National Legal Aid & Defender Association

EQUAL JUSTICE
OF THE PEOPLE
FOR THE PEOPLE

October 31, 2011

The Supreme Court of Washington
In care of: Ms. Camilla Faulk, Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
Camilla.Faulk@courts.wa.gov

Re: Proposed Standards for Indigent Defense Services pursuant to CrR 3.1, CrRLJ 3.1, and JuCR 9.2

Dear Justices,

I write to respectfully ask the Washington Supreme Court to adopt the standards for indigent defense services proposed pursuant to CrR 3.1, CrRLJ 3.1, and JuCR 9.2. To aid your deliberations, I address below three issues raised by the Washington State Association of Municipal Attorneys (WSAMA) and the Association of Washington Cities (AWC) in a letter dated October 14, 2011. Specifically, I discuss their claims that: a) the proposed standards unnecessarily assume that indigent defense attorneys cannot follow the Rules of Professional Conduct (RPC), the state and federal constitutions, and their attorney oaths; b) the proposed standards establish a "different" or "higher" threshold for ineffective assistance of counsel; and, c) the proposed rule changes, if adopted, would constitute a separation of powers issue by forcing counties and local municipalities to spend money on right to counsel services (i.e., legislating from the bench).

1. **Rules of Professional Conduct, constitutional demands, and attorney oaths are not sufficient to ensure reasonable public defense workloads.**

Policymakers have long recognized that minimum quality standards are necessary to assure public safety in building a hospital, a school, or a bridge. The taking of a person's liberty or life merits no less consideration.

Foundational standards set the limits below which no public defense system should fall. The use of national standards of justice to guarantee constitutionally adequate representation meets the demands of the United States Supreme Court. In *Wiggins v. Smith*, 539 U.S. 510 (2003), the Court recognized that national standards serve as guideposts for assessing ineffective assistance of counsel claims. Standards for public defense attorneys and systems define competency, not only in the sense of the attorney's personal abilities and qualifications, but also in the systemic sense that the attorney practices in an environment that provides her with the time, resources, independence, supervision, and training to effectively carry out her charge to adequately

represent her clients. *Rompilla v. Beard,* 545 U.S. 374 (2005) echoes those sentiments, noting that the standards describe the obligations of defense counsel "in terms no one could misunderstand."[1]

The American Bar Association's *Ten Principles of a Public Defense Delivery System (Ten Principles)* present the most widely accepted and used compiled summary of national standards for public defense systems. Adopted in February 2002, the ABA *Ten Principles* distill the existing voluminous national standards to their most basic elements, which officials and policymakers can readily review and apply. In the words of the ABA Standing Committee for Legal Aid & Indigent Defendants (ABA/SCLAID), the *Ten Principles* "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney."[2] United States Attorney General Eric Holder called the ABA *Ten Principles* the basic "building blocks" of a functioning public defense system.[3]

The ABA *Ten Principles* reflect interdependent standards. That is, the health of an indigent defense system cannot be assessed simply by rating a jurisdiction's compliance with each of the ten criteria and dividing the sum to get an average score. For example, just because a jurisdiction has a place set aside in the courthouse for confidential attorney/client discussions (*Principle 4*)[4] does not make the delivery of indigent defense services any better from a constitutional perspective if the appointment of counsel comes so late in the process (*Principle 3*),[5] or if the attorney has too many cases (*Principle 5*),[6] or if the attorney lacks the training (*Principles 6 & 9*),[7] as to render those conversations ineffective at serving a client's representational needs.

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

[2] American Bar Association, *Ten Principles of a Public Defense Delivery System,* from the introduction, at: http://bit.ly/ggLidF.

[3] United States Attorney General Eric Holder. *Address before the Department of Justice's National Symposium on Indigent Defense: Looking Back, Looking Forward 2000-2010.* Washington, DC February 18, 2010. http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html

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

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

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

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

If it were possible, however, to evaluate the overall health of a jurisdiction's indigent defense system by a single criterion, the establishment of reasonable workload controls might be considered the most important benchmark of an effective system. An adequate indigent defense program must have binding workload standards for the system to function, because public defenders do not generate their own work. Public defender workload is determined, at the outset, by a convergence of decisions made by other governmental agencies and beyond the control of the indigent defense providers. The legislature may criminalize additional behaviors or increase funding for new police positions that lead to increased arrests. And, as opposed to district attorneys who can control their own caseload by dismissing marginal cases, diverting cases out of the formal criminal justice setting, or offering better plea deals, public defense attorneys are assigned their caseload by the court and are ethically bound to provide the same uniform level of service to each of their clients.[8]

