judgment of the defendant's guilt or innocence.

³³⁰ Considerably less information is provided one's adversary as a matter of course in criminal proceedings than in civil. Unless the defense counsel actively subpoenas and files motions for discovery material, he will simply not obtain what could be vital material information for the defense of his client. *See, e.g.,* United States v. Agurs, 427 U.S. 97, 110 (1976) (even where the defendant claims self defense, the prosecutor is not obligated to provide defense counsel with the victim's arrest record unless specifically requested to do so).

³³¹ In many cases the counsel should interview not only possible defense witnesses, but prosecution witnesses as well. It can be most advantageous in preparing the cross examination of a witness if counsel has had an opportunity in advance of the trial to assess that witness' personality and note any weaknesses in the witness' account of the occurrence. In *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974), the court found that defense counsel's frequent failure to approach prosecution witnesses was "absurd and dangerous," contravened the attorney's essential obligation to conduct factual investigations, and constituted an abdication of professional judgment. *Id.* at 216. *See also* *Morrow v. Paratt*, 574 F.2d 411, 413 (8th Cir. 1978) (failure to interview prosecution witnesses violates the attorney's constitutional duty to provide effective assistance); *United States v. DeCoster*, 487 F.2d 1197, 1204 (D.C. Cir. 1973) (defense counsel should interview government witnesses as well as those that he intends to call).

³³² Judge Bazelon, the former Chief Justice of the Court of Appeals for the District of Columbia Circuit, has observed regarding the obligation of defense attorneys, that counsel must confer with his client without delay and as often as necessary to elicit matters of defense, discuss fully potential strategies and tactical choices with his client, properly advise his client of his rights and take all actions necessary to preserve them, and conduct appropriate investigations, both factual and legal. Precisely because these rules are so elementary, no one can dispute that a "reasonable" lawyer, absent good cause, would comply with them.

Bazelon, *The Realities of Gideon and Argersinger*, *supra* note 250, at 823 (1976).

³³³ If judicial monitoring were to be institutionalized, accepted, and anticipated, one could expect lawyers to attempt, to the extent time permits, to prepare and investigate each case fully. The result might very well be that after a while, less court time would be required for intervention. There might even be some economic gains for the system: as judges ensure that counsel are prepared, there may be fewer reversals of convictions on ineffective assistance grounds, with a corresponding decrease in costs for retrials.

³³⁴ *See* Schwarzer, *Dealing with Incompetent Counsel — The Trial Judge's Rule*, 93 HARV. L. REV. 633, 665 (1980).

³³⁵ *See* Kaufman, *Attorney Incompetence: A Plea for Reform*, 69 A.B.A. J. 308, 309 (1983).

Perhaps the most significant advantage in instituting a system of pretrial conferencing would be the message communicated to the judges: Lawyers *must* conduct full investigations and adequately prepare before a trial can begin. If a public defender were to inform the court at conference that he is not ready to begin trial because he has not had sufficient time to prepare, the judge would find it most difficult to disregard such claim and order the counsel to begin the trial.

B. *The Defense Counsel Pretrial Worksheet*

An advantage of the worksheet approach is that it involves less court time. This approach requires the lawyer to indicate on the worksheet what he has done — for example, what witnesses he interviewed — and not done, including explaining why he has not, for example, made a motion for a hearing to suppress the pretrial identification lineup.³³⁶ The worksheet could be based on the ABA's *Standards for the Administration of Criminal Justice, Chapter Four: The Defense Function*,³³⁷ or could be formulated to encourage compliance with local regulations (for example, requirements that motions be filed within fifteen days of arraignment).

