Raising the Bar: Indigent Defense and the Right to a Partisan Lawyer

by Steven Zeidman*

In *Ake v. Oklahoma*,[1] the Supreme Court of the United States held that an indigent defendant is entitled to the assistance of an expert in cases where it is established that mental health is at issue.[2] Thirty-two years later, in *McWilliams v. Dunn*,[3] the Court finally addressed whether an expert must be independent of the prosecution.[4] During oral argument, counsel for McWilliams argued that *Ake* required that the expert must be part of the defense team and on the defendant's side.[5] Justice Gorsuch, in only his second week on the Court, stated dubiously that if that were the case, then "surely it would also require a partisan lawyer."[6] Although certainly not his intent, Justice Gorsuch's question should compel a reexamination of the contours of the right to counsel. Given the complexities and demanding nature of the work and the intricacies of the relationship between lawyer and client, the accused should indeed be entitled to a partisan lawyer.[7]

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1. 470 U.S. 68 (1985).

2. *Id.* at 83.

3. 137 S. Ct. 1790 (2017).

4. *Id.* at 1800.

5. Transcript of Oral Argument at 3, McWilliams v. Dunn, 137 S. Ct. 1790 (2017) (No. 16-5294).

6. *Id.* at 27.

7. Webster's defines *partisan* as "a firm adherent to a party, faction, cause or person; *especially*: one exhibiting blind, prejudiced, and unreasoning allegiance." *Partisan*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/partisan (last visited Dec. 10, 2017). The right to partisan counsel is also dictated by the explosion of collateral consequences that flow from conviction and require counsel's steadfast vigilance. *See, e.g.*, Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119 (2009); Gabriel J. Chin

This Article looks into the motivations of lawyers who represent poor people accused of crime. Poor criminal defendants must be entitled to unabashedly and unequivocally partisan lawyers, those fully devoted to the underlying causes of indigent criminal defense and the case of each individual client. This Article notes that many lawyers on assigned counsel plans are former prosecutors and argues that they should not be permitted to represent indigent defendants unless and until their attitudes and motivations are vigorously vetted.[8]

The phrase *mass incarceration* is now on radar screens across the country as we grapple with the incarceration explosion and the reality that 2.2 million people in the United States are currently behind bars.[9] While there are myriad reasons posited to explain the jail and prison growth, there are certain undeniable truths about the 2.2 million—all were adjudicated, prosecuted, and, for the most part, defended.[10] While power in the criminal legal system is vested in the hands of the judiciary and the prosecution, no one can gainsay that the defense bar had some role in the massive increase of incarcerated people. At a minimum, it is necessary to ask just how zealously those 2.2 million were represented.

Historically in New York City, those who are charged with a crime and are unable to afford counsel have been represented by attorneys from organizations contracted with the city to provide criminal defense services, and in cases presenting conflicts of interest, by individual attorneys from an assigned counsel panel.[11] Several years ago, I served

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& Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002). The Supreme Court's application of the right to effective assistance of counsel to plea bargaining also dictates that defense counsel must be fully devoted to all clients, not just those pursuing a trial. *See* Missouri v. Frye, 132 S. Ct. 1399 (2012); Lafler v. Cooper, 132 S. Ct. 1376 (2012).

8. For a historical overview of individually assigned counsel systems of indigent defense, see Junius L. Allison, *Relationship Between the Office of Public Defender and the Assigned Counsel System*, 10 VAL. U. L. REV. 399 (1976).

9. *See, e.g.*, Editorial, *End Mass Incarceration Now*, N.Y. TIMES, May 24, 2014; *Criminal Justice Facts*, SENTENCING PROJECT, http://www.sentencingproject.org/criminal-justice-facts (last visited Feb. 6, 2018).

10. It is tragically not uncommon for defendants charged with lower level offenses to enter guilty pleas without benefit of counsel. *See, e.g.*, ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009), https://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808; Timothy Williams, *Courts Sidestep the Law, and South Carolina's Poor Go to Jail*, N.Y. TIMES, Oct. 12, 2017; Jeremy Borden, *Immigrants Take Guilty Pleas Without a Lawyer and Can Later be Deported*, WASH. POST, Jan. 27, 2013.

11. Indigent defendants in New York State are provided counsel pursuant to article 18-B of the County Law. N.Y. COUNTY LAW § 722 (LexisNexis 1968). New York City's indigent defense plan was initially spelled out in Executive Order No. 178, City of New

on the screening committee overseeing membership on the assigned counsel panel.[12] Chief among our responsibilities was reviewing applications from attorneys seeking to be placed on the panel.[13]

Early on in my tenure, we reviewed the application of a person who had recently resigned from a local district attorney's office after three years as a prosecutor. He sailed through the process as everyone on the screening committee seemed to assume he had all the experience required to be on the panel. It was apparently of no moment that he had never advocated for anyone charged with a crime or counseled someone faced with the overwhelming decision of whether to accept a plea or go to trial, and no one asked him why he now suddenly wanted to defend.

