RESPONSE

VIVIAN BERGER*: In order to put the issue of effective assistance of counsel in perspective, I will present an overview of the relevant Supreme Court decisions. This overview will also provide a context for the Court's recent decisions on effective assistance in *Strickland v. Washington*[1] and *United States v. Cronic*,[2] and help explain why it was so terribly important that the Supreme Court address the issue. I agree with Professor Goodpaster that the Court essentially bobbled the issue.

In the 1960s and early 1970s, a series of cases established the bedrock right to counsel. The Supreme Court established the right to appointed counsel for indigents in any felony case,[3] in any misdemeanor case involving imprisonment[4] and for a defendant's first appeal as of right.[5] Perhaps most importantly, the Court recognized the right to *effective* assistance of counsel.[6] The great expansion of procedural and substantive rights of criminal defendants, with respect to the fourth,[7] fifth,[8] and sixth[9] amendments, meant not only that counsel would be present in a greater number of criminal cases, but also that in order to represent a defendant competently, those attorneys were going to have to do more in each case. There were more rights to assert, and because there was more to get right, there was also more to get wrong.

Under the Burger Court, however, the trend has been away from the expansion of defendants' rights. As a result, the effective assistance standard has become even more important, not because of what counsel can do *for* the defendant, but because of what counsel can do *to* the defendant. During this era, a new jurisprudence of habeas corpus has evolved to the point where counsel could forfeit a defendant's rights in myriad ways. For example, virtually all types of habeas corpus claims have been removed from the *Fay v. Noia*[10] test. Under *Fay*, a defendant could assert, in federal court, claims on which she

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1. 466 U.S. 668 (1984).
2. 466 U.S. 648 (1984).
3. Gideon v. Wainwright, 372 U.S. 335 (1963).
4. Argersinger v. Hamlin, 407 U.S. 25 (1972). However, the mandate of *Argersinger* was significantly restricted by the Supreme Court in Scott v. Illinois, 440 U.S. 367, 373 (1979), which limited an indigent criminal defendant's right to appointed counsel in misdemeanor cases to those in which imprisonment is actually imposed.
5. Douglas v. California, 372 U.S. 353 (1963). The Supreme Court refused to recognize a right to counsel for discretionary appeals in Ross v. Moffitt, 417 U.S. 600, 617 (1974).
6. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).
7. *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961).
8. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).
9. United States v. Wade, 388 U.S. 218 (1967).
10. 372 U.S. 391 (1963).

defaulted under state law in state courts, unless the defendant personally and deliberately chose to bypass those state remedies. This opportunity has been severely limited by the Supreme Court. In *Wainwright v. Sykes*,[11] the Court held that in order to assert a habeas claim in federal court, a defendant must show not only cause for the default in the state court proceeding, but also actual prejudice.[12] In essence, habeas corpus claims have been restricted to the colorably innocent defendant. The prejudice test for habeas cases is similar to that used in evaluating ineffectiveness claims. Under *Strickland*, for example, a defendant must show a reasonable probability that but for ineffective assistance of counsel the case would have come out differently, i.e., the defendant might have been found not guilty.[13]

In both habeas and effective assistance claims, the Court has moved towards a bottom line, due process model which focuses on whether there has been fundamental fairness, reliability, or no miscarriage of justice. Used interchangeably, these terms evoke the old due process notion that something must have happened which shocks the conscience of the Court before it will find reversible constitutional error.[14]

Also during the 1970s, the Supreme Court handed down significant decisions concerning guilty pleas. Guilty pleas are the essence of the criminal justice system. In the *Brady* trilogy,[15] the Court made a voluntary and intelligent guilty plea a virtual bar to a defendant's ability to raise antecedent claims, constitutional or otherwise. The Court defined voluntariness very broadly and, most importantly for our purposes, identified an intelligent plea as one made on the advice of competent counsel. Competence, always important in a practical sense, became the linchpin of guilty plea jurisprudence.

The three recent decisions that are most directly relevant to *Strickland* and *Cronic* deserve commentary at this point. In *Jones v. Barnes*,[16] the Supreme Court rejected an appellant's claim that his right to counsel on a first appeal had been violated when his appointed counsel refused to brief an allegedly non-frivolous point that the defendant had insisted his counsel raise. The Supreme Court viewed this claim essentially as an assertion of a right to *in*effective assistance of counsel. As a constitutional matter, the decision was probably correct; on ethical grounds, it's very dubious. As with guilty pleas, the Court is saying that as a constitutional matter, it will almost always defer to counsel's decisions. Under such a standard, counsel's competence and her choices become absolutely critical.