If the Supreme Court had approved a set of performance standards for defense attorneys, the task of monitoring an attorney's work would be easier.³³⁸ But the Court stated in 1986 in *Nix v. Whiteside*³³⁹ that the time had not yet come for the Court to specify the weight to be assigned professional codes or canons of ethics in defining proper attorney performance.³⁴⁰ Other courts, however, have developed their own stan-

³³⁶ The pretrial worksheet should also encompass items such as: whether police reports were subpoenaed and if not, why not; whether all the witnesses present at the scene of the alleged crime were contacted; whether the scene was visited and photographs taken; whether character witnesses for the defense were contacted; what specific examinations were performed (e.g. chemical and fingerprint analyses) and were the results subpoenaed and, if called for, submitted to a defense expert for examination; whether any arrest or search warrants were involved and if so, whether they were subpoenaed; whether discovery motions were made, and if applicable, whether a motion was filed to suppress the introduction of physical evidence against the defendant; whether the defendant has been notified of the prosecutor's intention to introduce inculpatory statements and if so, whether a motion has been filed for a *Miranda* hearing to challenge the voluntariness of such statements; and whether any evidence exists that the defendant might not be competent to stand trial or may have been legally insane at the time of the crime and if so, whether psychiatrists have been contacted to examine the defendant. The lawyer should also be required to indicate the number of times and the amount of time that he has spent consulting with his client.

³³⁷ See Tague, *The Attempt to Improve Criminal Defense Representation*, 15 AM. CRIM. L. REV. 109, 164 n.285 (1977). Many courts have used the ABA Criminal Justice Standards when assessing ineffective assistance claims. For example, in *Eldridge v. Atkins*, 665 F.2d 228, 232 (8th Cir. 1981), *cert. denied*, 456 U.S. 910 (1982), the court adopted Standard 4.1 regarding the duty of counsel to investigate and call witnesses.

³³⁸ The author is a member of the Defense Counsel Competency Committee of the National Legal Aid and Defender Association which has prepared proposed *Performance Guidelines for Criminal Defense Representation*. The *Guidelines*, which specify actions that counsel should take at each stage of the proceedings, are organized as follows: 1. General Principles of Representation; 2. Pretrial Release; 3. Preliminary Proceedings; 4. General Case Preparation; 5. Pretrial Motions; 6. Disposition by Plea; 7. Trial Proceedings; 8. Sentencing; 9. Post-Judgment Proceedings.

³³⁹ 106 S. Ct. 988 (1986).

³⁴⁰ Justice Blackmun's concurring opinion expressed the belief that "[i]t is for the State to decide how attorneys should conduct themselves in state criminal proceedings." *Id.* at 1006. The Court, in *Strickland v. Washington*, 466 U.S. 668 (1984), had held that ineffective assistance occurred when representation fell below "an objective standard of reasonableness." *Id.* at 688. Courts have applied this standard, as well as a requirement that attorneys' performance fall within a "range of compe-

dards to evaluate ineffective assistance claims. The Fourth Circuit Court of Appeals outlined the following key principles by which counsel must abide:

Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.³⁴¹

The pretrial worksheet may not provide the court as ample an opportunity as the pretrial conference would to assess, in an intelligent and informed manner, the quality of the preparation the lawyer has done. The attorney may view the worksheet merely as another form he must fill out and, as is the practice with voucher forms for appointed counsel or case evaluation sheets with public defenders, merely concern himself with the worksheet in a routine, pro-forma manner. A significant benefit of the worksheet approach, however, is the assistance it would provide for the appellate review of ineffective assistance claims.³⁴² The worksheet would become part of the court file, and in some cases might obviate the need for a hearing to determine the amount of preparation or investigation done.³⁴³

Both the pretrial conference and the defense counsel pretrial worksheet proposals might meet resistance by those claiming intrusion upon the attorney-client relationship. There is, however, no need for the trial court judge to scrutinize confidences, strategies or tactics. Rather, the court's focus should be on whether the lawyer has devoted the time necessary to prepare and investigate the client's case properly. In *Coles v. Peyton*,³⁴⁴ the Fourth Circuit held that the defendant, who was sentenced to twenty-five years in prison upon his conviction, was denied effective assistance. The Court based its decision on the finding that the lawyer had failed to explain fully the elements of the crime³⁴⁵

tenace," on a case-by-case basis. In *Moore v. United States*, 432 F.2d 730, 736 (3d Cir. 1970), the Third Circuit defined "normal competency" as "the exercise of the customary skill and knowledge which normally prevails at the time and place." Judges commonly evaluate the "reasonableness" of other professional's conduct, and a trial judge ought to be able to ascertain easily whether defense counsel's representation is "reasonable." See Bazelon, *The Realities of Gideon and Argersinger*, *supra* note 250, at 836-38 (1976), for a suggested sample worksheet. As Judge Bazelon acknowledged, his worksheet can indicate only "gross cases of poor investigation . . ." *Id.* at 831. Professor Tague indicates that his suggested checklist need not be disclosed to the judge unless the defendant, upon reviewing it, chooses to indicate to the judge an objection as to its accuracy. Tague, *supra* note 337, at 164.