As I looked deeper into the composition of the assigned counsel panel, I learned that it was populated by a majority of former prosecutors. That recognition led me to examine the contours of the right to counsel to try and ascertain what the accused was entitled to by way of his attorney's attitude toward him and toward indigent criminal defense in general.

Over fifty years ago, in *Gideon v. Wainwright*,[14] the Supreme Court held that states must provide lawyers for indigent defendants accused of felonies.[15] Almost ten years later, in *Argersinger v. Hamlin*,[16] the Court expanded *Gideon*'s reach to essentially require counsel for misdemeanors.[17] However, while states were now required to provide

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York, Office of the Mayor (Nov. 27, 1965). For discussions of the three basic types of indigent defense systems (public defender, individually assigned counsel, and contract organizations), see ROBERT L. SPANGENBERG ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY (1986); Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?*, 22 RUTGERS L.J. 361 (1991). The last comprehensive survey of indigent defense services nationwide examined the country's 100 most populous counties. It found that individually assigned counsel handled 15%, or 630,000, of the overall 4.2 million cases. *See* Carol J. Frances & Marika F. X. Litras, *Indigent Defense Services in Large Counties, 1999*, BUREAU OF JUST. STAT. BULL. (U.S. Dep't of Justice, Washington, D.C.), Nov. 2000, at 1, https://www.bjs.gov/content/pub/pdf/idslc99.pdf.

12. For a discussion of the responsibilities of the screening committee, see *In re* Central Screening Committee of the Appellate Division First Department, 906 N.Y.S.2d 435 (N.Y. Sup. Ct. 2010).

13. Panel attorneys are paid $60 an hour for misdemeanors and $75 an hour for felonies. *See Assigned Counsel Plan 18B*, NYCOURTS, https://www.nycourts.gov/courts/AD1/Committees&Programs/18B/index.shtml (last visited Jan. 10, 2018).

14. 372 U.S. 335 (1963).

15. *Id.* at 344–45.

16. 407 U.S. 25 (1972).

17. *Id.* at 37–38. The Court declared that a defendant could not be incarcerated in any case—felony, misdemeanor, or even petty offense or violation—unless the defendant had been provided counsel. *Id.* Justice Powell, in a concurring opinion, observed that even seemingly minor offenses could involve complex factual and legal issues, and that "[t]he

attorneys for poor people accused of crimes, the Court did not speak directly to the quality of representation those lawyers needed to provide. While the physical presence of a defense attorney was now a necessary condition to most criminal prosecutions, the presence alone could not be sufficient to satisfy the Sixth Amendment.[18]

In the years after *Gideon*, the Court vacillated between phrases such as "reasonably competent,"[19] "adequate,"[20] and (merely) "competent"[21] when describing the quality of lawyering owed to the accused. Then, in *United States v. Cronic*,[22] the Court seemed to settle on the notion that the accused was entitled to the effective assistance of counsel.[23]

As the saying goes, the devil is in the details, and the appellate courts struggled trying to define effective, adequate, or even competent assistance.[24] However, rather than affirmatively delineate the component parts of effective assistance, the Supreme Court addressed the issue by creating a two-pronged test for postconviction claims of ineffective assistance: the defendant must show that the attorney's performance "fell below an objective standard of reasonableness"[25] and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[26] Specifically and clearly eschewing calls to articulate a comprehensive list of a defense lawyer's duties, the Court held that

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consequences of a misdemeanor conviction, whether they be a brief period served under the sometimes deplorable conditions found in local jails or the effect of a criminal record on employability, are frequently of sufficient magnitude not to be casually dismissed by the label 'petty.'" *Id.* at 47–48.

18. "In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

19. McMann v. Richardson, 397 U.S. 759, 770 (1970).

20. Cuyler v. Sullivan, 446 U.S. 335, 344 (1980) (holding that the Constitution guarantees "adequate legal assistance").

21. Engle v. Isaac, 456 U.S. 107, 134 (1982).

22. 466 U.S. 648 (1984).

23. *Id.* at 654. "It has long been recognized that the right to counsel is the right to effective assistance of counsel." *McMann*, 397 U.S. at 771 n.14. Yet, several subsequent cases still refer to the right to "adequate" representation. *See, e.g.*, Caplin & Drysdale v. United States, 491 U.S. 617, 624 (1989). At a Justice Department event honoring the fiftieth anniversary of *Gideon*, Justice Kagan observed that the accused had no right to a "Cadillac" defense but was at least entitled to "Ford Taurus" representation. *See* Debra Cassens Weiss, *Kagan Says Poor Defendants are Entitled to a 'Ford Taurus' Defense*, A.B.A. J., Mar. 19, 2013.

24. At one point, courts considered whether counsel's performance rendered the trial a "mockery of justice." United States v. Wight, 176 F.2d 376, 379 (1949). *See also* Bottiglio v. United States, 431 F.2d 930, 931 (1970) (per curiam).