In *Morris v. Slappy*,[17] the Supreme Court unanimously decided that a

11. 433 U.S. 72 (1977).
12. *Id.* at 90-91.
13. 466 U.S. at 694.
14. *Cf.* Rochin v. California, 342 U.S. 165, 172 (1952).
15. Brady v. United States, 397 U.S. 742 (1970); *McMann*, 397 U.S. 759; Parker v. North Carolina, 397 U.S. 790 (1970).
16. 463 U.S. 745 (1983).
17. 461 U.S. 1 (1983).

court's refusal to grant the defendant's motion for a continuance until the lawyer originally assigned to him could represent him did not violate the sixth amendment right to counsel when that motion was not timely nor made in good faith. Despite the Court's recognition that it was unnecessary to consider whether the sixth amendment includes the right to a meaningful attorney-client relationship,[18] the majority opinion rejected that claim.[19] Once again, the case involved an indigent defendant. One might well ask whether the Court would have come to the same expansive conclusion if the defendant had been John DeLorean or the defense attorney had been Edward Bennett Williams, rather than some public defender. Given the Justices' agreement that the defendant should lose on grounds unrelated to the attorney-client claim, the Court's further action is discomforting.

Finally, in *Polk County v. Dodson*,[20] a former defendant brought a civil rights claim against a public defender.[21] The ex-defendant complained that he had received ineffective assistance of counsel because his attorney withdrew his appeal, believing it to be meritless. The Supreme Court held that there was no action under color of state law for purposes of the civil rights statute, even though the attorney was a public employee. Justice Blackmun dissented caustically, stating that the Court was holding a public defender exempt from section 1983 liability only when the alleged injury was ineffective assistance of counsel.[22]

By the time the Supreme Court considered *Strickland* and *Cronic*, everything pointed toward both a legal and a moral need for a direct and thoughtful statement by the Court on what constituted ineffective assistance of counsel. In the adversarial system we have, each element of the standard for effective assistance of counsel is very important. In effect, the prejudice requirement which the Supreme Court imposed in *Strickland* recognizes only the right of a colorably innocent defendant to have competent counsel. This is but a natural outgrowth of the decisions which I have rather quickly rehearsed. The *Strickland* test also raises myriad practical problems of proof.[23]

Counsel ought to be more than some kind of retrospectively conceived defender of the innocent. That is not what a public defender system is concerned with and that is not what a constitutional vision of the system ought to be.

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18. *Id.* at 4.
19. *Id.* at 13-14.
20. 454 U.S. 312 (1981).
21. 42 U.S.C. § 1983 (1982).
22. 454 U.S. at 337 (Blackmun, J., dissenting).
23. *See* Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 78-80 (1986).

RESPONSE

JOSEPH GRANO*: I have a different perspective. It seems to me that the due process model of effective assistance of counsel was the only one that the Supreme Court could have possibly adopted in *Strickland v. Washington.*[1] While considering the specific question of ineffective assistance of counsel, the Court was mindful of its larger constitutional role in the criminal justice system. The Court's proper role is simply to decide whether a particular defendant's constitutional rights have been violated. The argument that the Court should provide standards for the benefit of attorneys is an argument for a prophylactic approach to constitutional law, an approach that is difficult to defend.[2]

Even from a policy perspective, I am troubled by the argument that the Court should have defined a set of specific, minimum standards for trial counsel to follow in criminal cases. Such an argument is symptomatic of the legal thinking of our age which seeks to solve all problems by propounding standards and rules. For example, before accepting a guilty plea, a trial judge must ask a whole litany of questions to assure that a defendant who pleads guilty is acting voluntarily and with an understanding of the charges against her.[3] Do we have any empirical evidence that, as a result of these questions, defendants who plead guilty today are doing so more voluntarily or with a greater understanding of the charges against them than they were previously? Or have we only made it a little easier for guilty pleas to be sustained on appeal, because the prescribed litany has been recited? Should the constitutionality of a guilty plea be contingent upon this litany? To have so many intelligent people spending so much of their time looking for little defects in the litany and arguing that cases should be reversed because of those defects is a great waste of resources. Similarly, if we attempt to reduce ineffective assistance of counsel through rigid and complicated standards, we will achieve only a new formality and not a substantive improvement in the quality of attorneys' advocacy skills.[4]

The "equal protection" model of effective assistance of counsel[5] is just as problematic as the "minimal standards" model I have just discussed. Many assertions have been made about how the criminal justice system works, with-

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1. 466 U.S. 668 (1984).

