DISSERTATIONES IURIDICAE UNIVERSITATIS TARTUENSIS

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Remedies against ineffectiveness of defense counsel. Judicial supervision over the performance of defense counsel in Estonian criminal proceedings

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INTRODUCTION

1. Overview of the Essence of the Problem Discussed

On the 1st of July 2004 when the Code of Criminal Procedure (hereinafter CCP)[1] entered into force, Estonian criminal procedure took a big step towards the adversary system.[2] As it is provided for in § 14 (1) of the CCP: in a court proceeding, the functions of accusation, defense and adjudication of the criminal matter are performed by different persons subject to the proceeding. Thus, court proceedings are conducted by courts (CCP, § 16 (1)), and the Prosecutor's Office, the accused and his counsel are parties to a court proceeding (CCP, § 17 (1)). According to the explanatory memorandum of the Code of Criminal Procedure, the aim of the draft of the Code of Criminal Procedure was to raise the effectiveness of criminal procedure by giving active roles to the parties to a court proceeding, *i.e.* task of the prosecutor is to accuse, the task of defense counsel is to defend the accused, and the court's task is to decide the case based on the evidence represented by the parties to the court proceeding.[3]

One essential element of the system in which different functions of the proceedings are divided between different subjects to the proceedings, *i.e.* the adversary system, is an impartial tribunal – the court. Absence of bias and nonparticipation in prosecution of the case, in assisting the accused and in presentation of the evidence and arguments are two main characters of the impartiality.[4] In short, the court's task is to remain as passive as possible during the court proceedings, to avoid expressing sympathy for one specific party to a proceeding and acting on behalf of a party to a proceeding. Absence of bias should appear both from court's actions during the proceedings and from its decisions and final judgment.[5]

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[1] Code of Criminal Procedure. Passed 12 February 2003. Entered into force 1 July 2004. Last amended 1 September 2011 – RT I, 14.03.2011, 35.

[2] Andreas Kangur, *Märkusi seoses võistleva menetluse rakendamisega kriminaalkohtupidamises,* 3 Juridica 176 (2005), p. 176; Eerik Kergandberg & Priit Pikamäe, *Eesti uue kriminaalmenetluse seadustiku eelnõu lähtekohad,* 9 Juridica 555 (2000), pp. 556 and 560.

[3] Explanatory Memorandum to the Draft of the Code of the Criminal Procedure. 594 SE, 9th Riigikogu. Online. Available: http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=003674541& login=proov&password=&sys tem=ems&server=ragne11, 29 April 2011. See also Meris Sillaots, *On the Scope of Competitiveness of Court Proceedings in the Draft Code of Criminal Procedure,* 6 Juridica International 198 (2001), p. 198.

[4] Murray L. Schwartz, *Zeal of the Civil Advocate, the,* 1983 Am. B. found. Res. J. 543 (1983), p. 546.

[5] According to the second sentence of § 146 of the Constitution of the Republic of Estonia (Passed 28 June 1992. Entered into force 3 July 1992. Last amended 22 July 2011 – RT I, 27.04.2011, 2.) the courts shall be independent in their activities and shall administer justice in accordance with the Constitution and the laws. The Supreme Court of Estonia has also emphasized that every accused has a constitutional right his case to be heard by impartial court. Judgment of the Criminal Chamber of the Supreme Court, 26 January 2009, court case no. 3-1-2-2-08, pp. 13 and 15. Online. Available: http://www.nc.ee/?id=11&tekst=222514168, 29 April 2011.

The nonparticipation of the court is the obverse of another essential element of the adversary system, which dictates the course of the adversary proceedings: the parties to a court proceeding are responsible for prosecuting and presenting their cases, including the evidence, and for challenging the prosecution and presentation of the other party,[6] which in turn leads to the conclusion that each subject to a proceeding has its own and inalienable function in the criminal proceedings. In a system in which the functions of prosecution and defense are performed not by the tribunal but by the parties to a court proceeding, each party is expected to try as hard as it can to present its version of the case and to support it with appropriate evidence and the same time challenge the standpoints of the other party,[7] and the court is expected to remain passive when it comes to presenting the case. Consequently, the task of counsel is to present his case and challenge the prosecutor's arguments as thoroughly as possible, because he and his principal, the accused, are not supposed to get any help from the court in doing that. In addition, counsel's actions and decisions in criminal proceedings should be based on the presumption that at least in legal decisions he is not going to get any help from his principal either, because accused persons usually do not have a legal education or even knowledge of the legal system. Therefore, counsel has a duty to be diligent in the criminal proceedings, the same duty as his opponent, the prosecutor, has, and "[t]he significance of the assistance of counsel can be seen to be directly connected to the corresponding importance of the defence's institutional role in procedural systems based on two opposing sides and an impartial judge."[8]

Thus, another essential element of the adversary system is participation of counsel: but not only participation of counsel, but participation of diligent counsel, as the requirement of participation of counsel without requirement for him to be diligent can easily result in the situation where the accused in fact has no support from his counsel. Only when counsel is an equal opponent to the prosecutor, prosecutor's arguments and evidence can be challenged and the accused has an opportunity to present his version of the case through the activities of his counsel. To expect the same to be done by the accused himself is obviously too optimistic and unrealistic – as I already discussed, the accused has most likely no legal education and consequently it is unfair to let him compete alone against an adversary who is professional in the field of law. Therefore, if competent and diligent counsel is absent in the criminal proceedings, the balance of the scales – the Prosecutor's Office and defense – is disturbed to the prejudice of the accused.

There exist two different bases to justify the accused's right to fair trial. As John Jackson from the University College Dublin has described: "On the one hand, they (*fair trial standards – author's explanatory remark)* are seen as an

[6] Schwartz, *Zeal of the Civil Advocate, the,* 543, p. 546.
[7] *Ibid.*, pp. 546–547.
[8] Sarah J. Summers, Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights (2007), p. 78.

expression of individual autonomy – the right of the accused to be respected as an individual throughout the criminal process and participate in his or her defence; on the other hand, they are an expression of the need for trials as the public face of justice to reach accurate verdicts by means of a system of accusatorial or adversarial truth finding."[9] If the system is adversarial, the only way to reach the verdict and to conclude that the trial in result of which the verdict was reached was fair is through competition of equal adversaries, *i.e.* the prosecutor and counsel. If the court has decided the case in the proceedings where counsel is absent or performs his duties inadequately, there has been no competition or there has been an unbalanced one, which means that the accused has not had a chance to participate in his defense, the adversarial system has broken down and the right to fair trial has been violated.

2. Formulation of the Research Question

The perfect balance in the adversary system I described above – an impartial and therefore passive tribunal with two diligent adversaries presenting their cases, hardly ever exists to the full extent. In my thesis I am analyzing situations in which the unbalance between the parties arises from the shortcomings of the defense: from the shortcomings in the activities of counsel to be more exact. If we picture the adversary system as scales (the prosecutor on one side and counsel on the other), which we can call fair only if the sides are in balance, we can conclude that if counsel's contribution to the proceedings lessens, the balance is disturbed at the expense of the accused. The scales are no longer in balance and the trial ceases to be fair. If we want to restore equality to the sides of scales, we have to find someone to support the side of the defense or to compel counsel to do more work himself. The first option is somewhat contradictory to the idea of the adversary system, at least when the court or the prosecutor is the one that has to do counsel's job. If the court is tribunal and counsel at the same time, both principles that form the basis for the adversary system – the absence of bias and nonparticipation in defense – are violated. To ask the prosecutor to do counsel's job means that the prosecutor has to prosecute and defend at the same time, which is obviously impossible. Of course, one option is to name a new or additional counsel for the accused instead of asking the court or the prosecutor to perform as counsel, but this raises the question about who should decide the replacement or addition of counsel: should it be for the accused, the Bar or the court to decide whether new counsel is needed and whether the former, ineffective one should leave the proceedings? Definitely it should not be the prosecutor as the adversary proceeding is a competition and there is no real competition if one adversary can choose his opponent. If counsel is not replaced but he is asked to do his job

[9] John Jackson, *Autonomy and Accuracy in the Development of Fair Trial Rights,* UCD Working Papers in Law, Criminology & Socio-Legal Studies (Research Paper No. 09/2009), pp. 5–6.

better, a similar question arises: should it be the accused, the Bar or the court that has the competence to do that?

3. Arguments Set Forth for the Defense

In my dissertation I am raising the hypothesis that it should indeed be up to the court to decide whether to replace counsel or not, which means that the court ceases to be passive for a moment and instead of taking the place of counsel, names the new one to replace the ineffective one (or just adds an extra one). In addition, I am going to examine if the replacement of counsel, which is the most drastic step for the court to take, is the only option to guarantee the accused the real assistance of counsel or are there any techniques the court could use to compel an ineffective counsel to fulfill his obligations as the accused's advisor and a person who acts on behalf of the accused. Court's competence to compel counsel to fulfill his duties or replace counsel both mean that the court interferes with counsel's activities and influences the scales, the place where it should not be according to the idea of the adversary process. That is why I am going to examine thoroughly, what are the main justifications for giving the court the competence to do that and what are the main dangers. Basically it means that I am going to analyze if the balance of the scales is restored after the court has taken the measures it finds appropriate to react towards the ineffectiveness of certain counsel in the proceeding or the scales remain still unbalanced (and maybe now to the advantage of the accused), which means that the fairness of the proceeding comes into question. What I am not going to discuss in this dissertation is the solutions outside of the criminal proceedings for the ineffectiveness of counsel for the following reasons.

First, it should be specified that supervision over counsel's activities performed by the courts can be divided into two categories: direct (performed during the criminal proceedings by the courts) and indirect (performed in proceedings other than the criminal proceedings, *e.g.,* by the Bar or civil courts), with the former subdivided into ongoing and *ex post* supervision. By ongoing supervision I mean the competence of the court conducting the proceedings, mostly trial court, but sometimes also higher courts, to make remarks and enquiries with ineffective counsel, up to and including the competence of the court to remove ineffective counsel from the proceedings. The courts perform *ex post* supervision at the request of the accused (and/or his new counsel), primarily in the appeal or cassation proceedings, which may lead to annulment of the judgment of the lower court on grounds of ineffective counsel and the possible new proceedings for the accused (other possibilities are also acquittal of the accused and also imposing a more lenient punishment).[10] In this

[10] Anneli Soo, *An Individual's Right to the Effective Assistance of Counsel Versus the Independence of Counsel: What can the Estonian Courts do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?* 7 Juridica International 252 (2010), p. 253.

dissertation I am going to analyze only the first category with both ongoing and *ex post* supervision and leave indirect supervision aside.

Sometimes the opportunity to deal with ineffectiveness of counsel in the criminal proceedings is rejected, because it is argued that the convicted offender has the right to file a legal malpractice action against counsel. Nevertheless, I agree with many authors that claim that a legal malpractice action is an insufficient remedy for counsel's ineffectiveness in the context of criminal proceedings. In a situation where the person has already received a guilty verdict the damages can hardly compensate for an unfair trial and in the worst cases an incorrect conviction and incarceration.[11] Because a civil damage award does nothing to remove the harm done to a convicted person as a result of counsel's ineffective performance – the conviction that is a result of a proceeding in which counsel was ineffective stands,[12] it is little comfort to the convicted offender who remains punished and in many cases in prison to obtain a judgment for damages against his counsel for professional negligence.[13] As the liberty of the person is at stake in the criminal proceedings, it is very important that there is a standard to ensure that accused persons receive their guaranteed right to effective assistance of counsel in the criminal proceedings,[14] not that afterwards it is stated that they did not receive effective defense and they must be financially compensated. Even if the accused is not incarcerated, but punished another way (pecuniary punishment, probation or community service), one has to take into account that the conviction of a person results in labeling the person as "a criminal" and it should not be done unless the person has had a proper chance to defend himself. Consequently, convicted offenders can bring malpractice actions against lawyers, but as a practical matter, the only remedy for ineffective representation is to annul convictions that are the result of the proceedings in which counsel was ineffective and give to the accused person a chance to receive a new and fair trial.[15] In addition, the legal malpractice action is something that a convicted offender may or may not file in a distant future, *i.e.* post-factum, and is therefore an inefficient remedy to improve the quality of defense, because it has almost no effect on counsel's behavior at least in a certain criminal proceeding.

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[11] William W. Schwarzer, *Dealing with Incompetent Counsel – the Trial Judge's Role,* 93 Harv. L. Rev. 633 (1979–1980), p. 649. See also Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims,* 92 Cornell L. Rev. 679 (2006–2007), p. 700.

[12] Jay William Burnett & Catherine Greene Burnett, *Ethical Dilemmas Confronting a Felony Trial Judge: To Remove Or Not to Remove Deficient Counsel,* 41 S. Tex. L. Rev. 1315 (1999–2000), p. 1353.

[13] Asher D. Grunis, *Incompetence of Defence Counsel in Criminal Cases Articles and Addresses,* 16 Crim. L. Q. 288 (1973–1974), p. 289.

[14] Elizabeth Gable & Tyler Green, *Wiggins v. Smith: The Ineffective Assistance of Counsel Standard Applied Twenty Years After Strickland Current Developments 2003–2004,* 17 Geo. J. Legal Ethics 755 (2003–2004), p. 756.

[15] Harvey E. Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus,* 59 Va. L. Rev. 927 (1973), p. 929.

Some also claim that another solution would be to address the advocates' ineffectiveness through the disciplinary boards of the Bar.[16] But Eve Brensike Primus has expressed her opinion about the matter very pertinently: "A problem with this strategy, however, is that it ignores both the inherent weaknesses of the attorney disciplinary system and the resistance within the profession to strengthening it."[17] It is an absolutely appropriate standpoint when we think about the fact that the Bar has to perform supervision over its own members and who wants to admit that its member has been incompetent? In addition to that every member of the Bar pays fees to be a member of the organization, which means that the loss of a member means also a financial loss to the Bar. These are the main reasons for the Bar's loyalty to its members, that weaken the Bar's disciplinary system. In addition to that, as advocates are not only counsels in criminal proceedings and non-advocate persons may be allowed to perform as counsels also, as it is in Estonia, a number of counsels would be left without sanctions altogether if the Bar would be the only competent body to react in case of ineffectiveness of counsel in the criminal proceedings. In addition to that, disciplinary action is not a proper remedy against ineffective defense, because it has the same problems as the civil action – when it comes after the criminal proceedings, it does not change the result of the criminal proceedings and most of the time it does not have a direct effect on the advocates' performance as defense counsels.

If the accused turns to the Bar during criminal proceedings and complains that an advocate has provided him ineffective assistance, there is a chance that consequences of ineffective defense are cured: the disciplinary board of the Bar may disbar an advocate or suspend his professional activities, and the accused will have new counsel. If the disciplinary board of the Bar imposes on an advocate any other penalty than disbarment, it is even possible that the penalty will have an effect on the advocate's future behavior. But anything that has been mentioned above does not change the fact that it is highly probable that the Bar, as a representative of its members – advocates – is at the same time loyal to them and therefore avoids taking actions against them whenever possible. If the accused turns to the Bar after the criminal proceedings are finished, in a civil action, the Bar's action does nothing to restore the convicted offender to the position he would have been in if the ineffective conduct would not have

[16] But in the United States some authors say that although judges in the United States prefer to leave the disciplinary function to the disciplinary authorities of the Bar, they are often reluctant to notify the Bar of professional misconduct of counsel that may have occurred in their cases. Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective Ethics Symposium what do Clients Want: Practice Contexts,* 52 Emory L. J. 1169 (2003), p. 1193, Note 112, referring also to Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients, and Professional Regulation,* 1976 Am. B. found. Res. J. 917 (1976), pp. 999–1014.

[17] Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims,* 679, p. 700.

occurred:[18] it really does not help the convicted offender if his advocate is disbarred or sanctioned any other way.[19] In addition to that, as already mentioned, it is again reacting post-factum, which means that the quality of the advocate's behavior will not be influenced, at least in the specific case. Because of the Bar's inherent weakness described above, there is also a risk that the Bar's disciplinary action does not have a direct effect on the quality of defense, which means that there will be hardly any improvement in the advocate's overall performance, as they know that even if they perform ineffectively, no serious consequences follow. This in turn leads to a conclusion that there will be no improvement in guaranteeing the right to defense counsel for accused persons. As it has been said: "... [A] right is only as potent as its enforcement..."[20] And finally, if we think about it from the side of the accused, the disciplinary action is even more pointless for him than the civil action: the civil action may result in monetary compensation, whereas the best result for the accused in the case of disciplinary action is the finding by the disciplinary board of the Bar that the advocate did not fulfill his duties properly.

For the aforementioned reasons I discard the opportunity to file a legal malpractice action and the opportunity to turn to the Bar for disciplinary action as direct remedies for the ineffectiveness of a defense counsel in the criminal proceedings in this dissertation and concentrate on the remedies applied by courts during the criminal proceedings to react in case of ineffectiveness of the defense counsel and through that to improve the quality of defense in criminal proceedings. I agree that measures against an ineffective defense, no matter if they are applied by courts of lower instance during the court proceedings or by courts of higher instances in the appellate proceedings are the most effective safeguard against poor criminal defense lawyering[21] and I do that because of following reasons.

As civil action and control exercised by the Bar are mostly post-factum remedies, one has to search for more appropriate measures that prevent ineffective lawyering in criminal proceedings or at least enable timely interference, *i.e.* interference during the criminal proceedings. Three possible measures exist: the market for legal services if we talk about retained counsel (in Estonia it is called contractual counsel), possible state's regulation and interference if we talk about appointed counsels, and judicial supervision. The market helps to assure competent lawyering, because reputation prevents some

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[18] Burnett & Burnett, *Ethical Dilemmas Confronting a Felony Trial Judge: To Remove Or Not to Remove Deficient Counsel,* 1315, p. 1355.

[19] Grunis, *Incompetence of Defence Counsel in Criminal Cases Articles and Addresses,* 288, p. 289.

[20] Adele Bernhard, *Exonerations Change Judicial Views on Ineffective Assistance of Counsel,* 18 Crim. just. 37 (2003–2004), p. 37.

[21] See also Meredith J. Duncan, *(so-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform, the,* 2002 BYU L. Rev. 1 (2002), pp. 12–13 discussing that ineffective counsel claims in criminal proceedings are constitutional safeguard against poor lawyering.

clients from engaging ineffective counsels, both members and non-members of the Bar. Nevertheless, in some areas, especially in rural areas, the small number of lawyers dictates the reality: clients simply have no choice.[22] In the case of appointed counsels, it can be that the state has competence to choose counsel either by establishing public defender offices and naming persons to work there and/or giving the court competence to choose between certain persons to be appointed as counsels in the certain criminal proceeding. But it could be that the state does not have the competence to take either of these steps. For instance, in Estonia, as of the 1st of January 2010, counsel is appointed at the request of an investigative body, the Prosecutor's Office, or the court by the Estonian Bar Association, which means that neither the state nor courts have any say in the choice of appointed counsel. While on the one hand this ensures that the body conducting the proceedings cannot appoint an advocate who will make its job easy, it also leaves no possibility for the courts to exclude advocates who are known to provide ineffective assistance.[23] Therefore, as long as counsel is a member of the Bar, he can accept tasks of an appointed counsel whenever he wants to, no matter how ineffective he has been in former criminal proceedings. Thus, neither the state nor the court is authorized to choose the appointed counsel, which means that in Estonia the system of appointed counsel is exclusively in the hands of the Bar.[24]

As I have already discussed, judicial supervision means that judges have the authority to interfere with counsel's performance in anything from making small remarks up to disqualifying a defense counsel or to reverse convictions in cases where counsel has provided ineffective assistance,[25] *i.e.* to perform ongoing and *ex post* supervision. It can even be that the court has the competence to verify counsel's preparation even before the ineffectiveness has appeared. In order to justify judicial supervision over the performance of counsel, Eli Wald has written: "Presiding over the adversary system, judges are arguably

[22] Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors do Justice,* 44 Vand. L. Rev. 45 (1991), p. 66. I still remember a comment posted on the website of the daily newspaper Postimees in Estonia in which one reader lamented that he required legal assistance in a small town in Estonia but his choice was rather limited: one advocate was a known crook, another was the spouse of the judge trying the case, the third was hired by the opposing party, and he was left with no choice than to hire the fourth and last one.

[23] Soo, *An Individual's Right to the Effective Assistance of Counsel Versus the Independence of Counsel: What can the Estonian Courts do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?* 252, pp. 253–253.

[24] As right now appointment of counsels takes place through the State Legal Aid information system, which means that counsels themselves choose in this system whether they want to acquire the case and also which cases they want to acquire, it could be even said that in Estonia appointment of counsels is in the hand of advocates.

[25] See also Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors do Justice,* 45, pp. 66–67.

well-positioned to directly observe lawyer misconduct."[26] To be more exact, two judges may expose the ineffective services rendered by defense counsel: the first is the trial judge (although sometimes it could be also the judge of the higher court before whom the ineffectiveness occurs), and the second is the judge reviewing the case, *i.e.* the judge of the higher court, before whom the allegation of ineffectiveness is raised.[27] In this dissertation I am raising a hypothesis that both supervision by the trial court and supervision by the courts of higher instances are appropriate measures to cure consequences of the ineffective assistance and to improve quality of the assistance provided by counsels. I will bring out advantages and disadvantages of both forms of supervision and will find out which of these forms should be the one to be preferred in criminal proceedings and why.

The judicial supervision is considered to have at least two advantages over other measures that could be used in the case of ineffectiveness of counsel and that have been discussed briefly above. First, it allows intervention during the criminal proceedings, therefore before the final verdict. If the supervision is performed by the trial judge, it allows the amendment of damage caused by the ineffectiveness of counsel before the first verdict is made, and even more, it enables the court to react already before the ineffectiveness has occurred.[28] Second, judicial supervision has an effect on the quality of legal representation in the specific criminal proceedings and also generally: although a judicial decision that the accused was represented ineffectively would not result in direct punishment for the defense lawyer, it would have a high price for a lawyer who cares about his reputation, because his failure to fulfill his duties will be established by the judge hearing the criminal matter, not by a judge deciding a civil matter or the disciplinary board of the Bar.[29] Thus, by disqualifying counsel or annulling the judgment of the lower court, the judicial supervision can provide strong informal sanctions.[30] In case the court decides not to remove counsel and confine itself to a more lenient measure, the remark made by the court may have an effect on counsel's behavior immediately and it might be that counsel will turn out to be sufficiently effective in a proceeding after all.

The problem with judicial supervision is that counsel does not work by himself or for himself in the criminal proceedings and neither is his function to perform in

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[26] Eli Wald, *Should Judges Regulate Lawyers?* University of Denver Legal Studies Research Paper no. 11–01, pp. 14–15.

[27] Grunis, *Incompetence of Defence Counsel in Criminal Cases Articles and Addresses,* 288, p. 291.

[28] If counsel is ineffective during the court proceedings of higher instance, the situation is similar – ineffectiveness is cured before the verdict is made.

[29] Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective Ethics Symposium what do Clients Want: Practice Contexts,* 1169, pp. 1185–1186.

[30] Barbara R. Levine, *Preventing Defense Counsel Error – an Analysis of some Ineffective Assistance of Counsel Claims and their Implications for Professional Regulation,* 15 U. Tol. L. Rev. 1275 (1983–1984), p. 1428.

the way that just pleases the court. The duty of counsel is to be at the accused's side, to advise him and to present his case to the court for him. Therefore, whenever the possible intervention by the court to the performance of counsel comes into question, it has to be taken into account that it should not be done without a good reason and without at least considering the accused's opinion, because every intervention by the court affects the attorney-client relationship and also the principle of independence of counsel. If the trial court does not use the most drastic measure – removal of counsel – it is obvious that whatever step it takes towards the improvement of performance of counsel, it does not need the consent of the accused, because counsel stays in the criminal proceedings, although the court should always have the attorney-client relationship and also counsel's independence in mind when it takes such actions. In a higher court the question of possible ineffectiveness of counsel is answered only if the accused requests it, because the accused is the one who decides whether to appeal or not. But when it comes to the court's competence to remove counsel, even if there is a strong cause for removal of counsel, the question of whether the accused's consent is needed or not, rises very sharply. This is a question that I am going to discuss in this dissertation thoroughly. To do that, I am raising a hypothesis that the monitoring of counsel's performance, even if it results in the removal of counsel, should be exercised by the courts conducting the procedure regardless of the accused's opinion about his counsel's work. I am going to analyze the advantages and disadvantages of this approach and then give my opinion about the matter. I am also raising a hypothesis, that although counsel's independence is a principle that should be honored, it is nevertheless a principle that could be overridden if the accused's right to counsel and therefore to fair trial is violated.

If one agrees that judicial supervision over the performance of counsel is an appropriate and allowable measure against the ineffectiveness of counsel, the questions whether courts should rely on some standard to evaluate the performance of counsel and what standard should it be, arise. It is easier for the courts to evaluate the work of counsel if guidelines for counsel's performance have been established and consequently there is less chance that the courts will infringe the independence of counsel and the attorney-client relationship without good reason.[31] In addition to that the existence of a standard helps to reduce unreasoned differences between decisions made about the performance of counsel by different courts in similar cases. Therefore establishment of an effective counsel standard or standards that would assist the court in evaluating the performance of counsel both during a criminal proceeding and also retrospectively in appeal or cassation proceedings should at least be considered. Of course, there are some criterions for a person who wants to enter the criminal proceedings as counsel, *e.g.,* requirements of education or requirement of membership of the Bar, but that may not be enough. The experience of many

[31] Soo, *An Individual's Right to the Effective Assistance of Counsel Versus the Independence of Counsel: What can the Estonian Courts do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?* 252, p. 263.

countries, including Estonia, has indicated that even if a person matches the stipulations provided by the law, it can still turn out that he performs his duties ineffectively in the criminal proceedings. Therefore criterions to enter the criminal proceedings are just a basic minimum and courts should check the person's Bar membership status and educational history, if necessary before allowing him to perform as a counsel as well as monitor the performance of counsel during the proceedings.

On which standards should courts base their decision about whether counsel is or was ineffective, is another question to be solved. It is obvious that regulations provided by the state governing the education, qualifications and conduct of lawyers authorized to practice law in a state criminal system are permissible,[32] and in order to guarantee at least a minimal quality of defense in my opinion even compulsory. But often laws providing the rules for criminal procedure do not give guidelines for conduct of counsels. There are codes of conduct, which are established by the Bars and applied to the performance of advocates, *i.e.* to the members of the Bar, and also laws that regulate qualification and even conduct of advocates. But to ask a court to verify if counsel followed the rules established by the Bar or for the Bar in order to solve an ineffectiveness claim or decide removal of counsel, is to ask court to apply rules that are imposed by or to a private organization that incorporates a small number of lawyers from the society, which in turn means that lawyers who are not members of the Bar should act in accordance with rules imposed by the organization or for the organization that they actually are not members of. In addition to that it must be taken into account that these rules have been worked out for disciplinary actions and therefore are not usually meant to bring along such severe outcomes as removal of counsel or annulment of judgment of a lower court, although it could be claimed that disbarment that may be imposed as a punishment on the advocate who has broken those rules is almost as severe as these consequences. Nevertheless, if it is decided that all lawyers that perform as counsels in criminal proceedings should fulfill duties that are imposed by the Bars or for the Bars, courts should consider that because of the nature of these rules not every breach of the duty described in these codes should result in severe action taken by the courts. Of course, the codes established by the Bars and laws that are established for the Bars can be taken as an example, as the United States Supreme Court has taken the American Bar Association's standards as an example in case of ineffectiveness claims, but for the above mentioned reasons courts should have discretion in this matter.

Whether to rely on the codes imposed by private organizations, *e.g.,* by the Bars, and also on laws that are provided by legislation for the members of Bars, to impose a distinct standard for courts or to ask courts to solve ineffectiveness claims on a case-by-case basis, which basically means that there is no standard at all, is a matter of agreement. But if one supports imposing a specific standard

[32] David Harris & et al, Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights (Second Edition ed. 2009), p. 316.

different from guidelines imposed by the Bars, it must be very careful to work out a standard that really is a guideline and therefore helpful for courts.[33] If a standard states only that counsel needs to be "diligent", "effective", "reasonably competent" *etc.*, it means that one has actually put together no standard at all and counsel's performance is still evaluated in accordance with the case-by-case approach. Actually, there is nothing blameworthy in admitting that an institution or a person is unable to compose an appropriate standard and therefore counsel's performance should be in fact analyzed based on the facts of a certain case, but one should have courage to admit so. Nevertheless, in this dissertation I am taking my chances and raising a hypothesis that a specific standard is possible to compose, but at the same time I am also ready to admit that it is unattainable after all, if all I can find is that counsel should be, for instance "reasonably competent".

As one of the main purposes of the dissertation is to find out, whether the standard-based approach is really achievable, I am trying to work out a standard for the Estonian courts to be used in case the question, whether counsel is or was ineffective, arises during the criminal proceedings. My goal is to determine whether it is possible to elaborate a standard that is not excessively vague and offers real support to courts, instead of guiding them to use a case-by case approach. As I have already discussed, I agree with the opinion that the codified standards, which courts could rely on in case the question of ineffective defense arises, would promote the impartial and efficient administration of justice and through that ensure effective legal assistance.[34] The standard would also provide defense counsel with knowledge of the necessary steps to be taken in the criminal proceedings and therefore would serve as a notice to counsels of the professional performance standards required from them. The Bar would have guidance for professional and educational programs in fashioning the means to educate lawyers for practice under the standard of professional conduct. And other persons who want to perform as counsels in criminal proceedings would have an opportunity to improve their skills also by familiarizing themselves with the quality of performance requirements expected. Courts of all instances could use the guideline to monitor the performance of counsel who appears before them in the courtroom. Higher courts would have a guide for resolving claims based on allegations of ineffective assistance. Guidelines would improve consistency and predictability in the outcome of judicial supervision over the performance of counsel in the courts of first instance as well as of appellate reviews from one jurisdiction to another. Finally, these standards might be

[33] For instance in the United States where the United States Supreme Court has set out a "standard" for ineffective counsel claims, many people still think that the standard governing effective assistance of counsel is a national embarrassment and does not provide any help at all. Deborah L. Rhode, *Legal Ethics in an Adversary System: The Persistent Questions Legal Ethics Symposium: Lawyers' Ethics in an Adversary System,* 34 Hofstra L. Rev. 641 (2005–2006), p. 652.

[34] Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes,* 59 Tex. L. Rev. 689 (1980–1981), p. 690.

useful for accused persons, because they would at least have a chance to have a clearer understanding of the quality of representation to which they are entitled and therefore it might be that they would be able to demand much more from their counsels.[35]

4. Description of Methods

Although it is my strong belief that the code of conduct imposed by the Bar Associations (in Estonia the Estonian Bar Association) and laws that regulate activities of Bar members cannot and should not be used one-to-one in criminal proceedings to evaluate effectiveness of counsel for the reasons I have discussed above, I still suggest that those codes and laws could be used as an example of how one organization thinks that counsel should be performing in the criminal proceedings. The United States Supreme Court uses different American Bar Association standards as guidelines, but still warns the courts to take into account that they are composed by the American Bar Association and not for the courts specifically, but for the Bar and its members (and for disciplinary actions). Therefore with reservations, guidelines composed by the Bars and also for the Bars could be used as models to work out courts' own standard(s). Consequently, I will use conduct rules established by the Estonian Bar Association and to the Estonian Bar Association and by the American Bar Association as guidelines to develop counsel's performance standards in criminal proceedings for Estonian courts. I also use the standards imposed by the Council of Bars and Law Societies of Europe (hereinafter CCBE).[36] Additionally, when trying to work out a standard for Estonian courts I assume that there should be at least two standards: one for the courts conducting the proceedings and the other for appellate courts. I base this assumption on the fact that the higher court's conclusion that counsel has been ineffective in the court proceedings of the court of lower instance results in annulment of the judgment. Therefore, only the most serious mistakes of counsel should be listed in the standard for higher courts. With the standard of counsel's effectiveness to the court conducting the proceedings the situation is a bit different – the most serious step the court could take is replacement of counsel, which means that principle of finality is not affected. Therefore there the standard of effectiveness of defense counsel should be much stricter and should enable the courts to react already to counsel's less serious breach of duties.

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[35] Of course the usefulness of standards to accused persons depends on whether they understand the essence of those standards or not. More about advantages of specified standards: Thomas Hagel, *Toward a Uniform Statutory Standard for Effective Assistance of Counsel: A Right in Search of Definition After Strickland,* 17 Loy. U. Chi. L. J. 203 (1985–1986), pp. 213–214; J. Eric Smithburn & Theresa L. Springmann, *Effective Assistance of Counsel: In Quest of a Uniform Standard of Review,* 17 Wake Forest L. Rev. 497 (1981), p. 526.

[36] Estonian Bar Association has been a full member of the CCBE since 1 May 2004. Estonian Bar Association, General Information. Online. Available: http://www.advokatuur.ee/?id=4&PHPSESSID=5eee24e4f6a0fca5f04e4683b67dd667, 29 April 2011.

In addition to conduct rules established by the Estonian Bar Association, by the Estonian legislator to the Estonian Bar Association, rules established by the American Bar Association and the CCBE, I will also use the European Convention on Human Rights and Fundamental Freedoms (hereinafter ECHR),[37] the judicial practice of the European Court of Human Rights (hereinafter ECtHR), the judicial practice of the Supreme Court of Estonia and of the United States Supreme Court, legislation of the European Union, the Code of Criminal Procedure and other relevant Estonian legislation in order to create a standard of effectiveness of defense counsel in criminal proceedings for Estonian courts. It must be mentioned that when it comes to the European Convention on Human Rights and to the judicial practice of the ECtHR, it has to be taken into account that the ECtHR's finding that counsel has been ineffective in domestic criminal proceedings does not automatically result in annulment of judgment of a domestic court and usually just results in compensation for the convicted offender. Therefore, the ECtHR does not have to consider the principle of finality to compose its standard for effectiveness of defense counsel, which in turn means that whenever the case law of ECtHR is taken into account, one has to consider the fact that the ECtHR does not search for a ground for annulment of the state's judgment. On the other hand, it must be also considered that because the ECtHR makes decisions over independent states, it could be that it sometimes makes the Court refrain from taking a reproachful standpoint.

In order to prove my hypothesis that judicial supervision is an allowed measure and should be used to guarantee the accused effective legal aid, I employ the results of analyses conducted by different authors from the United States and from Europe in numerous law reviews and also monographs. Here I also use the same sources that I use for composing the standard of effectiveness of defense counsel for Estonian courts with the exception that the Bars' guidelines do not provide any help in answering this question.

There is a very simple reason why this dissertation employs the United States as an example in the field of ineffective counsel claims – in the United States this subject has been widely dealt with for a long time. I also examined some other countries with adversary criminal proceedings – Great Britain and Canada mainly – for the dissertation, but as it turned out, almost always they refer to the United States' long-term experience on this matter. Therefore I am relying on many sources originating from the United States in my dissertation. My decision to use the United States experience as an example also stems from the fact that Estonian criminal proceedings has moved towards the adversary system since the year 2004 and latest developments, *e.g.,* amendments of the Code of Criminal Procedure that came into force on the 1st of September 2011 show that Estonia is willing to move even closer to the adversary system. Because criminal proceedings are adversary in the United States, it is logical to thoroughly examine the United States' experience in the field of ineffectiveness

[37] European Convention on Human Rights and Fundamental Freedoms. – RT II 1996, 11/12, 34. Entered into force in respect of Estonia 16 April 1996.

of defense counsel. While doing that, I am not looking only for success stories but also mistakes that have been made in the United States from which we can learn a great deal. In addition to looking into adversary systems I also did a research in German judicial practice, because Germany is the country that has been used as a model for Estonian lawmaking, although not when the Code of Criminal Procedure was drafted. Even though not adversary, the German system of criminal procedure could be cited as an example. In specific literature it has even been claimed that because of the adversary system's vulnerability in cases where one party is not effectively represented, there is an interest in reforms that have implicit or explicit inquisitorial elements as a means to prevent and remedy these situations.[38]

To achieve the two main goals I propose in this dissertation – to search for justification for the judicial supervision over the performance of counsels and to work out standards for effectiveness of defense counsel to be used by Estonian courts, I have divided my dissertation into six chapters. In the first chapter I write about the accused's right to counsel, about where this right comes from and what it means. I also write about the role that counsel plays in criminal proceedings and what are his duties. The second chapter is about the effectiveness of counsel: why is the right to effective assistance of counsel inseparably related to the right to counsel and what to do in order to guarantee the accused the right to effective assistance of counsel. The goal of the first two chapters is to show that not only has counsel to be present in the criminal proceedings, but he has to be effective as well. In the third chapter I list different reasons for ineffective representation resulting in various types of ineffectiveness of defense counsel, which I will be using as examples to set my proposed standard. The fourth chapter is about judicial supervision and in that chapter I am searching for justification for ongoing and *ex post* supervision performed by courts. In addition to that I am also writing about the requirement of prejudice, which is a very important element of ineffectiveness claims in the United States and at the same time rejected by the ECtHR explicitly, although as I will discuss further, there seems to be a slight confusion about the matter in the judgments of the ECtHR. In the fifth chapter I try to answer the question why should there be standards for courts to be used in case of ineffectiveness of defense counsel and why I decline case-by-case analysis, using the United States as an example. This enables me to continue with the sixth chapter in which I am making a proposal for standards, which could be used by Estonian courts in order to decide whether counsel's performance has fallen under what is required from him in the criminal proceedings.

[38] Kent Roach, *Wrongful Convictions: Adversarial and Inquisitorial Themes,* 35 N. C. J. Int'l L. & Com. Reg. 387 (2009–2010), p. 424. For example, more active role could be given to the judge. *Ibid.*, pp. 426–432.

I. THE RIGHT OF THE ACCUSED TO THE ASSISTANCE OF COUNSEL

1. Where Does the Accused's Right to the Assistance of Counsel Come From?

1.1 The Accused's Right to the Assistance of Counsel in Estonia

The right to defense is one of the main procedural principles of the rule of law and gives a person the right to defend himself against criminal charges with every means enacted by the law.[39] One of the defense rights is the accused's right to the assistance of counsel. The Constitution of the Republic of Estonia § 21 (1) establishes: "Everyone who is deprived of his or her liberty shall be informed promptly, in a language and manner which he or she understands, of the reason for the deprivation of liberty and of his or her rights, and shall be given the opportunity to notify those closest to him or her. A person suspected of a criminal offence shall also be promptly given the opportunity to choose and confer with counsel." The subsection under discussion distinguishes two groups of people: everyone who is deprived of his or her liberty, which is a broad group, and a person suspected of a criminal offence, which is a narrow group. Compared to everyone who is deprived of his or her liberty, the person suspected of a criminal offence has the right to choose counsel and confer with him.[40] The second sentence in § 21 (1) of the Constitution is the only sentence in the Constitution of the Republic of Estonia that considers the right to counsel.[41]

The Supreme Court of Estonia has interpreted § 21 (1) of the Constitution in the court case no. 3-4-1-5-10.[42] The Court stressed that the second sentence of this subsection provides, without making any reservations that the suspect shall be promptly given the opportunity to choose and confer with counsel.[43] The Court added that arising from § 47 (2) of the CCP, counsel is required to use all the means and methods of defense which are not prohibited by law in order to ascertain the facts which vindicate the person being defended, prove his innocence or mitigate his punishment, and to provide other legal assistance necessary in a criminal matter to the person being defended, which means that counsel participates in the proceedings in the interests of the accused.[44] But the Court also stressed that although the duty of counsel is to act in the proceedings

[39] Court Ruling of the Criminal Chamber of the Supreme Court, 22 November 2002, court case no. 3-1-1-114-02, p. 7.3. Online. Available: http://www.nc.ee/?id=11&tekst=RK/3-1-1-114-02, 29 April 2001.
[40] Eesti Vabariigi Põhiseadus: Kommenteeritud Väljaanne (Eerik-Juhan Truuväli & et al eds. Second Edition ed.2008), § 21, Comment 3.
[41] *Ibid*., § 21, Comment 6.
[42] Judgment of the Constitutional Review Chamber of the Supreme Court, 18 June 2010, court case no. 3-4-1-5-10. Online. Available: http://www.nc.ee/?id=1176, 29 April 2011.
[43] P. 38 of the judgment.
[44] P. 41 of the judgment.

in the interests of the accused, at the same time he is not the representative of the accused, but an independent party to a proceeding. Hence, the duty of counsel is to act in the interests of the accused also when the accused does not understand the need to act.[45] In the light of this case two conclusions arise. First, that counsel is an independent party to a proceeding, and second, that because of this independence he has competence to act in the proceedings as he sees fit and not always is he obliged to take the accused wishes into account or ask for his permission or approval.

According to the third clause of § 8 of the CCP investigative bodies, Prosecutors' Offices and courts shall ensure the assistance of counsel to the suspect and the accused in the cases where participation of counsel is mandatory by the Code of Criminal Procedure or if such assistance is requested by the suspect or the accused. The Supreme Court of Estonia has emphasized that it is the duty of the investigative bodies, Prosecutors' Offices and courts to provide the accused with an opportunity to defend himself (also provided for in the second clause of § 8 of the CCP).[46] Clauses 34 (1) 3) and 4) of the CCP prescribe that a suspect has the right to the assistance of counsel and to confer with him without the presence of other persons. As it is established in § 35 (2) of the CCP the accused has the rights of a suspect. Thus, the accused's right to counsel is provided for verbatim in the Code of Criminal Procedure, although the accused is not mentioned in the Constitution of the Republic of Estonia. The general principle, which is adopted by the Code of Criminal Procedure and also recognized by the Supreme Court of Estonia with its judicial practice as described above, is that the accused has the same rights as a suspect, so it can be concluded that both the Constitution of the Republic of Estonia and the Code of Criminal Procedure protect the accused's right to counsel as well as the suspect's right to counsel.

1.2 The Accused's Right to the Assistance of Counsel According to the European Convention on Human Rights and the Judicial Practice of the ECtHR

According to Article 6 paragraph 3 (c) of the ECHR, everyone charged with a criminal offence has the right to choose either to defend himself in person, through legal assistance of his own choosing[47] or, if he has not sufficient means

[45] P. 57 of the judgment.

[46] Court Ruling of the Criminal Chamber of the Supreme Court, 29 January 2002, court case no. 3-1-1-3-02, p. 7.1. Online. Available: http://www.nc.ee/?id=11&tekst=RK/3-1-1-3-02, 29 April 2011. Court Ruling of the Criminal Chamber of the Supreme Court, 2 August 2010, court case no. 3-1-1-61-10, p. 10.1. Online. Available: http://www.nc.ee/?id=11&tekst=RK/3-1-1-61-10, 29 April 2011.