³⁴¹ *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968).

³⁴² It is, however, certainly possible that individuals evaluating the worksheet may reach different conclusions about the effectiveness of the representation provided. In *United States v. Clayborne*, 509 F.2d 473 (D.C. Cir. 1974), the trial lawyer's written statement regarding why he chose not to cross examine a crucial prosecution witness was found meritorious by the majority of the District of Columbia Circuit. *See id.* at 481. The dissenting judge, however, concluded that the lawyer's explanation was in fact an attempt to cover up inadequate research and preparation. *Id.* at 490 (Bazelon, J., dissenting).

³⁴³ *See* Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1248 (1970). Appeal proceedings increasingly focus on the competence or incompetence of trial counsel. *See also* Van de Kamp, *The Right to Counsel: Constitutional Imperatives in Criminal Cases*, 19 LOY. OF L.A.L. REV. 329, 330 (1985).

³⁴⁴ 389 F.2d 224 (4th Cir.), *cert. denied*, 389 U.S. 849 (1968).

³⁴⁵ The Fourth Circuit found that one of the elements required to constitute a violation of the Virginia law at issue may not have been present. *Id.* at 227.

and to question the defendant about possible defenses,³⁴⁶ failed to interview possible material witnesses to discover what their testimony might be, and failed to investigate the reputation of the complaining witness.³⁴⁷ These findings could have been easily ascertained by a trial judge before the trial ever began, possibly preventing a trial that violated the defendant's constitutional right to the effective assistance of counsel.

Lawyers may resist being "checked up on," but if the long term result would be higher standards of performance for lawyers in criminal cases, that price is worth paying. Conscientious, overburdened public defenders, pressured to represent more clients than they adequately can handle, may in fact find significant support in a requirement that judges must ensure proper preparation and investigation before a trial can commence. If the state engages an attorney to do a job, in this instance, to provide effective assistance of counsel, it is eminently reasonable to permit measures to confirm that the job is being done.

CONCLUSION

When the state accuses someone of a crime, that individual cannot be denied the means with which to respond, i.e. the effective assistance of counsel. When defense counsel represents to the court that he is unprepared to commence trial, the court must not routinely deny the request for a continuance, for to do so would impair the fundamental rights of the accused. Even though the public defender may have had a sufficient number of days in which he could have investigated and prepared the case, the reality is that the overburdened attorney may simply have been unable to prepare effectively all the cases assigned to him. It is unfair, improper, and unjust to sacrifice the defendant's rights because of his counsel's failings.

When a trial has taken place wherein the defense counsel has not been adequately prepared, we cannot be confident of the accuracy of the verdict. The adversary system assumes that each side has done everything possible to present the issues to the court; if defense counsel has not effectively done so, then justice may not have prevailed. For the judge to fulfill his role properly, he must be confident that the defense counsel has fulfilled his.

Trial judges cannot operate under the comfortable illusion that all defense counsel who appear before them are effectively and competently representing their clients. Inadequate funding of public defender offices has created excessive caseloads and this, in turn, has reduced the time available for each case and has encouraged excessive reliance on pleas. Courts themselves have succumbed to administrative pressures to rapidly process and dispose of cases, and have therefore too often failed in their responsibilities to the defendant.

Institutionalizing the proposals advocated in this Article — judicial monitoring of attorney preparation through a pretrial conference or a defense counsel pretrial worksheet — would communicate the message that the *quality* of assistance provided is of critical importance. It is properly the judge's function to ensure that the counsel he has appointed to represent the indigent defendant perform in accordance with professionally accepted standards of preparation, investigation, consultation, and motion practice.

³⁴⁶ The court emphasized that counsel has an affirmative obligation to conduct sufficient inquiry to determine whether valid defenses exist. *Id.* at 226 n.3.

³⁴⁷ *Id.* at 226.