2. For a development of this argument, see Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U.L. REV. — (1985).

3. McCarthy v. United States, 394 U.S. 459 (1969); FED. R. CRIM. P. 11.

4. Perhaps instead of focusing on obtaining reversals on appeal based on counsel's errors, we should evaluate more rigorously the quality of our students' performance in law school.

5. *See infra* text accompanying notes 8-9.

out much empirical data to support them. Many people who hire attorneys suffer from shortcomings in the quality of their attorney's representation, similar to the shortcomings of public defenders. There are numerous cases in which defendants have paid a considerable amount of money to their attorneys and not received the kind of representation that they needed.[6] The Supreme Court has explicitly rejected the idea that defendants who retain their own lawyers are entitled to less protection than defendants for whom the state appoints counsel.[7] The problem is not so much one of indigency as it is one of protecting a defendant's constitutional entitlement to effective assistance of counsel which may be forfeited or reduced by private or retained counsel.

We have to be honest when asking whether disparities of wealth can be eliminated from our system. The *Griffin* line of equal protection cases, which afforded some legal services to indigents,[8] articulated the view that the ability to prepare for trial or an appeal should not be dependent on a person's wealth. In essence, the Court suggested that the quality of a trial or an appeal should be the same for the indigent defendant as for the defendant with money. Of course that was rhetoric. In a system that allows people to pay for attorneys, equality simply cannot be guaranteed. *Ross v. Moffitt*[9] and *Strickland* suggest a more realistic goal: guarantee the criminal defendant an appropriate level of due process, a basic standard of fairness, regardless of wealth.

The keynote address mistakenly focused on the disparity between defense services and other legal services in terms of money spent for attorneys, attorney's fees, awards, and caseloads.[10] Instead, we might ask the following questions: How much money do we spend for the prosecution of criminal cases? Do we relieve prosecutors in major urban areas from excessive caseloads and from poor salaries? The truth is that the whole system is suffering from a shortage of money. I fear the skewing effect of pouring money and resources into just one end of the system. There is a societal interest in having the truth determined in a criminal trial; to the extent that there are not enough resources to develop fully the state's side of the case, there is a legitimate concern with justice being denied.

Although much criticized, the prejudice requirement of *Strickland* seems

6. My wife, who is Chief of Appeals in the United States Attorney's Office for the Eastern District of Michigan, is the source of this information.

7. *See* Cuyler v. Sullivan, 446 U.S. 335, 344-45 (1980).

8. Griffin v. Illinois, 351 U.S. 12 (1956) (state cannot condition appellate review on an appellate transcript and fail to provide a free transcript to indigent appellant); Douglas v. California, 372 U.S. 353 (1963) (since state provided appellate review, indigent defendant entitled to appointed counsel for first appeal); Anders v. California, 386 U.S. 738 (1967) (special safeguards required to ensure appointed counsel was withdrawing from an appeal which was truly frivolous).

9. 417 U.S. 600 (1974) (indigent defendant not entitled to appointed counsel for discretionary appellate review, following a first appeal).

10. Lefstein, *Keynote Address: Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise Been Fulfilled?*, 14 N.Y.U. REV. L. & SOC. CHANGE 5, 6-7, 9-12 (1986) [hereinafter cited as *Keynote Address*].

both fair and essential to an efficient criminal justice system. The *Strickland* case must be read together with *United States v. Cronic*.[11] The Court in *Cronic* indicated that when surrounding circumstances are so egregious as to justify a presumption of ineffective assistance of counsel, a defendant is not required to prove prejudice. Otherwise, when a defendant claims that his lawyer has made specific mistakes, *Strickland* requires that a defendant must show prejudice. If there were no prejudice requirement, we would have to be willing to accept the possibility that every time a lawyer made a mistake that a reasonable professional would not have made, a conviction could be reversed, even if that error did not prejudice the defendant.[12]

One of Professor Goodpaster's biggest criticisms of *Strickland* is that it sharply restricts the number of defendants who can win ineffective assistance of counsel claims.[13] Without an empirical basis, he assumes that defendants should be winning these claims and that there should be more reversals of criminal convictions. In the academic world, we have failed too often to recognize the legitimate interest, expressed in *Strickland*, in finality and in avoiding the proliferation of post-conviction litigation.