[47] Therefore the denial of legal assistance constitutes a violation (Panasenko v. Portugal. *Application no. 10418/03.* 22 July 2008, § 54; Shulepov v. Russia. *Application no. 15435/03*. 26 June 2008, § 39) as does the failure to allow confidential communication (Zagaria v. Italy. *Application no. 58295/00.* 27 November 2007, § 36).

to pay for legal assistance, to be given it free when the interest of justice so require.[48]According to S. Trechsel a defense which is conducted with the assistance of chosen counsel is certainly the best of the three alternatives offered by Article 6 paragraph 3 (c).[49] S. Trechsel does not explain what he means by the concept "best". Since the object of Article 6 paragraph 3 (c) of the ECHR is an effective defense[50] and a person can defend himself effectively in a situation where he is opposed by a professional lawyer with the assistance of professional counsel chosen as he best sees fit, it is clear that the best option among the rights set out in Article 6 paragraph 3 (c) of the ECHR is a person's right to defense with the assistance of counsel of his choice.[51]

However, according to the case law of the ECtHR, the right to choose counsel, no matter if counsel is appointed or retained, is not an absolute one. It is noteworthy that under certain conditions the ECtHR does not require the state to provide the accused with legal assistance at all. For instance in the case of Engel and Others v. Netherlands, while the ECtHR recognized that the right of the person to choose counsel was limited in state proceedings, it held that there was no violation of Article 6 paragraph 3 (c) of the ECHR, as the persons charged were, in view of the simplicity of the case, capable of defending themselves.[52] As in Engel and Others v. Netherlands disciplinary proceedings not the criminal proceedings were conducted against the applicants, although the Court concluded that "charges" against the applicants were "criminal" in the context of the Convention, it could be that Engel and Others v. Netherlands does not apply for criminal proceedings as it is possible to claim that there is no such thing as "simplicity of the case" in criminal proceedings. Additionally, for instance S. Trechsel has claimed that the view expressed in Engel and Others v. Netherlands must be overall rejected,[53] a view I agree with as when it comes to the criminal proceedings there is too much at stake for the accused to conclude that if the case is simple, the accused request for the assistance of counsel could be rejected and he should be left alone to defend himself in the proceedings. Therefore in my opinion the right to counsel should be absolute in criminal proceedings in the meaning that it should be guaranteed to all persons accused of crime.

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[48] Pishchalnikov v. Russia. *Application no. 7025/04.* 24 September 2009, § 93; Padalov v. Bulgaria. *Application no. 54784/00.* 10 August 2006, §§ 53–54; Quaranta v. Switzerland. *Application no. 12744/87.* 24 May 1991.

[49] Stefan Trechsel, Human Rights in Criminal Proceedings (2005), p. 266.

[50] Clare Ovey & Robin White, The European Convention on Human Rights (4th ed. 2006), p. 205.

[51] Soo, *An Individual's Right to the Effective Assistance of Counsel Versus the Independence of Counsel: What can the Estonian Courts do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?* 252, p. 254 Note 13.

[52] Engel and Others v. Netherlands. *Application nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.* 8 June 1976, § 91.

[53] Trechsel, *Human Rights in Criminal Proceedings*, *p*. 267.

The ECtHR accepts that national law may prescribe certain conditions for persons who have the right to act as counsel in criminal proceedings. In addition to that it is permissible for national law to lay down even stricter rules for those who wish to defend persons in supreme courts.[54] In Mayzit v. Russia[55] Moskovskiy District Court refused to let the accused's mother and sister represent him at the trial. The mother was a person of advanced age and frail health. The sister worked as a speech therapist in a children's polyclinic, and the duties of her office prevented an active involvement in the proceedings. The ECtHR concluded that the right to choose counsel is "…subject to certain limitations where free legal aid is concerned and also where it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them."[56] When appointing defense counsel the national courts must certainly take into account the accused's point of view and his wishes, but "…they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice…"[57] In this case the restriction imposed on the accused's choice of counsel was limited to excluding his mother and sister, which means that the accused could have chosen any advocate he would have found suitable to represent him, but he did not do that, which led the Court to conclude no violation of the Convention.[58] Although in my opinion the right to counsel is by its nature absolute, I tend to agree with the Court that sometimes it is necessary to limit the accused's choice of counsel. The accused as a person with little or no knowledge about the legal system may think that he is best represented when a person familiar or even his relative is his counsel, but with that wish he may miss the fact that his opponent – the prosecutor – is a professional lawyer, which requires that he is represented by a professional lawyer too. It is here the duty of the court to make sure that the accused cannot prefer an emotional choice over a practical choice.

There is a general tendency in the judicial practice of the ECtHR, holding that although counsel has the right to participate in the proceedings, he must demonstrate a certain amount of initiative to do that (*e.g.*, request permission to be present during the questioning of a suspect, or he has the duty to ensure that he was replaced for the day of the hearing in cassation court or that the hearing would be adjourned), and if counsel fails to do so, there is no violation of a person's right to counsel.[59] On the one hand it makes sense as it is the duty of counsel as the representative of the defendant to be present when it is necessary and in order to do that he must be active, for instance, he has to show up when

[54] Meftah and Others v. France. *Application nos. 32911/96, 35237/97 and 34595/97.* 26 July 2002, § 45.
[55] Mayzit v. Russia. *Application no. 63378/00.* 20 January 2005.
[56] § 66 of the judgment. See also Croissant v. Germany. *Application no. 13611/88*. 25 September 1992, § 29.
[57] Mayzit v. Russia, § 66.
[58] §§ 70–71 of the judgment.
[59] Tripodi v. Italy. *Application no. 13743/88.* 22 February 1994, § 30; Imbrioscia v. Switzerland. *Application no. 13972/88.* 24 November 1993, § 42.

he is called or if he is not able to do that, he has to notify the appropriate authorities. On the other hand, this may lead to the conclusion that the right to counsel is a right that has to be guaranteed by counsel himself, not by the state, which is a standpoint contradictory to the ECtHR's own judicial practice. But one thing I most certainly agree with is that in cases where counsel abuses a person's right to the assistance of counsel, with the intention of delaying the proceedings, by systematically failing to appear in court and thereby causing the trial to be repeatedly postponed, the court should have the right to limit the person's right to choice of counsel and to appoint counsel for the person charged with a criminal offence.[60] In such cases, the principle embodied in Article 17 of the ECHR applies, by which the Convention does not protect any abuse of the law.[61] The court should be allowed to disqualify such counsel even if the accused is not aware of his counsel's tactical decision to cause delay in the criminal proceedings as allowing counsel to proceed in the proceedings would result in spending extra resources and may even cause expiration of the period of limitation of the criminal offence.

1.3 The Accused's Right to the Assistance of Counsel in the European Union

In the European Union a person's right to counsel is also considered to be important. The right to defense is provided for in the Charter of Fundamental Rights of the European Union,[62] although according to Article 51 (1) of the Charter, the provisions of the Charter are addressed to the member states only when they are implementing European Union law, which means that the provisions of the Charter are not binding to the member states in case they are conducting internal criminal proceedings. Article 47 (Title 6 of the Charter called "Justice") of the Charter provides the right to an effective remedy and to a fair trial. According to Article 47 (2) everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. According to Article 48 (2) of the Charter, which guarantees the right of defense, respect for the rights of the defense of anyone who has been charged shall be guaranteed.

According to the Lisbon Treaty[63] Article 6 paragraph (3) fundamental rights, as guaranteed by the European Convention on Human Rights and as they result

[60] The ECtHR has accepted the appointment of additional counsel by the court on its own initiative even in cases where counsel chosen by the person charged with a criminal offence has not abused any rights, if the matter has been complicated and it can be presumed that the proceedings will take a long time. See Croissant v. Germany, § 30.
[61] Trechsel, *Human Rights in Criminal Proceedings*, p. 267.
[62] OJ C 83, 30.3.2010, p. 389–403.
[63] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. OJ C 83, 30.3.2010, pp. 1–388, entered into force: 1 December 2009.

from the constitutional traditions common to the member states, constitute general principles of the European Union's law. The Stockholm Programme[64] states that the area of freedom, security and justice must be "…a single area in which fundamental rights and freedoms are protected."[65] The Programme continues: "The protection of the rights of suspected and accused persons in criminal proceedings is a fundamental value of the Union, which is essential in order to maintain mutual trust between the Member States and public confidence in the Union."[66] To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules that concern the rights of individuals in criminal procedure. Such rules shall take into account the differences between the legal traditions and systems of the member states (Article 82 (2) b of the Lisbon Treaty). Consequently, since the Lisbon Treaty entered into force the European Union has had the competence to adopt directives in the area of defense rights, if the Union considers that rights provided for in the Charter of Fundamental Rights of the European Union and the Lisbon Treaty are too general and they need to be specified in order to facilitate mutual trust and cooperation between the member states. Even the fact that all European Union member states are parties to the European Convention on Human Rights, and with the Lisbon Treaty the European Union received the competence to accede to the Convention, has not been enough for the European Union. It has already set itself a goal to set out the basic standards for suspects' and accused persons' procedural rights in the European Union. To achieve this goal, the European Union started taking action already before the Lisbon Treaty entered into force, *i.e.* before it was under the European Union's jurisdiction to adopt directives in order to establish minimum rules that concern the rights of individuals in criminal procedure, and has continued to do so after the enforcement of the Lisbon Treaty.

On the 19th of February 2003, the European Commission published a Green Paper "Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the EU".[67] In the Green Paper the Commission stated: "It is important for the judicial authorities of each Member State to have confidence in the judicial systems of the other Member States. From May 2004, this will apply to twenty-five rather than fifteen Member States. Faith in procedural safeguards and the fairness of proceedings operate so as to strengthen that confidence. It is therefore desirable to have certain minimum

[64] The Stockholm Programme – An open and secure Europe serving and protecting citizens. OJ C 115, 4.5.2010, pp. 1–38.
[65] 1.1., C 115/4.
[66] 2.4., C 115/10.
[67] Green Paper from the Commission – Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union (19 February 2003, COM(2003) 75 final).

common standards throughout the European Union, although the means of achieving those standards must be left to the individual Member States."[68] In this document the Commission concluded that whilst all the defense rights are important, some of these rights are so fundamental and basic that they should be given priority. Here the Commission added that the first of these rights is the right to legal assistance and noted: "If an accused person has no lawyer, they are less likely to be aware of their other rights and therefore to have those rights respected."[69] According to what is written in the Green Paper, the Commission sees the right of the accused to counsel as the foundation of all other rights.[70] The suspect or the accused who has counsel in the proceedings is in a far better position when it comes to the enforcement of all his other rights, and it is so because of two reasons. First, his chances of being informed of his rights are greater when counsel is by his side and second, a lawyer present will assist him with having his rights respected.[71] It is difficult not to agree with the Commission as counsel as a legal professional is a main source for information about other defense rights to the accused, as he is also the one whose duty is to help the accused to exercise these rights.

In the Green Paper the Commission also gives its opinion about the balance between the European Convention on Human Rights and minimal rules that will be established by the European Union. In the Commission's opinion the right to a lawyer is already well established – it is provided for in the European Convention on Human Rights and stated also in the Charter of Fundamental Rights of the European Union as well as in other instruments.[72] Therefore, the Green Paper is not designed to ensure that member states comply with the European Convention on Human Rights but rather to make sure that those rights, including the right to counsel, identified in the Green Paper are applied "in a more consistent and uniform manner throughout the European Union".[73] Still, the aims of the European Union would seem to be much clearer, if it would state that it sees a standard of minimum rights for accused persons higher that is established by the European Convention on Human Rights and the judicial practice of the ECtHR – otherwise the European Union only repeats what is already in force.

The Green Paper was followed by the proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union[74] on the 28th of April 2004. In the proposal the Commission stresses that research, consultation, and the judicial practice of the ECtHR, shows the European Convention on Human Rights is implemented by the

[68] Introduction, p. 4.
[69] Identifying the basic rights, 2.5., p. 14.
[70] *Ibid*.
[71] The right to legal assistance and representation, 4.1., p. 20.
[72] The right to legal assistance and representation, 4.2., p. 20.
[73] Treaty obligations and existing provisions, 3.1., p. 16.
[74] Proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union (28 April 2004, COM(2004) 328 final).

member states very differently and that there are many violations of the European Convention on Human Rights.[75] The intention of the European Union is however not to duplicate what is already told in the European Convention on Human Rights, but rather to promote the equivalent treatment in respect of trials throughout the European Union, which could be done by "orchestrating agreement between the Member States on a Union wide approach to a "fair trial".[76] Whilst it is in the competence of each member state to regulate its criminal justice system, the safeguards should be as similar as possible among member states: the standard can only be common if it is recognized and applied by all member states, so it is not possible to achieve a common standard and rely entirely on member states' right to shape internal procedural rules independently.[77] Still the Commission does not explain acceptably how its actions can help to guarantee the accused persons' rights that are already stipulated in the European Convention on Human Rights and stressed by the case law of the ECtHR.

In the proposal the Commission also speaks about the right to counsel. The Commission proposes that legal advice should be an entitlement of suspects and accused persons throughout all the criminal proceedings which are defined as "proceedings taking place within the European Union aiming to establish the guilt or innocence of a person suspected of having committed a criminal offence or to decide on the outcome following a guilty plea in respect of a criminal charge".[78] It also includes any appeal from these proceedings.[79] The Commission also proposes that the member states should ensure that only lawyers as described in Article 1 (2) (a) of Directive 98/5/EC[80] are entitled to give legal advice.[81]

The European Parliament recommended a number of amendments to the proposal,[82] including adding a subsection providing that the rights laid down in the European Convention on Human Rights should be regarded as minimum standards with which Member States should in any event comply, just as they

[75] 22., p. 6 of the proposal.
[76] 9., p. 3 and also 14., p. 4 of the proposal.
[77] 11. and 19., pp. 4 and 6 of the proposal.
[78] 32., p. 9 of the proposal.
[79] Article 1 (1) of the proposal.
[80] Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. OJ L 77, 14.3.1998, pp. 36–43. Article 1 (2) (a) of the Directive provides that "lawyer" means any person who is a national of a member state and who is authorized to pursue his professional activities under professional title of advocate.
[81] Article 4 (1) of the proposal.
[82] European Parliament legislative resolution on the proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union (COM(2004) 0328 – C6-0071/2004 – 2004/0113(CNS)). OJ 033 E, 09/02/2006, pp. 0159–0169.

should comply with the case law of the ECtHR.[83] In addition the Parliament suggested that a principle according to which a failure to respect the right to legal advice shall invalidate all subsequent acts and those dependent on them throughout the criminal proceedings should be added to the proposal.[84] In addition to what has been mentioned above, the Parliament mitigated the educational requirements for counsel with its recommendation, suggesting that lawyers as described in Article 1 (2) a of Directive 98/5/EC or other persons duly qualified in accordance with applicable national provisions should be entitled to give legal advice.[85]

It turned out that the Commission's plans were too ambitious and no political agreement was reached on the matter, some member states claiming that the European Convention on Human Rights adequately protects the rights of suspects and accused persons in the European Union,[86] an opinion that is actually not far from the truth. So in 2009 the European Union started all over again, now with slightly more modest plans. On the 1st of July 2009 a roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings was issued, stating that "…there is room for further action of the European Union to ensure full implementation and respect of the Convention standards, as well as, where appropriate, to expand existing standards or to make their application more uniform."[87] On the 30th of November 2009 the Council of the European Union adopted the resolution on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.[88] The Council emphasized in the resolution that any new European Union legislative acts in this field should be consistent with the minimum standards set out by the European Convention on Human Rights, as interpreted by the ECtHR.[89] In order to strengthen the rights of suspected or accused persons in criminal proceedings an action comprising legislation as well as

[83] Amendment 2.
[84] Amendment 17.
[85] Amendment 23. This is a reasonable proposal as there is no justification for the standpoint that only advocates should be authorized to provide legal advice, as there are many persons who are not advocates, but at the same time they have legal education, competence in the area of criminal law and law of criminal procedure, and willingness to give legal advice to accused persons.
[86] Taru Spronken and Gert Vermeulen, *Four Fundamental Procedural Rights in Criminal Proceedings Throughout the European Union; Study on Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union – 2008 Update*, [February 2009], p. 2.
[87] Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings (1 July 2009, 11457/09). 2., p. 3.
[88] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. OJ C 295, 4.12.2009, pp. 1–3.
[89] C 295/2. But the purpose of the European Union legislation in the light of the Convention and the case law of the ECtHR still remains vague.

other measures should be taken at the level of the European Union.[90] With the resolution the Council invited the Commission to submit proposals regarding the measures set out in the roadmap. The third measure, Measure C, in the roadmap is legal advice and legal aid. The right to legal advice through legal counsel for the suspected or accused person in criminal proceedings at the earliest appropriate stage of such proceedings is fundamental in order to safeguard the fairness of the proceedings; the right to legal aid should ensure effective access to the aforementioned right to legal advice.[91] By now, the European Parliament and the Council of the European Union have adopted the directive on the first measure, Measure A, translation and interpretation[92] and the Commission is working on Measure B, information on rights and information about the charges.[93]

1.4 The Accused's Right to the Assistance of Counsel in the United States

A person's right to the assistance of counsel for his defense was provided for in the United States Constitution[94] already at the time of adoption of the Bill of Rights in 1789. According to the Sixth Amendment of the Constitution in all criminal prosecutions, the accused shall enjoy the right to "have the Assistance of Counsel for his defence." At first when solving cases related to absence of counsel from the proceedings, courts in the United States relied not on the Sixth Amendment guarantee of the right to counsel but rather on the due process clause of the Fourteenth Amendment, with the principle laid down in this amendment that an accused must receive a fair trial.

So, first the due process was the basis for the right to the assistance of counsel, as courts relied on that when they decided whether counsel was appointed (or was not appointed at all) in a manner that precluded effective representation.[95] It was in 1932 when the first case concerning a person's right to counsel was brought before the Supreme Court.[96] The United States Supreme Court acknowledged in Powell v. Alabama that due process (*i.e.* the Fourteenth Amendment) requires an appointment of counsel when compelled by funda-

[90] C 295/2.
[91] Measure C: Legal Advice and Legal Aid, C 295/3.
[92] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings. OJ L 280, 26.10.2010, pp. 1–7.
[93] Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings (Brussels, COM(2010) 392/3). Online. Available: http://ec.europa.eu/justice/news/intro/doc/ com_2010_392_3_en.pdf, 20 June 2011.
[94] The Constitution of the United States of America. Online. Available: http://supreme.justia.com/constitution/, 29 April 2011.
[95] Jennifer N. Foster, *Lockhart v. Fretwell: Using Hindsight to Evaluate Prejudice in Claims of Ineffective Assistance of Counsel Notes,* 72 N. C. L. Rev. 1369 (1993–1994), p. 1378.
[96] Powell v. Alabama, 287 U.S. 45 (1932).

mental fairness. While deciding the case the Court adjudicating on the Powell case considered a number of factors about the trial: not just how counsel performed, but also other circumstances, including the accused's lack of education. So the Powell Court concluded that in order to analyze any possible violation of the right to counsel, it must also be taken into account the characteristics of the accused persons, the circumstances of the trial, the evidence presented and excluded, and many other factors.[97] In its judgment, the Supreme Court held that denial of counsel to the accused constituted a violation of the Fourteenth Amendment, yet what is more important is that the Court recognized that an accused in a capital case who is unable to employ counsel or defend himself, has the right to have counsel appointed. A few years later the United States Supreme Court took a small step back from the Fourteenth Amendment and interpreted the Sixth Amendment to guarantee counsel to all felony defendants in federal courts.[98] But in state criminal proceedings, the due process approach was applied until Gideon v. Wainwright[99] made the Sixth Amendment applicable for the states' criminal procedure by incorporating it into the Fourteenth Amendment.[100] This means that in states' criminal proceedings the courts were looking, until the Gideon v. Wainwright, at the overall fairness of the proceedings when the accused claimed that he was not provided with the assistance of counsel.

The Supreme Court's judicial practice in the area of the right to counsel with its explicit reliance on the Fourteenth Amendment halted the development of the right to the assistance of counsel for a person's defense as a fundamental right for some time and drew much criticism and dissatisfaction.[101] In 1963, when the Supreme Court finally ruled that all accused persons, regardless of the charges against them or the specific criminal case at issue, have the right under the Sixth Amendment of the Constitution to court-appointed counsel, the Court returned to the Sixth Amendment inquiry and "…laid the foundation for a

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[97] John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative Harmless Error Criminal Law,* 95 J. Crim. L. & Criminology 1153 (2004–2005), p. 1177.

[98] Johnson v. Zerbst, 304 U.S. 458 (1938). According to the Court, it is a duty of a federal court in the trial of a criminal case to protect the right of the accused to counsel (304 U.S. 462 and 465).

[99] Gideon v. Wainwright, 372 U.S. 335 (1963). Charged in a Florida State Court with a noncapital felony, petitioner appeared without funds and without counsel and asked the Court to appoint counsel for him, but this was denied on the ground that the state law permitted appointment of counsel for indigent defendants in capital cases only. Petitioner conducted his own defense about as well as could be expected of a layman, but he was convicted and sentenced to imprisonment. Subsequently, he applied to the State Supreme Court for a writ of habeas corpus, on the ground that his conviction violated his rights under the Federal Constitution. The State Supreme Court denied relief.

[100] Bruce Andrew Green, *Functional Analysis of the Effective Assistance of Counsel, A Note,* 80 Colum. L. Rev. 1053 (1980), p. 1054.

[101] William J. Genego, *Future of Effective Assistance of Counsel: Performance Standards and Competent Representation, the,* 22 Am. Crim. L. Rev. 181 (1984–1985), p. 184.

declaration of a specific Sixth Amendment right to effective counsel."[102] Betts,[103] which was overturned by Gideon, hoped to strike the balance between, on the one hand an accused's right to fair trial and on the other hand, a state's interest in conserving its resources and honoring the principle of finality[104]: "Only when both the magnitude of an accused's interest in life or liberty and the risk of unwarranted deprivation outweighed a state's interests would "fundamental fairness" require an appointment of counsel or, in its absence, reversal for deprivation of due process."[105] But in Gideon the Court said: "We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights."[106]

Hence, in pre-Gideon right to counsel cases, the United States Supreme Court justified the calculation of fairness of whole proceedings by reading due process requirements into the Sixth Amendment. But in Gideon, the Court abandoned the due process approach and shifted the focus of the right to counsel analysis from the Fourteenth Amendment to the Sixth Amendment,[107] *i.e.* from the right to fair trial to the right to counsel. The main message of Gideon was that a fair trial always requires a certain balance of power between the prosecution and the defense, and that is why the accused must have a lawyer to compete with the prosecution.[108] As the Supreme Court had stated 21 years before: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[109] By abandoning ordinary due process

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[102] Foster, *Lockhart v. Fretwell: Using Hindsight to Evaluate Prejudice in Claims of Ineffective Assistance of Counsel Notes,* 1369, p. 1378.

103 Betts v. Brady, 316 U.S. 455 (1942).

[104] How to balance the accused's rights and principles of finality and conservation of resources is thoroughly discussed in subsection 4.2.2.2 where I analyze requirement of prejudice.

[105] Green, *Functional Analysis of the Effective Assistance of Counsel, A Note,* 1053, pp. 1054–1055.

[106] Gideon v. Wainwright, 372 U.S. 342.

[107] David L. Bazelon, *Defective Assistance of Counsel, the,* 42 U. Cin. L. Rev. 1 (1973), p. 29. See also Whitney Cawley, *Raising the Bar: How Rompilla v. Beard Represents the Court's Increasing Efforts to Impose Stricter Standards for Defense Lawyering in Capital Cases Note,* 34 Pepp. L. Rev. 1139 (2006–2007), pp. 1145–1146; James A. Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems,* 19 Ariz. L. Rev. 443 (1977), p. 445. Pre-Gideon judicial practice required the accused to show a relationship between the lack of counsel and the denial of a fair trial. Under the Gideon this relationship was presumed once the accused showed a denial of his right to counsel. Willliam H. Erickson, *Standards of Competency for Defense Counsel in a Criminal Case,* 17 Am. Crim. L. Rev. 233 (1979–1980), p. 236. Gideon is credited with shifting counsel focus from the due process standard to the right to counsel standard of the Sixth Amendment. Matthew J. Fogelman, *Justice Asleep is Justice Denied: Why Dozing Defense Attorneys Demean the Sixth Amendment and should be Deemed Per Se Prejudicial,* 26 J. Legal Prof. 67 (2002), p. 73.

[108] Alfredo Garcia, *Right to Counsel Under Siege: Requiem for an Endangered Right, the,* 29 Am. Crim. L. Rev. 35 (1991–1992), pp. 49 and 85.

[109] Glasser v. United States, 315 U.S. 60 (1942), 315 U.S. 76.

methodology, Gideon converted all assistance of counsel cases into Sixth Amendment claims, which led to some authors hoping that due to Gideon, a denial of the right to counsel always requires automatic reversal.[110]

The Court's decision in Gideon has been perceived as an important symbolic victory for all those who had urged that the assistance of counsel was essential to fair trials.[111] It has been even asserted that the Gideon decision was so forward-looking that it has been immune from attack even by the most severe critics.[112] Gideon's message was that accused persons no longer had to argue that their trial was fundamentally unfair if they wanted to be successful with their absence of counsel claim. The Courts could set the Fourteenth Amendment aside and focus on what the Sixth Amendment itself required,[113] which meant that in every absence of counsel claim courts had to look thoroughly and directly into the fact that counsel was not present in the proceedings and leave other calculations aside.

But the truth is that the Court's decision in Gideon was not without its flaws. The problem with the Gideon judgment was that although the Court declared that the right to counsel was essential to achieving "a fair system of justice",[114] the basic elements of the right were not outlined and the question of what standards would be applied in determining whether the right of counsel has been constructive unanswered.[115] Since Gideon it was clear that counsel has to be present in the criminal proceedings, but what else he has to do there remained unanswered. It took the Court 21 years to do that and in that time the composition of the Court had changed and the right to counsel was dramatically altered by a new doctrine.[116] The standard the United States Supreme Court established by Strickland v. Washington[117] is a subject of the fifth chapter of this dissertation, but here it is important to mention that although the Strickland Court referred to the Sixth Amendment, it established a two-prong standard

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[110] Philip H. Newman, *Ineffective Assistance of Counsel: The Lingering Debate,* 65 Cornell L. Rev. 659 (1979–80), p. 681.

[111] Genego, *Future of Effective Assistance of Counsel: Performance Standards and Competent Representation, the,* 181, p. 185.

[112] Abe Krash & Anthony Lewis, *History of Gideon v. Wainright, the Conference: Gideon v. Wainwright Revisited: What does the Right to Counsel Guarantee Today,* 10 Pace L. Rev. 379 (1990), p. 382; Michael B. Muslin, *Foreword Conference: Gideon v. Wainwright Revisited: What does the Right to Counsel Guarantee Today,* 10 Pace L. Rev. 327 (1990), p. 327.

[113] Genego, *Future of Effective Assistance of Counsel: Performance Standards and Competent Representation, the,* 181, pp. 185–186.

[114] Gideon v. Wainwright, 372 U. S. 344.

[115] Jennifer M. Allen, *Free for all a Free for all: The Supreme Court's Abdication of Duty in Failing to Establish Standards for Indigent Defense,* 27 Law & Ineq. 365 (2009), pp. 374 and 379; Richard Brody & Rory Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 13 Colum. J. L. & Soc. Probs. 1 (1977), p. 6.

[116] Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronic's Call to Presume Prejudice from Representational Absence,* 76 Temp. L. Rev. 827 (2003), p. 836.

[117] Strickland v. Washington, 466 U.S. 668 (1984).

with a requirement of prejudice and therefore incorporated the right to counsel again with the due process based doctrinal limitations, leading to a much weaker construction of the right to counsel than seemed to be signaled by the Court in former decisions.[118] While the Court in Strickland understood the right to counsel as protecting an accused persons' right to fair proceedings, which is measured by the reliability of the outcome, the Court in Gideon and before that in Glasser viewed the Sixth Amendment more broadly as protecting individuals, guilty and innocent alike, from a potentially oppressive government.[119] Consequently, instead of affirming what was said in Glasser and Gideon, Strickland's focus refers back to Powell and to the Fourteenth Amendment and result-oriented analysis.[120] To be more exact, in the Supreme Court's opinion the right to counsel is split in half: prejudice is presumed if counsel was absent from the proceedings (or basically fails to act completely)[121] or there was a conflict of interest and the court failed to react although a party to a court proceeding informed the court about it,[122] and not presumed if any other claim of ineffectiveness of defense counsel is raised. But still the United States Supreme Court refers in every case concerning alleged breach of the right to

[118] Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel,* 60 Syracuse L. Rev. 1 (2009–2010), p. 12. Before Strickland none of lower courts had acknowledged a prejudice requirement as the elements of a Sixth Amendment violation; those courts that had adopted a prejudice requirement had done so with regard to the inquiry into whether there should be a remedy for the Sixth Amendment violation, i.e. whether the decision of lower court should be annulled. *Ibid*., p. 35.
In the United States v. Gonzalez-Lopez the question arouse "whether a trial court's erroneous deprivation of a criminal defendant's choice of counsel entitles him to a reversal of his conviction?" The government claimed that the accused should be required to show that the substituted counsel's performance prejudiced the accused by denying him a fair trial. The Court wrote: "In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous." United States v. Gonzalez-Lopez. 548 U.S. 140 (2006). But while rejecting a prejudice requirement with respect to an accused's choice of retained counsel, the Court justified a prejudice requirement for claims of ineffective assistance of counsel on the grounds that the latter had been derived from the due process. The Court stressed: "The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there – effective (not mistake-free) representation. Counsel cannot be "ineffective" unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to effective representation is not "complete" until the defendant is prejudiced." *Ibid*.
[119] Chhablani, *Disentangling the Right to Effective Assistance of Counsel,* 1, p. 38.
[120] Garcia, *Right to Counsel Under Siege: Requiem for an Endangered Right, the,* 35, p. 83. As the Supreme Court of United States has acknowledged the right to the assistance of counsel as an autonomous right, but still demands the proof of prejudice from accused persons, it has been claimed in the United States that requirement of prejudice is "a vestige of due process analysis of the right to counsel inappropriate to the trial rights guaranteed by the sixth amendment". Green, *Functional Analysis of the Effective Assistance of Counsel, A Note,* 1053, p. 1053, referring to judicial practice of lower courts in the United States.
[121] United States v. Cronic, 466 U.S. 648 (1984).
[122] Holloway v. Arkansas, 435 U. S. 475 (1978).

counsel to the element of prejudice, which means that in its opinion the right to counsel is a right that is not independent from the right to fair trial.

1.5 The Nature of the Right to the Assistance of Counsel

The question whether the right to counsel is an independent element of fair trial or the overall fairness of the criminal proceedings has to be considered if one has to decide whether the right to counsel was violated or not, is essential. It is not just a question the United States courts have tried to answer for a long time. Basically, it is a question which every court that deals with violation of the right to counsel claims has to answer before solving those claims. Therefore, although in the Constitution of the Republic of Estonia there is no specific right to fair trial, the question of where the right to counsel stands should be still solved in case the competence of courts to annul judgments, which are a result of the proceedings in which possible violation of that right arises, is recognized. In short, this is a question of prejudice, a notion which I will discuss thoroughly in chapters four and five. Here I will discuss what the results of both approaches are. [123]

If the right to counsel is not an independent procedural right, but an element of fair trial, then whenever solving claims referring to possible violation of the right to counsel, the court has to take into account circumstances of whole proceedings: whether any other accused's right was violated, whether the judge was fair, whether the outcome of the case was affected *etc*.

In short if the court takes the approach that the right to counsel is an element of fair trial, it considers the overall fairness of the proceedings without focusing on the absence of counsel (or on the particular acts or omissions of counsel if the accused claims that counsel was ineffective in any other way) which the accused complains. If the appellate court concludes that the accused got a fair trial despite of counsel's absence (or counsel's deficient performance), a judgment is not annulled. Therefore, when the right to counsel is considered to be just an element of fair trial, it might be that even if the court establishes that counsel was not present in the criminal proceedings (like it often was in the United States before Gideon) or there was a material violation of counsel's duties, it still concludes that the trial was fair and does not annul the judgment.

If the right to counsel is acknowledged as a separate procedural right, each court's finding that counsel did not participate in the proceedings or did breach one of his essential duties, results in annulment of judgment, even if in whole it could be concluded that in any other aspect the trial was fair: judge was neutral, any other rights were not violated, the verdict would have been the same even if

[123] It could actually be claimed that nowadays in the rule of law no one doubts that the right to have counsel present is independent from the right to fair trial and not just a part of it, but in order to achieve systematic approach to the right to the assistance of counsel and the right to effective assistance of counsel in this dissertation, I still think that first it is necessary to clarify what is the difference between the right to have counsel present on the one hand being a part of fair trial rights and on the other hand being an independent procedural right.

counsel would have been there or effective *etc*.[124] This means that the right to the assistance of counsel is regarded as a procedural guarantee to which an *ad hoc* balancing of interests is inappropriate: the right to the assistance of counsel, unlike the right to fair trial, is not defined exclusively by a concern for the reliability of the outcome of the adjudicative process.[125] Adjudicating a case with focus on the right to counsel means that the court looks directly at whether counsel was present or not and at the challenged conduct of counsel if counsel was present and decides the case based on those findings.[126] Other aspects of the trial that may have mitigated the prejudicial effect of poor representation are irrelevant since the only issue is whether the accused was denied the right to the assistance of counsel, which is a fundamental right: justice does not involve only outcomes, but also processes.[127]

As well as the aforementioned reasons, reliance on the right to counsel exclusively and leaving due process aside promotes a salutary thoroughness in the review of ineffectiveness claims (including absence of counsel claims) as it requires a reviewing court to look directly at the challenged conduct to determine whether it was "effective".[128] But if one agrees that the right to counsel is an essential procedural right, the element of prejudice, *i.e.* the requirement that the accused has to prove that his counsel's ineffectiveness had an effect on the outcome of the proceedings has to be discarded.[129] Hence, according to this approach representation by counsel is fundamental to fair proceedings and if the right to counsel is violated, the proceedings have been unjust no matter whether the outcome was influenced by counsel's non-appearance (or in other ineffective defense claims by his mistakes) or not.

There are two reasons for the primacy of fairness in the adversary system. First, it is viewed as a proper way to treat accused persons: they as persons have the right

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[124] As I have already discussed the United States Supreme Court's judicial practice shows that the Court has mixed position about where the right to counsel stands. When it comes to the participation of counsel, the Court, although talking about presumption of prejudice seems to acknowledge the right to counsel as separate right (the same is with conflict of interests in some situation). But when it comes to other counsel's ineffectiveness claims, the right to counsel clearly is just an element of fair trial.

[125] Green, *Functional Analysis of the Effective Assistance of Counsel, A Note,* 1053, p. 1056.

[126] Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, pp. 7 and 85.

[127] Smithburn & Springmann, *Effective Assistance of Counsel: In Quest of a Uniform Standard of Review,* 497, p. 503; Ed Cape et al., Effective Criminal Defence in Europe (2010), p. 4.

[128] Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 7.

"… [B]y protecting the explicit procedural right to counsel enunciated in the sixth amendment, fairness is achieved and the requirements of both the sixth and fourteenth amendments are satisfied." Richard L. Gabriel, *Stickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of due Process, the Comment,* 134 U. Pa. L. Rev. [1290] (1985–1986), p. 1275.

[129] Chhablani, *Disentangling the Right to Effective Assistance of Counsel,* 1, pp. 43–44.

to be respected as an individual throughout the criminal process and to participate in their defense. Second, fair trial rights help to assure that accurate verdicts are reached by means of adversarial truth finding.[130] One aim of the second principle is to ensure that innocent persons are not convicted, which is a great danger if a persons' procedural rights are not respected. The system seeks to satisfy this objective by implementing rules of procedure and rights of the accused in criminal proceedings, which all are guided by the principle of fairness.[131] But the aim of procedural rules is not only to guarantee that innocent defendants are not convicted. Richard Ekins has explained the additional aim of procedural rules very expressively: "An adversarial criminal process demands that convictions be obtained through fair processes with due regard to the procedural rights of defendants. Where convictions are obtained in violation of those rights, they are typically regarded as unsound and unsustainable. At some point, the failure to observe due process requirements forces the courts to treat a conviction as a miscarriage of justice."[132] The presumption of innocence upon which the criminal justice system stands in Estonia, requires that no accused be declared guilty unless the prosecutor, opposed by defense, proves guilt beyond a reasonable doubt.[133] Consequently, the reliable outcome is achieved by process that goes according to rules, which means that a vital prerequisite for adversary process is fairness of procedure and the fairness of the procedure in turn comes from following the rules of adversary procedure. It can even be said that the adversary process focuses on determining legal rather than factual guilt or innocence, as the person could be declared guilty only after the certain procedure is followed. The right to silence; the right to call and cross-examine witnesses; the exclusion of unfairly obtained evidence – all of these rights should not be overridden during the proceedings, even if it is clear that the accused is factually guilty.[134] Therefore many authors in the United States claim that the right to fair trial is not just an innocent persons' right but the right of all persons that are accused of committing a crime, a standpoint I agree with as there are certain procedural rules that courts have to follow in every criminal proceedings (in the case of Estonia rules provided for in the Code of Criminal Procedure) and it would go against the principle of equal protection, if it could be concluded that some of these rules apply to some of accused persons more than to others.

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[130] Jackson, *Autonomy and Accuracy in the Development of Fair Trial Rights*, *p*p. 5–6; Richard Ekins, *Defence Counsel Incompetence and Post-Conviction Relief: An Analysis of how Adversarial Systems of Justice Assess Claims of Ineffective Assistance of Counsel,* 9 Auckland U. L. Rev. 529 (2000–2003), pp. 531–532.

[131] *Ibid*., pp. 531–532 and 550.

[132] *Ibid*., p. 554.

[133] See about the United States Martin C. Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims Notes and Comments,* 77 Geo. L. J. 413 (1988–1989), pp. 429–430. In Estonia the principle of presumption of innocence is provided for in § 7 of the CCP and § 22 (1) and (2) of the Constitution of the Republic of Estonia.

[134] Ekins, *Defence Counsel Incompetence and Post-Conviction Relief: An Analysis of how Adversarial Systems of Justice Assess Claims of Ineffective Assistance of Counsel,* 529, p. 531.

In order to decide whether the right to counsel is an independent procedural right or just an element of fair trial, the structure of adversary proceedings and position of counsel in it must be taken into account. The primary purpose of the right to counsel is to ensure that in the adversary system, *i.e.* in a criminal justice system which is based upon the truth being revealed by a contest between two adversaries, every accused has access to the legal skill and knowledge to meet the prosecutor on a more or less equal footing.[135] Because the adversary system presupposes the existence of these two opposing parties, it is contradictory to say that we have an adversary system, when there is only one contestant – the prosecutor – and the other contestant – the accused – is a contestant in name only.[136] Here it is a lot to do with the principle of equality of arms, which requires that "…each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent..."[137] If counsel is absent from the proceedings, the accused is clearly at a substantial disadvantage *vis-à-vis* the prosecutor: if the accused, who usually does not have a legal education, participates in the criminal proceedings alone, he does not know how to present his case, exercise his rights and protect himself against a violation of rights. Counsel is needed to protect the accused's rights and marshal the conduct of the proceedings to be fair and reliable to determine the guilt or innocence of the accused, and if the accused is found guilty, a proper sentence.[138] Therefore, counsel is the person who gives the meaning to the notion of an "adversary" by balancing a scale that would be in favor of the prosecutor if counsel would not participate in the criminal proceedings, which in turn leads to a conclusion that the participation of counsel in the proceedings is absolutely essential for adversary proceedings. Therefore, we reach again the conclusion I presented in the last paragraph, but with different arguments supporting my conclusion: that

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[135] Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims Notes and Comments,* 413, p. 429; Martin Marcus, *Above the Fray Or into the Breach: The Judge's Role in New York's Adversarial System of Criminal Justice,* 57 Brook. L. Rev. 1193 (1991–1992), pp. 1193–1194.
The adversary system is a mighty engine for the discovery of the truth, but only if abilities of adversaries are more-or-less evenly matched and the accused has through counsel a meaningful opportunity to participate in the adversary process. Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard Criminal Law,* 88 J. Crim. L. & Criminology 242 (1997–1998), p. 293; Genego, *Future of Effective Assistance of Counsel: Performance Standards and Competent Representation, the,* 181, p. 201; Sillaots, *On the Scope of Competitiveness of Court Proceedings in the Draft Code of Criminal Procedure,* 198, p. 204.

[136] Herman I. Pollock, *Equal Justice in Practice Symposium: Right to Counsel,* 45 Minn. L. Rev. 737 (1960–1961), p. 741; Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine,* 97 Nw. U. L. Rev. 1635 (2002–2003), p. 1646.

[137] Coëme and Others v. Belgium. *Applications no. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96*. 22 June 2000, § 102.

[138] Stephen B. Bright, *The Right to Counsel: Gideon v . Wainwright at 40: Overviews and Perspectives: Turning Celebrated Principles into Reality,* 27 Champion 6 (2003), p. 9.

all accused persons, no matter how factually guilty they may be, should have counsel present in their proceedings:[139] the lawyers in criminal cases are "necessities, not luxuries".[140]

For the aforementioned reasons it is wrong to say that the only purpose of the guarantee of assistance of counsel is to reduce the chance that innocent persons will be convicted or to guarantee that the result is "correct" (which means that it is in accordance with the accused factual guilt). The right also functions to ensure that convictions are obtained through fundamentally fair procedures. Justice Marshall has written about it in his dissent in Strickland: "Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not … constitute due process."[141] But when we reach a conclusion that the right to counsel should be guaranteed to all accused persons, we cannot make the conclusion whether the accused's right to counsel was breached or not depend on other factors than the participation of counsel. This in turn means that the right to counsel is an independent procedural right and the right to have counsel present is of an absolute nature in the context of the adversary system.

Although the right to counsel is universally regarded as an individual right, like principle of fairness, it simultaneously enhances the protection for all of society by ensuring that courts are able to perform their independent role of adjudication according to valid laws and that all procedural rights of the accused are guaranteed in the course of the proceedings. Courts can check activities of executive power through the observations made by counsel[142] and they can check even their own actions. Therefore counsel's observations help to ensure that a trial conducted against the accused is fair, *i.e.* it goes in accordance with procedural rules. An accused has the right to know his rights and the right to have his rights respected, which means that he has the right to be tried fairly, and if he does not have counsel he may lose both of these rights. In short, an unrepresented accused risks a trial in which his rights are not respected,[143] which in turn upsets the common sense of justice. Consequently, the right to

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[139] See also Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims Notes and Comments,* 413, p. 429.

[140] United States v. Cronic, 466 U.S. 653–654.

[141] Strickland v. Washington, 466 U.S. 711, Justice Marshall, dissenting.

[142] Martin Guggenheim, *The People's Right: Reimagining the Right to Counsel,* New York University School of Law, Public Law Research Paper no. 10–65 (January 2011), p. 2.

[143] Bruce R. Jacob, *Memories of and Reflections about Gideon v. Wainwright,* 33 Stetson L. Rev. 181 (2003–2004), p. 289.

Individual rights can be protected against their potential abuse by the state and its officials only through the protections of due process of the law and due process in adversary system means a contest between two parties. Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 2; Edward L. Greenspan, *Future Role of Defence Counsel, the Major Article,* 51 Sask. L. Rev. 199 (1986–1987), pp. 200–201; Larry Taman, *Adversary Process on Trial: Full Answer and Defence and the Right to Counsel, the,* 13 Osgoode Hall L. J. 251 (1975), p. 251.

counsel is not just a right that is provided for in different legal acts from procedural codes to constitutions and even in international instruments, but it is clearly one of the most fundamental constitutional rights for an accused to protect all other rights he has in the criminal proceedings[144] that also helps to retain society's belief in the fairness of the criminal justice system.