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

26. *Id.* at 694.

"specific guidelines are not appropriate. The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance."[27]

In the years since *Strickland v. Washington*,[28] defendants frequently raise ineffective assistance claims on appeal.[29] While there is much scholarly support for the validity of those claims,[30] the courts, whether finding that defense counsel performed reasonably or that the defendant failed to show prejudice, have generally been unreceptive.[31]

Still, most ineffective assistance claims have focused on trials—defense counsel's preparation for and performance at trial.[32] What about other aspects of defense lawyering, such as counsel's attitude toward and relationship with the client?

In *Morris v. Slappy*,[33] the defendant's public defender, who had represented him at a preliminary hearing and supervised extensive investigation, was hospitalized for emergency surgery shortly before trial. Another public defender was assigned six days before trial. The California Superior Court denied the defendant's request for a continuance, and the defendant was ultimately convicted. The United States Court of Appeals for the Ninth Circuit reversed the conviction, finding that the Sixth Amendment guarantees the accused a right to counsel with whom he has a meaningful attorney-client relationship and, more specifically, the Sixth Amendment would be without substance if it did not include such a right.[34]

The Supreme Court of the United States reinstated the conviction and sharply criticized the Ninth Circuit for creating what it referred to as "a new constitutional standard which is unsupported by any authority."[35] The Court seemed to mock the Ninth Circuit's opinion by referring to it

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27. *Id.* at 688. Justice Marshall criticized the majority for failing to delineate specific standards. *Id.* at 709 (Marshall, J., dissenting).

28. 466 U.S. 668 (1984).

29. "Ineffective assistance of counsel is one of the most—if not *the* most—common appeal grounds asserted by convicted criminal defendants as appellants." JOHN M. BURKOFF & HOPE L. HUDSON, INEFFECTIVE ASSISTANCE OF COUNSEL 1–3 (1994).

30. *See, e.g.*, William S. Geimer, *A Decade of* Strickland's *Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995).

31. *See, e.g.*, Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841 n.34 (1998); Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus*, 29 U. RICH. L. REV. 1327, 1362 (1995) (To succeed on an ineffective assistance claim, the defendant "must have had truly abysmal lawyering.").

32. *See* Zeidman, *supra* note 31, at 844–45.

33. 461 U.S. 1 (1983).

34. *Id.* at 3–5.

35. *Id.* at 12.

as a "novel idea" adding a "novel ingredient" to the Sixth Amendment, ultimately writing that "[n]o court could possibly guarantee that a defendant will develop the kind of rapport with his attorney—privately retained or provided by the public—that the Court of Appeals thought part of the Sixth Amendment."[36]

Courts have since embraced the notion that the nature and quality of the attorney-client relationship is irrelevant to considerations of effective assistance. Numerous courts have treated defense counsel as fungible and replaceable at any time during the pendency of the case. The defendant in *Siers v. Ryan*[37] challenged the lack of continuity of counsel assigned to him by the Defender Association of Philadelphia. He argued that assigning him different attorneys at different stages of the litigation violated the Sixth Amendment.[38] Relying on *Slappy*, the United States Court of Appeals for the Third Circuit held that the right to counsel did not include the corollary right to any special rapport or even confidence in appointed counsel.[39] Instead, the court emphasized the right to counsel is no more than the right to competent counsel.[40]

In *United States v. Griffiths*,[41] defense counsel suffered a stroke at the conclusion of the trial testimony, and rather than grant a continuance or a mistrial, the judge appointed new counsel to deliver the defense summation, even though that attorney had not been present to see any part of the trial.[42] The United States Court of Appeals for the Second Circuit upheld the defendant's conviction, stating that the Sixth Amendment guarantees only an effective advocate, not the accused's preferred advocate (meaning, the lawyer with whom he had an established relationship).[43]

Prisoners' rights cases also raise questions regarding the nature of the relationship between client and lawyer. In *Mann v. Reynolds*,[44] death-row and high-maximum-security prisoners challenged a prison policy prohibiting barrier-free visits with legal counsel.[45] The plaintiffs argued that the restrictions on contact inhibited the formation of the relationship

36. *Id.* at 13–14.

37. 773 F.2d 37 (3d Cir. 1985).

38. *Id.* at 39–40.

39. *Id.* at 44.

40. *Id.*

41. 750 F.3d 237 (2d Cir. 2014).

42. *Id.* at 239–41.

43. *Id.* at 241.

44. 46 F.3d 1055 (10th Cir. 1995).

45. The counsel visits took place in a booth with a wire mesh plexiglass partition. Communication was by telephone in the booth, and documents had to be passed through a two-inch hole drilled through the partition. *Id.* at 1056.

necessary for open and honest dialogue about sensitive matters.[46] The United States Court of Appeals for the Tenth Circuit held that "[u]ntil it can be established as a general principle emotional bonding is required for the kind of counseling that meets constitutional muster, we are unwilling to find such a need within the confines of the Sixth Amendment."[47]

Perhaps no line of cases better expresses the courts' disdain for the claim that the accused is entitled to at least some kind of meaningful relationship with counsel than those involving defense counsel who is applying to or has already accepted a job offer with the very district attorney's office prosecuting his client.