It's sobering to contemplate the judicial time, the resources, and the energy from the best minds of our country that were consumed on the issue of ineffective assistance of counsel in *Strickland*. After losing a direct appeal in the case, the defendant started his post-conviction attack by raising an ineffective assistance of counsel claim. He raised it at the Florida trial level, and he appealed to the Florida Supreme Court. He remade the argument in federal district court, appealed to the Fifth Circuit and had that decision reconsidered by the Eleventh Circuit, sitting en banc, before appealing to the United States Supreme Court.[14] The criminal justice system does not have unlimited resources. It's just foolish to ignore the amount of resources that we allocate to issues which do not ultimately improve the criminal justice system. Academics and lawyers seem satisfied so long as there is a way to challenge a decision or a rule, regardless of whether anything is really accomplished. We too easily

11. 466 U.S. 648 (1984).

12. Both Justice Marshall, dissenting in *Strickland*, 466 U.S. at 710-12, and Professor Goodpaster, *see infra* note 13, address the prejudice requirement in the context of stunningly incompetent counsel. The Supreme Court was not addressing those kinds of cases, but rather ones in which lawyers made alleged mistakes. From the latter perspective, a prejudice requirement makes good sense.

13. Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 73, 78-80 (1986).

14. The Florida Supreme Court affirmed the defendant's murder conviction in Washington v. State, 362 So. 2d 658 (Fla. 1978), *cert. denied*, 441 U.S. 937 (1979). The only reported Florida decision on Washington's ineffective assistance of counsel claim is that of the Florida Supreme Court. Washington v. State, 397 So. 2d 285 (Fla. 1981). The Court of Appeals for the Fifth Circuit affirmed in part and vacated in part the federal district court's rejection of the ineffective assistance of counsel claim. Washington v. Strickland, 673 F.2d 879 (5th Cir. 1982). After the reorganization of the Fifth and Eleventh Circuits, the Eleventh Circuit, sitting en banc, reheard the case and reversed the judgment of the district court and remanded the case for further fact finding under newly announced standards for effective assistance of counsel. 693 F.2d 1243 (11th Cir. 1982).

overlook evidence which suggests that the cumbersome nature of the system is counterproductive to the very kinds of concerns that we are advocating.[15]

Nitpicking about the standards set forth in Supreme Court cases like *Strickland* diverts our attention from the more fundamental issues underlying effective assistance of counsel. For example, it was suggested this morning that we think about providing a socialized system of legal services.[16] That was a provocative suggestion which attempted meaningfully to address the problem of equality. Our current system of providing counsel to the indigent defendant is incapable of producing true equality. Whether a socialized system of legal services would be a better answer is debatable. The point, however, is that there are much more fundamental issues than the Supreme Court's legal standard for effective assistance of counsel in *Strickland*.

Another area which strongly implicates concern with effective assistance of counsel is multiple representation. For example, assume a corporation and several of its employees are suspected of criminal involvement. While the government investigation is being conducted, the corporation hires an attorney to represent the corporation and all the employees. The situation is much like the Scottsboro case[17] in that the issue is not just ineffective assistance of counsel but, arguably, lack of representation by counsel. What about the employee who may want to cooperate with the prosecutor but cannot because the attorney representing her is representing the corporation that hired her? What then is she to do? Fight the system alone? Hire a new attorney? Get fired? Face retaliation on the job?

What I am saying is simply that we have much more fundamental questions to address than the legal standards articulated in *Strickland* for which the Supreme Court is being criticized.

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15. *Cf.* Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681 (1984).

16. *Keynote Address*, *supra* note 10, at 9.

17. Powell v. Alabama, 287 U.S. 45, 58 (1932) (black indigent defendants tried for capital crime of rape "within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.").

RESPONSE

BENJAMIN LERNER*: I have been the head of a large public defender office for ten years. Before that, I was staff attorney in that office for a few years. I have tried criminal cases as private defense counsel, and I have represented the state during the period of time when I worked for the Attorney General's office in Pennsylvania. My remarks and comments are drawn from these various perspectives.