According to the common understanding in Europe a fair trial in criminal proceedings is impossible without adequate guarantees of the defense rights and effective exercise of these rights, which is inconceivable without one of the main actors of criminal proceedings – the defense counsel, whose task is to defend the accused against a criminal charge.[145] Consequently, having counsel present ensures that due process shall be followed.[146] The European Commission of Human Rights has stressed that counsel may play a particularly significant role as an observer monitoring the legality of the proceedings.[147] Also the bodies of the European Union have repeatedly emphasized that without counsel the accused may not be able to exercise his rights properly, which means that the standpoint of the European Union is, that the right to counsel is the basis for other rights of the accused in the criminal proceedings. In addition to the European Union the Supreme Court of Estonia has also emphasized counsel's role in protecting the rights of the accused. The ECtHR has strongly expressed the same opinion, holding violation of Article 6 paragraph (3) of the ECHR whenever counsel did not participate in the criminal proceedings, unless the participation was not necessary under very special circumstances like in the case Engel and Others v. Netherlands. In the United States Justice Schaefer from the Illinois Supreme Court once wrote: "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."[148]

For the aforementioned reasons, it can be concluded that the right to counsel is one of the basic rights of every accused in criminal proceedings and although it is closely related to the principle of fairness, it is still a separate procedural right. Therefore in my opinion if a criminal case has been conducted in the

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[144] Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer Essay,* 103 Yale L. J. 1835 (1993–1994), p. 1866; Mark R. Lee, *Right to Effective Counsel: A Judicial Heuristic,* 2 Am. J. Crim. L. 277 (1973–1974), p. 277; Foster, *Lockhart v. Fretwell: Using Hindsight to Evaluate Prejudice in Claims of Ineffective Assistance of Counsel Notes,* 1369, p. 1377.

[145] M. A. Nowicki, *Strasbourg and the Position of the Defense Counsel,* 4 Eur. J. Crime Crim. L. & Crim. just. 335 (1996), p. 335.

[146] M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions,* 3 Duke J. Comp. & Int'l L. 235 (1992–1993), p. 280.

[147] Ensslin, Baader and Raspe v. Germany. 8 July 1978. *Application nos. 7572/76, 7586/76 and 7587/76,* § 20.

[148] Walter V. Schaefer, *Federalism and State Criminal Procedure,* 70 Harv. L. Rev. 1 (1956–1957), p. 8. See also Green, *Functional Analysis of the Effective Assistance of Counsel, A Note,* 1053, p. 1056; Scott v. Illinois, 440 U.S. 367 (1979), 440 U.S. 377 (Justice Brennan, dissenting).

adversary proceedings and counsel has been absent from the proceedings, the question arises, whether the court judgment made in such proceedings could ever be left unrevised. It seems that when it comes to the judicial practice of the United States Supreme Court, the ECtHR and the Supreme Court of Estonia the answer to the question is clearly "no", which means that in the opinion of these courts the right to have counsel present in the criminal proceedings is an absolute one and stands separately from the right to fair trial. But when it comes to the right to effective assistance of counsel, there is no such consensus about the matter, as I will discuss in the next chapter.

2. Role of Counsel in the Estonian Criminal Procedure

In Estonia as in many other legal systems counsel may participate in criminal proceedings on two bases: on agreement with the client or on appointment by a competent authority. Whereas conclusion of a contract with counsel imposes an obligation on the person being defended to pay for counsel's services, state-appointed counsel provides services to the person being defended free of charge, at least during the proceedings. Pursuant to § 42 (1) 1) of the CCP an advocate or, with the permission of the body conducting the proceedings, any other person who meets the educational requirements established for contractual representatives in subsection 41 (4) of the CCP,[149] may serve as contractual counsel. According to § 42 (1) 2) only advocates can participate in criminal proceedings as appointed counsels. I agree with the position of the American Bar Association expressed in the standards "ABA Standards for Criminal Justice. Prosecution Function and Defense Function"[150] (hereinafter ABA Standards) that once representation has been undertaken by counsel, the functions and duties of him are the same whether defense counsel is retained, or appointed.[151] To conclude otherwise would mean violation of principle of equality provided for in § 12 of the Constitution of the Estonian Republic.[152]

With the retained counsel it is very simple: the accused may choose whoever he wants to become his counsel as long as the person he wants to become his counsel meets the requirements provided for him (in Estonia requirements provided for in § 42 (1) 1) of the CCP) and he reaches an agreement with this

[149] According to § 41 (4) of the CCP a person may participate in the criminal proceedings as counsel if he has acquired at least officially recognized Master's degree in the field of study of law or a qualification equal thereto within the meaning of subsection 28 (2^2) of the Republic of Estonia Education Act (Passed 23 March 1992. Entered into force 30 March 1992. Last amended 1 September 2010 – RT I 2010, 41, 240) or a foreign qualification equal thereto.

[150] ABA Standards for Criminal Justice. Prosecution Function and Defense Function. Third Edition (1993).

[151] Standard 4–1.2 (h).

[152] Anneli Soo, *Ebaefektiivne kaitse kriminaalmenetluses: mõiste ja probleemistik,* 6 Juridica 359 (2007), p. 367.

person. It may not be so simple for the accused to obtain appointed counsel, at least in some legal systems.

According to the ECtHR, two conditions must be met, one financial and one legal, for a person to qualify for the right to free legal aid.[153] The financial condition is that the right to free legal aid is reserved for persons who do not have sufficient means themselves. The ECtHR has left the definition of this condition primarily to the domestic courts.[154] The legal condition is that the provision of free legal aid must be in the interests of justice.[155] The concept "interests of justice" clearly does not mean that the accused should be provided with free legal aid only where the public interest so requires.[156] The ECtHR has associated the legal condition with four criteria: seriousness of the offence, the complexity of the case, the principle of equal treatment of the parties, and the personal situation of the accused (*e.g.*, mental health, linguistic skills, *etc.*).[157]

The grounds for provision of legal aid by the state are in the Code of Criminal Procedure broader than required by the European Convention on Human Rights and the ECtHR case law, and we cannot speak of free legal aid in the classic sense. Namely, there is no consideration of the financial situation of a suspect or the accused under Estonian criminal procedural law; rather, pursuant to § 43 (2) 1) and 2) of the CCP, counsel is appointed for every suspect or accused person who has not chosen counsel but has requested the appointment of counsel, or who has not requested counsel in a case where participation of counsel is mandatory. Grounds provided for in § 43 (2) 1) and 2) of the CCP could be considered as legal conditions for a person to qualify for the right to free legal aid.

Since in Estonia a person's financial situation is irrelevant to his right to use the assistance of appointed counsel in a criminal proceeding, it is reasonable that upon conviction the person assumes the obligation to reimburse the costs of legal aid, from which he can be partially released only if his financial situation does not allow him to perform this obligation. Subsection § 180 (1) of the CCP provides that in the case of conviction procedural expenses, which under § 175 (1) 4) of the CCP include remuneration established for appointed counsel, shall be compensated for by the convicted offender. Pursuant to the first sentence of § 180 (3) of the CCP, when determining procedural expenses, the court shall take into account the financial situation and chances of re-socialization of the convicted offender. Pursuant to the second sentence of the same subsection, the court shall order a part of the expenses to be borne by the state if the convicted offender is obviously unable to reimburse the procedural expenses. According to the judicial practice of the Supreme Court of Estonia the court is not allowed

[153] Artico v. Italy. *Application no. 6694/74*. 13 May 1980, § 34.
[154] Kreuz v. Poland. *Application no. 28249/95*. 19 June 2001, § 64.
[155] Artico v. Italy, § 34.
[156] Trechsel, *Human Rights in Criminal Proceedings*, *p*. 272.
[157] Twalib v. Greece. *Application no. 24294/94*. 9 June 1998, §§ 52–53.

to order all expenses to be borne by the state,[158] which means that the convicted offender always has to reimburse a part of procedural expenses, even if it is just a small part.

According to § 45 (1) of the CCP counsel may participate in a criminal proceeding as of the moment when a person acquires the status of a suspect in the proceedings. Of course, this presupposes that counsel has been appointed to the suspect or the suspect has chosen him to participate in a proceeding as his retained counsel. The participation of a counsel in a pre-trial proceeding is mandatory as of presentation of the criminal file for examination to counsel, which means that if a Prosecutor's Office declares a pre-trial proceeding completed, it gives a copy of the criminal file to the defense counsel who introduces it to the suspect (CCP, § 45 (3), § 223 (3) § 224 and § 224[1]). Therefore, by the time the suspect acquires the status of the accused, the participation of counsel is mandatory.[159] The participation of counsel is mandatory throughout a criminal proceeding if at the time of commission of the criminal offence, the person being defended was a minor; if due to his mental or physical disability, the person is unable to defend himself or if defense is complicated due to such disability; if the person is suspected or accused of a criminal offence for which life imprisonment may be imposed; if the interests of the person are in conflict with the interests of another person who has counsel; or if the person has been under arrest for at least six months or if the proceedings are conducted in the criminal matter pursuant to expedited procedure (CCP, § 45 (2)). Until the 1st of September 2011 the participation of counsel in a court proceeding was always mandatory. Now the participation of counsel in a court proceeding is mandatory unless the accused does not wish the participation of counsel, in the opinion of the court he is able to represent his interests himself and he wishes to waive counsel in court hearing in the settlement proceedings in case of criminal offence in the second degree; during the pronouncement of the court judgment in the simplified proceedings;[160] or in the case of the alternative proceedings if the accused meets the educational requirements established for retained counsels by the Code of Criminal Procedure and submits a reasoned request to defend himself (CCP, § 45 (4)). According to the explanatory memorandum to the Act to Amend the Code of Criminal Procedure the aim of amendment was to reduce the accused's expenses to the legal aid in the case

[158] Court Ruling of the Criminal Chamber of the Supreme Court, 16 September 2010, court case no. 3-1-1-76-10, p. 8. Online. Available: http://www.nc.ee/?id=11&tekst=222527795, 29 April 2011.

[159] According to § 35 (1) of the CCP the accused is a person with regard to whom a Prosecutor's Office has prepared a statement of charges pursuant to § 226 of the CCP or a person against whom a statement of charges has been brought pursuant to expedited procedure or a person with whom an agreement has been entered into in settlement proceedings.

[160] In Estonia simplified procedures are: alternative proceedings (CCP, § 233), settlement proceedings (CCP, § 239, similar to plea bargaining), summary proceedings (CCP, § 251) and expedited procedure (CCP, § 256[1]).

where there is no risk that his rights are violated in the court proceedings.[161] Because this is a very exceptional situation and always requires the accused's consent (his initiative to be more exact), I am not going to discuss this subject further in the dissertation as my aim is to analyze situations when counsel is participating in the court proceedings.

The participation and assistance of counsel in the criminal proceedings does not mean that a person is deprived of the right to defend himself together with his counsel. A person has the right to submit evidence, complaints, and requests (CCP, § 34 (1) 7) and 8), § 35 (2)), and he is an independent party to the court proceeding (CCP, § 17 (1)). Besides the victim he is the only party to the court proceeding who has the right to testify, a right that his counsel does not have. Therefore, the accused may be an equal partner to his counsel in defending himself provided that he is willing to do that and capable of doing it. Only in the cassation proceedings does the accused not have the right to defend himself together with counsel, as the accused is not a party to a cassation proceeding under § 344 (3) and (5) of the CCP. The ECtHR considers it permissible for a state to restrict the right of a person to defend himself in a supreme court.[162]

If a person is retained or appointed to perform in a criminal proceeding as counsel, the question of what are his functions in the criminal proceedings, *i.e.* the question of his rights and obligations in the proceedings arises. In Estonian criminal proceedings pursuant to § 47 (2) of the CCP counsel is required to use all the means and methods of defense which are not prohibited by law in order to ascertain the facts which vindicate the person being defended, prove his innocence or mitigate his punishment, and to provide other legal assistance necessary in a criminal matter to the person being defended. This allows us to conclude that counsel is bound by law and only by the law in the fulfillment of his duties.[163] In order to fulfill the duty provided for in § 47 (2) of the CCP counsel has a number of rights, including the right to submit evidence (CCP, § 47 (1) 2)); submit requests and complaints (CCP, § 47 (1) 3)); upon the completion of pre-trial investigation, examine all materials in the criminal file (CCP, § 47 (1) 7)) and confer with the person being defended without the presence of other persons for an unlimited number of times with unlimited duration unless a different duration of the conference is provided for in the Code of Criminal Procedure (CCP, § 47 (1) 8)).[164] Subsection § 47 (1) of the CCP does not establish all the rights that the defense counsel has during the

[161] Explanatory Memorandum to the Act to Amend the Code of the Criminal Procedure and Other Related Acts. 599 SE, 11th Riigikogu. Online. Available: http://www.riigikogu.ee/?page=en_vaade&op=ems&eid=793874&u=20110828103142, 1 August 2011.

[162] Meftah and Others v. France, § 45.

[163] Soo, *An Individual's Right to the Effective Assistance of Counsel Versus the Independence of Counsel: What can the Estonian Courts do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?* 252, p. 253.

[164] According to § 34 (2) of the CCP, conference between the accused and his counsel may be interrupted for the performance of a procedural act if the conference has lasted for more than one hour.

criminal proceedings. Defense counsel has also the right to submit a petition of challenge against the judge (CCP, § 50 (1)), against the prosecutor (CCP, § 53 (1)), against an expert (CCP, § 97 (1)), against the court session clerk (CCP, § 157 (3)) and against the translator or interpreter (CCP, § 162 (2)). In addition to that, defense counsel has the right to request an expert assessment. According to the § 105 (2) of the CCP the body conducting a proceeding shall not refuse to order an expert assessment requested by counsel if the facts for the ascertainment of which the assessment is requested may be essential for the adjudication of the criminal matter. At the request of the person being defended counsel has the right to participate in the hearing of the application for an arrest warrant (CCP, § 131 (3)), of an application for bail (CCP, § 135 (5)) and of an application for a temporary restraining order (CCP, § 141^1 (3)). As a party to a court proceeding, counsel has the right to question the accused (CCP, § 293 (3)), and examine a victim and a witness in a cross-examination (CCP, § 288). An important right for defense counsel is the right to refuse to give testimony as a witness concerning the circumstances which have become known to him in his professional activities (CCP, § 72 (1) 2)). This principle helps counsel to achieve a trusting relationship with his client and through that to fulfill his duties more effectively. The professional support staff of counsel also has the right to refuse to give testimony (CCP, § 72 (2)).

Since a considerable number of counsels participating in criminal proceedings in Estonia are advocates,[165] I will also look into what duties are imposed on them by laws and by the Estonian Bar Association rules.

According to § 44 (1) 1) of the Bar Association Act[166] (hereinafter BAA), that provides the organization of the Estonian Bar Association and the legal bases for the activities of advocates, associated members of the Bar Association and advocates of a foreign state (§ 1 of the BAA), an advocate is required to use all means and methods which are in conformity with the law in the interests of a client while preserving his professional honor and dignity. According to the Code of Conduct of the Estonian Bar Association,[167] which applies to the professional activities of the advocates (Article 1 of the Code), an advocate shall choose, within the power and authority given by the client, the best lawful measures and means to protect the interests of the client (Article 4 (5) of the Code). When rendering legal services, an advocate shall observe the law, legal acts and decisions of the Bar authorities, rules of professional conduct, as well as good practice and his conscience (Article 4 (1) of the Code). According to

[165] While no statistics have been published on the percentage of criminal proceedings that are conducted with participation of an advocate or the participation of other counsel in Estonia, I dare to say, based on my experience, that the majority of counsel in criminal proceedings are advocates.

[166] Bar Association Act. Passed 21 March 2001. Entered into force 19 April 2001. Last amended 24 March 2011 – RT I, 14.03.2011, 24.

[167] Code of Conduct of the Estonian Bar Association**.** Adopted on 8 April 1999 by the General Assembly of the Estonian Bar Association. Amended on 5 May 2005, 13 March 2007 and 21 February 2008 by the General Assembly of the Estonian Bar Association.

the second sentence of Article 8 (1) of the Code subject to due observance of all rules of law and professional conduct, the advocate shall use all means and methods for the benefit of his client such that the personal honor, honesty and integrity of the advocate are beyond doubt. Subject to the provisions of law, his expertise and experience as well as to his conscience, the advocate shall use only those measures and means consistent with law which enable him to better protect his client's interests (first sentence of Article 8 (2) of the Code). Therefore it is established by the Bar Association Act and the Code of Conduct of the Estonian Bar Association that advocates have to act in the best interests of the accused and they are only bound by the law and ethics.[168]

The other principle that comes from the Bar Association Act and the Code of Conduct of the Estonian Bar Association is advocate's independence, which is closely related to the principle that in his activities the advocate has to be guided only by law. The Code of Conduct for the European Lawyers[169] also emphasizes lawyers' independence. Article 2.1.1. of the Code states: "The many duties to which a lawyer is subject require the lawyer's absolute independence, free from all other influence, especially such as may arise from his or her personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his or her independence and be

[168] The American Bar Association emphasizes that the basic duty of defense counsel is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation. Standard 4–1.2 (b).

[169] This Code is adopted by the CCBE. The CCBE is an international nonprofit making association and its objects are to represent the Bars and Law Societies of its members, whether full, associate or observer members, on all matters of mutual interest relating to the exercise of the profession of the lawyer, the development of the law and practice pertaining to the rule of law and administration of justice and substantive developments in the law itself, both at a European and international level. In addition to that the CCBE monitors actively the defense of the rule of law, the protection of the fundamental and human rights and freedoms, including the right of access to justice and protection of the client, and the protection of the democratic values inextricably associated with such rights (Statutes of the Council of Bars and Law Societies of Europe. As adopted at the CCBE Plenary Session in Brussels on 28 November 2009. Online. Available: http://www.ccbe.org/fileadmin/user_upload/document/statuts/statutes_en.pdf, 29 April 2011). The Code of Conduct for European Lawyers (The Code of Conduct for European Lawyers. This Code of Conduct for European Lawyers was originally adopted at the CCBE Plenary Session held on 28 October 1988, and subsequently amended during the CCBE Plenary Sessions on 28 November 1998, 6 December 2002 and 19 May 2006. The Code also takes into account amendments to the CCBE Statutes formally approved at an Extraordinary Plenary Session on 20 August 2007. Online. Available: http://www.ccbe.eu/index.php?id=32&L=0, 29 April 2011) dates back to 28 October 1988 and has been amended three times; the latest amendment took place at the plenary session in Oporto on 19 May 2006. It is a binding text on all member states: all lawyers who are members of the bars of these countries (whether their Bars are full, associate or observer members of the CCBE) have to comply with the Code in their cross-border activities within the European Union, the European Economic Area and the Swiss Confederation as well as within associate and observer countries.

careful not to compromise his or her professional standards in order to please the client, the court or third parties." The independence of the Bar and counsel in criminal proceedings is a principle that is not usually provided for in any other law than the law that stipulates the Bar's position in society and legal system. Thus, in Estonia it is not established in the Constitution of the Republic of Estonia or in the Code of Criminal Procedure. Yet it is clear that defense counsel should act solely in the interests of the accused in criminal proceedings and that it is not up to the opposing side, to the court, to the third party or to the society to dictate how counsel should fulfill his obligations.[170] Pursuant to § 43 (1) of the Bar Association Act, advocates are independent in the provision of legal services and shall act pursuant to the law, legal acts and resolutions adopted by the bodies of the Bar Association, the requirements for the professional ethics of advocates, good morals, and their conscience. The principle of independence is important on the one hand because an advocate is an opposing party to the prosecutor and the court has to be neutral towards both of them, which means that neither the prosecutor nor the court is competent to dictate to an advocate how to perform his activities. On the other hand, as the accused usually does not have a legal education, an advocate should not at least fully depend on the accused's directions either.[171] And finally, an advocate should be free of influences from outside of the proceedings too, as otherwise the accused would not receive the best assistance or in the worst case he will receive no assistance at all from the advocate who has the other person's interests in mind.[172]

So, while rendering legal services, an advocate has to keep his client's best interests in mind and has to be independent in his activities. The same is with a non-advocate counsel, because if he does not put his client's interests first, he is not able to perform his functions in a way that would provide the accused with real assistance. It is obvious that by acting in the best interest of the accused counsel may sometimes upset other subjects to the criminal proceedings, especially the court. The American Bar Association emphasizes that defense counsel, in order to protect the rights of the accused, may resist the wishes of the judge on some matters, and although he is never allowed to be disrespectful towards the court, he may appear uncooperative at times. But instead of contradicting his duty to the administration of justice, counsel is actually fulfilling a necessary and important function within the adversary system.[173] This function the American Bar Association stresses here is counsel's task to stand for his client's interests and it must be agreed with the Association, that here the court's opinion does not matter. According to Article 4.3 of the Code of Conduct for European Lawyers a lawyer maintains due respect and courtesy

[170] Soo, *An Individual's Right to the Effective Assistance of Counsel Versus the Independence of Counsel: What can the Estonian Courts do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?* 252, p. 253.
[171] See more about this subject in subsection 3.4.6 of this dissertation.
[172] See about conflict of interests in subsection 3.2 of this dissertation.
[173] Standard 4–1.2 commentary.

towards the court and defends the interests of the client honorably and fearlessly without regard to the lawyer's own interests or to any consequences to himself or to any other person. Consequently, whenever ineffective assistance comes under discussion, counsel who acts in the best interests of the accused and by that upsets the court should not be considered ineffective. It has even been discussed that in case the competence to remove ineffective counsel is given to courts, courts may abuse it by removing counsels who act too fiercely on behalf of their defendants.[174] I personally believe that these abuses of independence of counsel could be avoided by imposing a standard, on which the court has to refer whenever it decides to remove counsel. That way it is possible for higher courts to verify if the decision to remove counsel made by a lower court was correct or was guided by the wish to get rid of an inconvenient party to the proceedings.

[174] Meris Sillaots, *Kaitsja võimalikust rollist ja seisundist Eesti tulevases kriminaalmenetluses,* 2 Juridica 83 (2000), p. 91.

II. THE RIGHT OF THE ACCUSED TO EFFECTIVE ASSISTANCE OF COUNSEL

1. The Meaning of Effective Defense, its Purpose and the Causes for Ineffective Defense

In the last chapter I talked mainly about participation of counsel and what the consequences of his absence are, but as I also mentioned a couple of times the notion of "effective defense", it is now necessary to explain what effective defense means. Basically, effective defense is what the assessor (the Bar, the court, the legislator) considers to be effective in a certain case or overall, *e.g.,* in guidelines, in legislation, in the court judgment *etc*. It could be that for the assessor mere presence of counsel in the proceedings is enough, which means that participation of counsel also is effective defense. But usually it is agreed that effective assistance is more than just participation of counsel. It actually covers the participation of counsel, but means also that counsel who participates in the proceedings has to be active and provide proper assistance to the accused. That is why the right to counsel can have two meanings: first the right to presence of counsel without paying attention to what counsel does in the proceedings,[175] and second, the right to have counsel present and active in the proceedings; but the right to effective assistance of counsel is usually considered as the right to have active counsel present in the proceedings. In my opinion the problem with the right to effective assistance of counsel is two-fold. Before I look into the problems related to the right to effective assistance of counsel, it is appropriate and necessary to explain why I am using in this dissertation, notions of "effective" and "ineffective" instead of the notions "competent" and "adequate", while the notions "competent" and "adequate" are often used as synonyms for the notion "effective". First of all I am doing it because theoretical sources and the judicial practice of the ECtHR and the United States Supreme Court use the notion "effective" and not "competent" or "adequate". Second, there are considerable difficulties, at least with using the word "competent" instead of "effective" in the context of the assistance provided by counsel to the accused. This difficulty is twofold and is described by Richard Brody: ""Competence" relates to the inherent abilities of the attorney (*in my opinion also his physical and mental health in the moment of court proceedings* – author's explanatory remark), whereas the focus should properly be on the performance actually rendered. An able and well qualified lawyer may fail to provide the kind of assistance which the Constitution guarantees to all defendants owing to factors beyond counsel's control, for example an overwhelming caseload. Furthermore, "incompetence" suggests an egregious case, a gross abuse. This is precisely the kind of notion which retards the

[175] Then there is no reason to look into quality of counsel's performance: whenever counsel participates in the proceedings the right to the assistance is guaranteed and no violation of that right can be concluded.

development of the right to effective representation."[176] Hence, the "incompetence" is a narrower notion than the notion "ineffectiveness". Therefore when I am speaking about "competence" I mean counsel's wisdom, education, physical and mental condition, whereas when I am speaking about "effectiveness" I mean counsel's overall performance in criminal proceedings.

But now I will explain the two main problems related to the right to effective assistance of counsel. First, as the right to the assistance of counsel derives from the constitutions of Estonia and the United States directly, and it is also stipulated in the European Convention on Human Rights, the right to effective assistance is not explicitly provided for in the legal acts and therefore it is difficult to say whether it is something that the accused should be guaranteed or not, *i.e.* whether the right to counsel should be considered to be the right to have counsel present and active or just present. When it comes to the judicial practice of the US Supreme Court and also to the judicial practice of the ECtHR,[177] although both courts acknowledge the right to effective assistance as part of the right to counsel guaranteed by legal acts, their acts speak another language: they refuse to evaluate the effectiveness of counsels' performance whenever possible. It could even be claimed that these courts interpret the right to counsel provided for in the constitutions and international legal acts, with rare exceptions, almost always as in a way that it means only the right to have counsel present in the proceedings. The United States Supreme Court has set a standard to prove ineffectiveness of defense counsel so high that it is almost impossible for the accused to claim successfully that counsel who participated in criminal proceedings provided the accused with the assistance that was not effective.[178] In addition to that the Supreme Court requires showing prejudice, which means that in the United States the right to effective assistance of counsel is the right of accused persons who are either factually innocent or manage somehow to prove that without counsel's deficiencies their punishment would have been more lenient. The ECtHR says that rights guaranteed to accused persons ought to be practical and effective, not theoretical and illusory, but when it comes to the right to effective assistance of counsel the ECtHR is much more modest in its actions than in its words. The ECtHR has concluded that the right to effective assistance of counsel was violated if counsel, no matter if retained or appointed by the state, was absent from the proceedings or failed to fulfill his duties completely. Whenever someone claiming ineffectiveness of defense counsel refers to mistakes of counsel other than being absent from the proceedings or failing to provide legal assistance completely, the ECtHR draws back and hides itself behind the principle of independence of the profession.[179]

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[176] Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 8.

[177] I am going to discuss the case law of the ECtHR and the United States in this area in next subsection of this chapter.

[178] I will discuss it in chapter five further.

[179] Read further about this subject in the next subsection of this chapter.

But to be fair towards the courts, their reluctance to intervene is actually understandable. On the one hand the accused has a constitutional right to fair trial and therefore adequate procedural safeguards, including the right to counsel.[180] At the same time in adversary proceedings the functions of accusation, defense and adjudication of the criminal matter are performed by different persons. For that reason a balance between the accused's right to counsel and defense counsel's autonomy has to be achieved.[181] Courts in the United States have stressed the importance of ensuring defense counsel's autonomy from judicial supervision because in their opinion such autonomy ensures that the adversary system is preserved.[182] The ECtHR has also emphasized the principle of independence of the Bar as I will discuss in the next subsection. In addition to that while solving ineffective defense claims society's interest in speedy and effective adjudication and conservation of judicial resources must also be taken into account.[183] It is clear that disputes over the effectiveness of defense counsel during criminal proceedings consume time and money and may end with the replacement of defense counsel or annulment of a court judgment, which may lead to new court proceedings and in turn consume more time and money. Besides, courts always have to balance between the competing interests of finality and procedural fairness,[184] which means that courts usually do not want to act unless there is a very serious breach of the accused's rights.

Second, if one concludes that the right to assistance is not enough and the right to effective assistance has also to be guaranteed to the accused (*i.e.* the right to effective counsel is an element of the right to counsel), one has to clarify what the right to effective assistance really means. Of course, it obviously means that counsel has to participate in the criminal proceedings, but what next? How active should counsel be in order to conclude that the accused's right to effective counsel was guaranteed in the proceedings? Should

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[180] Ekins, *Defence Counsel Incompetence and Post-Conviction Relief: An Analysis of how Adversarial Systems of Justice Assess Claims of Ineffective Assistance of Counsel,* 529, p. 532.

[181] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 93 Harv. Law Rev. 752 (1980), p. 752.

[182] *Ibid.*, p. 752 Note 4, discussing judicial practice about the matter. "Under our adversary system, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system." Estelle v. Williams, 425 U. S. 501 (1976), p. 425 U. S. 512. "The adversary system, warts and all, has worked to provide salutary protection for the rights of the accused. Efforts to improve the performance of defense counsel should not imperil that protection." United States of America v. Willie DeCoster, Jr. No. 72–1283, 624 F.2d 196; 199 U.S. App. D.C. 359; 1976 U.S., October 19, 1976, p. 36.

[183] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster, 752,* p. 752.

[184] Ekins, *Defence Counsel Incompetence and Post-Conviction Relief: An Analysis of how Adversarial Systems of Justice Assess Claims of Ineffective Assistance of Counsel,* 529, p. 533.

he perform some specific duties prescribed in some guidelines or does he have to make his decisions according to the facts of a certain case? Or should it be something in between those two options? These questions I will try to answer in the context of the Estonian criminal justice system in the next chapters of this dissertation.

Here it must be noticed that the right to effective assistance and effective assistance itself do not have the same purposes. The purpose of the right to counsel and also the right to effective assistance is to guarantee fair trial and through that a result that society can call just. To assume that this is also the role of defense counsel means that counsel provides ineffective representation only when society does not consider the result just.[185] But actually the role of counsel is not to see that the accused received a fair trial and therefore just outcome resultant,[186] although counsel should be monitoring that his client's rights are not violated. The task of counsel is to try to achieve the most likeable result for the accused, even if is not "just". In order to do that counsel has to challenge prosecution's arguments, present a defense, advise the accused, negotiate for him, advance mitigating arguments, *etc*. Although generally effective counsel tends to promote a reliable and therefore "just" verdict, in the context of a particular case effective assistance means simply fighting for the interests of the accused, whatever they may be and here counsel is only bound by law and ethics as I already discussed in the last chapter.[187] This actually leads to a conclusion that courts should decide whether an accused received effective assistance without regard to the fairness of the proceedings as a whole:[188] instead of that they should look directly into counsel's behavior. Because of the above mentioned arguments I believe that whenever counsel's conduct comes under question, the assessor (here I propose that the court) should analyze what counsel did or did not do in the criminal proceedings and not to dispose of the issue because the proceedings were "fair" in the meaning that the accused's other procedural rights were not violated. In addition it should be emphasized here that the phrase "effective counsel" may even be a bit misleading in the context of counsel's assistance, because it sounds like the accused should have successful counsel. However, this connotation is not correct, because there is no right to acquittal: the right to effective counsel is not a right to success.[189]

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[185] Genego, *Future of Effective Assistance of Counsel: Performance Standards and Competent Representation, the,* 181, p. 200.
[186] *Ibid.*
[187] Vivian O. Berger, *Supreme Court and Defense Counsel: Old Roads, New Paths-A Dead End, the,* 86 Colum. L. Rev. 9 (1986), p. 94. "The guiding principle in determining whether an attorney has provided effective representation must then be whether he or she discharged the role of partisan advocate faithfully and zealously, not whether the performance yielded what a court views as a just result." Genego, *Future of Effective Assistance of Counsel: Performance Standards and Competent Representation, the,* 181, p. 200.
[188] Green, *Functional Analysis of the Effective Assistance of Counsel, A Note,* 1053, p. 1069.
[189] Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 8.

Therefore in order to determine whether counsel has been "effective" in the proceedings, which means that the right to effective counsel was guaranteed to the accused, the focus should not be on the result of the case, but on counsel's actions in the proceedings. This is a standpoint I support strongly and will discuss further below.

When we talk about reasons for ineffective defense, there are five main ones: counsel simply may be a bad lawyer; he may be unable to perform his duties in the particular case (*e.g.*, because of illness, consumption of alcohol, or conflict of interest); he may be ineffective because of the lack of time or resources to prepare; or the law and the court's actions may constrain counsel's effectiveness (*e.g.,* the court does not give counsel enough time to prepare, the law provides for excessively short deadlines, the court does notify counsel of the date of the court session and counsel fails to appear).[190] A fifth reason could be counsel's motivation, which might include everything from how attractive the case is for defense counsel to whether counsel will receive fair remuneration.[191] I am going to analyze ineffectiveness of defense counsel no matter what the reasons for counsel's failure to fulfill his duties are.

Whenever ineffectiveness of counsel is a subject of discussion among judges, prosecutors and lawyers, one easily realizes that there is an understandable reluctance to discuss the problem of ineffective defense.[192] For courts the assumption of always-effective-counsel is convenient to apply, because it reduces the workload for them, as it removes the need for reasoned deliberation[193] and removes the never ending discussion over the independence of the Bar and whether courts are justified to intervene into it. Prosecutors seem to be reluctant to discuss the matter, because they also think that counsel is an independent party to a proceeding, and what is more important, as an adversary to counsel, they are not interested in too eager a contestant. And counsels themselves prefer to be independent and not criticized for the work they have done, which is understandable as they are representatives of an independent profession.

But in reality it has to be acknowledged that ineffectiveness of counsel is a problem that should be dealt with, because it really is there. To say that ineffectiveness of counsel does not exist, means turning a blind eye towards the reality. There is no reason to presume that an average lawyer is always doing

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[190] Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors do Justice,* 45, p. 66.

[191] Soo, *An Individual's Right to the Effective Assistance of Counsel Versus the Independence of Counsel: What can the Estonian Courts do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?* 252, p. 252.

[192] Karsten Gaede, *Schlechtverteidigung – Tabus Und Präklusionen Zum Schutz Vor Dem Recht Auf Wirksame Verteidigung,* Onlinezeitschrift Für Höchstrichterliche Rechtsprechung Zum Strafrecht (11/2007), available at www.hrr-straftrecht.de, p. 402.

[193] Lee, *Right to Effective Counsel: A Judicial Heuristic,* 277, p. 285.

his job properly. There simply is no evidence to justify the presumption.[194] On the other hand there is empirical evidence that supports the conclusion that ineffectiveness of counsel in criminal proceedings is a real problem, especially when it comes to appointed counsels.[195] But if the ineffectiveness of counsel is not dealt with, it means that there is no improvement in the quality of defense, which also means that one of the reasons for ineffective defense, or at least one of the factors that encourages it, is the reluctance of the justice system to pay attention to it and to solve the problem.

2. Does the Accused's Right to Effective Assistance Counsel Come from his Right to the Assistance of Counsel?

As it was already discussed in the last chapter, the constitutions of Estonia and the United States and the European Convention on Human Rights provide the accused's right to counsel for conference and defense, but not the compulsory level of quality of the assistance provided by counsel, which means that they are silent on the level of effectiveness required of such counsel.[196] It can even be said that it is not clear from the language of the constitutions of Estonia and the United States and the European Convention on Human Rights that the right to effective assistance is a necessary addition to the right to counsel. By its terms the second sentence of the first subsection of § 21 of the Constitution of the Republic of Estonia, the Sixth Amendment of the Constitution of the United

[194] Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronic's Call to Presume Prejudice from Representational Absence,* 827, p. 838; William S. Geimer, *Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel, A,* 4 Wm. & Mary Bill Rts. J. 91 (1995–1996), p. 120.

[195] The Estonian Ministry of Justice. Availability and Quality of Appointed Counsel in Criminal Proceedings. Online. Available: http://www.just.ee/orb.aw/class=file/action=preview/id=33504/m%E4%E4ratud+kaitsja+k% E4ttesaadavus+ja+kvaliteet_KPO+_2_.pdf, 29 April 2011. See also a discussion about the ongoing national crisis in indigent defense in the United States: Cara H. Drinan, *National Right to Counsel Act: A Congressional Solution to the Nation's Indigent Defense Crisis, the,* 47 Harv. J. on Legis. 487 (2010), pp. 491–494.
The European Union, for instance, supports the opinion that the quality of the assistance is something that cannot be presumed and that the member states have to monitor the performance of counsel, at least appointed counsel's performance. The European Union has even arranged for a study to be carried out on procedural rights in the European Union, concerning also ineffectiveness of counsels and monitoring their behavior in criminal proceedings. The study concluded that in a considerable number of the European Union countries there are no mechanisms to control the quality of legal assistance free of charge and in other member states the authorities carrying out this kind of control vary widely. Therefore, there seems to be substantial differences between member states in the way the quality of free legal assistance is controlled and ensured. Taru Spronken and others, *EU Procedural Rights in Criminal Proceedings*,[2009], p. 89.

[196] See about the United States Erickson, *Standards of Competency for Defense Counsel in a Criminal Case,* 233, p. 234.

States and Article 6 of the ECHR do not suggest that the accused's right to counsel is violated by counsel's mistakes made in the course of criminal proceedings.[197] Consequently, the question arises, whether the right to counsel in the context of constitution and international law means that counsel has to be present in the proceedings or counsel has to do more in order to conclude that the right to counsel is guaranteed to an accused.

As it was discussed in the previous chapter, the presence of counsel in the adversary system is absolutely necessary and arises from the concept of adversarial proceedings. But to say that mere presence is enough, means that although the accused will have counsel by his side he actually does not receive any support and assistance from him, which would result in the ceasing of the adversary process.[198] Without overstating the importance of the role of counsel in criminal proceedings in the adversary system it can be said that the system itself presumes counsel's effectiveness. The adversary system is premised upon defense counsel's function as a protector of the procedural rights of his representative that otherwise would be useless to an accused who usually does not have a legal education.[199] Certain rights, such as the right to confrontation, are preserved only if they are exercised in an effective manner and only counsel as a legal professional is able to do that. Consequently, the right to effective assistance should be defined by the accused's need for a skilled partisan to protect his procedural interests, a partisan that is an equal adversary to the prosecutor and acts diligently.[200] I think the standpoints from the authors from the United States are here appropriate and applicable to Estonian criminal proceedings also, as the Estonian criminal justice system is by its concept adversary.[201] This means that although the Constitution of the Republic of Estonia does not explicitly mention right to effective counsel, the right to counsel should be interpreted in the way that this means the right to have actively participating counsel present in the proceedings.

In case counsel has provided poor assistance, there is no contest between parties to a court proceeding and therefore the structure of the adversarial system is jeopardized.[202] The accused represented by ineffective counsel is at a manifest disadvantage in the criminal justice process, because he is practically without defense and yet the adversary system is predicated on the notion of an

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[197] See about the United States Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 6.
[198] Schwarzer, *Dealing with Incompetent Counsel – the Trial Judge's Role,* 633, p. 637.
[199] Green, *Functional Analysis of the Effective Assistance of Counsel, A Note,* 1053, p. 1057.
[200] *Ibid*.
[201] The issue is more thoroughly discussed in the introduction of this dissertation.
[202] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, p. 767. "The fundamental nature of the right to counsel in the adversary system makes effective assistance an indispensible predicate to institutional integrity." *Ibid*.

equal battle between zealous combatants.[203] These are the standpoints I strongly agree with. In case counsel does not exercise his duties effectively, the right to counsel and other rights in criminal proceedings lose their meaning and the accused loses the support counsel should give him. Consequently, one contestant in the proceedings, although physically present, is "missing" and the right to counsel is therefore an empty, meaningless right, which goes strongly against the right to fair trial and the idea of adversary proceedings.[204] Thus, if we say that the right to effective assistance is not a compulsory element of the right to assistance, we deny a basic requirement of a working adversary model – a fair contest between equals,[205] as we would also do if we would conclude that even presence of counsel is not needed in adversary proceedings. As Barbara Allen Babcock has strikingly written: "The people's victory has little value and offers less satisfaction if the individual has been represented by an ineffective champion."[206] It could be said that the fact that ineffectiveness of counsel has occurred in the criminal proceedings has bad consequences for the reliability of the criminal justice system. When ineffectiveness of defense counsel is so serious that it leads to an annulment of the court judgment, it can be said that the administration of justice is destabilized. Reversals always impair predictability and fairness of the judicial process, and undermine public confidence in it. Even if lawyers' ineffectiveness is not as serious as to justify the annulment of the court judgment, the administration of justice suffers if balance between the parties to the proceedings is disturbed,[207] which in turn affects public confidence in the justice system. Therefore in my opinion the conclusion

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[203] Ekins, *Defence Counsel Incompetence and Post-Conviction Relief: An Analysis of how Adversarial Systems of Justice Assess Claims of Ineffective Assistance of Counsel,* 529, p. 529; Sillaots, *Kaitsja võimalikust rollist ja seisundist Eesti tulevases kriminaalmenetluses,* 83, p. 84.

[204] "The impact of this right (*the right to counsel – author's explanatory remark*), however, is greatly diluted without its logical and important corollary, the right to effective assistance of counsel." Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims Notes and Comments,* 413, p. 413. See also Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 7 and Ekins, *Defence Counsel Incompetence and Post-Conviction Relief: An Analysis of how Adversarial Systems of Justice Assess Claims of Ineffective Assistance of Counsel,* 529, p. 532.

"The fundamental premise on which our adversary system is … that "truth is best discovered by powerful statements on both sides of the question." Merely to state this proposition, however, suggests the seemingly conflicting obligations of the advocate. To present the matter in its starkest form, can we command two men zealously to plead opposing causes when truth can never be with more than one? The answer is, "Of course, we can."" Irving R. Kaufman, *Does the Judge have a Right to Qualified Counsel,* 61 A. B. A. J. 569 (1975), p. 569.

[205] Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel,* 34 Stan. L. Rev. 1133 (1981–1982), pp. 1166–1667.

[206] *Ibid*., p. 1167.

[207] Schwarzer, *Dealing with Incompetent Counsel – the Trial Judge's Role,* 633, p. 637.

that the accused received effective assistance of counsel is one indicator that he received fair trial.

When it comes to the right to effective assistance of counsel, the principle of fairness is closely related to the principle of equal protection. This means that the criminal justice system, which relies on counsels of widely varying skills, is not allowed to treat similarly situated accused persons unequally. Basically this means that "[s]imilar defendants who have committed similar crimes under similar circumstances ought not to receive vastly different dispositions because of their respective lawyers' varying professional attributes."[208] Therefore it may be that when we look at a certain procedure, it may appear fair, but when we compare different procedures, we may conclude that is was unfair compared to similar cases where there was more lenient treatment.[209] For an adversary trial to be credible, contests based on similar facts should produce similar results. Counsel's zealous commitment to the interests of the accused ensures both that "…particular trials produce believable results and that all criminal trials are sufficiently similar as contests to produce results that are relatively reliable."[210] I agree with that opinion and believe that the treatment of the accused in criminal proceedings and also the result of the case should not depend on which counsel participated in criminal proceedings.