In *Plumlee v. Masto*,[48] the defendant was charged with robbery and murder and was assigned the deputy public defender as counsel. Plumlee subsequently heard a rumor that the chief deputy public defender was good friends with Plumlee's roommate, who was also a suspect in the crime. Plumlee believed that the chief deputy public defender leaked to his roommate that Plumlee intended to name him as the murderer. Plumlee also did not trust the deputy public defender, his actual lawyer, because he had applied to the district attorney's office before he was appointed to represent Plumlee. In fact, he received and accepted a job offer from the district attorney while he was representing Plumlee, and a new lawyer from the public defender's office was assigned.[49]

Plumlee's new lawyer moved to be relieved (personally and on behalf of the public defender's office as a whole) because of Plumlee's understandable lack of trust in the entire office. The trial judge denied the motion and told Plumlee that his only choices were to continue with his most recently assigned public defender or represent himself. Plumlee opted for self-representation and was handily convicted.[50] The Ninth

46. *Id.* at 1058.

47. *Id.* at 1060. The court added, "There are simply no cases presented to us in which courts have measured counsel's effectiveness by the strength of counsel's emotional bonds with the client." *Id.* In similar fashion, elected officials denigrate the need for defense attorneys to develop relationships with their clients. *See, e.g.*, Jessica Miller, *Appellate Attorney Fired for Speaking About Lack of Funding in Utah Death Penalty Case*, SALT LAKE TRIBUNE, Nov. 6, 2017 (County commissioner terminated attorney's contract to handle death penalty cases, questioning why he was communicating so often with his client and stating, "I don't agree with giving a guy an open checkbook because he wants to create a relationship with a convicted felon on the taxpayers' dime.")

48. 512 F.3d 1204 (9th Cir. 2008).

49. *Id.* at 1206.

50. *Id* at 1206–07.

Circuit affirmed, finding no violation of the right to effective assistance of counsel.[51]

Plumlee is not *sui generis*. Other cases with similar facts raise questions regarding whether defense counsel's efforts to obtain employment with the district attorney's office created an impermissible conflict of interest. In *Commonwealth v. Agbanyo*,[52] the defendant learned on the morning of trial that his privately-retained attorney had accepted a job offer from the very same office that was prosecuting him. The defendant consented to having his attorney remain as his counsel and was convicted.[53] The Massachusetts Appeals Court held that defense counsel's future employment as a prosecutor did not create a *per se* actual conflict.[54]

In *Garcia v. Bunnell*,[55] defense counsel announced on the morning of trial that at the end of the case he would be joining the district attorney's office.[56] The Ninth Circuit found no actual conflict of representation and "no . . . active representation of competing interests."[57] The court did, however, appear cognizant of at least the appearance of impropriety, stating, "We generally presume that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client."[58] The court was even more candid in its acknowledgement and acceptance of the ways that lawyers seemed regularly to switch sides: "Given the inherently transitory nature of representation in the area of criminal law . . . we must significantly rely on the integrity of counsel in evaluating such potential conflicts."[59]

A slight variation on the theme of criminal lawyers as fungible is exemplified by *State v. Bowen*.[60] At his preliminary hearing, Bowen's lawyer was the prosecutor who obtained prior convictions against him years earlier that the current prosecutor sought to introduce at trial as

51. *Id.* at 1206.

52. 872 N.E.2d 758 (Mass. App. Ct. 2007).

53. *Id.* at 760.

54. *Id.* at 765. In a long line of cases, courts distinguish between an actual conflict of interest and a potential conflict. If an actual conflict is established, then the prejudice required pursuant to the *Strickland v. Washington* test for ineffective assistance is presumed. If the conflict is deemed to be potential, then the defendant bears the burden of proving prejudice in order to prevail.

55. 33 F.3d 1193 (9th Cir. 1994).

56. *Id.* at 1194–95.

57. *Id.* at 1198.

58. *Id.* at 1198–99 (quoting Burger v. Kemp, 483 U.S. 776, 784 (1987)).

59. *Id.* at 1199.