Notwithstanding Professor Grano's position, most of us would agree with two propositions. One is that, as a general rule, the promise of *Powell*,[1] *Gideon*,[2] and *Argersinger*,[3] with regard to effective assistance of counsel, has not been fulfilled, particularly as concerns indigent criminal defendants. Secondly, the primary reason, though not the only one, for the failure to fulfill this promise is a substantial lack of funding for lawyers, both institutional and privately appointed, who represent indigent defendants in our criminal courts.

It may be true that prosecutors and police in many jurisdictions do not get everything they need to do the best job possible. But in Philadelphia, prosecutors, police, and courts are far better funded then indigent defense programs, whether public or private.[4] There is simply no comparison between the public's willingness to support more spending to prosecute people and put them in jail and their willingness to spend money to see that people's constitutional rights to effective assistance of counsel are in fact protected.

This lack of funding is also a direct reflection of present public concern about crime and the public's corresponding lack of concern with the rights of people accused of crime, particularly if those people are poor, and even more so, if they are minorities. Unfortunately, these attitudes reflect a larger lack of concern with individual rights generally, whipped up by people in positions who know better: political leaders and even some appellate judges, including some on our highest court.

A couple of terms ago, the United States Supreme Court decided *Morris v. Slappy*.[5] In his opinion, the Chief Justice reached out to discuss the issue of a sixth amendment right to a "meaningful relationship" between lawyer and client, which wasn't necessary to the decision in the case. Chief Justice Burger not only reached out to discuss that issue, but he rejected that claim with the

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

2. Gideon v. Wainwright, 372 U.S. 335 (1963).

3. Argersinger v. Hamlin, 407 U.S. 25 (1972).

4. *See* Lefstein, *Criminal Defense Services for the Poor: Methods and Programs for Providing Legal Representation and the Need for Adequate Financing*, A.B.A. STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS (May 1982).

5. 461 U.S. 1 (1983).

kind of disdain that most of us reserve for those occasions when we see our least favorite vegetable on our plates. That kind of attitude cannot but help to strengthen the hand of those who take the position that there is really no need to worry about providing adequate funding for indigent defendants because, after all, those people are all guilty anyhow. Therefore, we should put them in jail as quickly as possible and get on with the real work of the courts and the real business of our society.

Norm Lefstein asked in his opening remarks whether this attitude can be changed.[6] I suppose, if you take a long-term view, you might expect that it could be changed, but certainly not in the near future. We are not going to see any sudden reversal of the public's attitude with respect to indigents accused of committing crimes. The problem cannot be solved simply by changing public attitudes; it also requires a willingness to support the kind of resources necessary to fulfill the promise of *Gideon*, *Argersinger* and their progeny.

There are three areas in which we can and should work in order to improve the present dismal status of indigent defense representation in this country.

First, although never popular, the reversal of criminal convictions is a practical way for appellate courts to alert funding authorities to the fact that they won't save any money, in the long run, by failing to give public defenders' offices enough lawyers or support staff to handle their caseloads, because convictions resulting from gross inequalities in resources will not be allowed to stand. Unfortunately, in *Strickland v. Washington*[7] and *United States v. Cronic*,[8] the Supreme Court has made reversals based on inadequacy of representation even harder to obtain.

I think Professor Goodpaster is actually too kind to the Court when he describes its approach in *Strickland* and *Cronic* as a due process or fairness model.[9] I don't think those decisions have much to do with fairness or truth. They are more reflective of a concerted effort to find whatever can be found in the records of these cases to support the conviction that was obtained below. Judges are lawyers and lawyers are advocates. A judge reviewing a record can decide her position on an appeal in advance and pick out the version of the facts that best supports it. By ignoring the facts that don't support her point of view and focusing on the evidence which weighs against the defendant, she can craft an opinion which emphasizes the "correctness" of the trial judge or jury's verdict, even if the defendant's lawyer made some serious errors which may well have influenced the verdict.[10] This approach can be taken with al-

6. Lefstein, *Keynote Address: Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise Been Fulfilled?*, 14 N.Y.U. REV. L. & SOC. CHANGE 5, 10-11 (1986).

7. 466 U.S. 668 (1984).