For the aforementioned reasons, it is unquestionable that the adversary system requires more than the mere presence of counsel[211] and that the right to effective assistance of counsel is by its essence related to the right to counsel. Therefore, to say that the accused's constitutional right to counsel was guaranteed, counsel has to be present and participate actively on the accused's behalf in criminal proceedings, *i.e.* has to be effective.

Although not provided for in the European Convention on Human Rights, the right to effective legal assistance can be deduced from ECtHR case law.[212] The ECtHR has held that "…although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair

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[208] Gary Goodpaster, *Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases, the Colloquium: Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise been Fulfilled,* 14 N. Y. U. Rev. L. & Soc. Change 59 (1986), p. 65. As it was stated in the last chapter, the first sentence of § 12 (1) of the Constitution of the Estonian Republic provides that everyone is equal before the law.

[209] *Ibid*., p. 66.

[210] *Ibid*., p. 89.

[211] "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client." Anders v. California, 386 U. S. 738 (1967), 386 U. S. 744. "The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee..." Holloway v. Arkansas, 435 U. S. 491.

[212] Spronken & Vermeulen, *Four Fundamental Procedural Rights in Criminal Proceedings Throughout the European Union; Study on Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union – 2008 Update*, *p*. 7; Spronken et al., *EU Procedural Rights in Criminal Proceedings*, *p*. 24.

trial."[213] The most famous judgments of the ECtHR about the ineffectiveness of defense counsel are Artico v. Italy and Goddy v. Italy.[214] In both cases the Court concluded the violation of Article 6 paragraph (3) (c) of the ECHR.

Mr. Artico, who had originally been represented by retained counsel Mr. Ferri, included in his declaration of the 10th March 1972 to the Court of Cassation a request for free legal aid in connection with the applications to quash. This request was granted on the 8th of August 1972 by the President of the Second Criminal Section who appointed Mr. Della Rocca, a lawyer from Rome to Mr. Artico. After that Mr. Artico wrote to the Section President and the public prosecutor attached to the Court of Cassation to inform them that he had heard nothing from Mr. Della Rocca and to request that he would be provided with effective assistance. He also wrote to the Section President and the Cassation prosecutor requesting Mr. Della Rocca's replacement. In his application of the 26th of April 1974 to the ECtHR, Mr. Artico alleged violation of Article 6 paragraph 3 (c) of the ECHR, by reason of the fact that he was not assisted by a lawyer before the Court of Cassation in the proceedings that terminated on the 12th of November 1973.

The ECtHR held in Artico v. Italy that the aim of the European Convention on Human Rights is to guarantee not rights that are "theoretical or illusory" but rights that are "practical and effective": "…this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive…" The Court continued: "Again, mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfill his obligations."[215] After making previous statements the Court solved Mr. Artico's case and concluded that Mr. Artico never had the benefit of Mr. Della Rocca's services. From the very beginning Mr. Della Rocco stated that he was not able to act: first he referred to a busy schedule and after that to his state of health.[216] Because the government claimed that the lack of assistance did not actually prejudice Mr. Artico, the Court also had to answer the question of prejudice. The Court pointed out that "…here the government is asking for the impossible since it cannot be proved beyond all doubt that a substitute for Mr. Della Rocca would have pleaded statutory limitation and would have convinced the Court of Cassation when the applicant did not succeed in doing so." The Court added: "Nevertheless, it appears plausible in the particular circumstances that this would have happened. Above all, there is nothing in Article 6 par. 3 (c) (art. 6-3-c) indicating that such proof is necessary; an interpretation that introduced

[213] Poitrimol v. France. *Application no. 14032/88.* 23 November 1993, § 34.
[214] Goddi v. Italy. *Application no. 8966/80.* 9 April 1984.
[215] Artico v. Italy, § 33. Later the ECtHR has stressed it also in Czekalla v. Portugal. *Application no. 38830/97.* 10 October 2002, § 60.
[216] *Ibid.*

this requirement into the sub-paragraph would deprive it in large measure of its substance. More generally, the existence of a violation is conceivable even in the absence of prejudice..."[217] In addition to that the Court noted that although a state cannot be held responsible for every shortcoming on the part of appointed counsel, in this case it was an obligation of the competent Italian authorities to take steps to ensure that the applicant enjoyed the right to counsel. There were two ways the Italian authorities could have done that: either to replace Mr. Della Rocca or, if appropriate, to compel him to fulfill his obligations. But they choose the third and in the Court's eyes inappropriate way: remaining passive.[218] So, two important conclusions come from Artico v. Italy: first, that mere appointment of counsel is not enough, because counsel has to act during the proceedings also, and second, when the accused has notified the authorities about the absence of his counsel's actions, the authorities have to interfere.

In Goddi v. Italy Mr. Goddi's appeal was drafted by one of the two lawyers who had defended him in the first instance, Mr. Monteleone. The Bologna Court of Appeal set the hearing down for the 30th of November 1976, but Mr. Monteleone did not appear, although he had been notified of the date. The Court of Appeal appointed a lawyer, Mr. Maio, to act for Mr. Goddi and then adjourned the proceedings indefinitely for other procedural reasons. The President subsequently decided that the hearing should be held on the 9th of July 1977. On that day, the Court of Appeal once more ordered an adjournment. The record of the sitting discloses that Mr. Goddi appeared before the Court assisted by a new lawyer of his own choosing, Mr. Bezicheri. The hearing of the 3rd of December 1977 was held in the absence not only of Mr. Goddi and his lawyer but also of the party seeking damages, the co-accused and his lawyer, and the three witnesses who had been summoned. The Court of Appeal was unaware of Mr. Goddi's recent arrest and declared him to be unlawfully absent. Mr. Bezicheri failed to appear, because he had not received the notification: it had been sent to Mr. Monteleone and to Mr. Ronconi, the other lawyer who had defended Mr. Goddi at the first instance. At the hearing on the 3rd December, the Court of Appeal appointed another lawyer, Mr. Straziani, to act for Mr. Goddi. Mr. Straziani just referred to the grounds of appeal, which had been drafted by Mr. Monteleone. Mr. Goddi filed a complaint to the ECtHR, claiming that the hearing of the 3rd of December 1977 before the Bologna Court of Appeal was held in absence of himself and also his retained counsel, Mr. Bezicheri. He also claimed that the defense provided by Mr. Straziani, the appointed lawyer, had not been effective.

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[217] § 35 of the judgment. Court stated that prejudice is relevant only in the context of Article 50, according to which if the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from the present convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

[218] Artico v. Italy, § 36.

The ECtHR determined that Mr. Goddi and Mr. Bezicheri did not appear at the court session. Mr. Straziani was not familiar with the facts of the case and he did not even know who his client was. In addition to that he did not have enough time to prepare since the hearing closed on the same day, and the outcome of the hearing was a heavier sentence than the one imposed at first instance.[219] The Court expressed an opinion that failure to notify Mr. Bezicheri deprived the applicant of a "practical and effective" defense, because the Bologna Court of Appeal should have known that only Mr. Bezicheri could have provided an effective defense to Mr. Goddi on the 3rd of December 1977. Therefore, the court should have notified Mr. Bezicheri about the hearing.[220] Related to the applicants claim that Mr. Straziani was ineffective, the Court refused to give its opinion about the lawyer's work, referring to independence of the profession: "As regards the defence provided for Mr. Goddi on 3 December 1977 by the officially-appointed lawyer, it is not the Court's task to express an opinion on the manner in which Mr. Straziani, a member of a liberal profession who was acting in accordance with the dictates of his conscience as a participant in the administration of justice, considered that he should conduct the case."[221] On the other hand, the Court looked into the (in)action of the Bologna Court of Appeal and concluded that it did not take steps to ensure that the accused had an opportunity for an adequate defense. Mr. Straziani did not have the time and facilities to study the case-file, prepare his arguments and consult his client. Therefore the Court of Appeal should have taken measures, *e.g.,* it could have adjourned the hearing, as the Prosecutor's Office requested, or it could have directed on its own initiative that the sitting be suspended for a sufficient period of time.[222]

Thus, the most important judgments of the ECtHR in the field of ineffectiveness of defense counsel handle both cases with appointed and retained counsels. The ECtHR held in those cases that when counsel does not participate in criminal proceedings, no matter if it is because of counsel's failure or because of court's failure to notify him of the date of the court session, effective and practical right to counsel is not guaranteed to the accused. The next two ECtHR cases do not concern non-participation of counsel in criminal proceedings, but the quality of the assistance provided by him.

In Kamasinski v. Austria[223] Mr. Kamasinski complained that his appointed counsel, Dr Steidl, had not provided effective legal assistance for him in the preparation and conduct of the case: the lawyer did not attend at the indictment hearing, visited Mr. Kamasinski at prison only briefly, failed to acquaint Mr. Kamasinski with the prosecution evidence prior to the trial and did not perform adequately at the trial. Mr. Kamasinski claimed that after the incident following

[219] Goddi v. Italy, § 27.
[220] § 30 of the judgment.
[221] § 31 of the judgment.
[222] Goddi v. Italy, § 31.
[223] Kamasinski v. Austria. *Application no. 9783/82.* 19 December 1989.

which defense counsel made an unsuccessful request to withdraw from the case, he was without the benefit of any legal assistance at all.

The ECtHR stressed once more as it had done in Goddi v. Italy, that legal profession is independent from the state. Therefore the conduct of the defense is essentially a matter between the accused and his counsel, whether counsel is appointed or retained. The Court noted: "… [C]ompetent national authorities are required under Article 6 § 3 (c) (art. 6-3-c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way."[224] Because Mr. Kamasinski's lawyer unlike Mr. Artico's lawyer took a number of steps prior to the trial (visited Mr. Kamasinski in prison on nine occasions, lodged a complaint against the decision to remand in custody and filed written and telephone motions for the attendance of witnesses), there is no reason to conclude that competent authorities were notified of ineffective legal representation.[225] During the trial a dispute occurred between the accused and Dr. Steidl, as a result of which Dr. Steidl asked the trial court for withdrawal, which in the Court's opinion means that the Austrian judicial authorities were notified of the fact that Mr. Kamasinski was not pleased with the assistance provided him. Still, the ECtHR did not find that the decision at the trial not to discharge Dr. Steidl deprived Mr. Kamasinski from the effective assistance of counsel. "It may also be correct that the defence at the trial could have been conducted in another way, or even that Dr Steidl in some respects acted contrary to what Mr. Kamasinski at the time or subsequently considered to be in his own best interests. Nevertheless, despite Mr. Kamasinski's criticisms, the circumstances of his representation at the trial do not reveal a failure to provide legal assistance as required by paragraph 3 (c) (art. 6-3-c) or a denial of a fair hearing under paragraph 1 (art. 6-1)."[226]

In Daud v. Portugal[227] the first appointed lawyer, before reporting sick, had not taken any steps as counsel for Mr. Daud. The second lawyer, whose appointment the accused learned of only three days before the beginning of the trial at the Criminal Court, did not have the time she needed to study the file, visit her client in prison and prepare his defense. The ECtHR held that "…it was for the relevant authorities, while respecting the fundamental principle of the independence of the Bar, to act so as to ensure that the applicant received the effective benefit of his right, which they had acknowledged."[228] In the ECtHR's opinion, because the accused had sent the court letters claiming that his first counsel had not taken any steps since being appointed, the court should have inquired into the manner and possibly replaced him sooner, without waiting for him to state himself that he was unable to act for Mr. Daud. In addition to that, after appointing a replacement the court failed to adjourn the trial on its own

[224] § 65. Also later stated in Stanford v. the United Kingdom. *Application no. 16757/90.* 23 February 1994, § 28; in Czekalla v. Portugal, § 60; in Pavlenko v. Bulgaria, § 99.
[225] § 66 of the judgment.
[226] § 70 of the judgment.
[227] Daud v. Portugal. *Application no. 22600/93.* 21 April 1998.
[228] Daud v. Portugal, § 40.

initiative, although the judge knew that the accused had not had any proper legal assistance until then. The fact that the second appointed lawyer did not make the application is of no consequence for the ECtHR, because the circumstances of the case required that the court should not remain passive.[229] The case of Daud is very important as it shows that sometimes the court has an obligation to act to ensure effective assistance even if the accused or his counsel do not request court's action.

In general, the case law of the ECtHR indicates that the Court currently considers Article 6 paragraph 3 (c) of the ECHR to be breached only where counsel completely fails to perform some duty or the performance of duty is materially impeded. In the case Artico v. Italy counsel refused to provide legal assistance to the person charged with a criminal offence. In the case Goddi v. Italy counsel failed to appear to the court. In the case Daud v. Portugal the first appointed counsel provided no legal assistance at all, and the second failed to prepare for the trial. In all these cases the ECtHR held that Article 6 paragraph 3 (c) of the ECHR had been breached. It is noteworthy that all these cases involved a situation in which counsel completely failed to perform one of his duties or he was not able to perform because of court's action. In other cases like Kamasinski v. Austria, the court has referred to the independence of defense counsel and has refrained from evaluating the effectiveness of legal assistance provided by counsel. It is clear from the judgment in Kamasinski v. Austria that the ECtHR will refrain where possible from addressing the substantive aspect of counsel's assistance. In any case, the ECtHR has never found Article 6 paragraph 3 (c) of the ECHR to have been violated merely on the claim of a person charged with a criminal offence that although counsel fulfilled his duties generally, he failed to fulfill some of these duties effectively.[230]

In addition to that the standpoint of the ECtHR is that the national courts should intervene only if a failure by counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way. The ECtHR has therefore developed a harsh rule for the accused no matter if he has retained or appointed counsel: the judge has to act only if he is or should be aware that the accused is not being represented effectively. This rule was criticized already in the United States by Richard Brody in 1977 when Mr. Brody analyzed case law of the United States' courts. Mr. Brody pointed out that the accused may create such awareness by complaining to the court during the trial about the quality of defense counsel's assistance or bringing his dissatisfaction to the court's attention any other way. Otherwise, he will have to argue afterwards that his lawyer's ineffectiveness was so apparent that the judge

[229] § 42 of the judgment.

[230] See also Soo, *An Individual's Right to the Effective Assistance of Counsel Versus the Independence of Counsel: What can the Estonian Courts do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?* 252, p. 257.

should have been aware of it.[231] An accused who does not complain at trial may thus lose the chance to refer to the breach of Article 6 paragraph 3 (c) of the ECHR. Yet the expectation that an accused will complain about the performance of his counsel to the judge during trial is unrealistic and too burdensome for the accused. First the accused may not know that it is necessary to do that to obtain court's action. Secondly the accused often does not know that his counsel's performance is ineffective.[232] Thirdly, even if he knows, it is not certain that he dares to complain.[233] It is illogical to charge the accused with responsibility for the acts of his counsel, because he does not have proper knowledge to supervise his counsel's activity and even if he does he is in a very weak position, because he has to complain about the flaws of a person who is at his side. If we oblige the accused to watch over the conduct of his counsel, then in every ineffectiveness case it could be argued that the accused waived his right to effective counsel by not properly supervising his advocate.[234]

The cautious approach of the ECtHR to the quality of legal assistance is understandable – counsels truly are independent in their profession, which means that they can choose their actions and they do not have to act in the way that is pleasing to the court, and as a party to a court proceeding counsels need to have authority and freedom to make decisions. To hold a state responsible for counsel's mistakes seems somewhat contradictory as it is against the basic principles of criminal procedure, both adversary and modern inquisitorial, to ask the state through the courts to exercise control over the performance of an individual party to the proceedings and to oblige him to take some certain steps. In addition to that one argument against looking directly into counsels' actions for the ECtHR is the fact that by ratifying the European Convention on Human Rights, states agree to grant certain rights to individuals, but at the same time, the European Convention on Human Rights does not bind individuals. Therefore it is not possible for an applicant to complain to the Strasbourg Court about his lawyer's unsatisfactory representation only and he has to refer to

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[231] Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 56.

[232] On the level of the European Union it is claimed that an accused cannot be expected to assess the effectiveness of his legal representation himself, because he is not objective and usually he does not have legal education. Spronken & Vermeulen, *Four Fundamental Procedural Rights in Criminal Proceedings Throughout the European Union; Study on Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union – 2008 Update,* p. 7; Spronken et al., *EU Procedural Rights in Criminal Proceedings,* p. 24.

[233] "He *(the accused – author's explanatory remark)* will realize that his attorney may not take kindly to a suggestion that the lawyer is not performing effectively; silence, even at the risk of waiver, may be a better course of action than alienating the only person in the courtroom pledged to help the accused." Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 57.

[234] Richard A. De Sevo, *Ineffective Assistance of Counsel and the Harmless Error Rule: The Eighth Circuit Abandons Chapman Notes,* 43 Geo. Wash. L. Rev. 1384 (1974–1975), p. 1402.

mistakes made by the state.[235] However, from the accused's perspective the consequences of bad lawyering may be left unresolved, if he was represented by counsel, but the assistance provided by counsel was not effective, and the ECtHR refuses to analyze counsel's mistakes.[236] Of course, it is true that counsels are independent in their actions, but in sum the state is the one who charges the accused with crime, conducts the proceedings and may even finally deprive the accused person of his liberty, which means that the state is responsible for the quality of proceedings, not the accused or his counsel who are just parties to the proceedings. Therefore in case counsel has been ineffective, the ECtHR could find a justification for analyzing counsel's actions in the argument that it is the state's responsibility to guarantee fair trial rights to the accused. As some even say that ineffective representation reduces the right to counsel into "a hollow right" as "ineffective representation is the same as no representation at all"[237]condemnation of the state for not guaranteeing the right to fair trial for the accused is easy to justify in the situation where the accused did not receive effective assistance of counsel. That way, although the ECtHR would look directly into counsel's actions, it would finally give its opinion about the obligations of the state, not of counsel.

The European Commission has expressed its view about effectiveness of counsel in the area of state legal aid. According to the Commission it is not enough that the state appoints a lawyer – the legal assistance provided by counsel must also be effective.[238] The European Commission has proposed that member states should be required to implement a system for providing a replacement if the original lawyer is found to be in effective[239] and the European Parliament has recommended that member states should ensure that an independent body with competence to replace counsel is charged with hearing complaints about the effectiveness of a defense lawyer.[240] Since the suspect is not always in a position to assess the effectiveness of his legal

[235] Trechsel, *Human Rights in Criminal Proceedings*, *p*. 286.
[236] Cape et al., *Effective Criminal Defence in Europe*, *p*. 59.
[237] Smithburn & Springmann, *Effective Assistance of Counsel: In Quest of a Uniform Standard of Review,* 497, p. 503. "… [B]ecause of the very nature of the adversary system, it is inherently and fundamentally unfair to try a defendant who is without benefit of counsel. … A trial is just as easily tainted by ineffective counsel as it is by the absence of counsel." *Effective Assistance of Counsel: A Constitutional Right in Transition Note,* 10 Val. U. L. Rev. 509 (1975–1976), p. 510.
[238] Green Paper from the Commission – Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, 4.3.(b), p. 24.
[239] Proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union, 34., p. 9.
[240] European Parliament legislative resolution on the proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union, Amendment 24.

representation, according to the Commission, the onus has to be on the member states to establish a system for checking this.[241]

The United States Supreme Court has long recognized that the right to counsel is the right to effective assistance of counsel.[242] It is an absolutely reasoned standpoint when we look into the role that counsel has in the criminal proceedings as the prosecutor's adversary and the accused's adviser. Therefore it must be agreed with the United States Supreme Court that the mere fact that the accused is represented by a person who happens to meet formal requirements to enter the proceedings as counsel is not enough, which means that the guarantee of the assistance of counsel in criminal proceedings is not satisfied by a formal appointment of counsel to defend the accused.[243] The same is in the United States Supreme Court's opinion with retained counsel: "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."[244] Consequently, the right to effective assistance of counsel is recognized in the United States not for its own sake, but for the effect it has on the ability of all criminally accused to receive a fair trial.[245]

If the right to effective assistance of counsel is recognized as an essential element of the right to counsel and therefore the right to fair trial, it can be asserted as I already concluded when I discussed the right to counsel that it must be guaranteed to all accused persons, regardless of guilt or innocence, because only effective assistance guarantees that the proceeding is adversarial. Because the objective of an adversarial system is to reach the truth through skilled advocacy of counsels on both sides,[246] this holding should not be sacrificed even if there is strong evidence against the accused. No one ought to

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[241] Proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union, 59., p. 1.

[242] In 1970, the United States Supreme Court explicitly recognized the right to effective counsel as a part of the Sixth Amendment's guarantee of the right to counsel in McMann v. Richardson (McMann v. Richardson, 397 U.S. 759 (1970)) when the Court said: "It has long been recognized that the right to counsel is the right to effective assistance of counsel." 397 U.S. 775, Fn. 14, citing for *e.g.,* Powell v. Alabama and Glasser v. United States. See also Sheila Martin Berry, *Bad Lawyering – how Defense Attorneys Help Convict the Innocent Symposium Issue,* 30 N. Ky. L. Rev. 487 (2003), p. 488. "The constitutional guarantee of "effective assistance" of counsel is a guarantee with a purpose. It is to assure that our adversary system of justice really is adversary and really does justice." Bazelon, *Defective Assistance of Counsel, the,* 1, pp. 1–2.

[243] Avery v. Alabama, 308 U.S. 444 (1940), 308 U.S. 446.

[244] Strickland v. Washington, 466 U.S. 685.

[245] Duncan, *(so-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform, the,* 1, pp. 26–27. "If we ... accept the notion that the crucible of the adversary process is a meaningful contest in which the defendant is able to test the government's case, then the defendant must be allowed an effective sword with which to pierce the prosecution's heavy armor." Garcia, *Right to Counsel Under Siege: Requiem for an Endangered Right, the,* 35, p. 79. See also United States v. Cronic, 466 U.S. 658.

[246] Gable & Green, *Wiggins v. Smith: The Ineffective Assistance of Counsel Standard Applied Twenty Years After Strickland Current Developments 2003–2004,* 755, p. 766.

be found guilty without a fair trial, which means that there was the effective assistance of counsel in the proceedings.[247]

In spite of what has been mentioned above, it is obvious that the right to effective assistance of a defense counsel does not mean that the accused is entitled to an absolutely flawless and perfect defense. The United States Supreme Court has expressed its view in this matter: "... [T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one."[248] Therefore the representation does not have to be of the "highest quality", but only "effective".[249] This is an absolutely practical standpoint when we think about how things are in reality. First, counsels are humans and all humans make mistakes. Therefore it might be that in real life there is no such thing as a "perfect defense". Second, there are always the principle of finality and the need to save resources that we have to consider when we start demanding "perfect assistance". The truth is that if the accused shows that counsel made mistakes in the course of criminal proceedings, the question of whether the conviction was obtained through unfair process in denial of the accused's right to effective counsel always arises. But it would be too burdensome to the system to afford to have cases retried where the procedural violation is minimal.[250] Therefore I repeat here that it is important to set a standard which stipulates, which counsel's mistakes result in ineffective defense in a meaning that they lead to annulment of the court judgment and which are just mistakes. While it is probable that it will uphold a conviction obtained in denial of fair procedure (at least if we presuppose that in order a trial to be called fair, the defense counsel's representation has to be flawless), it is a pragmatic approach and helps to preserve institutional integrity.[251] Then again, effective advocacy is more than the mere absence of radical mistakes, and as such advocacy is essential to the adversarial system,[252] it is important not to set the standard of effectiveness too low. Both low standard and lack of coherent standard for evaluating counsel's

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[247] Richard Klein, *Emperor Gideon has no Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel, the,* 13 Hastings Const. L. Q. 625 (1985–1986), p. 645.

[248] Delaware v. Van Arsdall, 475 U.S. 673 (1986), 475 U.S. 681. The same is with the balance between abilities of the prosecutor and counsel: the system cannot require a perfect equilibrium because it is almost impossible that parties are absolutely equal in their presentational ability. It does, however, require at least a modicum of balance to achieve the goal promoted by the adversary process: fairness. Garcia, *Right to Counsel Under Siege: Requiem for an Endangered Right, the,* 35, p. 104.

[249] Russell L. Weaver, *Perils of being Poor: Indigent Defense and Effective Assistance Criminal Procedure Discussion Forum,* 42 Brandeis L. J. 435 (2003–2004), p. 441; Joel Jay Finer, *Ineffective Assistance of Counsel,* 58 Cornell L. Rev. 1077 (1972–1973), p. 1080.

[250] Ekins, *Defence Counsel Incompetence and Post-Conviction Relief: An Analysis of how Adversarial Systems of Justice Assess Claims of Ineffective Assistance of Counsel,* 529, p. 557.

[251] *Ibid*.

[252] *Ibid*., pp. 546–547.

conduct have an impact on counsel's performance in the criminal proceedings.[253]

3. The Methods to Guarantee the Quality of the Assistance of Counsels

There are two kinds of measures to guarantee the quality of the assistance: measures that are preventive and measures that are used during the specific criminal proceeding.

The most elementary preventive method to improve quality of the assistance provided to the accused by counsel in criminal proceedings is to enact requirements to persons who want to be counsels in criminal proceedings. In Estonia only advocates or persons who meet the educational requirements established for contractual representatives by § 41 (4) of the CCP are allowed to participate in criminal proceedings as retained counsels (CCP, § 42 (1) 1)). So to be a defense counsel one does not have to be a member of the Bar in Estonia – only counsel who is appointed by state has to be a member of the Bar (CCP, § 42 (1) 2)).

If a non-advocate person wants to enter the proceedings as counsel, he always has to have consent from the body conducting the proceedings, which is another measure to guarantee preemptively that the accused receives effective assistance. But if this person receives consent from the body conducting the proceedings, which means that the body conducting the proceedings presumes that he is able to act as counsel, it does not mean that if he turns out to be ineffective during criminal proceedings, he is allowed to continue as counsel. The Supreme Court of Estonia has repeatedly held that it is in the competence of the body conducting proceedings to permit a person who is not a member of the Bar, but who meets the educational requirements, to enter the proceedings as counsel and therefore it is in the competence of it to withdraw the permission. If the body conducting proceedings decides to withdraw permission, he has to notify the accused and counsel and give the accused an opportunity to choose another counsel.[254] The Supreme Court of Estonia reasons its position as follows. When the body conducting proceedings gives a person permission to participate in criminal proceedings as counsel, he verifies only whether the person meets qualification requirements or not, because the body conducting proceedings usually does not know the person personally and therefore has no other facts to use for evaluating his competence. During the proceedings the

[253] Ekins, *Defence Counsel Incompetence and Post-Conviction Relief: An Analysis of how Adversarial Systems of Justice Assess Claims of Ineffective Assistance of Counsel,* 529, p. 547.

[254] Court Ruling of the Criminal Chamber of the Supreme Court, 27 April 2006, court case no. 3-1-1-37-06, p. 7.3. Online. Available: http://www.nc.ee/?id=11&tekst=RK/3-1-1-37-06, 29 April 2011. Court Ruling of the Criminal Chamber of the Supreme Court, 2 August 2010, court case no. 3-1-1-61-10, p. 7.

body conducting proceedings has a chance to monitor the person's actions and gain knowledge of his skills. Consequently it is possible that the body conducting proceedings reaches a conclusion that the person is incompetent as counsel and leaves the accused without defense. That is why it might be necessary to withdraw permission and give an accused a chance to choose another counsel.[255] Even if the accused is against that, it is important to notice that the right to choose counsel is not just the accused's personal matter: the court has to make sure that counsel actually fulfills his duties.[256]

If counsel already participates in the criminal proceedings and turns out to be ineffective, the question arises, what should the state do and whether the state has to do anything at all in order to guarantee the accused effective assistance of counsel? As it was discussed above, the Estonian Supreme Court has found that the state has to act in case retained counsel who is not an advocate, turns out to be ineffective, but should the state act in case counsel is an advocate, and if yes, should it act no matter if counsel is retained or appointed? On the one hand it is unquestionable that the defense counsel is an independent party to a court proceeding, a standpoint that the ECtHR has declared repeatedly. On the other hand, it is clear that the state is responsible for guaranteeing the accused's right to fair trial and therefore effective defense, and as we look at the above referred judicial practice of the Estonian Supreme Court, the court has recognized this principle in despite of ECtHR's standpoint in the context of non-advocate counsels (who are in Estonia always retained counsels).

When it comes to the denying relief for ineffectiveness of retained counsel, the supporters of that approach impute errors of retained counsel to the client who retained him. They claim that the appointment of counsel constitutes state action,[257] so the ineffective assistance of appointed counsel is denial of the right to effective assistance of counsel. However, where the accused has chosen his own advocate, the supporters of denying relief for ineffectiveness of retained counsel suggest that the mere fact that the advocate was ineffective involves no state action and constitutes a denial of no right. [258]

I tend to agree with the authors who claim that there is no justification for holding that an accused who has appointed counsel is entitled to relief for ineffectiveness while relief would be denied to a person who has retained

[255] Court Ruling of the Criminal Chamber of the Supreme Court, 2 August 2010, court case no. 3-1-1-61-10, p. 8.
[256] *Ibid.*, p. 10.1.
[257] The state is the one that works out the system of appointment of counsels and finances it. An accused that has an appointed counsel does not usually choose his advocate; a judge or some other government official (in case of Estonia the Estonian Bar Association) assigns a lawyer to represent the accused. Thus, the state is responsible for deficient representation when it provides a lawyer who lacks the experience and skill to handle the case. Stephen B. Bright, *Neither Equal nor just: The Rationing and Denial of Legal Services to the Poor when Life and Liberty are at Stake Crisis in the Legal Profession: Rationing Legal Services for the Poor,* 1997 Ann. Surv. Am. L. 783 (1997), p. 832.
[258] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, p. 763 Note 79.

counsel when the conduct in question is the same.[259] To be true, the state cannot intrude directly into appointed counsels' actions either because of the principle of independence that applies to the conduct and actions of lawyers generally: what the state can do is that it has an opportunity to control the quality of the assistance of both retained and appointed counsel through the certification of advocates and minimum requirements for practice for all lawyers (and through courts' observations too as I will discuss in chapter four). Therefore there are some state measures to guarantee quality of both retained and appointed counsel's work. And what is more important, it is unfair to impute the ineffectiveness of counsel to an accused who does not possess the knowledge necessary to understand or detect his counsel's flaws. It has been also pointed out, and I explained this standpoint more thoroughly in the last subsection of this chapter, that the criminal trial itself is state action, and that the ineffective assistance of counsel at trial constitutes a denial of due process, no matter if the accused had counsel retained or court-appointed. Even where the accused selects his own lawyer, there is still the state's responsibility, because the state is the one who conducts criminal proceedings. If an accused is convicted in violation of his right to effective representation it is clear that there are shortcomings in the proceedings conducted by the state.[260] Advocates are informal agents of the state who supply one of the elements of a fair trial which the state is obliged to secure for all accused persons.[261] As the United States Supreme Court has found: "Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers."[262]

Therefore it is reasonable to hold the state responsible for the ineffectiveness of appointed and also retained counsel because the state has an obligation to provide a fair trial to all people accused of crimes. In turn it means that the state has to act in specific criminal proceedings and also in the justice system generally to improve effectiveness of counsels. In addition to imposing requirements of education beforehand, the state has to act also during the proceedings. By state I mean mostly the court, because the court is the one that presides over criminal proceedings. Of course, the state can always turn to the Bar Association too with the application to decide whether the advocate has fulfilled his duties in criminal proceedings, but this results in giving the state's responsibility to monitor fairness of the proceedings into the hands of a private organization. It is my sincere belief that courts themselves should be authorized to assess counsels' behavior and to evaluate if counsel fulfilled his duties properly or not, and the principle of independence of the Bar should be left

[259] Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 59.
[260] *Ibid*., p. 66.
[261] *Ibid*., p. 67.
[262] Cuyler v. Sullivan, 446 U.S. 335 (1980), 446 U.S. 344–345.

aside when the accused's right to effective counsel is violated. This principle might be convenient for the ECtHR to use if it does not want to assess counsels' actions for some reason, but it should not be taken as a tool for the state courts to disregard their responsibility to guarantee procedural rights to accused persons. The courts should note that supervision performed by them over the performance of counsel is an effective measure to raise the quality of the assistance provided by counsels. It is a strong condemnation, and I dare to say shame for counsel, if the court concludes that he has been ineffective in the proceedings and either asks him to fulfill his duties properly, removes him or annuls the judgment that was a result of the proceedings in which counsel was ineffective.

After I have described different reasons for ineffectiveness of counsel and different types of ineffective representation, I am going to discuss the justification of judicial supervision further as I am also analyzing different forms of judicial supervision over the quality in the performance of counsel in the criminal proceedings.

III. SITUATIONS THAT LEAD TO INEFFECTIVE DEFENSE AND TYPES OF INEFFECTIVE DEFENSE

1. Interference by the State

There are cases where ineffectiveness of counsel does not derive from counsel but from the court or from the law. For example the court may appoint counsel too late, *i.e.* give counsel too little time to prepare for the case, or grant too short deadlines during the criminal proceedings. The court may instruct counsel to do something that impairs the defense position (*e.g.,* ascertain that witnesses are questioned in a certain order, although counsel is strongly against it) or prohibit counsel to something (*e.g.,* to interrogate the accused during the court proceedings). The court may also groundlessly interrupt the attorney-client relationship (*e.g.,* remove retained or appointed counsel although there is no ground for removal) or refrain from interrupting when there is ground (*e.g.,* if there is a complete breakdown in the attorney-client relationship and the accused files a request to remove appointed counsel, but the court refuses to do that). It might be also that the law prohibits counsel to do something or instructs counsel to do something that breaches counsel's right to make tactical decisions or gives counsel too short deadlines. I will discuss all of these examples further below. In the United States the examples of the case law of the United States Supreme Court about court's or legislator's interference with counsel's assistance are: a bar on the attorney-client consultation during an overnight trial recess (Geders v. United States[263]), a case where a judge refused to allow defense counsel to make a closing argument (Herring v. New York[264]), a requirement that the accused has to testify first or not at all (Brooks v. Tennessee[265]), and a case where the state's law prevented defense counsel from calling his client as a witness (Ferguson v. Georgia[266]).

It may happen that the period between when counsel is retained or appointed and the court session begins is very short and counsel does not have enough time to prepare the case. In Estonia, although the participation of counsel is mandatory since a presentation of the criminal file, which occurs in the pre-trial stage of the proceedings and before court session there is a preliminary hearing, which gives counsel an opportunity to prepare the case thoroughly, it is still possible that during the proceedings the necessity arises to change counsel and therefore the problem with too little time to prepare may still arise. And even if there is no change of counsel, it might be that appointed or retained counsel has too little time to prepare before the court session, because there is an extensive amount of materials to work through. In Chambers v. Maroney the United

[263] Geders v. United States, 425 U.S. 80 (1976).
[264] Herring v. New York, 422 U.S. 853 (1975).
[265] Brooks v. Tennessee, 406 U.S. 605 (1972).
[266] Ferguson v. Georgia, 365 U.S. 570 (1961).

States Supreme Court stated that the courts should always make every effort to make early appointments of counsel, but it is not a *per se* rule requiring reversal of every conviction following late appointment of counsel.[267] The message of Chambers v. Maroney seems to be that even if counsel is appointed late, the higher court still has to analyze counsel's performance during the trial and in order to annul the judgment of the lower court the higher court must ascertain that counsel's performance was somehow deficient, *e.g.,* he was not familiar with the facts of the case, failed to consult with the accused *etc*.[268] In Morris v. Slappy the United States Supreme Court continued the same path and said that broad discretion must be granted trial courts on matters of continuances. If counsel assured that he was prepared and ready for a trial it cannot be concluded that the denial of a continuance prevented the substituted counsel from being fully prepared for trial.[269] Although the Supreme Court looked in this case into counsel's actions during the proceedings too, it still emphasized the most the fact that counsel himself assured that he was ready for the trial. Basically it seems to be that according to the Supreme Court's standpoint counsel is ineffective only if he declares himself ineffective, which does not make sense, as counsels usually do not want to admit their ineffectiveness. The ECtHR has expressed its opinion about the late appointment too, but according to the ECtHR's opinion counsel's view about his ineffectiveness does not matter. In Sakhnovskiy v. Russia,[270] the accused was able to communicate with the newly-appointed lawyer for fifteen minutes, immediately before the start of the hearing of the Supreme Court, sitting in Moscow. The ECtHR emphasized that, given the complexity and seriousness of the case, the time allowed was clearly not sufficient for the accused to discuss the case with his counsel Ms A.[271] Therefore the Court did not look into counsel's performance or into her opinion about the matter but relied on its own experience and concluded that with so little time counsel was not able to prepare the case thoroughly and adequately. The Court also emphasized that the relationship between the lawyer and his client should be based on mutual trust and understanding. The Court added: "Of course, it is not always possible for the State to facilitate such a relationship: there are inherent time and place constraints for the meetings between the detained

[267] Chambers v. Maroney, 399 U.S. 42 (1970), 399 U.S. 54.

[268] But later in United States v. Cronic the Supreme Court found that "[c]ircumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." United States v. Cronic, 466 U.S. 659–660. There the Court did not consider it important to look in counsel's actions, but into circumstances of the case when it comes to late appointment of counsel.

[269] Morris v. Slappy, 461 U.S. 1 (1983), 461 U.S. 11–12. It could be concluded that even Cronic with its "circumstances of the case" did not change this Supreme Court's opinion as it refers to Morris v. Slappy, 461 U.S. 11–12 in its judgment. See United States v. Cronic, 466 U.S. 662 Fn. 31.

[270] Sakhnovskiy v. Russia. *Application no. 21272/03.* 2 November 2010.

[271] § 103 of the judgment.

person and his lawyer. Moreover, in exceptional circumstances the State may restrict confidential contacts with defence counsel for a person in detention ... Nevertheless, any limitation on relations between clients and lawyers, whether inherent or express, should not thwart the effective legal assistance to which a defendant is entitled. Notwithstanding possible difficulties or restrictions, such is the importance attached to the rights of the defence that the right to effective legal assistance must be respected in all circumstances."[272] Therefore the ECtHR does not look for counsel's opinion in order to decide whether counsel was able to prepare the case or not when a late appointment occurs, which is a reasonable approach in the light of the thought that counsels do not want to admit their ineffectiveness.

The court's instruction to do something or refusal to allow counsel to do something may infringe a defense strategy. This may even not be a court, but some other state authority that interferes. For instance in Moiseyev v. Russia[273] counsel for Mr. Moiseyev was required to seek special permits to visit and confer with him. Permits were valid for one visit only and the lawyers' attempts to have extended their period of validity proved to be unsuccessful. Permits were issued by the authority in charge of the case. Consequently for the entire duration of the criminal proceedings against the applicant visits by the applicant's counsel were conditional on authorization. The ECtHR noted that the need to apply for an individual permit for every visit created considerable practical difficulties in the exercise of the rights of the defense because it claimed a lot of time and effort. In addition, this arrangement put the defense in a position where it depended on the discretion of the prosecution and therefore destroyed the appearance of the equality of arms.[274] In the context of this decision it is difficult to propose a certain standard in order to evaluate whether the accused's right to effective assistance of counsel is violated by a state's action that infringes the defense position. It is a task of the higher courts to ascertain whether state's action prejudiced counsel's independence and strategy, restrained counsel's freedom to exercise defense rights and in accordance with case law of the ECtHR destroyed the appearance of the equality of arms. When the law, not court or other state authorities, is the one that puts counsel in that position, counsel has a right to seek commencement of constitutional review.

In my opinion when it comes to the late appointment or too short deadlines, first it is a task of the higher court to give a meaning to the notions "too late" and "too short". Because every case is different and not all cases are difficult, it might be possible that counsel has enough time to consult the client and prepare the case even if he is appointed only a couple of days before the trial. With more difficult cases it is obvious that it is not possible. With deadlines it is the same: if counsel is instructed to, for instance, compose a short document, the deadline granted to counsel could be very short, but if counsel is instructed to

[272] § 102 of the judgment.
[273] Moiseyev v. Russia. *Application no. 62936/00.* 9 October 2008.
[274] Moiseyev v. Russia, §§ 205 and 207.

write a thorough opinion about a complicated case, he needs a lot more time. Another question is, should the finding "too late" or "too short" compose the ground for annulment of judgment *per se.* In my opinion here it would be reasonable to look into counsel's performance in the proceedings and see, for example, if counsel was badly prepared or not, if the document was thorough or not, *etc*. If the court orders counsel to do something or prohibits counsel to do something and the accused claims that it impaired the defense position, the higher court should also look directly into counsel's performance and decide, whether court's action prevented counsel from fulfilling his duties or not. Therefore the question should not be whose fault was that,[275] but always what was the consequence of it. If the consequence was inadequate or nonfulfillment of one or more duties, the higher court could declare counsel's performance ineffective depending on what duties he did not fulfill. If the accused claims something that is not shown from the evidence, *e.g.,* that counsel had not enough time to consult him, which is not shown from the minutes of the court session, then the higher court should try to answer the question, what would have been reasonable time for reasonable counsel to fulfill the duties that the accused claims he failed to do and therefore make the decision based on its own experience.

The next questions are, what are the limits of interference into the attorney-client relationship for the court (and other institutions) and when should court definitely interfere.

The first subject I will discuss here is appointment of counsel and whether the court (in case of Estonia, the Bar) should take into account the accused's wishes on the matter. First, it has to be mentioned, that the ECtHR has dealt with this subject as well. In Lagerblom v. Sweden[276] Mr. Lagerblom complained that he had not been allowed to be defended by counsel of his own choosing. The court appointed him H., but he had clearly requested that S. be appointed. H. had been unable to perform his duties effectively as defense counsel due to the accused's refusal to co-operate with him and their difficulties in communicating, although this is crucial in planning an effective defense strategy. In addition to that, S. had his office in the same city as H., so there would not have been any increased costs in appointing him as public defense counsel. The ECtHR noted that the right to choose counsel cannot be considered to be absolute and then continued: "It is necessarily subject to certain limitations where free legal aid is concerned. When appointing defence counsel the courts must certainly have regard to the accused's wishes but these can be overridden when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice…"[277] Additionally the Court expressed an opinion that Article 6 paragraph (3) c cannot be interpreted as securing a right

[275] As it was already discussed, it can also be the law that is the reason for counsel's ineffectiveness.
[276] Lagerblom v. Sweden. *Application no. 26891/95.* 14 January 2003.
[277] Lagerblom v. Sweden, § 54.

to have public defense counsel replaced.[278] Then the ECtHR solved the case before it. According to the Court's opinion at the time the accused sought replacement of counsel, H. had been his counsel for about two and a half years and therefore had already undertaken a certain amount of work. Consequently, it is clear that the proceedings had reached a stage where the requested replacement would have caused a certain amount of inconvenience and entailed additional costs. The ECtHR emphasized that it "…does not find it unreasonable, in view of the general desirability of limiting the total costs of legal aid, that national authorities take a restrictive approach to requests to replace public defence counsel once they have been assigned to a case and have undertaken certain activities."[279] Moreover, there is no evidence in the case that H. was unable to provide the accused with effective legal assistance or that he lacked confidence in H.[280] Therefore, the accused's wish is important when it comes to choosing appointed counsel, but interests of justice are important as well and state's courts have to balance between those two values, especially when change of initially appointed counsel comes under the discussion.