60. 299 Kan. 339 (2014).

propensity evidence.[61] The Kansas Supreme Court held that the defense lawyer's stint as the prosecutor who helped send the defendant to jail a decade earlier is not the type of conflict of interest that requires automatic reversal under the Sixth Amendment.[62]

Additionally, there are cases directly confronting how defense attorneys actually and openly feel about their client. A particularly troubling and revealing case is *United States v. O'Connor*.[63] Two days before trial, defense counsel filed a motion to withdraw, citing an Ethical Consideration (EC) set out in the New York Lawyer's Code of Professional Responsibility (since replaced by the New York Rules of Professional Conduct), providing that a lawyer should decline employment if the intensity of his personal feelings might impair his effective representation.[64] Defense counsel made abundantly clear that his feelings of disgust toward his client would affect his representation, stating, *inter alia*, that his past successes in defending criminal cases were largely due to "'the strength of [his] moral conviction[] and [his] ability to convey that moral conviction' to juries."[65] He added that he "could probably go through the motions" but that his heart would not be in it.[66] To make the depths of his feelings perfectly clear, he informed the judge that his personal, moral, and religious beliefs created issues for him.[67]

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61. *Id.* at 342. Bowen at that point orally waived the apparent conflict of interest. The attorney withdrew from representing Bowen two months later when the prosecution formally moved to admit the prior crimes evidence. *Id.* at 343–44. The court noted that while Bowen's oral waiver of the conflict may not have satisfied the ethical dictates of the Kansas Rules of Professional Conduct, it was not a structural error requiring automatic reversal. *Id.* at 346.

62. *Id.* at 347. Apparently, it is a different situation if a juror is seeking employment with the prosecutor's office. In *People v. Southall*, the defendant's murder conviction was reversed because a juror failed to disclose that she was pursuing a position with the prosecuting attorney's office (the Manhattan, New York District Attorney). 156 A.D.3d 111, 118 (N.Y. 2017). The court held that the juror's assertions of impartiality were irrelevant because her "implied bias" was incurable, and therefore, the defendant's right to a fair trial before an impartial jury had been violated. *Id.* at 124.

63. 650 F.3d 839 (2d Cir. 2011).

64. *Id.* at 848. EC 2-30. *See* N.Y. JUD. LAW APP. (McKinney 2006). Defense counsel began representing the defendant in February 2008. In March, the trial was scheduled for April 28. On April 24, defense counsel moved to withdraw in a written motion that explained that upon receipt of a used condom (alleged to have been recovered from his client) bearing the victim's DNA, he had an immediate and involuntary shift in his "moral and technical perspective on [the] case." *O'Connor*, 650 F.3d at 849.

65. *O'Connor*, 650 F.3d at 849.

66. *Id.*

67. *Id.* at 851.

The judge denied his motion to withdraw, stating that "'I don't think the law requires zealousness. . . . I think it requires adequacy'" and that he was sure defense counsel would continue to provide "appropriate" representation.[68]

The defendant was ultimately convicted, and on appeal, claimed the judge's decision to deny counsel's motion to withdraw denied him his right to a fair trial.[69] The Second Circuit disagreed.[70] The court held that defense counsel conflated EC 2-30 (factors to consider before accepting a case) with EC 2-29 (grounds for withdrawing following appointment).[71] EC 2-29 provides that counsel should not seek to withdraw except for "compelling reasons" and expressly states that "repugnance of the subject matter" does not qualify as a compelling reason.[72]

Other cases reach a similar result even when the lawyer's loathing of the client was present at the outset of his representation. In *Hale v. Gibson*,[73] the very first thing defense counsel did after being appointed was file an application to withdraw because he suspected the defendant, his new client, of having attempted to burglarize his office about one year earlier: "Because of this, this applicant has a personal dislike, distrust and animosity toward the Defendant which will prevent desirable communication and trust that is necessary to an attorney-client relationship."[74]

The United States District Court for the Western District of Oklahoma denied the application, finding that defense counsel would not permit personalities to affect his relationship with or representation of the defendant. [75] The defendant was ultimately convicted of murder and sentenced to death.[76]

Hale raised the conflict of interest issue on direct appeal, and the Court of Criminal Appeals of Oklahoma found "no abuse of the [trial] court's discretion in requiring counsel to overcome his personal feelings

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68. *Id.* at 850.

69. *Id.* at 851.

70. *Id.*

71. *Id.*

72. EC 2-29. Notably, the most recent version of the American Bar Association Standards for Criminal Justice provides that "qualified defense counsel should not seek to avoid appointment . . . except for good cause, such as: . . . the client or the crime is so repugnant to the lawyer that it will likely prejudicially impair the lawyer's ability to provide quality representation." AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION STANDARD, STANDARD § 4-2.1 (4th ed. 2015).

73. 227 F.3d 1298 (10th Cir. 2000).

74. *Id.* at 1310.

75. *Id.* at 1308.