Workload controls allow public defenders to spend a reasonable amount of time fulfilling the parameters of adequate attorney performance,[9] including: meeting and interviewing a client; preparing and filing necessary motions; receiving and reviewing the response to motions; conducting factual investigation, including locating and interviewing witnesses, locating and obtaining documents, locating and examining physical evidence; performing legal research; conducting motion hearings; engaging in plea negotiations with the state; conducting status conferences with the judge and prosecutor; preparing for and conducting trials; and sentencing preparation in cases where there is a guilty plea or conviction after trial.[10]

For all these reasons, the ABA *Principle 5* states unequivocally that defense counsel's workload must be "controlled to permit the rendering of quality representation" and that "counsel is

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[8] Workload limits have been reinforced in recent years by a growing number of systemic challenges to underfunded indigent defense systems, where courts do not wait for the conclusion of a case, but rule before trial that a defender's caseloads will inevitably preclude the furnishing of adequate defense representation. *See, e.g., State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981), *cert. den.* 454 U.S. 1142 (Mo. 1982); *State v. Robinson*, 123 N.H. 665, 465 A.2d 1214 (N.H. 1983); *Corenevsky v. Superior Court*, 36 Cal.3d 307, 682 P.2d 360 (Cal. 1984); *State v. Smith*, 140 Ariz. 355, 681 P.2d 1374 (Ariz. 1984); *State v. Hanger*, 146 Ariz. 473, 706 P.2d 1240 (Ariz. 1985); *People v. Knight*, 194 Cal. App. 337, 239 Cal. Rptr. 413 (Cal. 1987); *State ex rel. Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (Kan. 1987); *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), *cert den.* 495 U.S. 957 (1989); *Hatten v. State*, 561 So.2d 562 (Fla. 1990); *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit*, 561 So.2d 1130 (Fla. 1990); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990); *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (Ark. 1991); *City of Mount Vernon v. Weston*, 68 Wash. App. 411, 844 P.2d 438 (Wash. 1993); *State v. Peart*, 621 So.2d 780 (La. 1993); *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996). Many other cases have been resolved by way of settlement.

[9] This is just a partial list of ethical duties required under national and state performance guidelines. Performance Guidelines for Criminal Defense Representation (NLADA, 1995) is available on-line at: www.nlada.org/Defender/Defender_Standards/Performance_Guidelines.

[10] Restricting the number of cases an attorney can reasonably handle has benefits beyond the impact on an individual client's life. For example, the overwhelming percentage of criminal cases in this country requires public defenders. Therefore, the failure to adequately control workload will result in too few lawyers handling too many cases in almost every criminal court jurisdiction -- leading to a burgeoning backlog of unresolved cases. The growing backlog means that people waiting for their day in court fill local jails at taxpayers' expense. Forcing public defenders to handle too many cases often leads to lapses in necessary legal preparations. Failing to do the trial right the first time results in endless appeals on the back end – delaying justice to victims and defendants alike – and ever-increasing criminal justice expenditures. And, when an innocent person is sent to jail as a result of public defenders not having the time, tools, or training to effectively advocate for their clients, the true perpetrator of the crime remains free to victimize others and put public safety in jeopardy.

obligated to decline appointments" when caseload limitations are breached. In May 2006, the ABA's Standing Committee on Ethics and Professional Responsibility further reinforced this imperative with its *Formal Opinion 06-441.* The ABA ethics opinion observes: "[a]ll lawyers, including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently."[11] Both the trial advocate and the supervising attorney with managerial control over an advocate's workload are equally bound by the ethical responsibility to refuse any new clients if the trial advocate's ability to provide competent and diligent representation to each and every one of her clients would be compromised by the additional work. Should the problem of an excessive workload not be resolved by refusing to accept new clients, *Formal Opinion 06-441* requires the attorney to move "to withdraw as counsel in existing cases to the extent necessary to bring the workload down to a manageable level, while at all times attempting to limit the prejudice to any client from whose case the lawyer has withdrawn."[12]

Given that the American Bar Association -- through promulgation of standards and adoption of ethics opinions -- has so ardently required caseload control for indigent defense systems, why do public defense attorneys continue to accept new assignments that force them to triage professional services to their clients because of work overload? In most instances, the answer is that the act of challenging the court or county administration over high caseloads would result in a public defense attorney's termination of employment.

This is why all pertinent national standards call for the independence of the defense function. The first of the ABA's *Ten Principles* explicitly limits judicial oversight and political interference and calls for the establishment of an independent oversight board whose members are appointed by diverse authorities, so that no single official or political party has unchecked power over the public defense function.