In Morris v. Slappy the Supreme Court of the United States agreed with the lower court that the accused does not have "an unqualified right to the appointment of counsel of his own choosing".[281] Although the United States Supreme Court did not recognize the accused's right to choose appointed counsel in this case, Justice Brennan, the Justice of the United States Supreme Court wrote in his concurrence: "But the considerations that may preclude recognition of an indigent defendant's right to choose his own counsel, such as the State's interest in economy and efficiency … should not preclude recognition of an indigent defendant's interest in continued representation by an appointed attorney with whom he has developed a relationship of trust and confidence. To recognize this interest and to afford it some protection is not necessarily to afford it absolute protection. If a particular jurisdiction has sufficiently important interests, such as the structure of its public defender's office, which make continued representation by a particular attorney impractical, the trial judge may take this into account in balancing the defendant's interest in continued representation against the public's interests. The fact that such interests might exist in some jurisdictions, however, is not a sufficient reason to refuse to recognize that an indigent defendant has an important interest in a relationship that he might develop with his appointed attorney. There is no need to decide on this record which state interests might be sufficient to overcome an indigent defendant's interest in continued representation by a particular attorney with whom he has developed a relationship."[282] The theorists have also argued in the United States that

[278] § 55 of the judgment.
[279] § 59 of the judgment.
[280] § 60 of the judgment.
[281] Morris v. Slappy, 461 U.S. 16.
[282] *Ibid.*, 461 U.S. 29 Note 5.

although the choice of a legal aid lawyer is ultimately for the state, the wishes of the accused must be taken into account.[283]

In Estonian criminal proceedings, an accused who has not chosen defense counsel himself and in whose criminal matter the participation of defense counsel is required by law or who applies for the participation of defense counsel may receive state legal aid, regardless of his financial situation (§ 6 (2) of the State Legal Aid Act[284] (hereinafter SLAA); CCP, § 43 (2) 1) and 2)). Regardless of the accused's financial situation, counsel is also appointed if counsel chosen by a person cannot assume the duties of defense within twelve hours as of the detention of the person as a suspect or, in other cases, within twenty-four hours as of entry into an agreement to defend the suspect or the accused or summoning to the body conducting the proceedings and counsel has not appointed substitute counsel for himself (CCP, § 43 (2) 3)) or if counsel is not able to appear to the court in case a criminal matter is heard in general procedure and counsel has not appointed substitute counsel for himself (CCP, § 43 (2) 4)).[285] Counsel is appointed by the Estonian Bar Association upon receipt of an application from a court and the court itself does not have the right to agree with an advocate upon the provision of state legal aid or to appoint an advocate who provides state legal aid (SLAA, § 18 (1) and (2)). Before the 1st January 2010 counsel was appointed by the body conducting the proceedings, including the court. This caused quite many problems: for instance counsel who was convenient or likable for the body conducting the proceedings was

[283] Harris & et al, *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights*, *p*. 319.

[284] State Legal Aid Act. Passed 28 June 2004. Entered into force 1 March 2005. Last amended 24.03.2011 RT I, 14.03.2011, 16.

[285] The problem, which § 43 (2) 4) of the CCP that entered into force on the 1st of September 2011 tries to solve, is appointing counsel to the accused who already has counsel, but whose counsel is not able to appear to the court session.

The Estonian Supreme Court dealt with that matter before § 43 (2) 4) of the CCP entered into force. In court case no. 3-1-1-120-06 the accused was represented by the appointed counsel in the court of second instance not by the retained counsel he had chosen himself before. The Supreme Court of Estonia denied violation of defense rights and explained as follows. The participation of counsel in a court proceeding is mandatory (CCP, § 45 (4)). Counsel can be either retained or appointed. The circuit court notified counsel whom the accused had chosen of the time and place of the court session, but counsel informed the court twice that he is not able to appear, because he has to participate in another court session. He did not appoint substitute counsel and he did not inform the court of when it is possible for him to appear to the court. Therefore the circuit court was in accordance with § 43 (2) 3) of the CCP (§ 43 (2) 4) of the CCP had not entered into force yet) justified appointment of new counsel to the accused. The Supreme Court also pointed out that the accused did not request the removal of counsel and did not request to be represented by counsel chosen by him. Judgment of the Criminal Chamber of the Supreme Court, 16 April 2007, court case no. 3-1-1-120-06, p. 12. Online. Available: http://www.nc.ee/?id=11&tekst=222499052, 29 April 2011.

appointed (this problem arose especially with prosecutors).[286] To avoid these kinds of problems counsel is now appointed by the Bar Association. While on the one hand this ensures that the body conducting the proceedings cannot appoint an advocate who will make its job easy, it also leaves no possibility for the courts to exclude advocates who are known to provide ineffective assistance, which is the main shortcoming of the new system.[287]

The advocate appointed by the Bar Association assumes the obligation to immediately provide state legal aid and to organize his activity such that it would be possible for him to participate in procedural acts in time (SLAA, § 18 (1), second sentence). In order to guarantee that the accused will know as soon as possible that counsel is appointed and has an opportunity to contact him, § 43 (3) of the CCP provides that the body conducting the proceedings has an obligation to immediately notify the accused of the appointment of counsel and submit him counsel's details.

The ECtHR has weighed the latter issue in Sannino v. Italy.[288] Mr. Sannino pointed out that, when the lawyer he had chosen, Mr. G., withdrew from the case, the Naples District Court officially appointed a defense lawyer, Mr. B. The Court did not notify the accused or Mr. B of the appointment and therefore, the accused did not find out that Mr. B. had been appointed to represent him until after the trial had ended. As a result of Mr. B.'s failure to appear, the court had appointed a different person at each hearing to replace Mr. B. Those lawyers had had no knowledge of the case, nor had they contacted the accused, who, on account of the lack of information from the court, had not even known who was representing him. The ECtHR first noted that although the replacement lawyers did not have any knowledge of the facts of the case, they did not request an adjournment in order to acquaint themselves with their client's case.[289] The accused never informed the authorities of the difficulties he had been having preparing his defense and failed to get in touch with his appointed lawyers to seek clarification from them about the conduct of the proceedings and the defense strategy. But still the Court decided that the accused's conduct did not free the authorities from their obligation to take steps to guarantee the effectiveness of the defense, because the above-mentioned shortcomings of the court-appointed lawyers were manifest, which put the onus on the domestic authorities to intervene.[290] Because the court did not take any measures to guarantee the accused an effective defense and representation, the ECtHR concluded a violation of Article 6 of the Convention.[291]

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[286] The Ministry of Justice. Availability and Quality of Appointed Counsel in Criminal Proceedings.
[287] Soo, *An Individual's Right to the Effective Assistance of Counsel Versus the Independence of Counsel: What can the Estonian Courts do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?* 252, p. 253.
[288] Sannino v. Italy. *Application no. 30961/03.* 27 April 2006.
[289] § 50 of the judgment.
[290] § 51 of the judgment.
[291] § 52 of the judgment.

In Estonia upon agreement of an advocate providing state legal aid and the recipient of state legal aid, legal services in the same matter may be provided to the person by another advocate who grants his consent for the transfer of the obligation to provide state legal aid to him. A new provider of state legal aid shall be appointed on the basis of the application of the court, Prosecutor's Office or investigative body (SLAA, § 20 (1)). Consequently, although the Code of Criminal Procedure does not impose the obligation to consult with the accused regarding the choice of counsel prior to appointment of counsel, according to the State Legal Aid Act it is possible to consider the accused's wishes after counsel is appointed: this counsel can be substituted with a new, more suitable counsel in the accused's point of view if new counsel agrees with that. The word "may" indicates that there is still possibility to refuse, if refusal is justified. The question then arises as to what constitutes special circumstances justifying the refusal to follow the wishes of the accused. Such reason could be, for example, that former counsel has already spent lots of time to get familiar with the case, like it was in Lagerblom v. Sweden. But definitely the court should give a reason for its judgment as the ECtHR has recognized the accused's right to choose appointed counsel. Therefore, one of the bases for annulment of a lower court's judgment should be that the court did not weigh the right of the accused to choose counsel and the interests of justice while refusing to file an application to the Bar to appoint the counsel that the accused requested (see *Standard 12.1*).[292]

The next question is whether a court is allowed to interfere into the accused's choice of retained counsel. If counsel is an advocate and he is not suspended from professional activities, there is no formal ground for the court not to allow counsel to enter the proceedings. Of course, ground for removal may arise afterwards, but this is another subject. If counsel is not an advocate the court has to ascertain that he meets the educational requirements and verify whether counsel meets other requirements that the court considers necessary, *e.g.,* whenever possible, the court should try to ascertain if that person has knowledge in criminal law and procedure. If in court's opinion the person meets the requirements, it allows the person to participate in the criminal proceedings as counsel, and if not, it denies it. If the court does not allow the person to enter the proceedings as counsel without good cause, it should form a basis for annulment of court judgment afterwards, because the accused's right to choose counsel, a right that comes from the European Convention on Human Rights, has been violated (see *Standard 12.2*).

Here two more questions arise. First, how many counsels should the court allow for a person and second, should the court appoint additional counsel to the accused, if it deems it necessary. These questions arise also if the accused has appointed counsel(s).

According to § 42 (2) of the CCP, a person being defended may, upon agreement, have up to three counsels. In ordinary criminal cases, an excessive

[292] Hereinafter I refer to Standards I propose in chapter 6 of this thesis.

number of counsels may lead to technical difficulties and could even interfere with the successful course of the trial[293] and therefore it is necessary to limit the number of counsels. In Croissant v. Germany the accused had two appointed counsels he had chosen himself and the third counsel was appointed to him against his wishes. He claimed during the criminal proceedings and also to the ECtHR that he did not have confidence in the third counsel. Therefore he claimed that by appointing the third counsel, Mr. Hauser, his right to choose counsel was violated. The judgment of the ECtHR formed a basis for a principle that the ECtHR has repeated in numerous cases: a principle that the right to choose counsel is not absolute, because it is subject to certain limitations where free legal aid is concerned and also where interests of justice require that the accused be defended by counsel appointed by the state's court.[294] From Court's judgment in Croissant v. Germany it is possible to conclude that even if the accused already has counsel(s), either they are appointed or chosen by the accused himself, the court is still allowed to appoint an additional one, if the interests of justice so require. Of course, it can be argued that if the accused has retained counsel, the court may oblige him to retain an extra one, but it would mean that the accused is obliged to pay more in a situation where he himself does not have a wish to retain an additional lawyer and therefore the court should be allowed to appoint additional counsel to the person who already has retained counsel if it finds it necessary.

Although § 42 (2) of the CCP provides that a person may have up to three lawyers as retained counsel, it would be reasonable and also compatible with the principle of equal treatment to apply the same limitation on the number of appointed counsels. Neither the Code of Criminal Procedure nor the State Legal Aid Act indicates that more than one advocate could be appointed as counsel. In my opinion there might nevertheless be criminal cases that are so complex that the appointment of one advocate as counsel would not guarantee the right to the assistance of counsel to the accused. In such cases, it should be possible to appoint several advocates as counsel, and even against the accused's wishes, like it was in Croissant v. Germany.[295] As the complaint of Mr. Croissant in Croissant v. Germany was directed against the order requiring him to reimburse to the state the fees of the three counsel officially appointed by the Stuttgart Regional Court to defend him, namely Mr. Baier and Mr. Kempf, at his request, and Mr. Hauser, against his wishes, he claimed that he was strongly against the appointment of the third lawyer. According to the judgment of the ECtHR, the appointment of more than one counsel is not of itself inconsistent with the European Convention on Human Rights and may be necessary in specific cases in the interests of justice. Complexity of the case may be one reason to appoint

[293] Trechsel, *Human Rights in Criminal Proceedings,* p. 268.
[294] Croissant v. Germany, § 29.
[295] Soo, *An Individual's Right to the Effective Assistance of Counsel Versus the Independence of Counsel: What can the Estonian Courts do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?* 252, p. 256.

more than one counsel. The Court emphasized that before doing that a court should ask the accused's opinion.[296] Still, as it comes from the Court's opinion, it does not have to act in accordance with it if the interests of justice so require.

I do not see how appointing additional counsel without the accused's consent and a good reason could form a basis for annulment of the lower court's judgment unless the accused can show that it precluded other counsels from fulfilling their duties. Otherwise the accused has counsel who he has confidence in (except of course from the one he claims he did not want to be appointed) and therefore there is no reason to conclude ineffective defense. Nevertheless, I do believe that refusing to appoint additional counsel if the accused insists and that appointment of additional counsel would be in the interests of justice (*e.g.,* because of the complexity of the case), forms a basis for annulment of lower court's judgment as the accused is left without proper defense (see *Standard 12.3*). Here it does not matter if the original counsel is retained or appointed as the accused may not have additional resources to retain extra counsel, although it would be necessary for some reason.

Another court's interference into the attorney-client relationship in addition to prescribing the accused, which counsel and how many counsels should represent him, is interference after counsel has already entered the proceedings, *i.e.* removal of counsel. Grounds for removal of counsel I will discuss thoroughly in chapter four, but here it should be mentioned that if counsel is removed without grounds, it should form a basis for annulment of the court's judgment *per se,* as unjustified removal is the form of interference that most affects the attorney-client relationship, because with that counsel loses the right to participate in the proceedings and the accused is left without the help of a person with whom he may already have developed a trustful relationship (see *Standard 12.4*).

In addition to a court's failure to respect the attorney-client relationship, failure to take into account the accused wishes while this relationship is formed and failure not to interfere into it while it has already been formed, there is a court's failure to act while there is counsel in the proceedings, *e.g.,* if the accused requests removal of that counsel because of counsel's ineffectiveness, which may manifest in non-fulfillment of certain duties or maybe even in complete breakdown of the attorney-client relationship. Because these are failures related to counsel more than they are related to court, I will discuss them in the fourth subsection of this chapter.

2. Conflict of Interest

Prerequisite for counsel's ability to exercise his duties zealously and defend the accused with every means that is not against the law is that counsel does not have an interest, which may be antagonistic to the interests of the accused.

[296]Croissant v. Germany, §§ 27 and 28.

Consequently, the Estonian Code of Criminal Procedure contains provisions that concern counsel's conflict of interests. Although the ECtHR has not discussed this problem, this is the subject that has been widely analyzed in the United States judicial practice, especially by the judicial practice of the Supreme Court, and therefore the component of the standard of ineffective defense counsel that is related to possible conflict of interests could be worked out with taking the United States as an example and without referring to ECtHR position of the matter.

Pursuant to § 54 clauses 1) and 2) and § 55 (1) of the CCP a person shall not act as counsel and if he does, the court shall remove him by a ruling on its own initiative or at the request of a party to the court proceeding, if he is or has been a subject to the criminal proceedings[297] on another basis in the same criminal matter or if he in the same or related criminal matter, has previously defended or represented another person whose interests are in conflict with the interests of the person to be defended. Article 42 (3) of the CCP provides that counsel may defend several persons if the interests of the persons are not in conflict. List in the § 54 of the CCP is exhaustive, which means that the court is not allowed to remove counsel if any other possible conflict of interest arises.

The notion "conflict of interest" for advocates is also explained in the Bar Association Act and in the Code of Conduct of the Estonian Bar Association, but there the conflict of interest seems to have wider meaning. This raises an interesting question. Reasons that courts find to be enough to be sufficient for removal of counsel are not basis for removal and therefore do not justify the removal of counsel by the court unless they are provided for in the Code of Criminal Procedure. This means that even if rules stipulated for members of the Bar or even by the Bar itself prohibit the advocate to act as counsel, the court still cannot remove him, unless the same basis for removal is provided for in the Code of Criminal Procedure.

Pursuant to § 44 (4) of the BAA an advocate shall not provide legal services if he provides or has provided legal services in the same matter to a person whose interests are contrary to those of the client. This is a provision similar to § 54 clause 2 of the CCP, although § 54 clause 2 does not mention current clients, which § 42 (3) of CCP actually does, even though it is not a ground for removal. Subsection § 44 (4) of the BAA on the other hand contains only the same, not related matter. According to the first sentence of Article 8 (1) of the Code of Conduct of the Estonian Bar Association an advocate must always act in the best interest of his client and must put those interests before his own interests or those of third parties, including the interests of fellow members of the legal profession.[298] This refers to the fact that interests that may become in

[297] According to Chapter 2 of the CCP persons subject to the criminal proceeding are bodies conducting the proceedings (courts, Prosecutors' Offices and investigative bodies; CCP, § 16 (1)) and participants in the proceedings (the suspect or the accused, his or her counsel, the victim, the civil defendant and the third party (CCP, § 16 (2)).

[298] Also provided for in Article 2.7 of the Code of Conduct for European Lawyers.

conflict with the accused's interest may be something else than it is described in § 54 of the CCP. In addition to that the Code of Conduct provides an interesting exception for advocates, which means that even if there is a conflict of interest the advocate is still allowed to represent a person under special circumstances. As Article 13 (1) of the Code provides: "An advocate may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict between the interests of those clients. An advocate shall not provide legal services to a client if there exist circumstances that affect or may affect the advocate's ability to observe the requirements set out in Article 8 (1) of this Code and act only in the interests of the client (conflict of interest), unless the attorney has notified his client of such circumstances and the client does not desist from demanding provision of legal services by the advocate."[299] Should there arise any dispute in that matter later on, the advocate shall not render legal services to any of the clients in the same matter (Article 13 (3) of the Code). The principle that the advocate may represent the client in case of conflict of interest if he notifies the client, but the client still insists on receiving the assistance from the certain advocate, does not, however apply for criminal proceedings, because the Code of Criminal Procedure does not make such an exception. The same is with the Code of Conduct for European Lawyers. According to this Code a lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients (Article 3.2.1. of the Code). A lawyer must cease to act for both or all of the clients concerned when a conflict of interest arises between those clients and also whenever there is a risk of a breach of confidence or where the lawyer's independence may be impaired (Article 3.2.2. of the Code).

Because the state and therefore bodies conducting a proceeding, including the courts, have a duty to guarantee the accused's right to defense, it can be concluded that in case of conflict of interest, the court should remove counsel from the proceedings even if the accused insists that counsel continues to represent him. Subsection § 55 (1) that provides procedural rules for removal of counsel in case of conflict of interest takes this into account and does not require the consent of the accused. It is highly probable that counsel is not able to represent conflicting interests equally effectively.[300] Consequently, the right to defense is not only a matter between the accused and counsel, but also serves the right to fair trial and society's expectation that the procedural rights are guaranteed in criminal proceedings.[301] For instance in the United States the

[299] According to Article 13 (3) the similar principle applies to a multiple representation.

[300] Even if counsel claims that the conflict does not affect his performance, he should be still removed in order to guarantee that the accused receives adequate and unbiased assistance, because another interest may either influence counsel subconsciously or even if he thinks that at some specific point of trial it does not affect him, it may start to have an effect on him afterwards.

[301] Court Ruling of the Criminal Chamber of the Supreme Court, 29 January 2002, court case no. 3-1-1-3-02, p. 7.2. and 7.3.

Supreme Court held in Wheat v. United States, that a trial judge has discretion to disqualify defense counsel, even over the accused's objection, if a serious possibility for a conflict of interest exists.[302]

For the same reason, if there is a possibility of conflict of interest and the court is not able to ascertain the conflicts of interest with absolute certainty, every suspicion should be interpreted towards the conclusion that the conflict exists. Most certainly should this principle apply if counsel has previously defended or is defending another person in the same or in the related matter and the court has to decide whether the interests of this person are in conflict with the interests of the accused. According to the standpoint of the American Bar Association, the potential for conflicts of interest in representing multiple accused persons is so grave that ordinarily defense counsel should decline to act for more than one of several accused persons except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop or in case there is a possible conflict of interest, that common representation will be advantageous to each of the accused persons represented and, in addition to that in both cases, that all persons being defended give an informed consent to such multiple representation, which is made a matter of judicial record. In determining the presence of consent by accused persons, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the accused persons fully comprehend the difficulties that defense counsel sometimes encounters in defending multiple clients.[303] Here I most certainly agree with the approach that the judge should be always the one who explains to the co-defendants the dangers of multiple representation.

On the above mentioned reasons the ground for removal of counsel in case of conflict of interests in criminal proceedings should in my opinion be as follows (see *Standard 2*).

1. If counsel is or has been a subject to criminal proceedings on another basis in the same criminal matter (provided for in the clause § 54 1) of the CCP).
2. If counsel previously defended or represented another person whose interests are in conflict or may be in conflict with the interests of the person to be defended (provided for in the clause § 54 2) of the CCP, except for the fact that clause § 54 2) of the CCP demands an actual conflict of interest, but I propose that it would be necessary in order to protect the accused's rights to remove counsel even if possibility of conflict arises).
3. Counsel's own interests are in conflict or may be in conflict with the accused's interests (provided for in the Article 8 (1) of the Code of Conduct, but should be added to the Code of Criminal Procedure as there might be situations in which counsel is for some reason, *e.g.,* because of a financial interest, interested in conviction of the accused).

[302] Wheat v. United States, 486 U.S. 153 (1988).
[303] Standard 4-3.5 (c) of the ABA Standards.

4. There is a conflict of interest or possible conflict of interest between the accused's interests and interests of the third party related to counsel (provided for in Article 8 (1) of the Code of Conduct, but should be added to the Code of Criminal Procedure as, for examples when counsel is a relative of the victim, which means that he might be interested in conviction of the accused, is not regulated in the Code of Criminal Procedure).
5. In case of multiple representation there is a conflict or may be conflict between the interests of persons being defended (provided for in § 42 (3) of the CCP, but not as a ground for removal).

Further I suggest that in the case of multiple representation counsel may defend the accused if there is a possible conflict of interest only if it is advantageous to the accused persons represented and all of them give their informed consent in writing. The same is provided for in the ABA Standards. This means that whenever the court sees the possibility of conflict in case of multiple representation, but it is not absolutely sure that the conflict exists, it should consider all circumstances of the case and if it finds multiple representation advantageous for the accused persons (*e.g.,* counsel has thorough knowledge of the law concerning the criminal matter and there is no other counsel that is familiar with that certain area of law) inform the accused persons immediately and ask their consent to continue with the same counsel. However, I would exclude the opportunity for multiple representation if real conflict of interest arises, because even if the accused persons would agree with counsel defending them all, it does not change the fact that counsel has real difficulties with representing them properly as it is almost impossible for a person to protect two conflicting interests at the same time. If there is not even possibility for conflict of interest, I do not suggest that courts should ask accused persons' consent to be represented by the same lawyer (like the American Bar Association suggests), because accused persons' rights are not at stake. However, it does not mean that the courts should not talk with the accused persons and notify them about the good sides and bad sides of multiple representation.

In addition to questions related to conflicts of interest as a ground for removal of counsel, other questions are: should it form a ground for annulment of judgment of the lower court in the appeal proceedings and what elements is the accused required to prove. The case law of the United States Supreme Court could be used as an example here.

There are three major cases in the United States, which make up the Supreme Court's conflict-of-interest jurisprudence: Holloway v. Arkansas, Cuyler v. Sullivan,[304] and Mickens v. Taylor.[305] These cases show that trial judges have

[304] See more about Cuyler: Mark D'Alelio, *Degree of Separation: Should a Non-Participating Lawyer's Conflict Taint the Representation of Other Unconflicted Lawyers Rendering their Representation Constitutionally Ineffective, the Note,* 37 Suffolk U. L. Rev. 97 (2004), p. 120.
[305] Mickens v. Taylor, 535 U.S. 162 (2002).

a duty to protect the right to counsel by inquiring into conflicts of interest of which they are or should be aware, although the burden of proof may vary when the trial court fails to inquire.[306]

In Holloway v. Arkansas, the Court held that when the trial judge is informed of a potential conflict through an objection, a failure to inquire will result in presumed prejudice. According to Court the trial judge's failure either to appoint separate counsel or to take adequate steps to ascertain whether the risk of a conflict of interest was too remote to warrant separate counsel deprived accused persons of the guarantee of the assistance of counsel. The Court cited Glasser v. United States and said that the trial court has to refrain from insisting or even suggesting that counsel undertake to concurrently represent interests that might conflict, when the possibility of inconsistent interests is brought to the court's attention by formal objections, motions, and counsel's representations.[307]

In Cuyler v. Sullivan, the Court held that when the trial court is reasonably unaware of any potential conflict, prejudice will still be presumed but the accused must "…demonstrate that an actual conflict of interest adversely affected his lawyer's performance."[308] The Court stressed that unless the trial court knows or reasonably should know that a particular conflict exists, the court itself need not initiate an inquiry into the propriety of multiple representation. In addition to that the Court held that the possibility of a conflict of interest is insufficient to impugn a criminal conviction. In order to establish a violation of the sixth amendment of the Constitution, an accused must show that it adversely affected his lawyer's performance.[309]

In Mickens v. Taylor, the Court held that when the trial court knows, or reasonably should know, of a potential conflict from something other than an objection by defense counsel, and fails to inquire, the burden is the same as in Cuyler v. Sullivan, when there is no reasonable basis for the trial judge to be aware of a threat to the accused's Sixth Amendment rights. The Court explained in Mickens that Holloway v. Arkansas creates an automatic reversal rule only where defense counsel is forced to represent accused persons over his timely objection, unless the trial court has determined that there is no conflict. Absent objection, an accused must demonstrate that "…a conflict of interest actually affected the adequacy of his representation."[310] Therefore, the Supreme Court presumes that only when there is an objection, there is an actual conflict.

So, in the United States what the accused has to prove in the case of conflicts of interest to the higher court depends mostly on his counsel's ability to protect his client's interests and bring any possible conflicts to the attention of the

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[306] Galia Benson-Amram, *Protecting the Integrity of the Court: Trial Court Responsibility for Preventing Ineffective Assistance of Counsel in Criminal Cases,* 29 N. Y. U. Rev. L. & Soc. Change 425 (2004–2005), p. 443.
[307] Holloway v. Arkansas, 4–5 U. S. 481–487.
[308] Cuyler v. Sullivan, 446 U.S. 348.
[309] *Ibid.*, 446 U.S. 348–350.
[310] Mickens v. Taylor, 535 U.S. 194.

court.[311] Because defense counsels are presumed capable of bringing any threat of conflict of interest to the attention of the court, the United States Supreme Court believes that if this objection is not made, the conflict of interest does not exist.[312]

Therefore Mickens creates the sad irony that an accused who has less effective assistance of counsel will have a heavier burden in proving ineffective assistance of counsel than an accused who has more effective assistance of counsel: the accused with the more effective conflicted counsel has only to show that the conflict existed, while the accused with the less effective conflicted counsel has to show also that the conflict adversely effected his representation.[313] However the positive side of the United States Supreme Court judicial practice is that while the burden of proof depends on whether counsel objected or not, the court's duty to inquire does not, because the duty to inquire does not apply only to cases where defense counsel objected. Therefore, the trial judge must also inquire when there is a reason for him to be aware of a potential conflict of interest, even if there is no objection.[314] Here Justice Souter asks: "But why should an objection matter when even without an objection the judge knew or should have known of the risk and was therefore obliged to enquire further?"[315] Then there is no reason to demand that the potential conflict is brought to court's attention: "An objection would have been superfluous, since it would only have brought her own knowledge to her attention."[316]

In my opinion the annulment of a court decision in case of conflict of interest should not depend on whether counsel or the accused objected during the trial or not. Because the conflict of interest refrains counsel from fulfilling his duties thoroughly and advising the accused on every possible aspect of the case, the question for the higher courts should be whether the conflict of interest existed or not. If there was a conflict of interest, the accused should have an opportunity for new proceedings because he had ineffective assistance in the first proceedings and if not, a ground for the annulment of the judgment does not exist. Because of the principle of finality and need to save resources, I would be a little bit more modest here with interpreting every suspicion towards the conclusion that conflict existed: the reversal should be granted for cases where the conflict really existed. But what I am strongly against is the requirement for the accused to show that a conflict of interest had an effect on counsel's performance. First, this is something that is almost impossible to

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[311] Mickens v. Taylor, 535 U.S. 456.
[312] *Ibid*., 535 U.S. 456.
[313] John Capone, *Facilitating Fairness: The Judge's Role in the Sixth Amendment Right to Effective Counsel Supreme Court Review,* 93 J. Crim. L. & Criminology 881 (2002–2003), pp. 911–912.
[314] Benson-Amram, *Protecting the Integrity of the Court: Trial Court Responsibility for Preventing Ineffective Assistance of Counsel in Criminal Cases,* 425, p. 449.
[315] Mickens v. Taylor, 535 U.S. 191, Justice Souter, dissenting.
[316] Capone, *Facilitating Fairness: The Judge's Role in the Sixth Amendment Right to Effective Counsel Supreme Court Review,* 881, p. 910.

prove. Second, the conflict of interest always affects the person's performance, which is why it is considered something that is a ground for removal in the criminal proceedings. The conflict of interest means that counsel has to represent two interests at the same time. The word "conflict" means that these interests are adversarial. Consequently, even if counsel tries to represent the accused as diligently as possible, his performance will be still influenced by the fact that there is another interest in his mind. Therefore actual conflicts of interest in my opinion means that there is another person who is in connection with counsel (even if it is counsel himself) whose interests are in conflict with the accused's interests, not that in the result of this conflict counsel did something he would not have done when adversary interests would not have existed (see *Standard 8.4*).

3. Violation of the Principle of Continuity

In Estonian criminal proceedings the principle of consistency is highly valued when it comes to appointment of counsel. According to § 45 (5) of the CCP appointed counsel is required to participate in a criminal proceeding until the end of the review of the criminal matter by way of cassation procedure and he may refuse to assume the duties of defense on his own initiative or relinquish the duties of defense assumed by him on his own initiative only on the grounds provided in the Code of Criminal Procedure. Retained counsel acts in accordance with the agreement between him and the accused, but in § 45 (7) and (8) of the CCP it is specified that the performance of duties of defense by retained counsel in a county court or in a circuit court includes correspondingly drawing up an appeal against the decision or ruling of the county court or drawing up an appeal in cassation or appeal against the decision of the circuit court, if the accused so wishes and he may refuse to assume the duties of defense on own initiative or relinquish the duties of defense assumed by him on own initiative only on the grounds same as appointed counsel (CCP, § 45 (9)).

Although the right of the accused to choose his appointed counsel is generally not recognized,[317] because of the importance of counsel's role, the criminal system should guarantee the accused the right to continuity of representation, which § 45 (5) of the CCP tries to do. The accused's involve-

[317] Wayne D. Holly, *Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent,* 64 Brook. L. Rev. 181 (1998), p. 199. In The United States three primary reasons for denying the accused's right to choose appointed counsel emerge: the judicial trade-governmental paternalism (judges know local bar and therefore are preferred persons to appoint counsels to represent the accused), administrative efficiency (judges are able to divide cases equally), and administrative convenience (no need to trouble court with obligation to ask the accused's consent, because it is not provided by the law). *Ibid*., pp. 201, 202 and 211. These reasons could be applied to Estonian criminal system also, although it should be taken into account that in Estonia the Bar Association appoints counsels, not courts.

ment at trial depends mostly on counsel and therefore the accused should have the right that the initially appointed counsel continue to represent him and this right can be overcome only under limited circumstances, *e.g.,* only if there is a justification for counsel for relinquishing his duties (CCP, § 46), the accused agrees to the change (SLAA, § 20 (1)) or if the court finds a sufficient countervailing interest like an absolute breakdown in the relationship between the accused and the defense counsel, there is a conflict of interest or circumstances exist that refer to any other counsel's ineffectiveness.[318] In addition to that it may be that something happens to counsel, which prevents him from participating in the proceedings in future (SLAA, § 20 (3)).[319]

If the principle of continuity is violated, it most certainly does not constitute ineffectiveness of counsel *per se:* in addition to that the accused has to show that his new counsel did not fulfill his duties. One thing is absolutely sure: if the new advocate is appointed and court does not provide him with sufficient time to prepare the case, rendering the representation ineffective, the accused's right to effective assistance is violated.[320] If counsel changes during the proceedings, additional serious questions arise. Should the proceedings be repeated (as is possible in Germany[321]) or should new counsel continue from where everything was left when former counsel left the proceedings? If some witnesses have been already questioned, it is obvious that new counsel will not get a direct impression of their testimony, even if he reads the minutes of a court session. This could mean that counsel loses an important opportunity to claim that the prosecutor's witness was not reliable or he does not have a chance to ask further questions from the defense witness, although he has noticed that there are subjects left untouched by former counsel. Therefore new counsel should be allowed to request at least repetitive questioning of witnesses he considers necessary in order to ask questions he wants to ask from the defense witness or receive an impression of the prosecutor's witness's reliability. In Estonia the possibility of repetition of questioning a witness is not provided for in the Code of Criminal Procedure and by the judicial practice of the Supreme Court of Estonia, but this opportunity should not be discarded, because it allows new counsel to build his case according to his own strategy, not by the strategy that was worked out (or was not worked out) by the former colleague who is not in the proceedings anymore.

[318] Anne Bowen Poulin, *Strengthening the Criminal Defendant's Right to Counsel,* 28 Cardozo L. Rev. 1213 (2006–2007), pp. 1249, 1252, 1256 and 1260–1261.
[319] I will discuss the different aspects of change of counsel thoroughly in subsection 4.1.4 of this thesis.
[320] Poulin, *Strengthening the Criminal Defendant's Right to Counsel,* 1213, p. 1252.
[321] The Federal Court of Justice in Germany has emphasized this option in court case BGH 1 StR 537/99, 2 February 2000.

4. Failure of Counsel to Exercise the Skill of an "Effective" Lawyer: Types of Ineffectiveness Arising from this Failure

4.1 Counsel's Duties Generally

Chronologically, when counsel enters the criminal proceedings, his first duty is to advise the client of his rights and then inform himself about the facts of the case, because otherwise he would not know how to approach the case; inform himself about relevant law; form the strategy and weigh what tactical decision has to be taken. In order to become acquainted with the facts of the case, counsel must talk to the accused, maybe ask some questions from witnesses, and when the prosecutor is ready to give counsel the copy of the criminal file, counsel has to examine the file as well. When counsel has informed himself about the facts of the case, his task is to evaluate the relevant law; formulate a theory of the case and possible strategy; determine the scope of the investigation, *e.g.,* compose a list of evidence he finds necessary to present to the court; determine what if any pretrial motions to make; draft, file, and litigate those motions; determine whether and if so how to plea bargain, and, if no bargain results, determine how to proceed on trial. In addition to that counsel has to weigh the options to conduct the case in other simplified procedures. If there is a trial in general proceedings, counsel must decide before the court session whether to call witnesses or not; give an opening statement; determine how and to what extent to conduct cross-examination; determine what trial motions to make and when to object; decide what charges (and punishment) to request and sum up.[322] At all times defense counsel should avoid unnecessary delay in the disposition of cases and should be punctual in attendance of court and in the submission of all motions, briefs, and other papers.[323]

Another important aspect of counsel's duties that has to be discussed here is counsel's ability to plan his time: if counsel is proficient in that, he is able to prepare the case thoroughly, if not, counsel will have problems providing a proper performance. In order to avoid a serious time-deficit, counsel should not accept too many cases. There is always the question about how much work is too much. It is clear that defense counsel should not carry a workload that interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations.[324] According to Article 12 (4) of the Code of Conduct of the Estonian Bar Association an advocate shall not accept an assignment unless he can discharge those instructions promptly having regard to the

[322] See also Lissa Griffin, *Right to Effective Assistance of Appellate Counsel, the,* 97 W. Va. L. Rev. 1 (1994–1995), p. 32.
[323] Standard 4–1.3 (b) of the ABA Standards.
[324] Standard 4–1.3 (e) of the ABA Standards.

pressure of other work.[325] But those provisions still do not answer the question how much is too much? In the Code of Criminal Procedure this problem is solved by giving counsel a timeframe, during which he has to participate in the court session. Namely, since the 1st of September 2011 the Code of Criminal Procedure provides that counsel has to refuse to assume the duties of defense in a criminal matter conducted pursuant to the general procedure or relinquish the duties of defense assumed by him no later than in a preliminary hearing if counsel is not able to participate in a court proceeding within three months after the preliminary hearing (CCP, § 46 (1^1)). In case counsel is already in the proceedings and he lacks time, there is an option to appoint new counsel (counsel is appointed if counsel chosen by a person cannot assume the duties of defense within twelve hours as of the detention of the person as a suspect or, in other cases, within twenty-four hours as of entry into an agreement to defend the suspect or the accused or summoning to the body conducting the proceedings and counsel has not appointed substitute counsel for himself (CCP, § 43 (2) 3)) or if counsel is not able to appear to the court in case a criminal matter is heard in general procedure and counsel has not appointed substitute counsel for himself (CCP, § 43 (2) 4))). In addition, court has competence to ascertain whether counsel has prepared the case or not (according to § 274 (4) of the CCP if counsel is not familiar with the criminal matter, the court may adjourn the court session for up to ten days), as non-preparation is usually the main indicator of an excessive workload.

In order to fulfill his duties effectively, counsel has to be present, fully aware of the facts and relevant law, diligent, sober and in good health, have a good and trustful relationship with the accused and provide him with the necessary advice and information, and what is also very important, get involved with the defense already in the pre-trial stage, not start to prepare shortly before the trial. All these duties will be discussed further below. As one of the goals of my thesis is to work out a standard for conduct of counsel in criminal proceedings for the courts, I will only analyze those duties counsel has at the pre-trial stage of the proceedings that have an effect on the relationship between counsel and the accused or on counsel's performance in a court proceeding as these are the duties, which, in case they are breached, may in my opinion result in removal of counsel in the trial court proceedings or annulment of the court judgment of court of lower instance in higher court. I will mostly discuss duties that counsel has during the general proceedings, although I will bring out some duties peculiar to plea bargaining as this is a very distinct proceeding when it comes to counsel's duties. At the same time it is obvious that many of the duties that counsel has in the general proceedings also apply to the simplified proceedings, as the main goal of counsel always is to be the accused's advisor and provide him with help in exercising his rights, which is why most of the time I do not analyze the simplified proceedings separately.

[325] Provided for also in the second sentence of Article 3.1.3. of the Code of Conduct for European Lawyers.

4.2 Failure of Counsel to Show Up

First and foremost, counsel has to be present in court session, because only the right to have counsel participating in the proceedings is guaranteed to the accused. According to § 270 (2) of the CCP if counsel fails to appear in a court session, the court hearing shall be adjourned. If counsel is an advocate, the Board of the Bar Association shall be notified of counsel's failure to appear. As adjournment of a court session always means spending extra resources, I suggest that if counsel fails to appear to the court session repeatedly, which means that he has repeatedly been not diligent enough to notify the court that he is unable to appear, and what is more important, he has failed to appoint substitute counsel for himself, court should have competence to remove him (see *Standard 3.1*). If he has a good cause for not appearing to the court proceedings the court could still conclude that as a diligent counsel he should have acted in order to avoid causing the delay of the court session, which means that the court should have discretion to remove him if special circumstances so require. If a court proceeding is despite everything conducted without the participation of a counsel, which is material violation of criminal procedural law pursuant to § 339 (1) 4) of the CCP, the court judgment is annulled by a higher court and the case will be tried again (see *Standard 8.1*).

It should be obvious to all concerned that counsel must be present throughout an entire criminal trial since an accused has the right to be represented by counsel. Therefore, there is no dispute that it is a very serious violation of the accused's rights when a portion of a criminal trial is conducted in the absence of the accused's counsel,[326] which should always result in annulment of the court judgment made as a result of the proceedings from where counsel was absent. Counsel's participation in the pre-trial proceedings is a bit different. First, if the person does not ask for counsel, he is not provided by the assistance of counsel, unless it is mandatory according to the Code of Criminal Procedure. Second, even if he does and he is not provided with counsel, the result of this violation is that evidence collected in the course of the procedural act, which counsel did not participate, is declared prohibited by the court. Therefore, if the body conducting the proceedings wants to collect evidence that could be used in the court, it has to honor the accused's wish to be represented by counsel during the procedural act. And third, at least according to case law of the ECtHR, counsel should, in order to participate in the pre-trial proceedings take the initiative. For instance, counsel must have the opportunity to attend the examination of the accused and witnesses during the pre-trial proceedings, but he must ask to be informed of the venue and to be permitted to attend.[327] Once the ECtHR

[326] David A. Moran, *Don't Worry, I'Ll be Right Back: Temporary Absences of Counsel during Criminal Trials and the Rule of Automatic Reversal,* 85 Neb. L. Rev. 186 (2006–2007), p. 198.

[327] Subsection 1.2 of the thesis. See also Trechsel, *Human Rights in Criminal Proceedings,* p. 267, discussing the judicial practice of the ECtHR in that area. I still do not fully agree

emphasized the importance of counsel being active in order to participate in the court session as well. In Tripodi v. Italy Mrs. Tripodi complained that, at its hearing on the 6th of December 1985, the Court of Cassation had examined her appeal in the absence of her retained lawyer and had failed to appoint a lawyer to take his place. The Court noted that, despite knowing that he would be unable to attend the hearing set down for 6th of December 1985, the accused's lawyer failed to take any action, although he should have taken steps to ensure that he was replaced for the day of the hearing.[328] As counsel failed to take any action the Court concluded that there has been no breach of the European Convention on Human Rights. But in my opinion this case should be taken as an exception. Mrs. Tripodi's complaint was not about her counsel not participating in the court proceedings of the court of first instance, but in the court proceedings of the cassation court. As the court noted in its opinion, the Italian Court of Cassation decides only on points of law. Its proceedings are essentially written and at the hearing the appellant's lawyer may only present argument in relation to submissions already made in the appeal and the memorials.[329] Therefore it could be concluded that the applicant's lawyer's participation in the session was not as essential as it is for example in the court of first instance, where evidence is presented and evaluated, and new arguments are made.

If the accused has not one, but two or three counsels, it has to be decided whether absence of one of them results in a material violation of procedural law according to § 339 (1) 4) of the CCP. Pursuant to the judicial practice of the Supreme Court of Estonia, if the accused has chosen himself more than one counsel and one of counsels fails to appear to the court session, the continuation of the court proceedings does not automatically constitute a violation of the right to defense. The duty of state is to guarantee rights not only formally but also factually. Consequently, there might be exceptional situations when appearance of one of the retained or appointed counsels is not enough to guarantee the accused's right to defense.[330] If that kind of violation of the accused's rights has occurred during the court proceedings of the court of first instance, it cannot be eliminated in the appellate proceedings.[331] Consequently, the Supreme Court has held that conclusion on whether absence of one of several counsels from the court proceedings constitutes a violation of the right to the assistance of counsel depends on special circumstances of the case, but has not specified what those circumstances are. Therefore I suggest here that absence of counsel in case the accused has more than one counsel should form a

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with this standpoint as I believe that it should be ultimate responsibility of the state to guarantee the accused's right to counsel.

[328] Tripodi v. Italy, § 30.

[329] Tripodi v. Italy, § 28.

[330] Court Ruling of the Criminal Chamber of the Supreme Court, 20 June 2003, court case no. 3-1-1-86-03, p. 10. Online. Available: http://www.nc.ee/?id=11&tekst=RK/3-1-1-86-03, 29 April 2011.

[331] P. 11 of the judgment.

basis for annulment of court judgment under special circumstances that are left to the higher court to decide (see *Standard 8.1*).