76. *Id.*

and to represent Hale."[77] Citing *Slappy*, the court held that "[t]here is no constitutional right to an attorney client relationship free of animosity."[78] The Tenth Circuit affirmed, stating that "[u]nder Hale's view, any time that counsel dislikes his or her client, the defendant could claim a conflict of interest. This is not the state of the law."[79]

Courts are similarly dismissive when it is the accused, as opposed to their lawyer, who requests a change in representation. In *People v. Linares*,[80] the trial judge for the New York County Supreme Court asked why the defendant was brought out in handcuffs. Defense counsel replied that it was because the defendant had verbally abused him and threatened to cut him. The defendant denied that accusation and, unsurprisingly, stated he had no confidence in his attorney and asked for a new lawyer.[81] New York State's highest court held that the defendant had not established good cause for the trial judge to replace counsel, and the Sixth Amendment did not require a "harmonious" attorney-client relationship.[82]

However, to be clear, a defendant with access to money need not be saddled with a lawyer he does not want (or that does not want him for a client). Courts have long recognized the accused's right to hire counsel of choice.[83] Those who are able to pay for an attorney can search for a meaningful relationship with counsel and do not have to, and surely would not, endure representation marked by animosity or even disharmony. As one commentator trenchantly observed:

> If a defendant does not have a reasonable opportunity to employ counsel of choice, the right to be heard by counsel becomes worthless. A defendant who can afford to retain counsel of choice chooses an attorney on skill, experience, and a special relationship of trust. If a defendant is not provided the opportunity to select his own counsel,

77. Hale v. State, 750 P.2d 130, 135 (Okla. Crim. App. 1988).

78. *Id.*

79. *Hale*, 227 F.3d at 1313.

80. 813 N.E.2d 609 (2004).

81. *Id.* at 610–11.

82. *Id.* at 612.

83. *See, e.g.*, United States v. Gonzalez-Lopez, 548 U.S. 140 (2006); *Caplin*, 491 U.S. at 624–25 (1989); Wheat v. United States, 486 U.S. 153, 159 (1988); United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979) ("Attorneys are not fungible, as are eggs, apples and oranges."). Taking the right to counsel of choice even one step further, the Colorado Supreme Court recently held that the right includes the right to fire retained counsel without having to show good cause, even when the defendant wants a public defender as a replacement. Ronquillo v. Colorado, 404 P.3d 264, 269–70 (Col. 2017).

> the basic trust between counsel and client that is fundamental to the adversarial system would be impaired.[84]

It is an entirely different matter for indigent defendants. The oft-repeated line is that you are entitled to a lawyer but not one of your choosing, and that is the case even if you do not like, respect, or trust your court-appointed lawyer, or he does not like, respect, or trust you.[85]

The problems associated with indigent defendants being tethered to their appointed counsel is compounded by constitutional and ethical rules regarding the allocation of decision-making authority between lawyer and client. In *Jones v. Barnes*,[86] The Supreme Court observed, in dicta, that it was "recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."[87] Virtually all other decisions are deemed to be strategic or tactical in nature and are ceded to defense counsel.[88] As a result, once an indigent defendant accepts what he is constitutionally entitled to—meaning, a lawyer—he forfeits the right to make a host of decisions affecting the outcome of his case and his very future. It is therefore critical to ensure that only partisan lawyers—those who bleed for their clients, who stay up nights agonizing over each case they handle and what they could have done better, who trek out to jails and prisons in the heat of the summer and the cold of the winter, who are fully and unequivocally committed and faithful to their clients—are permitted to represent indigent defendants.

The importance of the attorney-client relationship in criminal cases is irrefutable, even if the Supreme Court is unwilling to proclaim that it is constitutionally required. In fact, the Court has acknowledged generally

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84. Michael E. Lubowitz, *The Right to Counsel of Choice After* Wheat v. United States*: Whose Choice Is It?*, 39 AM. U. L. REV. 437, 444–45 (1990).

85. *See, e.g.*, *Gonzalez-Lopez*, 548 U.S. at 151. ("[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them."); *Caplin*, 491 U.S. at 624; *Wheat*, 486 U.S. at 159 ("[W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers."). *But see* Janet Moore, *The Antidemocratic Sixth Amendment*, 91 WASH. L. REV. 1705, 1730 (2017) (arguing that the Supreme Court's language seeming to limit an indigent defendant's right to choose counsel is mere dicta).

86. 463 U.S. 745 (1983).

87. *Id.* at 751. The Court has also held that a defendant may choose to eschew counsel and act as his or her own advocate. Faretta v. California, 422 U.S. 806, 813–14 (1975).

88. *See* AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, STANDARD § 4-5.2 (4th ed. 2015).

the critical role played by criminal defense counsel, using almost spiritual words and phrases referring to defense counsel's "different mission"[89] and the accused's need for counsel's "guiding hand."[90] When the Court held in *Cronic* that the right to counsel included the right to effective assistance, it simultaneously highlighted the importance of counsel providing meaningful adversarial testing of the charges.[91] Surely, counsel's ability to provide meaningful representation, assistance, or adversarial testing is enhanced when there is a meaningful attorney-client relationship. In their concurring opinion in *Slappy*,[92] Justices Brennan and Marshall noted the importance of "a relationship characterized by trust and confidence,"[93] especially because a defendant may need "to disclose embarrassing and intimate information to his attorney."[94]

Scholars have also recognized the magnitude of the relationship between lawyer and client in criminal cases:

> All criminal defenders know that nothing matters more for effective assistance of counsel than a client–lawyer relationship in which the client trusts the lawyer, at least somewhat. Without trust, the client won't share information with the lawyer, won't take the lawyer's advice. . . . Admittedly, the constitutional standard for effective assistance does not require a "meaningful relationship" between lawyer and client; but that merely illustrates the debased level of the courts' effective-assistance jurisprudence. . . . The real-world standard, and the ethical standard, demand far more trust than the constitutional minimum.[95]

The American Bar Association (ABA) Standards do indeed place a higher premium on the nature and quality of the attorney-client

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89. United States v. Wade, 388 U.S. 218, 256 (1967).