The lack of independence negatively affects public defense systems in a variety of ways, depending on the type of system. In assigned counsel systems, the concern is with unilateral judicial power to select lawyers to be appointed to individual cases and to reduce or deny the lawyer's compensation. Defense attorneys (especially those who have practiced in front of the same judiciary for long periods of time) instinctively understand that their personal income is tied to "keeping the judge happy" rather than zealously advocating for their clients. And, in jurisdictions that place a high emphasis on celerity of case processing, the defense attorneys simply understand they are not to do anything that will slow down the pace of disposing of cases, else they will risk the pay that a judge has been able to secure for them. Over time, the defense attorney is

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[11] American Bar Association, Standing Committee on Ethics and Professional Responsibility, *Formal Opinion 06-441: Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation.* May 13, 2006. Opinion can be found online at: **www.abanet.org/cpr/pubs/ethicopinions.html.**

[12] Ibid. (emphasis added).

indoctrinated into the culture of the judge's courtroom, triaging the responsibilities all lawyers owe their clients.[13]

While judges often place a priority on speed, in jurisdictions where county administrators predominantly control the appointment of counsel, it is typically cost that becomes the driving factor in inadequate representation. For public defender offices, independence is necessary to address the concerns associated with vesting the hiring and firing of the chief executive with a judge or governmental official whose interests -- at times -- will invariably be at odds with the principles of "zealous advocacy," which defenders are ethically bound to provide. Without regard to the necessary parameters of ethical representation, the attorney's caseload creeps higher and higher,[14] yet the attorney is in no position to refuse the dictates of the judge or county manager.

Thus, the WSAMA and AWC position that attorney oaths, constitutional imperatives, and Rules of Professional Responsibilities are enough to control indigent defense workload does not hold true in jurisdictions without independence. The proposed workload standards are, therefore, necessary in states like Washington that have chosen to delegate its right to counsel obligations to its counties without first ensuring the independence of those county systems.

2. The proposed standards will not set a "different" or "higher" threshold for ineffective assistance of counsel.

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

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

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[13] While the vast majority of judges strive to do justice in all cases, political pressures, administrative priorities such as the need to move dockets, or publicity generated by particularly notorious crimes can make it difficult for even the most well-meaning judges to maintain the appearance of neutrality.

[14] Moreover, having judges maintain a role in the oversight of indigent defense services can create the appearance of impartiality -- creating the false perception that judges are not fair arbitrators. The Legislature should guarantee to the public that critical decisions regarding whether a case should go to trial, whether motions should be filed on a defendant's behalf, or whether certain witnesses should be cross-examined are based solely of the factual merits of the case and <u>not</u> on a public defender's desire to please the judge in order to maintain his job. When the public fears that the court process is unfair, people are less inclined to show up for jury duty or to come forward with critical information about crimes.

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

Cronic explains the two situations where a client receives what we will call "non-representation," as contrasted with "ineffective representation" that is governed by *Strickland.* Under *Cronic*, a trial proceeding is unfair and the Sixth Amendment is violated where either of these types of non-representation occur. In these situations, there is no inquiry into the attorney's "actual performance at trial" and prejudice is presumed. The *Cronic* Court observed that the most obvious form of non-representation is the "complete denial of counsel" altogether. For this discussion, it is important to note that *Cronic* goes on to define a second form of non-representation that violates the Sixth Amendment. The Court said surrounding circumstances may render even a fully competent lawyer incapable of providing effective assistance, making "the adversarial process itself presumptively unreliable" and "the trial inherently unfair."

The *Cronic* Court pointed to the systemic factors in *Powell v. Alabama*, 287 U.S. 45 (1932), as creating such as situation. This is the case of the Scottsboro Boys, in which a judge appointed unqualified attorneys who met their clients on the morning of trial and failed to devote sufficient time to zealously advocate for their clients in the face of the state court's emphasis on disposing of the cases as quickly as possible.[15]

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

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

States are charged with providing attorneys to indigent defendants facing loss of liberty, and states and their counties and cities provide these attorneys through their indigent defense systems. When the circumstances of the indigent defense system are such that the lawyers nominally designated to represent clients are rendered incapable of providing effective assistance, then a presumption of prejudice is presumed under *Cronic.* Under these circumstances, the indigent defense *system* is ineffective.

So what were the structural deficiencies specified by the U.S. Supreme Court in *Powell* that constituted "non-representation" under *Cronic*? The answer is a lack of independence and a lack of time to zealously defend clients.