The most identifiable absence is when counsel is not physically present in court, either because he has not appeared at all, the judge has permitted him to leave during the trial, he has not arrived yet and the judge is too impatient to wait until counsel arrives or because of any other reason.[332] Because the right to the assistance of counsel is one of the most essential rights the accused has in the criminal proceedings and absence of counsel in the court proceedings forms material violation of procedural law according to § 339 (1) 4) of the CCP, whenever counsel is absent in a court proceeding, even if it is just for a very short time, his absence should result in annulment of court judgment without any further examination.

More difficult than counsel's physical absence from trial are, however, cases in which counsel sits in court, but is still "absent". These are so called "sleeping lawyer" cases. Sleeping at trial is absolutely improper for counsel, and generally, the court should be aware of the sleeping and should take steps to remedy the problem.[333] The easiest remedy for the court to use is to make a remark about counsel's behavior. If counsel does not react to court's remark and continues napping, it should form a basis for removal of counsel as it refers to the fact that counsel does not take his duties and court's remarks seriously (see *Standard 3.2*). Of course, the problem with counsel sleeping does not mean that counsel is sleeping during the whole trial. Usually counsel naps only occasionally. Yet, it is clear that "…unconscious attorney is in fact no different from an attorney that is physically absent from trial since both are equally unable to exercise judgment on behalf of their clients…",[334] even if counsel is unconscious just for a while. When counsel sleeps during the trial, even if only for

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[332] F. Emmit Fitzpatrick & NiaLena Caravasos, *Ineffective Assistance of Counsel,* 4 Rich. J. L. & Pub. Int. 67 (1999–2000), p. 84; Moran, *Don't Worry, I'Ll be Right Back: Temporary Absences of Counsel during Criminal Trials and the Rule of Automatic Reversal,* 186, pp. 198 and 199.

[333] Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement,* 75 Neb. L. Rev. 425 (1996), p. 466; Moran, *Don't Worry, I'Ll be Right Back: Temporary Absences of Counsel during Criminal Trials and the Rule of Automatic Reversal,* 186, p. 200.

[334] Burdine v. Johnson. 262 F.3d 336 (5th Cir. 2001) (*en banc*), *petition for cert. filed,* 70 U.S.L.W. 3246 (U.S Sept. 21, 2001) (No. 01–495). The central issue for the court was whether Burdine's counsel's sleeping during the trial entitled Burdine to a presumption of prejudice, or whether he was required to prove prejudice under the two-prong Strickland test. According to the court, Burdine's entitlement to a presumption of prejudice arises from the joint holdings of Powell and Cronic. See about Strickland and Cronic tests subsection 5.3 of this dissertation. See also James M. Donovan, *Burdine v. Johnson – to Sleep, Perchance to Get a New Trial: Presumed Prejudice Arising from Sleeping Counsel Case Note,* 47 Loy. L. Rev. 1585 (2001), p. 1595. "The phenomenon of defense counsel falling asleep during trial is particularly troubling, because when sleeping occurs the defendant is effectively without counsel and has, therefore, been egregiously deprived of his Sixth Amendment constitutional rights." Fogelman, *Justice Asleep is Justice Denied: Why Dozing Defense Attorneys Demean the Sixth Amendment and should be Deemed Per Se Prejudicial,* 67, p. 70.

a short period of time, he cannot object to the prosecutor's motions, cannot advise his client or perform any analysis, and he cannot cross-examine properly either.[335] Therefore I agree that, the situation where counsel is asleep during the trial is more analogous to the situation where an accused is without counsel than where an accused claims that counsel acted improperly, because when counsel is asleep, the accused basically is without counsel.[336]

As it was already mentioned, if the trial judge notices counsel sleeping himself or he is notified by the prosecutor or the accused, he has an opportunity to correct counsel's behavior, which he most certainly should do. But if he is not aware of that or does not react properly, higher court has to look into counsel's behavior. Since higher courts have to take into account principle of finality also, it is obvious that not every nap taken by counsel during the court session should result in annulment of court judgment. Instead of that, one has to take into account the influence counsel's sleeping had on the defense position. On the one hand, an accused's interests are at stake at some stages of the trial, *e.g.* when the prosecutor is filing a motion. On the other hand, if the lawyer is absent for a few seconds during which time the prosecution says nothing, it might be possible to conclude that counsel did not fail to fulfill his duties. Therefore, sleeping lawyer jurisprudence in the United States requires counsel to have been sleeping during the substantial moments of the trial in order to conclude ineffective defense. The moments are substantial for example when evidence is being produced against the accused, *e.g.,* when the prosecutor is cross-examining a witness.[337] The other situations when it is possible to conclude that counsel has clearly breached his duties, at least what has been suggested in the United States, is when counsel sleeps "through a relatively large portion of the overall trial proceedings" (*e.g.,* sleeps 10 minutes of a one-hour trial) or "during a large amount of time" (although none of these moments are "substantial") (*e.g.,* sleeps several different times over a 30-day trial).[338] The last two situations enable the higher courts to conclude that because counsel was absent from the proceedings for substantial amount of time, his failure might have influenced his ability to form the strategy and make decisions,

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[335] Fogelman, *Justice Asleep is Justice Denied: Why Dozing Defense Attorneys Demean the Sixth Amendment and should be Deemed Per Se Prejudicial,* 67, p. 99.

[336] Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement,* 425, p. 466.

[337] Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronic's Call to Presume Prejudice from Representational Absence,* 827, p. 863 and pp. 876–877. Javor v. United States, 724 F.2d 831, 834 (9th Cir. 1984); Tippins v. Walker, 77 F.3d 682, 686 (2d Cir. 1996); Burdine v. Johnson, (5th Cir. 2001).

[338] Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement,* 425, p. 469. If counsel sleeps during a large portion of the trial, during a large amount of time, or during the admission of critical evidence, the prosecution's case is not subjected to meaningful adversarial testing and an accused is denied the right to effective assistance of counsel. *Ibid*., p. 470.

which in turn means that the accused did not receive effective assistance. Therefore I suggest the same approach for my standard (see *Standard 8.2*).

Similar to the "sleeping lawyer" cases are cases where counsel is present and does not sleep but refuses to participate in the entire trial, an entire section of a trial or at some specific point during the trial. In the United States counsel silence cases, in which counsel was silent during the whole trial or entire section of the trial, are solved according to Cronic rules.[339] In case a lawyer refrains from examining one witness or fails to voice every possible objection, the ineffective counsel claim is solved according to the Strickland rules.[340] According to Bell v. Cone[341] the key distinction between the Strickland and Cronic is whether the accused alleges a defect in the whole proceedings or "at specific points" of the trial. The critics of Bell v. Cone have claimed that the Court did not take into account that "…a lawyer's absence during specific points of a trial may cause a breakdown in the adversarial nature of the proceedings as a whole."[342] In my opinion a proper way to approach the "silent counsel" cases where counsel failed to act during some specific point of the trial would first make sure that what he failed to do was an essential duty of counsel in the criminal proceedings, and then look into what was behind his decision. Because there might be a thoroughly considered reason for counsel's action, counsel should be asked to explain that before his performance is considered to be ineffective (see *Standard 10.1*). But if counsel fails to act during the entire trial or an entire section of a trial (for instance during the opening statement), his performance should be declared ineffective *per se* (see *Standard 9.4*). If counsel refuses to act during the trial and he does not have a proper explanation for that, the court should be allowed to remove counsel as it has appeared that counsel does not fulfill his duties (see *Standard 3.3*).

4.3 Lack of Knowledge about the Facts

If counsel is unaware of the facts of the case, he basically cannot perform in the proceeding. Thus, after counsel's duty to be present, knowledge of the facts is

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[339] The difference between Cronic and Strickland rules are discussed in subsection 5.3 of this thesis. In short, according to the Cronic rules prejudice is presumed and according to the Strickland rules the accused has to prove the element of prejudice.

[340] Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronic's Call to Presume Prejudice from Representational Absence,* 827, p. 869. For instance, if an accused argues that his counsel failed to adequately represent him throughout the whole court proceeding, the prejudice exception from Cronic may apply. On the other hand, if an accused insists that his attorney failed to challenge the prosecution's case at specific points during the proceeding, then the two-part Strickland test will apply. Stuart E. Walker, *What we Meant was ... the Supreme Court Clarifies Two Ineffective Assistance Cases in Bell v. Cone Casenote,* 54 Mercer L. Rev. 1271 (2002–2003), pp. 1271 and 1282.

[341] Bell v. Cone, 535 U.S. 685 (2002).

[342] Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronic's Call to Presume Prejudice from Representational Absence,* 827, p. 871.

one of the most substantial obligations of counsel. The trial court should attentively observe that counsel is aware of the facts and higher courts should regard this failure most seriously.

Pursuant to § 273 (4) of the CCP if counsel is not familiar with the criminal matter, the court may adjourn the court session for up to ten days, order that the expenses relating to the criminal proceedings due to the adjournment of the session be paid by counsel, and notify the Board of the Bar Association of such conduct of counsel if counsel is an advocate. In order to avoid spending extra resources and delaying the court proceedings, I suggest that if counsel appears to the court session repeatedly without knowing the facts of the case, court should have competence to remove him (see *Standard 3.4*).

Counsel's duty to investigate the facts is not, of course, confined to getting to know the facts shortly before the court session. The American Bar Association here emphasizes: "The effectiveness of advocacy is not to be measured solely by what the lawyer does at the trial; without careful preparation, the lawyer cannot fulfill the advocate's role. Failure to make adequate pretrial investigation and preparation may also be grounds for finding ineffective assistance of counsel."[343] Because counsel has to make many choices during the pre-trial stage of the proceedings, he has to get to know the facts of the case as soon as he is retained or appointed, which in Estonia happens no later than when the prosecutor is ready to present the criminal file. Then counsel should investigate the file and ask relevant information from the client as soon as possible. After that he has many important decisions to make, before making some of which he has to consult the client first and some he is authorized to make on his own. Because some of those decisions, *e.g.,* whether to choose the general procedure or plea bargaining, are the ones that may decide the fate of the case and the accused, counsel must know the facts thoroughly. Here one has to agree with the standpoint of the American Bar Association that counsel's duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty,[344] because otherwise counsel cannot advise the accused fully, as he does not know what the possible solutions for the accused would be. Therefore, after counsel has investigated the facts and realized that there is not enough evidence to prove the accused's guilt, although the accused is admitting his guilt, he has to suggest the accused that the case should be conducted in general procedure and plea bargaining is not a reasonable choice.

Effective investigation by the lawyer affects also counsel's representation at trial, because without proper knowledge of facts the lawyer is not in a position to make the best use of such mechanisms as cross-examination at trial.[345] Without good preparation counsel cannot do legal research in order to present his opinion about the relevant law to the court and he does not know what

[343] Standard 4-4.1 commentary of the ABA Standards.
[344] Standard 4-4.1 (a) of the ABA Standards.
[345] Standard 4-4.1 commentary of the ABA Standards.

prosecutor's positions should be objected. Therefore, the knowledge of facts forms a basis for effective defense, which in turn means that if counsel has appeared to the court session unprepared and the court of first instance has not paid attention to this flaw, it should constitute ground for reversal *per se* (see *Standard 9.1*). Other counsel's shortcomings that come from unpreparedness, and result in for example, ineffective plea bargaining, ineffective assistance provided to the accused in the meaning of ineffective consultation, I will discuss further below.

4.4 Lack of Competence

As provided for in the Code of Criminal Procedure, counsel has to be an advocate or he has to have legal education, but in order to participate in the criminal proceedings, in addition to common knowledge of law counsel should have a thorough knowledge about penal law and law of criminal procedure: otherwise his help is of no assistance to the accused. In addition to that counsel should know how to exercise his rights and help the accused to exercise his rights in the criminal proceedings, how to present his case in the court proceedings and to file motions, which means that counsel should have good general lawyering skills. Additionally, he should be in a mental and physical condition that allows him to do that. These three duties I will discuss here further. In addition to that at the end of this subsection I will discuss the subject that is very important in the context of Estonian criminal procedure, because only advocates can be appointed as counsel to the criminal proceedings: a question what should court do if the person is disbarred, which means that he does not have legal competence to participate in the proceedings as advocate, or if he is suspended, which means that he is not allowed to provide legal assistance for a certain period of time?

In order to provide the accused with competent assistance, counsel should know the relevant law. The lawyer's duty to be informed on the law is very important.[346] In the United States, there are a number of cases when counsel lacks knowledge of the procedural law or the criminal law,[347] and there is no reason to believe that in Estonia the situation is remarkably better. Here I do not mean only that counsel should know the law that is applicable in the certain case, but he should know the general principles of penal law and law of criminal procedure also in order to protect his client's interests. As the CCBE has expressed: "Keeping abreast of developments in the law is a professional obligation."[348] For counsels who are advocates this subject is much more regulated than for non-advocate counsels: according to Article 12 (4) of the Code of Conduct of the Estonian Bar Association an advocate shall not handle a

[346] Standard 4–5.1 commentary of the ABA Standard.
[347] Laurence A. Benner, *Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California, the,* 45 Cal. W. L. Rev. 263 (2008–2009), pp. 327–328.
[348] Article 5.8 commentary, the Code of Conduct for European Lawyers.

matter which he knows he is not competent to handle in the best interests of the client.[349] Therefore if the advocate has so far handled only civil cases and has not developed his skills in the field of criminal law, he should not participate in the criminal proceedings as counsel. This is at least what the ethics recommends to advocates, although as there are many problems with the quality of assistance in Estonia, it can be guessed that advocates do not tend to follow that principle. With persons who are not advocates the subject is even more complicated. First, their conduct is not regulated by any act other than the Code of Criminal Procedure. Second, although the Code of Criminal Procedure provides the educational requirement, this does not guarantee that the person is competent in the area of criminal law and procedural law, and the body conducting the proceedings whose task is to decide whether or not to give permission to the person to enter the proceedings as counsel often does not know whether that person is competent in that area or not. Therefore, as I discussed in the last chapter, the Supreme Court of Estonia has explicitly emphasized that the permission of the body conducting the proceedings for the person to participate in the criminal proceedings can be withdrawn if it turns out that the person is not competent, meaning that he does not have the knowledge and skills to participate in the criminal proceedings. In my opinion, whether counsel is an advocate or not, for the trial court, counsel's serious lack of knowledge in penal law and law of criminal procedure should be a ground for removal (see *Standard 1.1*) and for the higher courts it should be indication that the accused did not receive adequate advice and therefore effective assistance, which in turn results in an annulment of the court judgment (see *Standard 8.6*).

Of course, counsel has to be aware of the law imposable in the certain case also. As the first sentence of Article 14 (2) of the Code of Conduct of the Estonian Bar Association provides: "Legal services rendered by the advocate must be professional and based on the investigation of underlying circumstances, evidence, legal acts and court practice."[350] Counsel should have knowledge of imposable law in certain case and therefore § 273 (4) of the CCP, which allows the court to adjourn the court session for up to ten days if counsel is not familiar with the criminal matter, should be interpreted in the way that the court may adjourn the session if counsel does not know the facts or imposable law in certain case as well. For reasons I have discussed above, if counsel appears to the court session unprepared more than once, it should form a basis for his removal (see *Standard 3.4*). Also, counsel's serious lack of knowledge of law imposable in certain cases should result in annulment of judgment of lower court in the appellate proceedings as counsel who does not know the law imposable in certain cases is not capable of providing adequate assistance (see

[349] A lawyer shall not handle a matter which the lawyer knows or ought to know he is not competent to handle, without cooperating with a lawyer who is competent to handle it (first sentence of the Article 3.1.1. of the Code of Conduct for European Lawyers).
[350] Also provided for in § 40 (2) of the BAA.

Standard 9.1). What is a serious lack of knowledge of law should be left for the courts to decide in certain cases.

In addition to that, counsel's general lack of lawyering skills and experience may also be a problem. Counsel must provide the skill necessary to ensure reliable adversarial testing of the prosecution's case at trial.[351] For the advocates the Code of Conduct for European Lawyers, the Bar Association Act and the Code of Conduct of the Estonian Bar Association impose a duty to improve professional skills. According to Article 5.8 of the Code of Conduct for European Lawyers, lawyers should maintain and develop their professional knowledge and skills taking proper account of the European dimension of their profession. According to § 44 (2) of the BAA advocates shall continuously enhance their professional knowledge and expertise. The second sentence of Article 14 (2) of the Code of Conduct of the Estonian Bar Association adds the premise of professional advice is constant advancement by an advocate of his professional knowledge and skills. Counsel's overall competence is something that is very difficult to assess, especially for the higher courts, because they do not see counsel's performance. In addition to that, indicators of the lack of overall competence are difficult to describe. Therefore I suggest that this should not be added in the standard for conduct of counsel and counsel's lack of lawyering skills should be assessed through certain mistakes he has made (*e.g.,* failure to question witnesses properly, presenting adequate closing arguments *etc.*).

Closely related to counsel's lawyering skills is the manner how counsel conducts himself towards other participants during the proceedings. Counsel should be respectful towards the court as well as towards other parties to a court proceeding and at pre-trial stage towards the investigative body. Pursuant to § 267 (4) of the CCP if counsel violates order in a court session, fails to comply with the orders of a judge or acts in contempt of court, a fine may be imposed on him. The court also notifies the Bar Association if counsel is an advocate (§ 267 (4^2) of the CCP). In my opinion counsel who acts disrespectfully towards the court or other parties to a proceeding shows that he lacks lawyering skills and therefore is not capable of defending the accused adequately. If he shows disrespect towards other participants repeatedly and even after court's remarks, it should be concluded that he is not competent to participate in the criminal proceedings, which in turn means that the court should be allowed to remove him (see *Standard 1.2*).

A problem arises, if counsel has a physical impairment or mental disorder or he is under the influence of drugs or alcohol. If he is mentally or physically impaired and it does not influence his lawyering skills, it should be concluded that he is able to participate in the proceedings and act diligently as counsel, although the judge should observe his performance during the proceedings

[351] Heidi H. Woessner, *Criminal Law – the Crucible of Adversarial Testing: Ineffective Assistance of Counsel and Unauthorized Concessions of Client's Guilt Note,* 24 W. New Eng. L. Rev. 315 (2002), p. 341. See also Ramsey Clark, *Fulfilling the Right to the Effective Assistance of Counsel,* 19 Washburn L. J. 395 (1979–1980), p. 404.

attentively and decide whether this person, especially the person with physical impairment, needs a support person (*e.g.* if counsel is blind he may need someone to help him to observe what is going on in the court room *etc.*). But if counsel has a mental or physical disorder and it appears that it affects his ability to make decisions and fulfill his duties in the proceedings (*e.g.,* counsel is paralyzed, he is not able to speak clearly and he is not able to make himself understandable to the court even with help of a support person), ineffectiveness should be presumed and the trial court should remove that counsel (see *Standard 1.3*). If for some reason this counsel continues in the proceedings, the accused should be granted with the new proceedings if he claims his lawyer's ineffectiveness to the higher court (see *Standard 8.3*). The same principles should apply if it has been ascertained that counsel acted under the influence of alcohol or drugs during the trial (see *Standards 1.3 and 8.3*) as intoxication most certainly affects counsel's ability to perform his duties.

The problem also arises if the advocate continues to practice law after being suspended or disbarred, which should be ineffectiveness *per se* according to some authors in the United States.[352] Pursuant to § 38 (1) of the BAA if a person is excluded from the Bar Association or is disbarred, he loses the right to practice as an advocate. Upon exclusion of an advocate providing state legal aid from the Bar Association or his disbarment or upon suspension of the professional activities or long-term incapacity for work or the death of the advocate, and in other cases provided by law, the Bar Association shall appoint a new provider of state legal aid on the basis of an application of the former provider of state legal aid, the recipient of state legal aid, a court, Prosecutor's Office or investigative body or on its own initiative (§ 20 (3) of the SLAA). Since the 1st of January 2010 § 19 (3) of the BAA stipulates that if the advocate provides legal services during the period he has been suspended the professional activities, he is disbarred. In my opinion if counsel loses the status of advocate, in order to proceed in representing the accused, he has to ask permission from the court as other non-advocate persons with legal education have to do too. If he is suspended, pursuant to § 19 (3) of the BAA, he is not allowed to provide legal services. Thus, the assistance provided by the person who is disbarred or excluded from the Bar Association and who has not asked the permission from the body conducting a proceeding should result in annulment of court judgment as formally there has been no counsel in the proceedings*,* as well as the assistance provided by a person who is suspended from professional activities (see *Standards 1.4 and 8.5*).

[352] Khanh L. Nguyen, *Close but no Cigar: Courts Shy Away from Announcing a Per Se Ineffective Assistance of Counsel Rule when an Attorney Continues to Practice while Suspended Notes and Comments,* 2 J. Legal Advoc. & Prac. 113 (2000), p. 121; Fogelman, *Justice Asleep is Justice Denied: Why Dozing Defense Attorneys Demean the Sixth Amendment and should be Deemed Per Se Prejudicial,* 67, p. 82.

4.5 Failure to Act in the Pre-trial Proceedings

Most counsel's failure to act in a pre-trail stage of the proceedings can be eliminated by conducting a fair court proceeding and excluding evidence that was gathered through the violation of the right to the assistance, including the right to effective assistance of counsel. Still there are some duties counsel has to fulfill in order to perform effectively during the court proceedings, *e.g.,* failures that may have influence on how fair the court proceedings are. One of them, counsel's failure to get to know the facts I have already discussed, but there are some more I would like to mention here.

If a Prosecutor's Office declares a pre-trial proceeding completed, it gives a copy of the criminal file to defense counsel (CCP, § 223 (3) and 224 (1)) and since then the participation of counsel in the criminal proceedings is mandatory (CCP, § 45 (3)). Pursuant to § 224^1 (1) of the CCP it is the task of counsel to introduce the criminal file to the person being defended. Counsel may submit requests to the Prosecutor's Office within ten days as of the date of submission of the criminal file to counsel for examination. If a criminal matter is especially extensive or complicated, the Prosecutor's Office may extend such term (CCP, § 225 (1)). If a Prosecutor's Office has submitted a criminal file for examination and is thereafter convinced that the necessary evidence in the criminal matter has been collected, it prepares the statement of charges and sends a statement of charges and a list of persons to be summoned to a court session at the request of the Prosecutor's Office to the accused and counsel (CCP, § 226 (1), (2) and (3)). After receipt of the copy of statement of charges, counsel prepares the statement of defense and submits it no later than three weekdays before the preliminary hearing to the court and the copy to the Prosecutor's Office. If a criminal matter is especially extensive or complicated, the court may extend such term by counsel's reasoned request (CCP, § 227 (1)). In the statement of defense counsel has to set out his position about the statement of charges (CCP, § 227 (3) 1)); evidence that counsel wishes to present and what counsel aims to prove with every single piece of evidence (CCP, §227 (3) 2)); a list of the persons whom counsel requests to be summoned to a court session (CCP, § 227 (3) 3)) and other requests (CCP,§ 227 (3) 4)). Before the 1st of September 2011 counsel did not have to prepare a statement of defense, he simply had to submit his requests and a list of the persons whom he requests to be summoned to a court session to the court and a copy of the abovementioned documents to the Prosecutor's Office. The purpose of preparation of the statement of defense is to guarantee equality of arms and to conduct a court proceeding better prepared and therefore speedier.[353] If counsel does not prepare the statement of defense on time, the court notifies the Bar Association immediately and makes the accused a proposal to choose within the term granted by the court, or turns to the Bar Association, for appointment of new counsel (CCP, § 227 (5)) (see *Standard 3.5*). The Code of Criminal Procedure does not specify what happens

[353] Explanatory Memorandum to the Act to Amend the Code of the Criminal Procedure and Other Related Acts. 599 SE, 11th Riigikogu.

if the accused refuses to change counsel in this situation, but in order to achieve the purpose set out in the explanatory memorandum, the court should be allowed to remove that counsel.

Therefore in Estonia counsel's preparation for the trial begins at least right after the prosecutor gives him a copy of the criminal file, if even not earlier. This is the time when counsel's communication with the prosecutor, and later the court, begins with relation to future court proceedings. In addition to that counsel has to introduce the person being defended with evidence that the prosecutor has against him. And what is most important, counsel has an opportunity to submit a request to collect evidence, first to the prosecutor (CCP, § 225 (1)) and after that to the court (CCP, § 227 (1)). Here two main mistakes can occur. Counsel may fail to contact the person being defended and introduce him to the evidence. It is the matter of counsel and client communication, which I will discuss further below. Second, counsel may fail to submit the request to collect evidence on time. In order to correct that mistake, counsel may submit that request during the court proceedings also, but according to § 286^1 (2) 2) of the CCP the court may dismiss a request for the collection of additional evidence submitted by counsel if counsel has no material reason for failure to submit the request on time. In my opinion, if the court sees that the evidence is extremely relevant to the adjudication of the criminal matter in question, in the meaning that there is a probability that it would mitigate the accused's situation, the court should not dismiss a request, although counsel has not filed it on time. Otherwise an important aspect of the case may be left out, which in turn may affect the accused's position to the prejudice of him. Therefore I suggest that counsel's failure to present this kind of evidence should be ground for annulment of the decision of the court of first instance in the higher court, a subject that never arises if the trial court satisfies counsel's request to collect additional evidence, although it is filed too late (see *Standards 3.6 and 9.5*).

In addition, one of the aspects counsel should also explore at the pretrial stage of the proceedings is whether there would be enough reason to enter into plea bargaining or not. I will analyze counsel's failures that are related to plea bargaining further below.

4.6 Lack of Trust between the Accused and Counsel

Due to his position counsel is the closest person to the accused in the criminal proceedings. Therefore he should seek to establish a trustful relationship with the accused and follow ethical and confidentiality rules. Although the break-down in the attorney-client relationship may be caused by many factors other than counsel's own behavior (*e.g.,* it might be that the accused has a conflicting nature) there are still some remarkable mistakes counsel may make himself.

First, counsel may misuse the accused's trust by revealing information he got from the accused to the third person. The CCBE declares: "It is of the essence of a lawyer's function that the lawyer should be told by his or her client

things which the client would not tell to others, and that the lawyer should be the recipient of the information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer. The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State."[354]Article 5 (1) of the Code of Conduct of the Estonian Bar Association provides: "The relationship between the advocate and his client is founded upon trust. Therefore, all information given or received by him in the course of rendering legal services is confidential."[355] The duty to confidentiality does not apply only to advocates in criminal proceedings: since the 1st of September 2011 the duty of confidentiality comes also from § 47 (3) of the CCP and it applies to all counsels in criminal proceedings.

In order to facilitate the accused's trust in his counsel, the duty of confidentiality does not end when the proceedings are over. Subsection 47 (3) of the CCP does not express this principle explicitly, but it does not impose a time limit either. For the advocates Article 5 (7) and (8) of the Code of Conduct of the Estonian Bar Association provide that the obligation of confidentiality is not limited in time[356] and only the client or his successor may in writing exempt the advocate from the confidentiality obligation.[357] To make sure that the accused is aware of counsel's duty, defense counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense and explain the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosures.[358] The latter is not provided for in the Code of Criminal Procedure, but here the ABA Standards should be taken as an example and this duty should be added to the Code as it helps the accused understand the principle of confidentiality and encourages him to disclose information necessary for the defense to counsel.

The duty to confidentiality is not, of course, an absolute one. Pursuant to § 45 (4) of the BAA disclosure of information to the Board in the exercise of supervision over the activities of an advocate or to the court of honor in the hearing of a matter concerning a disciplinary offence shall not be deemed to be a violation of professional secrecy. In addition to that in order to prevent a criminal offence in the first degree, an advocate has the right[359] to submit a reasoned written application for exemption from the obligation to maintain a professional secret to the Chairman of an administrative court or an administrative judge of the same court appointed by the Chairman. A judge shall hear a submitted application immediately and shall issue or refuse to issue a

[354] Article 2.3.1. of the Code of Conduct for European Lawyers.
[355] Also provided for in § 43 (2) of the BAA.
[356] Also provided for in Article 2.3.4. of the Code of Conduct for European Lawyers.
[357] The same is provided for in § 45 (1) and (2) of the BAA.
[358] Standard 4–3.1 (a) of the ABA Standards.
[359] But not an obligation, which is actually a very questionable regulations as it allows the advocate not to disclose information about very serious crimes, as for instance murder.

written permission (§ 45 (5) of the BAA).[360] Justifications for non-advocate counsel to disclose the information received from the accused are not provided by law, although at least in order to prevent a criminal offence in the first degree, counsel should be allowed to disclose information, the principle that should be added to § 47 (3) of the CCP for non-advocate counsels.

Second, counsel may misuse his position and make decisions in the name of the accused, which are not in his competence. In relation to that a question arises, which decisions are in the competence of the accused and which in the competence of counsel. It could be said that the relationship between counsel and the accused is a collaborative one, in which certain fundamental decisions are reserved for the accused, while other decisions are in the competence of defense counsel.[361] In addition to that some decisions are divided between the accused and his counsel. The Code of Criminal Procedure does not provide us with the full list of decisions that are in the competence of the accused only. Of course, it is up to the accused to waive counsel if counsel's participation is not mandatory. This is the decision the accused has to make himself. The accused also has the right to give or refuse to give testimony with regard to the content of the charges (CCP, § 34 (1) 1) and § 35 (2)). These are the rights that are exercised by the accused solely. In addition to that the accused has sole right in Estonia to give consent for termination of the criminal proceedings (*e.g.,* § 202 of the CCP). The same is with the right to give consent for application of the alternative proceedings (CCP, § 233) and the settlement proceedings, although the latter requires counsel's consent also (but the accused can decline application of these proceedings irrespective of his counsel's standpoint about the matter), as I will discuss further below.

In Jones v. Barnes[362] the United States Supreme Court held that certain tactical decisions would be left to counsel's discretion, while four constitutional rights are reserved exclusively for the accused: "… [T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify on his or her own behalf, or make an appeal..."[363] Court's finding in Jones v. Barnes stems from general agreement in the United States that the accused absolutely controls the decision to waive constitutional rights and that decision is protected by the requirement

[360] But it may be claimed that this is not a reasonable rule as it obliges counsel to first consult with the court and only after that reveal the information, which may be too late. The ABA Standards for instance provide that defense counsel should not reveal information relating to representation of a client unless the client consents after consultation, except that defense counsel may reveal such information to the extent he reasonably believes necessary to prevent the client from committing a criminal act that defense counsel believes is likely to result in imminent death or substantial bodily harm (Standard 4–3.7 (d) of the ABA Standards). No court's permission is needed here, which guarantees that counsel can act without any delay if necessary.

[361] Woessner, *Criminal Law – the Crucible of Adversarial Testing: Ineffective Assistance of Counsel and Unauthorized Concessions of Client's Guilt Note,* 315, pp. 340–341.

[362] Jones v. Barnes, 463 U.S. 745 (1983).

[363] *Ibid.*, 463 U.S. 751.

of a knowing, intelligent and voluntary waiver by the accused.[364] Of course, counsel is allowed to persuade and urge the client to follow his advice and to do what counsel thinks is the best option. The American Bar Association stresses here: "Ultimately, however, because of the fundamental nature of decisions such as these, so crucial to the accused's fate, the accused must make the decisions himself or herself."[365] Consequently, if counsel overrides an accused's decisions regarding how the accused wishes to exercise his personal constitutional rights, counsel has ceased to function as his client's advocate. Such betrayals are *per se* prejudicial, as it is claimed in the United States.[366] Although it is not provided for in the Code of Criminal Procedure, one has to agree that it is the decision of the accused to say whether to appeal or not. The person's right to appeal comes from the Constitution (§ 24 (5) of the Constitution of the Republic of Estonia) and it should not be taken from him or used against his will. In addition to that, because appellate procedure is a whole new procedure that takes additional money and time, it should be up to the accused to decide whether to spend it or not.[367] In order to clarify the matter, this principle should be added to the Code of Criminal Procedure.

Although the accused has the right to give consent to the application of the settlement proceedings, participate in the negotiations for the settlement proceedings, make proposals concerning the type and term of punishment and enter or decline to enter into an agreement concerning the settlement proceedings (CCP, § 34 (1) 10) and § 35 (2)), technically it is not his sole right. More specifically, according to § 239 (2) 2) of the CCP the settlement proceedings shall not be applied if the accused's counsel does not consent to the application of the settlement proceedings. Therefore it could happen that the accused agrees with the settlement proceedings, but his counsel does not. Here it should be taken into account that counsel is a person with legal education and what is also important, most likely with previous experience in the criminal proceedings. This means that he is presumably able to assess whether there is enough evidence against the accused or not. If there is not or the prosecutor proposes legal assessment of the criminal offence or the category or term of the punishment, which counsel finds unsuitable, he should not consent with the settlement proceedings no matter what the accused's position is. Of course, he should

[364] Poulin, *Strengthening the Criminal Defendant's Right to Counsel,* 1213, p. 1239.
[365] Standard 4–5.2 commentary of the ABA Standards.
[366] Kimberly Helene Zelnick, *In Gideon's Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion,* 30 Am. J. Crim. L. 363 (2002–2003), p. 397.
[367] Here it is important to mention that according to § 333 (2) of the CCP counsel may discontinue an appeal of the accused only with the written consent of the person being defended and according to § 333 (4) of the CCP the accused may discontinue an appeal of counsel, except in the cases where the participation of a counsel in the criminal proceeding is mandatory pursuant to subsection 45 (2) of this CCP. Subsection § 358 (3) of the CCP provides that the accused may discontinue an appeal in cassation filed by counsel, unless the participation of counsel in the criminal proceeding is mandatory pursuant to subsection 45 (2) of the CCP. Counsel himself is allowed to discontinue an appeal in cassation if the person being defended has agreed to this in writing (§ 358 (2) of the CCP).

explain the rationale behind his decision to the accused and if the accused does not agree with him, he may decide to change his counsel (in case it is appointed counsel it would not be possible, as refusing to give consent for the application of the settlement proceedings is not ineffectiveness of counsel *per se*), but if counsel's decision is well considered and explained to the accused it may even be that the accused provides his consent and agrees with counsel.

In case a decision-making authority is shared between counsel and the accused, as it is for instance with submitting evidence and submitting requests and complaints in Estonia as both the accused (CCP, § 34 (1) 7) and 8); § 35 (2)) and counsel (§ 47 (1) 2) and 3)) have the right to do that, the only viable option is to do that in a manner that allows the accused to shape the direction of his defense, but that also enables counsel to make appropriate tactical and strategic decisions.[368] In the United States it has been argued that defense counsel should have discretion to make decisions concerning matters such as what motions to file, what witnesses to call, what objections to rise and what arguments to make,[369] which basically means forming a strategy of the case, but it is not that way in Estonian criminal procedure. It might even be that that the accused spoils counsel's questioning tactic, because he as a party to a court proceeding may question the witness during the cross-examination himself (CCP, § 288). In my opinion counsel's right to form the strategy and make tactical decisions should be recognized in Estonia also, although this principle does not come directly from the law, which leads to my proposal that it should be added to the Code of Criminal Procedure. This assures that counsel is the "professional representative of the accused, not his alter ego".[370] This also assures that counsel is able to fulfill his duty provided for in § 47 (2) of the CCP. Furthermore, although decisions related to strategy and tactic should be in the competence of counsel, it does not mean that counsel does not have a duty to consult with his client. Unless it is contrary to law, the rules of professional conduct or to the interests of his client, the advocate shall always take into consideration the wishes of his client when choosing the means and measure of protection (second sentence of Article 8 (2) of the Code of Conduct of the Estonian Bar Association, a principle that should also guide non-advocate counsel actions in criminal proceedings). As the United States Supreme Court has stressed: "From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the

[368] Zelnick, *In Gideon's Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion,* 363, p. 395.
[369] Poulin, *Strengthening the Criminal Defendant's Right to Counsel,* 1213, p. 1239 .
[370] Joseph P. Busch et al., *Lawyer's use of the Standards, the A Symposium: The American Bar Association Standards Relating to the Administration of Criminal Justice: Part 2,* 12 Am. Crim. L. Rev. 427 (1974–1975), p. 442. According to Article 4 (6) of the Code of Conduct of the Estonian Bar Association an advocate may not be identified with the client or the client's case as a result of performing the client's assignments (provided also in § 43 (4) of the BAA).

defendant informed of important developments in the course of the prosecution."[371]

Consequently, the right to waive counsel, testify on his own behalf, give consent for application of the alternative proceedings and for termination of the proceedings are rights that the accused has to exercise himself in Estonia, although, of course, counsel is allowed to provide the assistance in these areas also. With the right to appeal the situation is not so clear, although it really should be the accused that makes the decision whether to appeal or not. Both the accused and his counsel have to give consent for the application of the settlement proceedings and if one of them does not give it, these proceedings are not applied. Procedural decisions which are in the competence of counsel alone (these are not listed in the Code of Criminal Procedure, but in my opinion counsel should have sole competence to form a strategy and make tactical choices) or in the competence of counsel and the accused, should be exercised by counsel after consultation with the accused and because counsel is a professional lawyer, not the "alter ego" of the accused, he should be allowed to deviate from the accused's wishes.

Counsel's duty of loyalty to, and advocacy of, the accused's cause is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain his client's objectives, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law.[372] Counsel's duty to follow the law is in Estonia stipulated in § 47 (2) of the CCP and in § 44 (1) 1) of the BAA. Therefore, if counsel has broken the law in the course of provision of assistance, and it has prejudiced the accused's position in the proceedings, the court should be allowed to disqualify him (see *Standard 1.5*). If it has caused serious breakdown in the attorney-client relationship or has prevented counsel in any other way from fulfilling his lawful duties, it should also form a ground for annulment of the court judgment of the court of lower instance. Then the higher court can refer to the breakdown of the attorney-client relationship or counsel's failure to fulfill an important duty, which means that here is no need for a specific ground for annulment of the lower court's judgment.

As counsel is an advisor and representative to the accused, it is proper to assume that counsel is the accused's confidant. If there has been a complete and total breakdown of the trust and confidence in the attorney-client relationship, and counsel has become the accused's adversary, it is clear that the relationship

[371] Strickland v. Washington, 466 U.S. 688. According to § 44 (1) 2 of the BAA an advocate is required to notify a client of activities relating to the provision of legal services. According to the ABA Standards if a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship. Standard 4–5.2 (c) of the ABA Standard.

[372] Nix v. Whiteside, 475 U.S. 157 (1986), 475 U.S. 1-6-171.

is ruined and therefore counsel should be allowed to withdraw so that the accused could try again with another counsel. Otherwise the result of this breakdown can lead to the denial of an accused's right to effective assistance of counsel.[373] Consequently, trial courts should be given wide latitude in granting or denying counsel's motion for leave to withdraw as counsel (see *Standard 4.1*), and their decisions should be reviewed only for abuse of that discretion.[374] But at the same time the United States Supreme Court has explicitly held that the Constitution does not guarantee the accused "a meaningful relationship" with counsel.[375] The same principle could be derived from the case law of the Estonian Supreme Court also. In court case no. 3-1-1-70-10 the accused requested removal of counsel, claiming that there has been a breakdown in the attorney-client relationship. The Supreme Court of Estonia concluded that there was no violation of the right to defense, because it was already the appellate proceedings and changing an appointed counsel so late was not practical.[376] Although the Supreme Court of Estonia did not say it out loud, it could be derived from its judgment that in case of breakdown of the attorney-client relationship, courts still have to consider and weigh different values before they decide whether to remove counsel or not. I do not agree with either of the Supreme Courts, as in my opinion, a trustful attorney-client relationship is a precondition for counsel to be able to provide proper assistance to the accused. Thus, total breakdown in the attorney-client relationship results in ineffective assistance of counsel *per se*, and should form automatically a ground for annulment of the court judgment (see *Standard 8.7*). What is total breakdown should be up to the courts to assess based on certain facts of the case.

4.7 Insufficient Consultation with the Accused

In addition to defense counsel's duty to try to seek to establish a relationship of trust and confidence with the accused, he should discuss the objectives of the representation with him as it was already mentioned above, which in turn results in a trustful relationship. Counsel should start consulting with his client promptly, discuss all aspects of the case with him and try to determine all

[373] Stephen W. Jr Still, *Divided we Fall: Breakdown in the Attorney-Client Relationship and the Criminal Defendant's Right to Counsel Student Commentary,* 29 J. Legal Prof. 315 (2004–2005), p. 323; Lindsay R. Goldstein, *View from the Bench: Why Judges Fail to Protect Trust and Confidence in the Lawyer-Client Relationship – an Analysis and Proposal for Reform, A Note,* 73 Fordham L. Rev. 2665 (2004-2005), p. 2689.

[374] Still, *Divided we Fall: Breakdown in the Attorney-Client Relationship and the Criminal Defendant's Right to Counsel Student Commentary,* 315, p. 316.

[375] Morris v. Slappy, 461 U.S. 13. But: "Given the importance of counsel to the presentation of an effective defense, it should be obvious that a defendant has an interest in his relationship with his attorney." *Ibid.*, 461 U.S. 20, Justice Brennan, concurring.

[376] Judgment of the Criminal Chamber of the Supreme Court, 15 November 2010, court case no. 3-1-1-70-10, p. 24. Online. Available: http://www.nc.ee/?id=11&tekst=RK/3-1-1-70-10, 29 April 2011.

relevant facts. This helps counsel to understand the accused's position about the case and in turn enables the accused to understand counsel's position. During the proceedings counsel should keep the client informed of developments in the case, advise the client on all aspects of the case and consult with the client on decisions relating to direction of the case. Thereat, an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial and follows from Article 6 paragraph (3) c of the ECHR: "If a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective…"[377] According to § 34 (1) 4) and § 35 (2) of the CCP, the accused has the right to confer with counsel without the presence of other persons.

Although the duty to consult with the accused is not provided for in the Code of Criminal Procedure, it should be, as it is essential for the trustful relationship between the accused and counsel and also necessary in order to keep the accused informed about what is going on in the proceedings commenced against him. According to Article 14 (4) of the Code of Conduct of the Estonian Bar Association an advocate shall keep his client informed as to the progress of the matter entrusted to him[378] and respond to the inquiries of the client when due and as appropriate and, if possible, in the language of inquiry. The ABA stresses that existence of such consultations about the appropriate ends and means of representation do not mean that counsel must follow whatever decisions the client makes about how the representation should proceed: "A lawyer is not required to pursue objectives or employ means simply because a client may wish or demand that the lawyer do so."[379] This standpoint is absolutely logical in the light of principle that counsel is an independent party to the proceedings, not an accused's alter ego and also if we consider the fact that it is counsel not the accused who has a legal education and therefore has knowledge of the law.

As consultation with the accused is an essential duty of counsel in the criminal proceedings, it should be concluded if counsel fails to do that, the court should direct counsel to fulfill this duty and if counsel does not react after that, the court should be allowed to remove counsel (see *Standard 4.2*). The failure to consult with the accused should form a basis for annulment of court judgment, if the higher court finds the serious lack of consultation, which should be concluded if counsel did not consult with the accused at all or failed to do it in a complete way. The latter should be decided by a case-by-case approach (see *Standard 9.2*).