90. Powell v. Alabama, 287 U.S. 45, 69 (1932).

91. *Cronic*, 466 U.S. at 656–57. *See also* Linton v. Perini, 656 F.2d 207, 212 (6th Cir. 1981) ("Basic trust between counsel and defendant is the cornerstone of the adversary system and effective assistance of counsel.").

92. Justices Brennan and Marshall concurred in the result denying the defendant's appeal because he failed to file a timely motion for continuance. They took issue with the majority's discussion of the defendant's right to a meaningful relationship with counsel. *Slappy*, 461 U.S. at 20–21.

93. *Id.* at 21 (Brennan, J., concurring).

94. *Id.*

95. David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981, 1992–93 (2008); *see also* Anne Poulin, *Strengthening the Criminal Defendant's Right to Counsel*, 28 CARDOZO L. REV. 1213, 1250 (2006) ("Counsel's view of the defendant, as well as the defendant's trust or mistrust of counsel, plays a role in determining the course of the defendant's representation.").

relationship than the Supreme Court. ABA Defense Function Standard 4-3.1(a) provides that "[i]mmediately upon appointment . . . defense counsel should work to establish a relationship of trust and confidence with each client."[96] The commentary to the previous version of Standard 4-3.1[97] refers to "the relationship of trust and confidence for which defense counsel should strive,"[98] and notes that "the trust and confidence inherent in a well-functioning attorney-client relationship is so important."[99]

Most public defender offices recognize and stress the importance of the attorney-client relationship and strive, as challenging as it might be, to ensure that they hire only those lawyers who truly and passionately want to represent poor people accused of crime.[100] They try to ascertain and gauge each applicant's motivations[101] and hopefully get it right substantially more often than they get it wrong. It is admittedly a challenge to figure out who has the right stuff—motivations, qualities, characteristics, background, experience, and, yes, partisanship—to represent poor people accused of crime, but the type of vetting critical to public defender offices must be replicated in some manner for assigned counsel plans, especially for applicants with prosecutorial backgrounds.

There are already numerous obstacles between indigent defendants and their attorneys, as most lawyers neither look like their clients nor come from similar backgrounds.[102] There is also the lack of trust

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96. AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, STANDARD 4-3.1(a) (4th ed. 2015).

97. The commentary to the extant ABA Defense Function Standards has not yet been completed.

98. AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, STANDARD 4-3.1(a) cmt. a (4th ed. 2015).

99. *Id.*

100. *See* Janet Moore & Andrew L.B. Davies, *Knowing Defense*, 14 OHIO ST. J. CRIM. L. 345, 361 (2017) (stating that public defenders surfaced the attorney-client relationship as one of the major themes that should be researched to improve the delivery of public defense). A study of public defender clients found that client satisfaction was closely correlated with the nature and quality of the communication between lawyer and client. Marla Sandys & Heather Pruss, *Correlates of Satisfaction Among Clients of a Public Defender Agency*, 14 OHIO ST. J. CRIM. L. 431, 458 (2017).

101. For a discussion of motivations for public defense work, see Barbara Babcock, *Defending the Guilty*, 32 CLEVE. ST. L. REV. 175 (1983–84).

102. *See, e.g.*, Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 173 (2012) ("Perceived and real differences in race and socioeconomic status also affect communication between clients and their lawyers. The criminal justice system disproportionately impacts poor people of color, whereas lawyers are disproportionately white and less likely to be poor."); Shani M. King, *Race, Identity and Professional Responsibility: Why Legal Services Organizations Need African-American Staff Attorneys*, 18 CORNELL J.L. & PUB. POL'Y 1

occasioned by a defendant's rational skepticism about a lawyer given to him for free by the very government prosecuting him.[103] Why add yet another difference into the equation by foisting on the accused a lawyer whose previous experience was prosecuting people in the very same situation as the accused now finds themselves?