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

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

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

Powell further underscores the importance of adequate time as the core of effective representation, stating: "The right of the accused ... to have the aid of counsel for his defense, which includes the right to have sufficient time to advise with counsel and to prepare a defense, is

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

Where indigent defense systems do meet the standards of independence and workload control that are at the core of the ABA *Ten Principles*, then and only then is it appropriate to evaluate the representation actually provided by the appointed attorney under the performance and prejudice test of *Strickland.*[16] By adopting maximum caseload numbers as a de facto way to ensure that attorneys have sufficient time to provide representation, the Washington Supreme Court would not be creating a "different" or "higher" standard for ineffective assistance of counsel, but rather is setting the foundational basis upon which *Strickland* can be appropriately applied.

3. The proposed standards, if adopted, would not violate the separation of powers

First, the right to counsel mandate is far from new – the *Gideon* decision is now nearly 49-years old. So this Court is hardly creating new law by enacting these Rules regarding provision of right to counsel services. The fact that the right to counsel has been obscured in Washington for so long does not allow the state and its counties to now cry poverty and be absolved of its constitutional responsibilities under the Sixth and Fourteenth Amendments. I well understand the difficulties Washington counties face in trying to shoulder the state's responsibility, but the Constitution does not allow for rights to be infringed during difficult economic times.

Secondly, the establishment of binding caseload caps does not require that state or local legislative branches throw money at the problem, negating any question of separation of powers. On this front, it is important to heed the words of Cato Institute Adjunct Scholar, Erik Luna, who testified before the United State House Judiciary Committee, Sub-Committee on Crime, Terrorism & Homeland Security in 2009 on the failure of states to uphold the right to counsel: "In practice, the states have brought any crisis upon themselves through, *inter alia,* overcriminalization – abusing the law's supreme force by enacting dubious criminal provisions and excessive punishments, and overloading the system with arrests and prosecutions of questionable value. State penal codes have become bloated by a continuous stream of legislative additions and amendments, particularly in response to interest-group lobbying and high-profile cases, producing a one-way ratchet toward broader liability and harsher punishment. Lawmakers have a strong incentive to

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

add new offenses and enhanced penalties, as conventional wisdom suggests that appearing tough on crime fills campaign coffers and helps win elections, irrespective of the underlying justification. Law enforcement also has an interest in a more expansive criminal justice system, with the prospects of promotion (or reelection) often correlated to the number of arrests for police and convictions for prosecutors."

The legislative branches retain full control over the manner in which they respond to this Court's Rules, if at all. In short, changing prosecution charging practices, creating new criminal justice processes to divert cases out of the formal criminal justice system, and reclassification of crimes to civil infractions are all perfectly acceptable ways to decrease the number of cases needing publicly paid representation in order to meet any imposed caseload caps, without the state or counties spending one dime more for public defense. Indeed, the establishment of caseload caps may spur on a reevaluation of criminal justice practices that would result in major cost savings for Washington taxpayers across the entire criminal justice system.

Moreover, the imposition of caseload standards would go a long way toward correcting the existing separation of powers issue – namely that the Washington legislative and executive branches have failed to create a right to counsel system that meets the demands of the Sixth and Fourteenth amendments, which judges are singularly responsible for ensuring.

Should the Court ultimately be unmoved by arguments presented here, there is another course of action. In *State of Louisiana v. Citizen*, 04-1841, 898 So.2d 325 (La. 2005), the Louisiana Supreme Court affirmed that figuring out how to fund indigent defense is a statewide legislative duty. However, the ruling also affirmed that the judicial branch of government is responsible for ensuring the proper – i.e. constitutional – administration of justice. *Citizen* states that if the state government does not find some way to ensure the adequate funding and administration of the right to counsel, then the state cannot put the poor on trial. This left with the legislative branch the decision whether to fund indigent defense services or not pursue prosecutions. Should the Washington Supreme Court choose not to impose caseload standards, it could deem all systems that have not ensured the independence of the public defense attorneys – thus allowing them protection in invoking their ethical duties to turn back cases – as presumptively providing "non-representation" under *Cronic*. This would leave the legislature in the same position as their counter-part in Louisiana, which ultimately decided to overhaul their right to counsel system.

Conclusion

I understand the financial strains Washington counties are experiencing and I am not immune to arguments regarding cost and efficiencies, especially during these difficult economic times. However, the purpose of a public defense system is not to save money or to help the system more quickly move from arrest to prison. It is instead to make certain that, before the court removes a citizen's liberty, it provides that citizen with the process that is due him or her under the Constitution. Justice -- not cost savings, nor politics -- is the entire purpose of the American criminal justice system. As the United States Supreme Court stated in *Gideon*: "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."

Sincerely,

David J. Carroll, Research Director
National Legal Aid & Defender Association
1140 Connecticut Avenue, NW, Suite 900
Washington, DC 20036
(202) 329-1318
d.carroll@nlada.org
@GideonAlerts