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[377] Brennan v. the United Kingdom. *Application no. 39846/98.* 16 October 2001, § 58; Öcalan v. Turkey. *Application no. 46221/99.* 12 March 2003, § 146.

[378] Lawyer's duty to inform is also established with the second sentence of Article 3.1.2. of the Code of Conduct for European Lawyers.

[379] Standard 4-3.1 commentary of the ABA Standard.

4.8 Improper Plea Bargaining

In the United States it has been argued that given the high number of plea bargaining in the criminal justice system, its low visibility, and the crucial importance of the defense counsel's role, it is appropriate to set out specific duties for defense counsel in these proceedings.[380] In Estonia in 2010 only 8,6% of criminal cases were conducted in general procedure, 31,9% in alternative proceedings and 33,8% in settlement proceedings, which is similar to plea bargaining.[381] This means that in Estonia the plea bargaining also plays an important role in criminal proceedings.

In Estonia the settlement proceedings can be commenced by the Prosecutor's Office or the accused. However, the settlement proceedings shall not be applied, if counsel does not consent to the application of the settlement proceedings (CCP, § 239 (2) 2)), as already discussed above. The accused and the prosecutor may submit a request for the application of the settlement proceedings to the court until the completion of examination by the court in the county court (CCP, § 239 (3)). According to the Code of Criminal Procedure the obligation to explain the rights to the accused and also explain him the option of applying the settlement proceedings and its consequences lies on the prosecutor (CCP, § 240 1)). Nevertheless, counsel participates in negotiations with the prosecutor in order to conclude a settlement and gives his consent to application of the settlement proceedings. In order to conclude the settlement a Prosecutor's Office and the accused and his counsel has to reach a settlement concerning the legal assessment of the criminal offence and the nature and extent of the damage caused by the criminal offence, and also the type and the category or term of the punishment which the prosecutor requests in court for the commission of the criminal offence (CCP, § 244 (2)). After the settlement is concluded the prosecutor, the accused and his counsel shall be summoned to a court session (CCP, § 246 (1)). The obligation of the judge is to ask from the accused whether the accused understands the settlement and consents thereto. In addition to that the judge makes a proposal to the accused to explain the circumstances relating to the conclusion of the settlement and ascertains whether conclusion of the settlement was the actual intention of the accused (CCP, § 247 (2)). Finally the judge asks the opinions of counsel and the prosecutor concerning the settlement and whether they will adhere to the settlement (§ 247 (3) of the CCP).

There are quite many dangers for the accused when it comes to the ineffective defense during the plea bargaining. One of them is that innocent accused persons may be persuaded to plead guilty leading to a wrongful conviction. Although the judge should convict the accused only if he is satisfied

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[380] Jake Dear, *Adversary Review: An Experiment in Performance Evaluation,* 57 Denv. L. J. 401 (1979-1980), p. 418.

[381] Court Statistics of Estonian Courts of First and Second Instances in 2010. Online. Available: http://www.kohus.ee/orb.aw/class=file/action=preview/id=54294/Kohtute+menetlusstatistika.2010.a.pdf, 29 April 2011.

that the accused committed the offence, the difficulty for a court faced with a guilty plea is that it can be hard to examine its validity without the evidence being properly tested in court.[382] In addition to that the accused, although factually guilty, may be convicted even if the prosecutor does not actually have enough evidence for the accused to be convicted in general procedure. And finally, the accused may agree with the severity of punishment he would not have received or legal assessment of the criminal offence the court would have not concluded in general procedure.

It could be stated that a system of plea bargaining is a catalyst for ineffective representation. It subjects defense counsels to serious temptations to disregard their clients' interests, and aggravates the harmful impact of ineffective representation when it occurs.[383] It is understandable that with agreement counsel is able to get rid of an unpleasant, uninteresting or for some other reason unwanted criminal case quickly and with minimal effort. But what makes this ineffectiveness very dangerous is the fact that usually the agreement leads to the court judgment on the conviction of the accused and on imposition of the punishment agreed upon in the agreement on the accused. Although the court has an obligation to ascertain the accused's actual intent, the previous ineffectiveness of defense counsel may not appear in the court session, because the accused often affirms to the court that he fully agrees with the settlement.

Because entering the settlement negotiations which may have very serious consequences to the accused, at minimum, his counsel should be required to investigate the case (the facts and the law) previously and give advice to the accused.[384] Counsel should let the accused know that he does not recommend that the accused gives his consent to the agreement before counsel has learned the relevant facts and law and provided the accused a candid estimate of the probable outcome.[385] It is the duty of counsel to ascertain that the Prosecutor's Office has enough evidence against the accused that if the criminal matter were conducted in general procedure, the accused would be convicted. In addition to that counsel should investigate the facts and the law and ascertain that legal assessment of the criminal offence and the punishment proposed by the prosecutor are in accordance with the law and judicial practice. Consequently, counsel's advice to an accused to plead guilty merely because the accused has admitted guilt to the lawyer, without exploring the relevant facts and law or attempting to determine whether the prosecution can establish guilt, is im-

[382] Jackson, *Autonomy and Accuracy in the Development of Fair Trial Rights*, *p*. 11.

[383] Albert W. Alschuler, *Personal Failure, Institutional Failure, and the Sixth Amendment Colloquium: Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise been Fulfilled,* 14 N. Y. U. Rev. L. & Soc. Change 149 (1986), p. 149.

[384] Bazelon, *Defective Assistance of Counsel, the,* 1, pp. 34–35; Steven Zeidman, *To Plead Or Not to Plead: Effective Assistance and Client-Centered Counseling,* 39 B. C. L. Rev. 841 (1997–1998), p. 863.

[385] Similar obligation is provided for in standard 4–5.1 (a) of the ABA Standards.

proper.[386] After counsel has investigated the case and the law thoroughly, he should explain to the accused about possible choices and outcomes. In addition to that, although the prosecutor is obliged to explain the accused his rights, counsel should do that before the accused decides to enter the negotiations at all, because only then the accused could understand the nature of negotiations and his and his counsel's role in it. Consequently, diligent counsel ensures that the rights of the accused are first introduced and afterwards recognized and respected in the plea negotiation process. The integrity of the plea bargaining process depends on the fundamental right to counsel.[387]

It can be said that the decision to plead guilty can be an intelligent one only if the accused has been advised fully as to his rights and as to the probable outcome of alternative choices. In addition to that, the accused should also be aware of the consequences of settlement. In McMann v. Richardson the United States Supreme Court stated that if an accused's plea is "…based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession."[388] The Court continued: "Whether a plea of guilty is unintelligent, and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends, as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases."[389] But as the case concerned a coerced confession, I doubt whether counsel's advice in this situation to plead guilty could ever fall within the range of competence demanded of attorneys in criminal cases. In Hill v. Lockhart,[390] the United States Supreme Court stated that the Strickland standard is also applicable in cases of plea bargaining. Where an accused enters a guilty plea upon counsel's advice, the voluntariness of the plea depends on whether the advice was within the range of competence demanded of counsels in criminal cases. The accused has to show that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, *i.e.* in order to satisfy the second, prejudice, requirement, the accused must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty, and would have insisted on going to trial.[391]Although the United States Supreme Court always requires that the accused's decision should be based on reasonably competent counsel's advice, it also emphasizes that the accused himself should have common sense to assess this advice: "The rule that a plea must be intelligently made to be valid

[386] Standard 4–5.1 commentary of the ABA Standards, also Standard 4–6.1 (b) of the ABA Standards.
[387] Greenspan, *Future Role of Defence Counsel, the Major Article,* 199, p. 210.
[388] McMann v. Richardson, 397 U.S. 770.
[389] *Ibid.*, 397 U.S.769–770.
[390] Hill v. Lockhart, 474 U.S. 52 (1985).
[391] *Ibid.*, 474 U.S. 56–60.

does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action."[392]

When it comes to the quality of the advice, it should be noted that it is insufficient for a lawyer merely to give an opinion, devoid of the predicate for the recommendation: it renders the advice hollow. Counsel should provide his opinion and the bases for it.[393] This allows the accused to rely on counsel's advice when it is time for the accused to make the decision whether to agree with the proposed settlement or not. In addition to that counsel should have bargaining skills: as the accused has an opportunity not only to decide whether to plead guilty to the charges or to go to trial but also to plead guilty to other, more lenient charges or receive more lenient punishment, it is possible that skilled counsel would obtain a better bargain.[394]

I agree with those who claim that the most serious mistakes of a defense counsel in relation to plea bargaining are failure to inform of an offer at all, inaccurate information or inadequate advice provided for the accused, coercion and neutrality.[395] The first one is the mistake that should not occur in Estonia, because according to the Code of Criminal Procedure if a Prosecutor's Office considers application of settlement proceedings possible, the Office explains the option of applying settlement proceedings, the rights of the accused in the settlement proceedings and the consequences of application of the settlement proceedings to the accused (CCP, § 240 1)). Therefore, in order to commence settlement proceedings, the Prosecutor's Office must contact the accused. The second mistake is the one that comes from counsel's inadequate investigation of the relevant facts and the law and may even sometimes be intentional if counsel is interested in the case resulting in a settlement or on the contrary in going to trial. Coercion has the same goal – for some reason counsel wants that the case

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[392] Brady v. United States, 397 U.S. 742 (1970), 397 U.S. 757.

[393] Zeidman, *To Plead Or Not to Plead: Effective Assistance and Client-Centered Counseling,* 841, p. 896.

[394] Goodpaster, *Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases, the Colloquium: Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise been Fulfilled,* 59, pp. 82–83. However, in Estonia the Supreme Court has expressed an opinion that during the plea bargaining the prosecutor should not agree with considerably more lenient punishment than he would have asked to the accused during the general procedure, as the punishment should be in accordance with the accused's guilt and guilt is the same no matter which proceedings is applied. Court Ruling of the Criminal Chamber of the Supreme Court, 14 December 2009, court case no. 3-1-1-96-09, p. 9. Online. Available: http://www.nc.ee/?id=11&tekst=222521168, 29 April 2001. In addition, although never said out loud, at least not on the level of the Supreme Court, it seems that Estonian courts also disapprove bargaining over legal assessment of the offence.

[395] Zeidman, *To Plead Or Not to Plead: Effective Assistance and Client-Centered Counseling,* 841, p. 852.

is conducted in settlement proceedings or in the general procedure and for instance, threatens the accused with untrue consequences that can happen if the accused does not agree to act in the way counsel requires. The last one – neutrality – I have already discussed above. It means that counsel, although while advising the accused names the possible outcomes, but does not express his opinion based on investigation of relevant facts and law about the case and therefore provides no support to the accused. That leaves the accused alone to make the decision and gives the impression that he is not supported by his counsel, which is one of the duties of counsel. Although the consequences of neutrality could be reduced in Estonia by the fact that the prosecutor also explains the accused his rights and the results of the plea bargaining, it still means that the accused has not received advice and support from a person who should be by his side during the criminal proceedings. That leaves three mistakes, inadequate advice, coercion and neutrality, which should form a basis for annulment of the court judgment or if the trial court finds it out before the judgment is made, a court's ruling on the return of the criminal file to the Prosecutor's Office (see *Standards 5 and 9.6*).

There are two main scenarios in case of ineffectiveness claims of counsel in plea bargaining. First, an accused ignorantly pleads guilty without exercising his right to a trial and then desires the opportunity for trial, and second, an accused exercises his right to a trial, is found guilty and then desires a lighter sentence than resulted from his trial because he missed an opportunity to effectively plea bargain.[396]

In the United States courts are reluctant to overturn convictions stemming from guilty pleas.[397] Although in order to plead guilty the accused does not have to confess guilt, as in order to conclude the settlement the accused does not have to confess his guilt in Estonia either,[398] a guilty plea is seen as an admission that removes doubts about whether the accused is guilty. Consequently, judges in the United States see accused persons' complaint over their counsels' in-effectiveness as an attempt to manipulate the criminal justice process by persons "who initially took the risk that they would fare better by pleading guilty than by standing trial and then, after seeing the result, concluded that they had made the wrong decision". [399] In my opinion if it is ascertained that the accused's

[396] Tara Harrison, *Pendulum of Justice: Analyzing the Indigent Defendant's Right to the Effective Assistance of Counsel when Pleading Not Guilty at the Plea Bargaining Stage, the,* 2006 Utah L. Rev. 1185 (2006), p. 1200.

[397] Bruce A. Green, *Judicial Rationalizations for Rationing Justice: How Sixth Amendment Doctrine Undermines Reform Colloquium: What does it Mean to Practice Law in the Interests of Justice in the Twenty-First Century,* 70 Fordham L. Rev. 1729 (2001–2002), p. 1730.

[398] Judgment of the Criminal Chamber of the Supreme Court, 26 September 2005, court case no. 3-1-1-79-05, p. 8. Online. Available: http://www.nc.ee/?id=11&tekst=RK/3-1-1-79-05, 29 April 2011.

[399] Green, *Judicial Rationalizations for Rationing Justice: How Sixth Amendment Doctrine Undermines Reform Colloquium: What does it Mean to Practice Law in the Interests of Justice in the Twenty-First Century,* 1729, p. 1730.

decision to agree with the settlement was intelligent, *i.e.*, before he made the decision he was advised by counsel who knew the facts of the case and the relevant law, counsel's advice based on the facts and the law was honest and true, counsel did not deceive the accused or did not coerce him to enter the decision, it could be said that there is no ground for annulment of the court judgment. According to the Code of Criminal Procedure, an appeal cannot be filed against a judgment made by way of settlement proceedings except in the event of a violation of the provisions of the procedural rules of settlement proceedings or material violation of procedural law according to the first subsection of § 339 of the CCP (§ 318 (4) of the CCP).[400] As ineffectiveness of defense counsel is in my opinion material violation of procedural law according to CCP § 339 (1) 12) as I will discuss further in the next chapter, it forms the basis for filing an appeal for the accused.

It is theoretically possible, although not frequent at least in the United States that the accused argues after the conviction that the decision to reject a plea and proceed to trial was due to ineffective assistance of counsel. There are conflicting views about the matter in the United States. Some courts in the United States consider the performance of counsel during plea bargaining ineffective if there is a reasonable probability that, but for counsel's deficient performance, the outcome of the plea negotiations would have been different; *i.e.*, the accused would have pled guilty and waived his right to a trial. Also, these courts request the accused to show that he was deprived of the opportunity to exchange a guilty plea for a lesser sentence.[401] The rationale behind this position is that the result of an error during the plea bargaining stage can be significant, regardless of how the accused pleads.[402] But others emphasize that there is no constitutional right to a plea bargain.[403] Their position is that fair trial has produced a reliable final judgment and annulling that judgment would be against the principle of finality.[404] They also claim that there is no appropriate remedy to cure ineffectiveness of counsel in these situations: the courts that support overturning the judgments have granted the accused a new trial or required the prosecution to reinstate the originally rejected plea offer, but the new trial is not a proper remedy, because the accused already received a fair

[400] Since the 1st September 2011 the second sentence of § 318 (4) of the CCP provides that the accused and his counsel may file an appeal also if the act described in a settlement is not crime, if the legal assessment of the act is incorrect or if the accused has received the sentence that is not provided by law. Therefore if counsel's ineffectiveness has severely affected the accused's position, the accused could rest his appeal on this provision.

[401] Harrison, *Pendulum of Justice: Analyzing the Indigent Defendant's Right to the Effective Assistance of Counsel when Pleading Not Guilty at the Plea Bargaining Stage, the,* 1185, p. 1199.

[402] *Ibid*.

[403] *Ibid*., p. 1201.

[404] Leigh Tinmouth, *Fairness of a Fair Trial: Not Guilty Pleas and the Right to Effective Assistance of Counsel,* 50 B. C. L. Rev. [iii] (2009), p. 1630; Harrison, *Pendulum of Justice: Analyzing the Indigent Defendant's Right to the Effective Assistance of Counsel when Pleading Not Guilty at the Plea Bargaining Stage, the,* 1185, p. 1202.

trial. Requiring the prosecution to reinstate the original plea offer harms the balance of power between the parties and the court: an offer was originally given by the grace of the prosecutor, not by the court.[405] The United States Supreme Court has not, however, had the opportunity to express its opinion about the matter[406] and therefore it is not possible to conclude what solution would be proper in the eyes of the Supreme Court.

I agree more with the ones who are against overturning convictions than with the ones who support it. If the accused is convicted in a trial that is declared fair, *i.e.* his procedural rights, including his right to effective assistance of counsel were honored during the trial, the principle of finality automatically acquires a very important meaning. To conclude that even if the accused received a fair trial, he has the right to either a new trial or new settlement, may be in the interests of the accused and may even serve the principle of equal protection as the accused who has declined the plea agreement may claim that he received a more strict punishment than other accused persons who have similar charges and who accept the plea agreement (as plea agreements usually means more lenient punishment), but is still strongly against the principle of finality. As I have emphasized repeatedly, the principle of finality and the accused's right to counsel are the main values that should be weighed in case of ineffectiveness of counsel claims. Sometimes the right to counsel overcomes the principle of finality and sometimes it is the other way round. As here the accused has already had a chance to effective assistance of counsel, in my opinion it erases the former ineffectiveness of defense counsel and therefore, the court judgment should not be annulled. Additionally, I also agree with those who claim that it is against the principle of independence of parties to a court proceeding to compel the prosecutor to offer an agreement once more to the accused, which would be only proper remedy if the court judgment would be annulled (but which I am strongly against).

4.9 Improper Representation in the Court Proceedings

There are quite a lot of mistakes counsel can make during the court proceedings. Failure to seek out or present evidence that may lead to the acquittal of the accused or mitigate his guilt is one possible violation. The duty to use all means and methods of defense which are not prohibited by law in order to ascertain the facts which vindicate the person being defended, prove his innocence or mitigate his punishment comes directly from § 47 (2) of the CCP. Two additional ones are the lack of overall strategy and failure to object to

[405] Paul J. Sampson, *Ineffective Assistance of Counsel in Plea Bargain Negotiations Note,* 2010 BYU L. Rev. 251 (2010), p. 266; Harrison, *Pendulum of Justice: Analyzing the Indigent Defendant's Right to the Effective Assistance of Counsel when Pleading Not Guilty at the Plea Bargaining Stage, the,* 1185, pp. 1202–1203.

[406] Tinmouth, *Fairness of a Fair Trial: Not Guilty Pleas and the Right to Effective Assistance of Counsel,* [iii], p. 1613.

inadmissible aggravating evidence.[407] Counsel's failure to prepare the case is the one I have already discussed above. In addition to that counsel may show incompetence in cross-examination of a witness or fail to object to a prosecutor's questions to the witness. Although the list of counsel's possible mistakes in trial is endless, I will discuss here the most serious ones, *i.e.* the ones that in my opinion lead to ineffectiveness of counsel.

First, if counsel says during the trial that in his opinion the accused is guilty, although the accused has not confessed his quilt, it can be said that a very serious breach of counsel's duties has occurred. Although it could be claimed that, if the accused could not convince his own counsel to argue his innocence at trial, there is virtually no likelihood that court acquits him, the question whether or not the accused is convicted is not relevant and the improper counsel's representation can be concluded because of defense counsel's unauthorized concession of guilt.[408] As the United States Supreme Court has stated: "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate on behalf of his client, as opposed to that of *amicus curiae*."[409] In Estonia, this problem is only regulated if counsel is an advocate. Article 19 (3) of the Code of Conduct of the Estonian Bar Association provides: "If the client denies the accusations made against him the position of the client shall be binding upon the advocate. The advocate shall not be bound by the position of his client when rendering a legal opinion on the accusations made against his client, however, he shall inform the client about the defense position." In my opinion this is an absolutely reasonable regulation that takes into account both the accused's and counsel's position in the proceedings and should be added to the Code of Criminal Procedure. The accused is the one who has the best knowledge of

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[407] Jeffrey Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel Note,* 38 Am. Crim. L. Rev. 147 (2001), p. 172.

[408] Woessner, *Criminal Law – the Crucible of Adversarial Testing: Ineffective Assistance of Counsel and Unauthorized Concessions of Client's Guilt Note,* 315, p. 348.

[409] Anders v. California, 386 U.S. 744. "Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client." Ferri v. Ackerman, 444 U.S. 193 (1979), 444 U.S. 204.
However, in Florida v. Nixon (543 U. S. 175 (2004)) the United States Supreme Court stated that counsel's failure to obtain the accused's express consent to a strategy of conceding guilt in a capital trial does not automatically render counsel's performance deficient. "According to Nixon, a defendant, who has a constitutional right to testify in his own defense, can take the stand, give his side of the story, declare his innocence, and his attorney may then turn around and tell the jury that the defendant is guilty, implying that the defendant committed perjury." Jennifer William, *Criminal Law – the Sixth Amendment Right to Counsel – the Supreme Court Minimizes the Right to Effective Assistance of Counsel by Maximizing the Deference Awarded to Barely Competent Defense Attorneys – Florida v. Nixon the Ben J. Altheimer Symposium: Courtroom with a View: Perspectives on Judicial Independence in Honor of Judge Richard Sheppard Arnold: Note,* 28 UALR L. Rev. 149 (2005–2006), p. 171. This United States Supreme Court's standpoint I definitely do not agree with.

what really happened and what did not happen, which means that only he is the one who has the right to say whether the defense position is that he is guilty or not. Counsel, on the other hand is professional and has much more thorough knowledge about the law and judicial practice, which means that there is no way he should be obliged to present the same legal reasoning as the accused, who may not even be able to understand the law at all. Consequently, if counsel expresses opinion that the accused is guilty although the accused has not confessed his guilt, it should form a basis for removal of counsel and later the annulment of the court judgment.

In Estonia counsel has to compose the list of evidence he wants to present and witnesses he wants to be questioned before the court session, as I already discussed above. The collection of additional evidence during the court proceedings at the request of counsel may be ordered in exceptional cases, which means that failure to present evidence is usually an issue of ineffective pre-trial representation, not trial representation. Therefore, usually counsel has all the evidence he wants to present listed before the trial. If counsel finds out that additional evidence exists after the deadline of statement of defense, he should file a motion to collect additional evidence during the court proceedings. However, if he does not do that, this may lead to the conclusion that counsel has been ineffective during the trial stage of the proceedings.

After the prosecutor has given an opening statement, it is time for counsel to give his. The American Bar Association explains here: "The primary purpose of the opening statement is to give counsel an opportunity to outline the issues and matters counsel believes can and will be supported by competent and admissible evidence introduced during the trial."[410] As I already discussed, defense counsel should not express a personal belief or opinion in his client's innocence.[411] If counsel is aware of circumstances that show that there are no grounds for criminal proceedings, *i.e.* if the necessary elements of an offence do not exist, it is possible to preclude unlawfulness of the act or there are circumstances that preclude guilt, counsel should stress that and also refer to evidence that supports his conclusion.

After opening statements the examination of evidence begins. Here counsel needs good lawyering skills, especially when it comes to questioning of witnesses. Because in most cases only testimony given by a witness during the court proceedings could be used as evidence, it is important that counsel asks all the questions he considers important from the witness and in case the witness is the prosecutor's witness, tries to call credibility of the testimony into question. Therefore incompetent questioning of witnesses could also lead to ineffective defense. In addition to that ineffectiveness may also occur when counsel fails to object to prohibited questions asked by the prosecutor or even unlawful evidence that the prosecutor tries to present.

[410] Standard 4–7.4 commentary of the ABA Standards. The purpose of opening statement in Estonian criminal proceedings should be the same.
[411] Provided for also in the Standard 4–7.7 (b) of the ABA Standards.

After examination by the court is completed, the summations commence. Here counsel has an opportunity to give his opinion about punishment. Even if the accused has not confessed his guilt, counsel should still have a say on the punishment requested by the prosecutor. In order to do that, first, counsel should be aware of the potential punishment that the client is facing, including whether the punishment could be only imprisonment or pecuniary punishment as well. In addition to that counsel should be aware of the potential term of punishment and also applicable supplementary punishments. Of course, counsel should also be aware of general principles of the imposition of punishments as well as facts of the certain case and the background of the accused. And last, counsel should investigate circumstances that the prosecutor claims to be aggravating and refer to circumstances he himself finds mitigating.[412]

For the aforementioned reasons, the most serious individual mistakes of counsel during the trial, which in my opinion may constitute ineffectiveness and result in annulment of the court judgment, are:

1. Failure to make an adequate opening statement, *e.g.,* statement that does not include his opinion about the charges or other likewise superficial opening statement (see *Standard 10.2)*.
2. Failure to ask for an acquittal if counsel knows or should know that there are no grounds for criminal proceedings, *i.e.* if necessary elements of an offence do not exist or it is possible to preclude unlawfulness of the act (see *Standard 9.8)*.
3. Failure to bring out an existing circumstance that precludes guilt and that are known or should be known to counsel (see *Standard 9.9)*.
4. Failure to put material witnesses (material means that there is a probability that the testimony of this witness could mitigate the accused's position) on the stand, if counsel did not know the necessity to hear the witness when he was composing the statement of defense. If he did, this is ineffectiveness of defense counsel during the pre-trial stage of the criminal proceedings, which was already discussed above (see *Standard 9.5)*.[413]
5. Failure to ask for collection of additional evidence, if additional evidence is extremely relevant (meaning that there is a probability that it mitigates the accused's situation) and counsel did not know about the evidence when he was composing the statement of defense. If he did, this is ineffectiveness of defense counsel during the pre-trial stage of the criminal proceedings, which was already discussed above (see *Standard 9.5)*.[414]
6. Failure to object to unlawful evidence or to make other material objections or requests, *e.g.,* failure to submit a petition of challenge

[412] See also Carissa Byrne Hessick, *Ineffective Assistance at Sentencing,* 50 B. C. L. Rev. 1069 (2009), p. 1117.
[413] See also subsection 3.4.5.
[414] See also subsection 3.4.5.

against the judge if there is a basis for the judge to remove himself (see *Standard 10.6)*.

7. Ineffective cross-examination, which means failure to question the witness with the required thoroughness (see *Standard 10.3)*.
8. Failure to make adequate closing arguments (see *Standard 10.4)*.
9. Failure to give adequate opinion about the punishment required by the prosecutor. This opinion should be based on the facts of the case and relevant law and both refer to mitigating circumstances and object to aggravating circumstances (see *Standard 10.5)*.
10. Expressing the opinion that the accused is guilty although the accused has not confessed his guilt (which should also form a basis for removal of counsel as it shows that counsel goes strongly against the standpoint that the accused has taken about the subject known to the accused only) (see *Standards 4.3 and 9.3)*.
11. Lack of overall strategy, which means that counsel is there and acts but for an observer it is obvious that he does not have a proper goal for his actions, *e.g.,* he acts in the proceedings, but from his opening statement and from the evidence he presents, it cannot be concluded what in his opinion the best result of the proceedings for his client could be (see *Standard 9.7)*.

Failures 1 and 6–9 are the ones that could be concluded only by considering counsel's overall strategy in the criminal proceedings. For example, the higher court may think that counsel made an inadequate opening statement, but after counsel has explained the rationale behind making such a statement, the higher court may decide that in the light of the counsel's strategy the opening statements were not inadequate at all. Therefore these failures do not constitute ineffective defense *per se.* The last failure, the failure of counsel to form his strategy is obviously quite difficult to assess. Here it would be useful if counsels had a duty to compose a written overview of their strategy before trial, seal it and put it in the criminal file. This document should be allowed to be used only by higher courts in the case of an ineffectiveness claim.

4.10 Improper Representation in Higher Courts

In the United States claims of ineffectiveness of appellate counsel have focused on three major categories of ineffectiveness, which I will now discuss further. These claims arise from the duties of an appellate counsel. Appellate counsel must be familiar with procedural rules for protecting the accused's right to appeal; must review the court file for possible appellate issues and be familiar with the facts of the case and relevant law; must determine what issues to raise in appeal and how to formulate those issues. And finally, counsel must write persuasively.[415] The Supreme Court of Estonia has held that the duties of

[415] Griffin, *Right to Effective Assistance of Appellate Counsel, the,* 1, p. 37.

counsel do not only consist of assisting the accused with composing an appeal against the decision or ruling of the court. Counsel also has to ascertain the position of the accused and to file an appeal in cassation that considers the accused's interests and is in accordance with requirements provided by the law.[416]

First, accused persons have referred to the failure to gain or protect access to the appeal, such as failure to file a notice of appeal, appeal itself or the failure to advise the client concerning his right to appeal.[417] The Court of Honor of the Estonian Bar Association held on the 6th of March 2008 in its decision that when it comes to the accused's right to appeal, the advocate has to act and not stay passive: the accused is not the one who has to notify the advocate of his wish to file an appeal. Instead, the advocate has to be the one who contacts the accused, via e-mail or fax if necessary, and finds out his intentions.[418] However, this only forms a basis for disciplinary action in Estonia: the courts have not held that in this case the accused should have a new chance to file an appeal. According to Estonian judicial practice, if counsel fails to file a notice of appeal or the appeal itself, no matter if he has advised the accused about his opportunity to file an appeal or not, the accused loses this opportunity, unless there is a ground for restoration of the term of appeal, which according to judicial practice of the Supreme Court of Estonia is objective impediment, for instance natural disaster, traffic accident, illness of counsel, *etc.*[419]

However, the courts in the United States have concluded that an accused who loses his right to appeal because of counsel's error prejudice *per se*. As long as the appellant establishes an intention to appeal and a reliance on counsel to preserve the right to do so, the appellant does not have to show that he had some chance of success on appeal in order to achieve a new chance for an appeal.[420] Thus, in Roe v. Flores-Ortega[421] the United States Supreme Court stressed that when counsel fails to file a requested notice of appeal (or an appeal itself, like the Court had stated in Peguero v. United States[422]), an accused is entitled to a new appeal without showing that his appeal would likely have had merit. "This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's

[416] Ruling of the Criminal Chamber of the Supreme Court, 17 February 2010, court case no. 3-1-1-9-10, p. 9. Online. Available: http://www.nc.ee/?id=11&tekst=RK/3-1-1-9-10, 29 April 2011.
[417] Evitts v. Lucey, 469 U.S. 387 (1985). The Due Process Clause of the Fourteenth Amendment guarantees an accused the effective assistance of counsel on his first appeal as of right. *Ibid.*, 469 U.S. 391–405.
[418] Digest of the Code of Conduct of the Estonian Bar Association. Online. Available: http://www.advokatuur.ee/?id=176, 29 April 2011.
[419] Court Ruling of the Criminal Chamber of the Supreme Court, 12 February 2007, court case no. 3-1-1-5-07, p. 6. Online. Available: http://www.nc.ee/?id=11&indeks=0,1,105,1596,3210&tekst=RK/3-1-1-5-07, 29 April 2011.
[420] Griffin, *Right to Effective Assistance of Appellate Counsel, the,* 1, p. 23.
[421] Roe v. Flores-Ortega, 528 U.S. 470 (2000).
[422] Peguero v. United States, 526 U.S. 23.

failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes."[423] The Court also emphasized in Roe v. Flores-Ortega that counsel has a duty to consult with the accused about an appeal when there is reason to think either that a rational accused person would want to appeal (for example, because there exist grounds for appeal in counsel's opinion), or that this particular accused demonstrated to counsel that he was interested in appealing.[424] I agree with the standpoints of the United States Supreme Court. When the accused has put his hopes on filing the appeal or the appeal on cassation and counsel has not done it, the accused loses the opportunity in his case because of failure of his counsel not himself. Therefore if counsel fails to file a notice of appeal or the appeal, the accused should have a second chance (see *Standard 7.2*). When it comes to the question whether counsel should ask from the accused if he wants to file an appeal or not or the accused should notify counsel about his wish to do that, I support the latter approach. After the pronouncement of a court judgment the trial court has an obligation to explain the procedure for appeal to the accused (CCP, § 315 (5) 2)) and procedure for appeal and appeal on cassation are also explained respectively in the judgment of court of first instance (CCP, § 313 (1) 13)) and second instance (CCP, § 342 (1) and § 313 (1) 13)). Therefore the accused has knowledge about the appeal procedure and as he is the one who should give an ultimate opinion whether to appeal or not, he should show some initiative. Otherwise counsel who has many cases and who represents many accused persons should contact every one of them and ask their opinion about an appeal, which in turn would raise his workload substantially.

According to case law of the ECtHR if counsel makes an insignificant mistake while he files the appeal, the court should give counsel opportunity to correct the mistake. In Czekalla v. Portugal the Supreme Court declared inadmissible the accused's appeal against his conviction, lodged through Ms. T.M., ruling that the grounds of appeal had not been satisfactorily explained. The appeal contained no submissions and did not indicate in what way the legal provisions, which breach it alleged, should have been interpreted and applied. Mr. Czekalla complained of the inadequacy of the legal assistance he had been given, as a result of which he had been deprived of access to the Supreme Court on account of the mistake made by the lawyer officially appointed to assist him, Ms. T.M., who had omitted to include submissions in her pleading. The ECtHR concluded that "…the decisive point is the officially appointed lawyer's failure to comply with a simple and purely formal rule when lodging the appeal on points of law to the Supreme Court. In the Court's view, that was a "manifest failure" which called for positive measures on the part of the relevant authorities. The Supreme Court could, for example, have invited the officially appointed lawyer to add to or rectify her pleading rather than declare the appeal

[423] Roe v. Flores-Ortega, 528 U.S. 477.
[424] *Ibid.*, 528 U.S. 480.

inadmissible."[425] The Court added: "In the first place, it does not see how the independence of the legal profession could be affected by a mere invitation by the court to rectify a formal mistake. Secondly, it considers that it cannot be said *a priori* that such a situation would inevitably infringe the principle of equality of arms, given that it would be more in the nature of a manifestation of the judge's power to direct the proceedings, exercised with a view to the proper administration of justice."[426] In my opinion this case shows that the ECtHR accepts that in case counsel makes a procedural mistake, the court could declare the appeal inadmissible unless the mistake counsel made was manifest in the meaning that, *e.g.,* in this case the appeal the advocate filed did not meet some formal conditions and in the ECtHR's opinion the state should have acted in order to guarantee the accused's right to appeal. Still it is difficult to say what is in the ECtHR's opinion "a manifest failure" which calls for positive measures on the part of court. In the light of Czekalla v. Portugal it could be said that these are some formal requirements counsel fails to meet, but in order to give this notion a little wider meaning, one has to wait for further judgments from the ECtHR.

Second, in the United States accused persons have complained over deficient perfection of the appeal, such as deficient briefing or failure to appear at an oral argument, which basically means that counsel's preparation or presentation was deficient.[427] These claims are hardly ever successful in the United States.[428] In Estonia requirements for appeal are provided for in § 321 of the CCP. If an appeal is not in compliance with these requirements, the court shall, by a ruling, refuse to accept the appeal and set a term for the elimination of deficiencies (CCP, § 323 (1)). Only if the appellant has failed to eliminate the deficiencies contained in the appeal within the specified term or to substantiate such failure, a judge shall prepare a ruling on refusal to hear an appeal and return the appeal to the appellant (CCP, 323 (2) 3)). Therefore the question of ineffective defense may arise after the court has refused to hear an appeal, because counsel has not eliminated the deficiencies (see *Standard 7.3*). The same is with the appeal on cassation: requirements for that appeal are provided for in § 347 of the CCP. If those requirements are not followed, the Court shall set a term for the elimination of deficiencies (CCP, § 350 (1)) and refuse to hear an appeal of cassation if these deficiencies are not eliminated on time (CCP, § 350 (2) 3)). In the court hearing of the criminal matter in circuit court an appellant or the other parties to a court proceeding do not have the right to exceed the limits of the appeal (CCP, § 331 (4)). Therefore the circuit court has everything the appellant found necessary to claim already on the paper. If the appellant does not appear to the court session and he has not notified the court about a good reason for failure to appear or he has not explained that failure, the court may refuse to

[425] Czekalla v. Portugal, § 68.
[426] § 70 of the judgment.
[427] Griffin, *Right to Effective Assistance of Appellate Counsel, the,* 1, pp. 21–22.
[428] *Ibid*., pp. 23–25.

hear an appeal or hear a criminal matter in the absence of the appellant (CCP, § 334 (4)). This means that in case counsel as an appellant fails to appear without good reason, he may not even get the chance to express his views orally, which is not of great importance as counsel has already written them down and presented to the court as an appeal. But if the result of counsel's failure is court's refusal to hear the case, the question of possible ineffective defense is raised (see *Standard 7.5*). In the Supreme Court of Estonia generally, the Supreme Court shall hear a criminal matter by way of a written proceeding (CCP, § 352 (2)). If a matter is heard by way of an oral proceeding and a party to the proceedings fails to appear, the matter is usually heard in their absence CCP, § 352 (3)).

Third, deficient selection of appellate issues has been a subject in the United States.[429] This could be a problem in Estonian criminal proceedings, because the accused may not either want or be able to compose an appeal to the circuit courts and therefore gives this task to counsel with the list of issues he himself would want to rise in the appeal. It might be that counsel does not agree with the issues and arguments brought out by the accused and writes in the appeal his own ones. Then the question arises if counsel has been ineffective, because he ignored the accused's wishes. The same question arises with the appeal of cassation to the Supreme Court of Estonia even more sharply, because only an advocate has a competence to file it to the Supreme Court.

According to judicial practice of the United States and also opinions expressed in the law reviews, while choosing issues, defense counsel can leave aside every frivolous issue[430] and does not have a duty to raise every non-frivolous issue requested by the accused either. Experienced advocates in the United States have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible or at most on a few key issues. Selecting the most promising issues for review has assumed a greater importance in an era when the time for oral argument is strictly limited in the United States in most courts and when page limits on briefs are widely imposed.[431] The Supreme Court of Estonia has never expressed the view that counsels are allowed to leave some issues the accused wants to be added to the appeal or appeal on cassation aside. However, although it is the accused's ultimate choice whether to appeal or not, it should be in counsel's authority to choose from issues the accused wants to raise the ones that are in counsel's opinion the best ones. Raising frivolous and unimportant issues is very expensive for the accused himself, as he usually has to pay for counsel's work no matter if counsel is retained or appointed, and expensive also to the whole justice system. Although in Estonia time for oral arguments and number of pages of the appeal is not limited, it should be noticed that everything from reading to listening takes court's time. If court has to waste its time and

[429] Jones v. Barnes.
[430] Penson v. Ohio, 488 U.S. 75 (1988), 488 U.S. 69–85.
[431] Jones v. Barnes, 463 U.S. 750–754.

attention on frivolous and unimportant issues, it means the waste of society's resources. Therefore, in my opinion, counsel should be allowed to leave aside unimportant and frivolous issues as in exceptional circumstances he should also be allowed to refuse to compose an appeal if he thinks all the issues the accused wants to raise are frivolous and after he has examined the court file, he cannot raise any other issues himself. The latter proposal however, needs a serious debate in society as the principle that comes from the Constitution of Republic of Estonia and from the judicial practice of the Estonian Supreme Court is that the accused has an indefeasible right to appeal to a higher court against the judgment, a right that is restricted if counsel is allowed to refuse from composing an appeal. One thing is certain: it would definitely save a remarkable amount of resources. However, in order that counsels would not abuse this discretion, it would be important to supervise such a decision by counsel, maybe with an explanation he has to write to the court or to the Bar if counsel is an advocate.

The ECtHR has judicial practice about frivolous appeals also. In Kulikowski v. Poland[432] the ECtHR held that it is the responsibility of the state to ensure that the proper balance between, on the one hand, effective enjoyment of access to justice and the independence of the legal profession on the other, is achieved. The mere fact that an appointed lawyer can refuse to represent an accused in the proceedings before the highest court does not lead to denial of legal assistance.[433] The Court noted: "… [A]rticle 6 of the Convention does not confer on the State an obligation to ensure assistance by successive legal-aid lawyers for the purposes of pursuing legal remedies which have already been found not to offer reasonable prospects of success. In the present case the first lawyer appointed under the legal-aid scheme found no legal grounds on which to prepare a cassation appeal. In the absence of indications of negligence or arbitrariness on the lawyer's part in discharging her duties, the State can be said to have complied with its obligations to provide effective legal aid to the applicant in connection with the cassation proceedings."[434]

Consequently, counsel in the appellate proceedings has the following duties, the duties that the ABA Standards express verbatim and which in my opinion should be recognized in Estonia also. First, in order to make sure that the accused acquires the chance to file an appeal, defense counsel should give the accused proper advice after the accused has expressed his wish to file an appeal. He also should take whatever steps are necessary to protect the accused's rights to appeal, *e.g.,* file a notice of appeal.[435] Counsel should give a client his best professional evaluation of the questions that might be presented on appeal. When inquiring into the case, counsel should consider all issues that might affect the validity of the judgment of conviction and punishment. Counsel

[432] Kulikowski v. Poland. *Application no. 18353/03*. 19 May 2009.
[433] § 63 of the judgment.
[434] § 68 of the judgment.
[435] Provided for in Standard 4–8.2 (b) of the ABA Standards.

should also advise on the probable outcome of a challenge to the conviction and should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.[436] Appellate counsel has the ultimate authority to decide which arguments to make on appeal,[437] but when appellate counsel decides not to argue all of the issues that his client desires to be argued, appellate counsel should inform the client about it, after which the accused may decide to change counsel if it is possible for him. When it comes to claimed ineffectiveness, if counsel has neglected an issue on appeal and the accused claims it was not a right decision, the standard should be whether the neglected issue has sufficient merit, in light of the other available issues, that a reasonably competent counsel would have pursued it (see *Standard 7.4*),[438] as when it comes to determining counsel's ineffectiveness, the courts should always ask themselves, what would a reasonable lawyer have done.

[436] Standard 4–8.3 (b) of the ABA Standards.
[437] Standard 4–8.3 (d) of the ABA Standards.
[438] Griffin, *Right to Effective Assistance of Appellate Counsel, the,* 1, p. 45.

IV. JUDICIAL SUPERVISION OVER THE PERFORMANCE OF COUNSEL IN CRIMINAL PROCEEDINGS

1. Judicial Supervision in the Courts of First Instance

1.1 The Form of Supervision

Considering that the interpretations of Article 6 paragraph 3 (c) of the ECHR by the ECtHR are an inseparable part of the Estonian legal system,[439] Estonian state authorities, including the courts, are obliged to guarantee the right of defense to persons charged with a criminal offence that is practical and effective, not theoretical or illusory. On the basis of the case law of the ECtHR, the Estonian courts have a duty to intervene where the ineffectiveness of counsel is manifest or sufficiently brought to their attention in some other way. S. Trechsel has expressed a following opinion about the matter: "This may not be a very appropriate formulation, because the essential element seems to be that the shortcomings are brought to the attention of the authorities; the decisive aspect is, in fact, that the shortcomings are so blatant as to prevent there being the possibility of "effective representation". The requirement that this lack of effectiveness be brought to the attention of the competent authorities is very much of secondary importance."[440] Therefore Estonian courts have to react if the serious breach of counsel's duties has occurred and the accused is left without effective defense. Given the degree of reluctance which the ECtHR has been showing when it has been hearing claims concerning ineffective assistance of counsel, there is a significant chance that if a person who has been convicted in Estonia were to file an application regarding ineffective assistance of counsel other than absence of counsel or complete lack of counsel's action, the application would not be satisfied by the ECHR. This does not, however, mean that the Estonian courts may turn a blind eye and fail to react to a violation of the right set out in the European Convention on Human Rights and interpreted by the case law of ECtHR in the hopes that, should an application be filed, the ECtHR might for some reason (*e.g.*, reference to independence of counsel) find that no violation of Article 6 paragraph 3 (c) of the ECHR has occurred.[441]

Therefore I am convinced that Estonian courts should act if the accused's right to effective assistance of counsel is jeopardized. Next I am going to discuss why the trial court is the one to perform supervision over the performance of counsel in criminal proceedings and to react if it notices ineffective representation, name

[439] Judgment of the Criminal Chamber of the Supreme Court, 20 September 2002, court case no. 3-1-1-88-02, p. 7.1. Online. Available: http://www.nc.ee/?id=11&tekst=RK/3-1-1-88-02, 29 April 2011.
[440] Trechsel, *Human Rights in Criminal Proceedings*, *p*. 287.
[441] Soo, *An Individual's Right to the Effective Assistance of Counsel Versus the Independence of Counsel: What can the Estonian Courts do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?* 252, p. 259.

different forms of supervision that could be used by the courts of first instance and analyze justification for each form. I am also going to discuss the possibilities of Estonian courts to perform supervision over counsel's activities that are or should be enacted by the Code of Criminal Procedure.