This Article is avowedly and purposely not about the debate whether good people can or should be prosecutors.[104] This is about whether prosecutors can or should become institutional defense attorneys for poor people who have no say in the matter of who will represent them. Of course, it is true that many former prosecutors are excellent criminal defense attorneys, but that refrain is usually raised in the context of a prosecutor becoming a privately retained defense attorney, not lawyers making their career defending poor people. Further, those examples usually stress the attorney's trial skills and, as even the Supreme Court has recognized, current criminal practice is defined by plea bargaining that places a premium on a lawyer's negotiating and counseling experience and skill.[105]

Former prosecutors on assigned counsel panels raise three specific concerns. First, what motivated that person to prosecute; what was, or still is, their attitude about crime and the accused? Second, regardless of initial motivation to prosecute, the phenomenon of office acculturation, consciously or subconsciously fitting in, or conforming to institutional norms and expectations, affects all of us in the workplace.[106] I am reminded of a former criminal defense clinic student who went out of her

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(2008); Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 374 (1997) (discussing the ways that attorney-client relationships are affected by race, gender, and culture); Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 53 UCLA L. REV. 999 (2007).

103. *See, e.g.*, Steven Zeidman, *Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on the Rights of the Accused*, 62 BROOK. L. REV. 853, 890 (1996) (stating clients distrust institutional indigent defense attorneys); Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 74 (1986) ("[D]efendants often do not trust defense counsel, particularly when the attorneys are public defenders or court appointees."). Recently, a number of public defenders in Los Angeles signed a petition protesting the appointment of the interim chief defender asserting, *inter alia*, that her previous work defending sheriff's deputies in excessive force lawsuits would hurt their ability to build trust with their clients. Lorelei Laird, More than 150 Deputy Public Defenders Protect Appointment of Chief they Believe Unqualified, ABA J. (Feb. 13, 2018).

104. *See, e.g.*, Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001).

105. *See Frye*, 132 S. Ct. at 1399; *Lafler*, 132 S. Ct. at 1376.

106. *See, e.g.*, Charles A. O'Reilly & Jennifer A. Chatman, *Culture as Social Control: Corporations, Cults, and Commitment*, 18 RES. ORGANIZATIONAL BEHAV. 157 (1996).

way to tell me that she was a fair-minded prosecutor with the admiration and respect of the defense community. Suffice it to say that was not exactly the way the institutional defense lawyers described her. It is impossible to discount the powerful impact of organizational culture "as a social control system is based on shared norms and values that set expectations about appropriate attitudes and behavior for members of the group"[107] and that provides a "normative order, operating through informational and social influence, that guides and constrains the people's behavior."[108] Further, the overwhelming majority of assigned counsel attorneys are solo practitioners who, unlike attorneys in public defender offices, are not exposed to the norms, ethos, and expectations of an office devoted to defending poor people accused of crime.

Professor Paul Butler, a former prosecutor, writes about the impact of the adversarial system, law-and-order culture, and the politics of crime on people who go into prosecution with a progressive agenda.[109] According to Butler, "most prosecutors don't see advancing the defendant's interests as part of their job"[110] because it is "the other side's responsibility to argue in favor of civil liberties."[111] Butler describes the office culture of winning, defined as getting tough sentences and defeating defendants' claims that the police violated their constitutional rights.[112] He goes on to explain that "the culture of the workplace engenders suspicion against prosecutors with too many progressive values, translating it as too much sympathy toward defendants or too much suspicion of the police. It's not that people think you are a bad person, it's just that they wonder why you became a prosecutor."[113] Third, why do these former prosecutors now want to defend poor people accused of crime; what is their motivation to now defend the very people they had just been prosecuting?[114]

In addition to thinking hard about whether someone has the right motivation for representing the indigent accused, there is the question of ongoing justifications; what will sustain a lawyer for poor people accused of crime? Professor Charles Ogletree, former head of the Public Defender

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107. *Id.* at 160.

108. *Id.*

109. PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 114–18 (2009).

110. *Id.* at 114.

111. *Id.* at 115.

112. *Id.* at 116.

113. *Id.* at 117.

114. While it is obviously anecdotal, it was my sense that most former prosecutors in New York City sought to join the assigned counsel plan in order to supplement their income or to generate a stable source of income. I did not get the impression that they were motivated out of a heartfelt desire to aid poor people accused of crime.

Service in Washington, D.C., suggested that feelings of empathy and heroism could forestall burnout and enable public defenders to remain fully committed and inspired by their work and their clients. [115] Professor Abbe Smith, also a former public defender, proposed a "three-pronged model of respect, craft, and a sense of outrage," writing that "[d]efenders who approach the work out of respect for client, pride in craft, and a sense of outrage about inequality, injustice, and the routine abuse of power by those in a position to wield it are able to sustain their careers despite the systemic incentives to fail."[116] Every lawyer on an assigned counsel panel should feel the full measure of empathy, heroism, respect for client, pride in craft, and sense of outrage about the abuse of power by those who wield it envisioned by Ogletree and Smith. If we cannot ensure that degree of devotion, then at the very least, we should guarantee that indigent defendants do not get lawyers who were, or may well still be, partisans for the prosecution.

115. Charles Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993).

116. Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public* Defender, 37 U.C. DAVIS L. REV. 1203, 1208 (2004).