8. 466 U.S. 648 (1984).

9. Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 24-25 (1986).

10. *Cf.* United States v. Young, 105 S. Ct. 1038 (1985). In a prosecution for mail fraud, the prosecutor, in rebuttal argument to defense counsel's summation, said, "I think [defendant's

most all effective assistance cases. That is the main reason why the prejudice standard announced by the Court in *Strickland* and in *Cronic* really has nothing to do with fairness or truth-finding.

Second, we must pursue the kind of affirmative litigation typified by *State v. Smith*.[11] We need litigation which doesn't depend on reversing a criminal conviction, but instead, starts out affirmatively challenging the funding in a particular jurisdiction, in order to provide what is necessary for effective assistance of counsel. We may be foreclosed, for the time being, from persuading the Supreme Court to modify the *Strickland-Cronic* standard. However, appellate courts in state jurisdictions are not required to interpret their own effective assistance of counsel constitutional provisions as restrictively as the Supreme Court interprets the sixth amendment. A recent concurring opinion in a Pennsylvania case, *Commonwealth v. Garvin*,[12] suggested the following standard for effective assistance of counsel: "[I]f the defendant shows that counsel did not conduct the case in a reasonably competent manner, relief must be granted, unless the prosecution shows beyond a reasonable doubt that counsel's conduct had no effect on the outcome of the case."[13]

The *Garvin* court's language doesn't sound strange to lawyers who practice criminal law. It's the standard harmless error language that is used to test other constitutional violations.[14] Since courts have applied this standard to fourth amendment violations, surely it ought to be equally appropriate for a violation of the sixth amendment, because without effective assistance of counsel a fair trial for a defendant is virtually impossible.

Finally, public lawyers, institutional lawyers, and private lawyers alike have a responsibility which we have not yet fulfilled. Our responsibility is to take a portion of the funds which are available to ensure that the lawyers who join a public defenders' office and lawyers who wish to have their names put on appointed counsel lists are adequately trained. However, this is not an

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action was] a fraud . . . . I don't know whether you call it honor and integrity, I don't call it that, [defense counsel] does. If you feel you should acquit him for that it's your pleasure. I don't think you're doing your job as jurors in finding facts." *Id.* at 1041-42 (citation omitted). The Supreme Court reinstated the defendant's conviction, holding that overwhelming evidence of guilt eliminated any doubt that the prosecutor's remarks unfairly prejudiced the jury.

11. 140 Ariz. 355, 681 P.2d 1374 (1984) (en banc) (public defender system which assigns cases, without taking into account the amount of time attorney needs to represent clients, does not provide support staff costs, fails to consider the competency of an attorney before hiring, and makes no distinction in workload for attorney handling especially complex cases violates defendant's right to effective assistance of counsel); *see also* Wilson, *Litigative Approaches to Enforcing the Right to Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 203 (1986); Mounts, *The Right to Counsel and the Indigent Defense System*, 14 N.Y.U. REV. L. & SOC. CHANGE 221 (1986).

12. 335 Pa. Super. 560, 567, 485 A.2d 36, 39 (1984) (Spaeth, J., concurring).

13. *Id.* at 568, 485 A.2d at 40.

14. *See* Chapman v. California, 386 U.S. 18 (1967). "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. *Chapman* involved a fifth amendment issue, but courts have routinely applied this standard in the fourth amendment context. *See, e.g.*, United States v. McCulley, 673 F.2d 346 (11th Cir.), *cert. denied*, 459 U.S. 852 (1982).

effort which institutional defenders ought to be waging alone. After *Strickland*, bar associations are as responsible as defender organizations for providing defense work training.[15] Bar associations must work with courts in their jurisdictions to promulgate reasonable standards of competence which lawyers ought to be required to meet before they are put on an appointment list. Without training, the only way lawyers learn to practice law effectively is by making serious errors in real cases to the detriment of actual clients. For those of us who represent indigent defendants, the injustice of such a "trial and error" method is compounded by the client's lack of any choice as to who will be making these errors on her behalf.

It is not enough for those of us in this business to say that we're not doing a good job because we do not have enough money. We have a responsibility to prepare lawyers to represent indigent defendants effectively. It is just as important for us to fulfill that responsibility as it is for us to continue to fight for adequate funding and appropriate developments in the law.

15. *Strickland*, 466 U.S. at 688.