The United States Supreme Court has strongly emphasized the importance of judicial supervision in criminal proceedings: "... [T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct..."[442] In addition to Quercia v. United States, in many cases, the United States Supreme Court has demanded that lower courts "…must ever be concerned with preserving the integrity of the judicial process."[443] Justice Souter pointed out in his dissent in Mickens v. Taylor: "What is clear from *Strickland* and *Holloway* is that the right against ineffective assistance of counsel has as much to do with public confidence in the professionalism of lawyers as with the results of legal proceedings."[444] Almost 25 years before that the United States Supreme Court emphasized that judges "…must be alert to factors that may undermine the fairness of the fact-finding process."[445] Also the ECtHR has considered court to be "an ultimate guardian of the fairness of the proceedings".[446] As guardians of the conduct of the proceedings judges are expected to ensure the fairness of the justice system, which means that they have to make sure that lawyers behave in a way consistent with the rules of conduct.[447] Consequently, it is the trial judge's obligation to observe what is going on in his courtroom and to oversee the representation of parties to a court proceeding. This role corresponds to the court's institutional role: judge is the one who sees conduct of parties and the consequences of it, and based on his experience he knows what to demand from the parties.[448] Therefore I definitely agree that the administration of justice is the judge's "ultimate responsibility"[449]

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[442] Quercia v. United States, 289 U.S. 466 (1933), 289 U.S. 469.

[443] Stone v. Powell, 428 U.S. 465 (1976), 428 U.S. 485. See also Illinois v. Allen, 397 U.S. 337 (1970), 428 U.S. 343.

[444] Mickens v. Taylor, 535 U.S. 207, Justice Souter, dissenting.

[445] Estelle v. Williams, 425 U.S. 503.

[446] Timergaliyev v. Russia. *Application no. 40631/02.* 14 October 2008, § 59.

[447] Wald, *Should Judges Regulate Lawyers?, p*. 15.

[448] Judith A. McMorrow, Jackie A. Gardina & Salvatore Ricciardone, *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions Legal Ethics Conference: Judging Judges' Ethics,* 32 Hofstra L. Rev. 1425 (2003-2004), p. 1471.

[449] "… [I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." McMann v. Richardson, 397 U.S. 771.
"In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel. But that right has never been understood to confer upon defense counsel the power to veto the wholly permissible actions of the trial judge. It is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial." Lakeside v. Oregon, 435 U.S. 333 (1978), 435 U. S. 341–342. See also Mary Sue Backus & Paul Marcus, *Right to Counsel in Criminal Cases, a National Crisis, the,* 57 Hastings L. J. 1031 (2005–2006), p. 1085.

and he cannot be indifferent to events which diminish the quality of adjudication in his court.[450] In addition to that, the judge is really the only subject to the proceedings in addition to the accused that is authorized to make remarks to the parties to a court proceeding (the accused can make remarks, of course, only to his counsel). It is absolutely inappropriate for the prosecutor to oblige counsel to take some steps in the court proceedings or the other way around. Of course, they can always observe each other's behavior and notify the judge of mistakes, but it is still the judge who is responsible for conduct of the proceedings and should be therefore allowed to instruct the parties to a court proceeding.

In case of ineffectiveness of defense counsel the judge has basically three options. He may take the role of defense counsel over from counsel, remain passive, *i.e.* allow the case to stumble toward a fortuitous (or disastrous) result,[451] or to act as a responsible person while trying to stay as neutral as possible, *i.e.* assist the defense side, but to try not to take over counsel's role. The first option is excluded in the adversary system, because the judge has his own role – the role of a person who fulfils a duty to adjudicate and he cannot be counsel at the same time as he is the judge. The second option would mean that the judge tolerates the fact that one of the opposing parties ceases to exist to the prejudice of the accused, which means that the principle of fairness is violated in the judge's courtroom. Both options would mean that the judge backs away from the basic principles of the adversary system. The last option, which is the best one in my opinion,[452] as the judge tries to stay neutral and at the same time has an intention to retain the balance of the opposing parties performing in his courtroom, is unfortunately not without complications either.

Intervention by the judge in adversary proceedings never goes without difficulties. It always requires the judge to depart from his traditional neutral role and step towards the situation where court aids one adversary. In addition to that, inquiry into counsel's strategy means the possibility of jeopardizing the confidential relationship between counsel and the accused, which in turn impairs the adversary process.[453] By intervention the judge risks either getting to know facts that he was not supposed to know or to guide the defense in the direction the defense had no plan to go. Basically intervention by the judge for the defense means that the judge does something that is against the principle of two autonomous contestants and one impartial judge, which is the basis for the adversary system.

But yet again the judge is the one who is obliged to preserve the adversary proceedings and that is why the intervention is more favorable than remaining

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[450] Schwarzer, *Dealing with Incompetent Counsel – the Trial Judge's Role,* 633, p. 637.
[451] *Ibid*.
[452] In ineffective defense situations, the principles of the adversarial model are honored only by permitting or even requiring judicial intervention to compensate for the failures of defense counsel. Marcus, *Above the Fray Or into the Breach: The Judge's Role in New York's Adversarial System of Criminal Justice,* 1193, pp. 1196–1197.
[453] Schwarzer, *Dealing with Incompetent Counsel – the Trial Judge's Role,* 633, p. 637.

passive or becoming counsel himself. Basically it is the best option of three bad options. It is the obligation of the trial court to ensure that the adversary system is truly functioning, which it is not if one contestant is really absent or "absent" because he is ineffective or the judge is missing, because he has acquired the role of counsel.[454] Like many other issues in the field of ineffectiveness of defense counsel this is a coin that has two sides: "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. … Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," …"[455] The judicial intervention may threaten the autonomy of lawyers that is at the heart of the adversary system, but if the lawyer is ineffective, it may be that the proceeding is not adversary at all.[456] If one of the parties is not an effective advocate, a judge who seeks to be "neutral and detached" might risk the chance that important factual or legal aspects of the case go inadequately explored or even entirely undeveloped or the accused's substantial interests remain defenseless.[457] If he takes the place of counsel, he loses the neutral position completely and consequently his impartiality is called into question. In addition to that if he takes counsel's position, there is a danger that the equality of arms is violated, but now to the prejudice of the prosecutor. Therefore a middle way is needed, which means that the adversary nature of the proceedings does not relieve the trial judge of the obligation to intervene but rather obliges him to do that, but only as far as the judge does not become counsel himself: when it appears that competent representation has been compromised, the trial judge has an obligation to act and restore the balance,[458] and at the same time try not to unbalance the proceedings even more. William W. Schwarzer has described the situation very precisely: "The trial judge therefore has a responsibility, grounded on and tempered by the adversary process and constitutional principles and reinforced by the absence of adequate alternatives, to ensure a fair trial by maintaining minimum standards of the performance by counsel."[459]

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[454] Richard Klein, *Judicial Misconduct in Criminal Cases: It's Not just the Counsel Who may be Ineffective and Unprofessional Commentary Symposium: The Promise of Gideon: Unfulfilled,* 4 Ohio St. J. Crim. L. 195 (2006–2007), p. 202.

[455] Strickland v. Washington 466 U.S. 686.

[456] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, p. 773.

[457] Marcus, *Above the Fray Or into the Breach: The Judge's Role in New York's Adversarial System of Criminal Justice,* 1193, p. 1196.

[458] Burnett & Burnett, *Ethical Dilemmas Confronting a Felony Trial Judge: To Remove or Not to Remove Deficient Counsel,* 1315, pp. 1326–1327.

[459] Schwarzer, *Dealing with Incompetent Counsel – the Trial Judge's Role,* 633, p. 649. See Glasser v. United States, 315 U.S. 71. "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." See also Powell v. Alabama, 287 U.S. 52. "It was the duty of the court having cases in charge to see that they were denied no necessary incident of a fair trial."

If we conclude that the intervention by the judge during a trial is an appropriate measure to guarantee that the assistance given by counsel to the accused is effective, two concerns arise. First, in what form should the intervention be? Second, how should the judge know that there is a risk of ineffective defense? These questions I am going to discuss here further.

As ineffective assistance of counsel "…disturbs the assumptions of the adversarial model, since neither truth nor justice may result if the prosecution fights hard for its position but the defendant's advocate is not equally vigorous…"[460] it can be said that the question for the judge is not whether the intervention itself is in accordance with the adversary process, "…but how to exercise the discretion to intervene so as to accommodate the competing demands of that process."[461] What form any intervention should take, necessarily varies with the circumstances of the case, the extent of the problem, and the personalities and abilities of the parties and the court. It is obvious that choosing a right form of judicial intervention that is with the right vigour is very complicated. When a trial judge intervenes with undue restraint, the accused's right to effective counsel may be violated. On the other hand, when the judge's intervention is too intrusive, it can interfere with the legitimate strategy of counsel and undermine the relationship between the accused and his counsel.[462] There are quite many options to intervene available to the judge, but for the above mention reasons he always has to be careful not to underreact or overact and for instance, not to refrain from removing counsel when gross ineffectiveness has appeared or not to remove counsel for a minor mistake. In order to choose an appropriate form of intervention, the one from the many aspects that the judge has to take into consideration is independence of profession of counsel. For instance, in accordance of principle of independence of the Bar it is unquestionable that the appropriate intervention in a form of giving instructions would more likely consist of orders to do more work than of requirements that counsel should alter his fundamental strategy for protecting the accused's interests.[463]

The trial judge's discretion, consequently, must be guided by awareness that his intervention can have serious consequences for the independence of counsel, the trustful attorney-client relationship, and therefore the proper functioning of the adversary proceedings.[464] Of course it is easier to say than to actually apply

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[460] Marcus, *Above the Fray Or into the Breach: The Judge's Role in New York's Adversarial System of Criminal Justice,* 1193, p. 1200.
[461] Schwarzer, *Dealing with Incompetent Counsel – the Trial Judge's Role,* 633, p. 639.
[462] Marcus, *Above the Fray Or into the Breach: The Judge's Role in New York's Adversarial System of Criminal Justice,* 1193, p. 1205.
[463] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, p. 774.
[464] Schwarzer, *Dealing with Incompetent Counsel – the Trial Judge's Role,* 633, p. 650; see also Sillaots, *Kaitsja võimalikust rollist ja seisundist Eesti tulevases kriminaalmenetluses,* 83, p. 91.

in the particular case.[465] The trial judge does not have all the information available to a defense counsel. If the judge intervenes to the representation he considers being ineffective, but it's not, he might later be blamed for improper handling of the case. Thus his action, which was originally designed to help the accused, may actually harm the defense.[466] The same is with choosing an appropriate form of intervention – if the facts known to the judge indicate that the only way to guarantee effective defense to the accused is to remove counsel and afterwards it turns out that it would have been possible to use more lenient measures, the judge may be accused of overreacting, although he did the best he could in the light of information available. And if he does not act or uses too lenient measures in case of gross ineffectiveness of counsel, because he did not have enough information, it may be concluded that he did not guard his proceedings properly.

The intervention by a trial judge compared to intervention by courts of higher instances has at least one considerable advantage. It guarantees a wider range of remedies: while a higher court is limited to reversing the conviction, an intervention of a trial judge may urge a counsel on preparing a defense and taking his duties more seriously. Therefore it can be said that the intervention by a trial judge is in compliance with society's pursuit of the conservation of resources.[467] Postponing an inquiry into ineffectiveness known at the time of trial is illogical and unresponsive to the hardship that faces accused persons trying to show counsel errors later on appeal.[468] It is also an irresponsible waste of resources. In addition to that, appellate proceedings will take its own time and it is possible that prisoners may have served their sentences before the

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The inquiry into counsel's actions is always problematic: it is severely limited by the confidential nature of the lawyer-client relationship and the judge has to take into account that the defense counsel is prohibited from disclosing details of the lawyer-client relationship, and may answer the judges' questions only in a way that protects lawyer-client confidentiality. Goldstein, *View from the Bench: Why Judges Fail to Protect Trust and Confidence in the Lawyer-Client Relationship – an Analysis and Proposal for Reform, A Note,* 2665, p. 2703. In addition to that as a result of this inquiry the accused may lose confidence in his counsel, because the inquiry may cause him to question whether defense counsel is qualified to provide an adequate defense. Bruce A. Green, *Through a Glass, Darkly: How the Court Sees Motions to Disqualify Criminal Defense Lawyers,* 89 Colum. L. Rev. 1201 (1989), p. 1233. It is also possible that counsel feels humiliated after the judge's inquiry, which may be witnessed by the accused, the prosecutor and public, at least when the judge makes initial inquiry in the court session, and does not take defending the accused seriously anymore.

[465] Marcus, *Above the Fray Or into the Breach: The Judge's Role in New York's Adversarial System of Criminal Justice,* 1193, p. 1197.

[466] Grunis, *Incompetence of Defence Counsel in Criminal Cases Articles and Addresses,* 288, pp. 291–292.

[467] "Early intervention thus protects against the resource waste of trying and convicting an improperly represented defendant, entertaining his appeal, and then trying him a second time from the beginning." *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, p. 773.

[468] Benson-Amram, *Protecting the Integrity of the Court: Trial Court Responsibility for Preventing Ineffective Assistance of Counsel in Criminal Cases,* 425, p. 451.

higher court makes its decision.[469] If a society acknowledges a trial judge's right to intervene, it also gives an accused the right to challenge the effectiveness of counsel preemptively, *i.e.* instead of challenging counsel's work *ex post*, the accused has an opportunity to do it *ex ante*, *i.e.* before the verdict is reached by the court.[470] The trial judge's function is to remedy observed deficiencies before it is too late, and ideally resorting always to the least intrusive measure possible in a certain situation.[471] No *ex post* proceedings can remedy the real defects of the defense function, because it always comes too late. In the first place, *ex post* review is simply much less powerful in detecting ineffective assistance: the trial judge has immense advantages over the appellate courts in observing the quality of representation, because he may become aware of ineffective lawyering that would not be obvious by the mere review of the record.[472] In the second place, *ex post* review can remedy ineffective assistance only at the expense of the finality interest.[473] The duty to intervene may seem at first sight an additional burden on the trial courts, the long-term benefit from it is a potential general improvement of the performance of defense.[474]

I absolutely agree with the standpoints I just described. During the court proceedings of the court of first instance the judge has a chance to react immediately in case ineffectiveness of counsel occurs. Although making remarks and guiding counsel's actions, which sometimes may even lead to an argument between the court and counsel, take its time also, it still is a less expensive option than annulment of the judgment afterwards. Even if counsel is removed and new counsel enters the proceedings, asking for repetition of the former proceedings, it still does not demand so many resources as the annulment of the judgment would do. Therefore, I strongly support *ex ante* supervision meaning that it is performed by the court conducting the proceedings.

For the aforementioned reasons, the judge of the trial court in the adversary process has an obligation to depart from traditional paradigms of judging and being passive, and directly intervene when confronted with counsel's in-

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[469] Klein, *Emperor Gideon has no Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel, the,* 625, pp. 637–638.

[470] *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems,* 118 Harv. Law Rev. 1731 (2005), p. 1732; Levine, *Preventing Defense Counsel Error – an Analysis of some Ineffective Assistance of Counsel Claims and their Implications for Professional Regulation,* 1275, p. 1430.

[471] Schwarzer, *Dealing with Incompetent Counsel – the Trial Judge's Role,* 633, p. 650.

[472] Richard Klein, *Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform, the,* 29 B. C. L. Rev. 531 (1987–1988), p. 566; Donald A. Dripps, *Ineffective Litigation of Ineffective Assistance Claims: Some Uncomfortable Reflections on Massaro v. United States,* 42 Brandeis L. J. 793 (2003–2004), p. 803.

[473] Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard Criminal Law,* 242, p. 285. Of course it seems impossible to avoid some sort of ex post scrutiny of counsel's effectiveness, because not all defense counsel's mistakes are noticed by the trial judge. *Ibid*., p. 302; Smithburn & Springmann, *Effective Assistance of Counsel: In Quest of a Uniform Standard of Review,* 497, pp. 526–527.

[474] Schwarzer, *Dealing with Incompetent Counsel – the Trial Judge's Role,* 633, p. 669.

effective representation. This intervention may take various forms, ranging from a remark to the questioning of witnesses or removal of counsel, but the nature of the judge's duty is to accept responsibility for the proper functioning of the adversarial proceedings and therefore whole legal system. The judge's obligation is a natural extension of the judge's role as a guardian of the process. There is no reason for the judge to believe that some other part of the legal system (*i.e.* higher court, civil courts, bar disciplinary action system) will remedy the harm done to the accused in the proceedings. First, for many reasons, there is no guarantee that other mechanisms will be more effective than direct intervention during the trial. Second, passive acceptance of a deficient counsel's performance decreases the parties' to a court proceeding and spectators' confidence in the justice system.[475] For these considerations I strongly support the trial judge's obligation to supervise counsel's activities in the criminal proceedings and to react and intervene when there is reason to believe that counsel renders ineffective assistance to the accused.

Now it is time to look for the sources, from where the judge may receive information about counsel's ineffectiveness. It is more than obvious, that trial counsel will not identify his own act or omission as ineffective assistance and turn to the judge.[476] Of course, it is more probable that counsel will act if he is not able to perform his duties because of interference by the state or there is another hindrance to provide the accused with an appropriate assistance (*e.g.,* he has too little time to prepare for trial or he cannot find the witness he wants to call to testify), but if he himself is reason for an ineffective defense, it is obvious and human that he is not going to notify the judge. Naturally, the judge as he is present in the court room and observes counsel's behavior may notice counsel's mistake himself. And if the judge is not able to recognize poor lawyering, the accused may inform him about it. However, even if the accused notices that something is wrong with the conduct of the defense during the proceedings, which he may not do because he usually has a knowledge deficiency in the field of law,[477] it is very unlikely that he will raise it in court, especially in the presence of his counsel, because an average person without legal knowledge places great trust in his lawyer and gives him complete control over the activities of the defense.[478]

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[475] Burnett & Burnett, *Ethical Dilemmas Confronting a Felony Trial Judge: To Remove or Not to Remove Deficient Counsel,* 1315, p. 1316. Also *ibid.*, Note 1.

[476] Thomas M. Place, *Deferring Ineffectiveness Claims to Collateral Review: Ensuring Equal Access and a Right to Appointed Counsel,* 98 Ky. L. J. 301 (2009–2010), p. 309.

[477] "[C]onsequently a criminal defendant will rarely know that he has not been represented competently..." Kimmelman v. Morrison, 477 U.S. 365 (1986), 477 U.S. 378.

[478] Grunis, *Incompetence of Defence Counsel in Criminal Cases Articles and Addresses,* 288, p. 295. Accused persons are reluctant to antagonize the one person in the system who is supposed to be fighting for their cause. Klein, *Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform, the,* 531, p. 577, Note 308.

The question of form of intervention is even more troublesome. In Estonia, there is nothing prohibiting the court from ordering counsel in the course of the proceedings to study the case file, confer with the client, *etc.* The obligation of counsel to become familiar with a criminal case is even set out separately in § 273 (4) of the CCP, which provides that if counsel is not familiar with the criminal matter, the court may adjourn the court session for up to ten days. An equally or even more important duty is, of course, the obligation to participate in court sessions in accordance with § 270 (2) of the CCP. It should also be noted that if a court finds that counsel has failed to present an important piece of evidence, the court may under § 297 (1) of the CCP order the collection of additional evidence on its own initiative. However, the Supreme Court of Estonia has in numerous judgments held that the exercise of this right by the court is nevertheless an exception.[479] In some cases, which I will discuss later, the Estonian courts have an authority to remove counsel. But from the possible intervention further questions arise: what kind of intervention should the court choose, should the intervention be possible even if the ineffectiveness has not yet appeared and should it be possible even if the accused does not approve it? These questions arise in the context of the Estonian justice system also and in addition to the question whether there should be any other form of intervention available in Estonia that is not described in the Code of Criminal Procedure now, should be answered.

The first question has been already discussed above. The court has to choose the least intrusive way to intervene into counsel's work, but should still act strongly to the most erroneous assistance provided by counsel. The court has many options to choose starting with remarks and ending with removal of counsel and selecting one of them is a decision made by a case-by-case approach.

In the United States it has been suggested that defense counsel's performance may be monitored either passively or actively in trial courts. Passive monitoring requires only that the trial judge be alert to visible mistakes and also complaints made by other parties to a court proceeding. Should mistakes become evident, the judge may use a variety of intervention techniques ranging from inquiry, to admonition, to adjournment for further preparation, and finally to disqualification of counsel.[480] Active monitoring places the trial judge in the position of seeking to discover errors and even act before the errors have occurred in order to guarantee effectiveness of counsel. The procedures suggested for the latter are either written or oral, that is worksheet and confe-

[479] Judgment of the Criminal Chamber of the Supreme Court, 26 September 2007, court case no. 3-1-1-67-06 (Online. Available: http://www.nc.ee/?id=11&tekst=RK/3-1-1-67-06, 29 April 2011) and Judgment of the Criminal Chamber of the Supreme Court, 12 February 2008, court case no. 3-1-1-91-07 (Online. Available: http://www.nc.ee/?id=11&tekst=RK/3-1-1-91-07, 29 April 2011).

[480] Levine, *Preventing Defense Counsel Error – an Analysis of some Ineffective Assistance of Counsel Claims and their Implications for Professional Regulation,* 1275, p. 1431.

rences.[481] In the United States some legal theorists and practitioners are convinced that intervention before the mistakes have occurred, which cannot be actually called intervention in its classical meaning, is absolutely necessary to prevent ineffective assistance from happening. But they also admit that both worksheets and conferences are work, time and money consuming measures, *i.e.* demand a lot of resources.

Judge William W. Schwarzer has recommended the use of the pretrial conference as a measure to monitor counsel's behavior before mistakes have actually occurred.[482] The best way to conduct an inquiry is in private with the accused and separately with counsel, because otherwise it is likely that the accused does not want to expose doubts he has about his counsel's performance so far. During this conference the accused can give his opinion about his counsel's performance and counsel has an early opportunity to defend his actions and also adjust his behavior.[483] In addition to that the conference will help outline the contours of the upcoming trial and alert the judge to potential evidentiary problems.[484] If one is concerned that if the same judge presided over the pretrial monitoring as presided over the trial, the information gained from conferencing might affect his judgment of the accused's guilt or innocence, then it is possible to arrange a conference with another judge or court magistrate.[485] The pretrial conference might even be documented: then it will provide a record of what counsel did and why he did not do something.[486] The record would promote an informal exchange of information as everyone would be aware that their comments are preserved for the appellate review.[487]

The pre-trial conference would inform the judge as to whether counsel is acquainted with the facts of a case and relevant law, whether counsel knows what evidence the prosecutor has against the accused and are there any potential evidentiary problems, whether counsel has thought about what evidence he should present himself and what are the possible defenses (*e.g.* alibi, insanity). If the pretrial conference suggests a serious lack of preparation, the judge has an opportunity to make discreet inquiries, whether counsel has a plan to investigate

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[481] *Ibid*.

[482] Schwarzer, *Dealing with Incompetent Counsel – the Trial Judge's Role,* 633 .

[483] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, p. 774; Peter W. Tague, *Attempt to Improve Criminal Defense Representation, the,* 15 Am. Crim. L. Rev. 109 (1977–1978), pp. 161–162.

[484] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, p. 774.

[485] Klein, *Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform, the,* 531, p. 581. But a specially-assigned person might not easily provide the necessary review if he knew little about the case. Tague, *Attempt to Improve Criminal Defense Representation, the,* 109, p. 164.

[486] *Ibid*., p. 162.

[487] Levine, *Preventing Defense Counsel Error – an Analysis of some Ineffective Assistance of Counsel Claims and their Implications for Professional Regulation,* 1275, pp. 1433–1434.

the case further[488] and even adjourn the court session, which has already been settled. Where counsel's activity (inactivity to be more exact) indicates a risk of ineffective representation, the court should also advise the accused of the right to change counsel if counsel is retained.[489] Therefore pretrial conferences provide the opportunity of effective monitoring. One obvious advantage of a pretrial conference is the face-to-face discussion which enables the judge to detect circumstances which would be hidden in a normal situation. At the same time conferences would also require judicial self-restraint, because lawyers would fear violating the attorney-client privilege and affecting the judge's impartiality – any routine procedure which singles out defense counsel's conduct for special oversight is demeaning and may be vigorously resisted by lawyers.[490] But if the focus of a pre-trial conference is shifted to include the preparation of all participants (*i.e.* the court monitors not only counsel's but also the prosecutor's preparation), conferences become a means of improving the efficiency and fairness of the entire criminal justice system.[491]

In addition to cases conducted in general proceedings, it is possible to arrange the pre-trial conference in plea-bargaining also.[492] Because during plea-bargaining, no record is kept of counsel's performance and he is not required to demonstrate any preparation, it is not possible to ascertain afterwards whether counsel was familiar with the case or not. Accordingly, it is proposed the trial judge to require counsel to indicate for the record the extent and results of his investigation of the facts of the case and explain how he prepared the case.[493] While asking from counsel about what he has done to prepare the case, court should try to figure out whether counsel has investigated facts and law enough to conclude that the best option for the accused was plea-bargaining. The judge should ask the accused also whether in his opinion counsel has fulfilled his duties properly.

The other, and less time and money consuming, and less intrusive way to find out the preparation level of counsel, is to require counsel to file a pretrial worksheet. This approach requires the lawyer to indicate on the worksheet what he has done and not done, including explaining why he has not done it and what he is planning to do more.[494] The worksheet would specify the time spent in

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[488] Schwarzer, *Dealing with Incompetent Counsel – the Trial Judge's Role,* 633, p. 656.
[489] *Ibid*., p. 659.
[490] Levine, *Preventing Defense Counsel Error – an Analysis of some Ineffective Assistance of Counsel Claims and their Implications for Professional Regulation,* 1275, pp. 1433–1434.
[491] *Ibid*., p. 1434.
[492] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, p. 775; Levine, *Preventing Defense Counsel Error – an Analysis of some Ineffective Assistance of Counsel Claims and their Implications for Professional Regulation,* 1275, p. 1434.
[493] Bazelon, *Defective Assistance of Counsel, the,* 1, p. 37.
[494] Klein, *Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform, the,* 531, p. 582; Tague, *Attempt to Improve Criminal Defense Representation, the,* 109, p. 163; Levine, *Preventing Defense Counsel Error – an Analysis of some Ineffective Assistance of Counsel Claims and their Implications for Professional Regulation,* 1275, p. 1434.

consultation and investigation of facts and law.[495] The accused reviews the form and if he disagrees, he can object to the judge. By objecting, he waives the attorney-client privilege, at least on some level.[496] If he does not object, the judge will not see the form and it will be added to the court file to be used in case an accused files a complaint to the higher court about his counsel's representation.[497] The judge can ask counsel to complete a second worksheet form as he could arrange a second conference if necessary. The second review requires counsel to document his treatment of any further problems.[498] Although the pretrial worksheet does not give the judge his primary impression about how counsel has prepared the case if at all, it is still counsel's documented explanation about his preparation and therefore great assistance for the appellate review of ineffective assistance claims. On the other hand, counsels may view the worksheet merely as another form he must fill out and only concern himself with the worksheet in a routine manner. But if the pre-trial worksheet is found appropriate to check counsel's activities, like with the pretrial conference, there is no need for the trial court judge to scrutinize strategies or tactics. Rather, the court's focus should be on whether the lawyer has prepared and investigated the accused's case properly.[499]

One of the most significant advantages in instituting a system of pretrial conferencing or worksheets would be the message it gives to judges and counsels. Pretrial review would force counsel strongly to prepare and would deny him the opportunity to rationalize why he failed to do something. Lawyers must conduct full investigations and adequately prepare before a trial can begin and pre-trial supervision is an effective measure to guarantee that they have done so. In addition to that, if counsel informs the court at conference or in the worksheet that he is not ready to begin trial because he has not had sufficient time to prepare, the judge would find it very difficult to disregard such a claim and order counsel to begin the trial.[500] In order to guarantee that counsels prepare in case of plea bargaining too, an ideal system of monitoring defense counsel's performance would also provide the judge with an opportunity to check the homework done by counsel before an accused is allowed to plead guilty.[501]

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[495] John F. Fatino, *Ineffective Assistance of Counsel: Identifying the Standards and Litigating the Issues,* 49 S. D. L. Rev. 31 (2003–2004), p. 36; Joseph D. Grano, *Right to Counsel: Collateral Issues Affecting due Process, the,* 54 Minn. L. Rev. 1175 (1969–1970), p. 1248.

[496] Here the judge may decide that pretrial conference is necessary.

[497] Tague, *Attempt to Improve Criminal Defense Representation, the,* 109, p. 164; Grano, *Right to Counsel: Collateral Issues Affecting due Process, the,* 1175, p. 1248.

[498] Tague, *Attempt to Improve Criminal Defense Representation, the,* 109, pp. 164–165.

[499] Klein, *Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform, the,* 531, p. 583.

[500] *Ibid*., p. 582.

[501] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, p. 775.

For Estonian courts I would disregard pre-trial conferences, because of the resources they would need. In addition to that I am a bit wary about judges asking during informal conversation from accused persons and from counsels how the defense side has prepared the case: even if the judge does not look into tactical questions, counsel's disclosure to the judge of actions he has taken to prepare the case means that at least some of the strategy is also revealed and during the conversation the danger of such a revelation is much greater than in writing when counsel can think his answers through very thoroughly. Therefore I support the idea of pre-trial worksheets. Actually, Estonian criminal proceedings are moving towards that idea as from the 1st of September 2011 before beginning of the court proceedings counsel has to prepare a statement of defense, in which he has to show the evidence he is going to present in the court proceedings.[502] In order to verify counsel's readiness for the trial the statement of defense is still not enough as it does not reflect the fact that counsel really has prepared the case. Therefore, an additional worksheet is needed in which counsel could specify actions taken and justify his inaction if needed. Then trial courts would have a chance to react preemptively when they see that the accused's right to effective assistance might be jeopardized. Here I would not preclude that after the accused has expressed discontent with what counsel has written in the worksheet, Estonian courts would have an opportunity to organize a pre-trial conference. By doing that many problems could be solved before the court proceedings actually begin. As it has been suggested above, this work-sheet could be used in the appellate proceedings also to show whether counsel fulfilled his duties in the court of first instance or not. If counsel sees the worksheet as an annoying additional duty and fills it out superficially, he risks the possibility that his behavior is found ineffective during the proceedings in the trial court or afterwards by the appellate court when the court decides the matter taking into account what has been written in the worksheet. I think it is a good idea that the trial judge only looks into counsel's activities if the accused does not agree with what has been written down by his counsel in the worksheet – this helps to save resources and at the same time enables the court to react when the accused thinks that something is wrong with his counsel's performance. That way the accused's interest in preserving the attorney-client relationship and at the same time in avoiding the threat of ineffective assistance is honored.[503]

Even if the system for some reason does not allow active monitoring of representation of defense counsel, like it is presently in Estonia, the judge should still start taking some steps that do not involve looking into counsel's performance directly to guarantee effective assistance of counsel before the court

[502] I analyzed counsel's duty to prepare statement of defense further in subsection 3.4.5.

[503] Although here the question arises whether the accused understands that there is something wrong with his counsel's work. But as pre-trial worksheets and conferences are pre-emptive forms of interference, I still suggest that only after the accused's complaint the court would intervene as it would protect the attorney-client relationship better.

session, for instance in a preliminary hearing. First, the judge should explain counsel's obligations to counsel, inform counsel what kind of preparation is expected of him and explain to him what measures could be taken against him if he does not fulfill his duties.[504] The judge should explain counsel's duties to the accused also to make sure that the accused at least on some level is familiar with what kind of assistance he should expect from his counsel.[505] The judge should also try to discreetly figure out, if the accused is contented with the quality of the assistance provided to him so far. In addition to that the court should try to do the same with accused persons who offer guilty pleas to determine whether their pleas are being prompted by ineffective representation.[506] But still one has to take into account that even with a general introduction to the defense counsel's role, most accused persons will be unable to assess their counsel's explanations for why legal decisions were made or why counsel took some action or refrained from action,[507] and even if they are able to do that and are discontented with what their counsel is doing in the proceedings, they are not willing to take action or are unable to express their discontent properly. The ECtHR has addressed the latter issue in the following case.

In Sakhnovskiy v. Russia the accused refused to accept Ms. A.'s services but had not asked to be assigned somebody else as a lawyer. Neither had he asked for additional time to meet the court-appointed lawyer or to find a lawyer of his own choosing. The ECtHR emphasized that the accused could not be expected to take procedural steps which normally require some legal knowledge and skills. Mr. Sakhnovskiy did what an ordinary person would do in his situation: he expressed his dissatisfaction with the manner in which legal assistance was organized through the Supreme Court. In such circumstances, the accused's failure to formulate more specific claims cannot count as a waiver.[508]

The trial judge's obligation does not end with a determination that counsel is prepared for trial. During the trial the judge acquires the role of passive observer. This means that whenever during the course of the trial it appears that defense counsel is not properly fulfilling his obligations, the judge must take appropriate action to prevent violation of the accused's rights. As it has already been discussed repeatedly, it is the judge, not counsel, the accused or the prosecutor, who has the ultimate responsibility for the conduct of a fair and lawful trial.[509]

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[504] Of course, if certain person is a daily participant in criminal proceedings, there is no reason to repeat that information in every case.

[505] Tague, *Attempt to Improve Criminal Defense Representation, the,* 109, p. 161; Smithburn & Springmann, *Effective Assistance of Counsel: In Quest of a Uniform Standard of Review,* 497, p. 522.

[506] *Ibid*.

[507] Levine, *Preventing Defense Counsel Error – an Analysis of some Ineffective Assistance of Counsel Claims and their Implications for Professional Regulation,* 1275, pp. 1432–1433.

[508] Sakhnovskiy v. Russia, § p. 92.

[509] United States of America v. Willie DeCoster, 1976, Judge Bazelon, dissenting.

If the issue of ineffectiveness rises during the trial, the judge has to act very discreetly ensuring that the attorney-client relationship is not impaired in case counsel will proceed in the proceedings and trying to avoid putting counsel into a humiliating position in front of his contestant – the prosecutor. Therefore it is appropriate to discuss the matter in private with counsel and with the accused.[510] The trial judge should stop the proceedings, take the defense counsel aside, and inform him of the concern. The purpose of the inquiry, done by the judge, is to allow the judge to share, with counsel, the reasons for the judge's concern. It is not formal and it is a preliminary information gathering session.[511]After that the judge can decide whether to take more intrusive steps. There are ways other than asking counsel to do something in case of ineffective assistance provided by counsel and they involve taking a smaller step away from a judge's neutral position than compelling counsel to fulfill his duties. In some circumstances a judge need do very little, *e.g.,* by interjecting a single question, or by beginning a line of questioning, the judge may affirmatively provoke the development of the relevant facts. In an extreme case, a judge may reveal an area neither side has touched so far. In addition to that, the judge may interrupt the trial and point out an unraised or inadequately developed issue, leaving to defense counsel the choice of whether or not to pursue it.[512] It is a significant departure from the court's neutral role but still leaves room for counsel to decide whether he wants to proceed with the subject raised by the court or not. Therefore, these little hints are more preferable than making counsel do something when the principles of adversary proceedings are taken into account, because they guarantee that counsel remains independent in the proceedings.

In addition to the measures mentioned above, it has been also proposed that counsels should file reports explaining their action during the trial at the conclusion of trial.[513] It is not a form of monitoring by the trial judge, but a written document for higher courts. The trial court would not see this file but the file would be available to the higher court should ineffective assistance of

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[510] "First, it *(the judge's inquiry – author's explanatory remark)* often will involve an inquiry into defense strategy. Defense counsel should not be forced to tip his hand to opposing counsel in order to quiet the trial judge's apprehensions that the adversarial system has broken down due to counsel's incompetence. The second reason is that even the most informal of inquiries has the potential of straining the relationship between defendant and defense counsel, eroding confidence and trust. The final reason is perhaps not as obvious; it involves the reputational damage that counsel might suffer if it were known that his conduct had triggered the trial judge's alarm to the point that the judge felt there was a bona fide issue concerning whether the goals of the adversarial process were being realized." Burnett & Burnett, *Ethical Dilemmas Confronting a Felony Trial Judge: To Remove Or Not to Remove Deficient Counsel,* 1315, pp. 1338–1339.

[511] *Ibid*., p. 1337.

[512] Marcus, *Above the Fray Or into the Breach: The Judge's Role in New York's Adversarial System of Criminal Justice,* 1193, pp. 1205–1206.

[513] Bazelon, *Defective Assistance of Counsel, the,* 1, p. 39.

counsel be litigated in appeal.[514] For Estonian courts I see this suggestion as an additional chance for counsel to justify his actions during the court proceedings for appellate courts and it should not be excluded, if counsel wants to add something to the pre-trial worksheet.

1.2 The Test for Judging Ineffectiveness

In Estonia there is no test for judging ineffectiveness of defense counsel for trial courts (which are in Estonia called county courts) and therefore Estonian courts have to assess counsel's activities *ad hoc.* Counsel must be present obviously (CCP, § 270 (1)) and be prepared (CCP, § 273 (4)), but that is about all that the Code of Criminal Procedure requires. In addition to that the court can use the provisions of the Bar Association Act and the Bar acts as an example if counsel is an advocate, and State Legal Aid Act also if an advocate is appointed counsel. If counsel is not an advocate, court can be guided by its conscience and common conception of lawyer ethics, which both could be used if counsel is an advocate as well.

The question is whether the courts of first instance in Estonia need an established standard for evaluating counsel's work quality. Until now the courts have been using case-by-case analysis, which enables them to take into account circumstances of a specific case and take a flexible approach to counsel's duties. But there is another side of the coin. If a court intervenes into counsel's activities, especially if it decides to remove counsel, accusations of the court being biased are quick to come. If there would be set guidelines for counsel's conduct in criminal proceedings, it would be easier for the court to point out the certain duty counsel has not fulfilled and consequently conclude that counsel has not been effective, which in turns enables the court to apply some measures in order to guarantee effective defense for the accused. Then it would be much more difficult to question court's impartiality and blame the court in trying to get rid of a difficult counsel, which is the most common accusation referred to in law reviews. Therefore, in the last chapter of this dissertation, I will introduce a standard I think would be appropriate for the courts of first instance in Estonia to use to decide whether counsel has been ineffective or is ineffective in the criminal proceedings.

It is understandable that the requirement to show an element of prejudice in case the question of possible ineffectiveness of defense counsel arises in the trial court, is irrelevant, because the court has not reached its verdict yet. Therefore the accused cannot show to the court of first instance that without counsel's mistakes the result of the case would have been different. It is possible to require the accused to show that because of his counsel's ineffectiveness his interest will be not protected in the criminal proceedings or there is a possibility that his other rights will be violated, but it means that we require the

[514] Benson-Amram, *Protecting the Integrity of the Court: Trial Court Responsibility for Preventing Ineffective Assistance of Counsel in Criminal Cases,* 425, pp. 429–430 Note 27.

accused to show something that might or might not happen in the future, which is a very heavy burden for the accused. In addition to that it has to be taken into account that in some cases courts may act without consent of the accused, which means that it is absolutely unfair to oblige the accused to prove something. If guidelines for duties of defense counsel are worked out in order to use them for evaluating effectiveness of counsel in criminal proceedings, instead of trying to predict the future, the accused has a chance to refer to the specific guideline, and nothing further is required from the accused to prove. If the court is the one who has discovered counsel's deficiencies, it can also refer to the guidelines. But one has to take into account that only those duties that are absolutely essential will be provided in these guidelines, at least in those guidelines, which are meant for the courts to be used in case they want to remove counsel. Guidelines that would allow removing counsel too easily would result in a serious breach of counsel's independence and groundless interference into the attorney-client relationship.

1.3 The Outcome of Supervision

There are different possible outcomes of the supervision performed by the courts depending on whether we are talking about active or passive monitoring. The conclusion of active monitoring could be that counsel is well prepared and ready to go to trial and that the accused is satisfied with the work done by counsel so far. The other possible conclusion of the supervision is the opposite one and might be that counsel has not prepared or the accused is not satisfied with his work and the court has to give him more time and order him to work at the case (it may lead to adjournment of the court session already settled).[515] If counsel ignores court's instructions to prepare repeatedly, the question of possible removal arises.[516] Therefore the result of active monitoring starts with a remark and goes up to disqualification of counsel. The useful byproduct of active monitoring is a written paper, at least when the monitoring is done by the worksheet approach, which means that courts of higher instances will have a chance to use the document for giving their opinion about the quality of the performance of counsel in case the accused claims that his counsel has been ineffective.

The outcome of passive supervision, which is performed during the trial and which means that the court only acts if counsel's mistakes are brought to its attention or it notices counsel's mistakes itself, is manifold. The court may ask counsel to prepare the case and adjourn the court session as it is provided for in § 273 (4) of the CCP or may instruct counsel to take some steps during the court

[515] According to § 261 (3) of the CCP for prosecution a judge shall plan court hearing in cooperation with the parties to the court proceedings in such a way which helps to avoid unnecessary loss of time, repeated summoning of persons to court and adjournment of a court session.

[516] I am going to discuss grounds for removal further in the next subsection of this chapter.

session, for instance to ask questions from the witness. The court may ask questions from the witness itself (CCP, § 288 (6)) or even order the collection of additional evidence on its own initiative, as it was discussed above. In order to do that, the court may adjourn the court session (CCP, § 273 (1) 2)) if necessary. If another form of counsel's ineffectiveness than the fact that counsel has not prepared arises, the court may also adjourn the court session (CCP, § 273 (1) 3)).

Finally, the court may remove counsel as a result of passive monitoring, which should be used as *ultima ratio*. Removal of counsel is the most serious intervention into the independence of counsel and into the attorney-client relationship, especially when it comes to the retained counsel, because retained counsel is counsel chosen by the accused himself. If retained counsel is ineffective and the accused notices it or is notified by the court, the accused has an option to choose another counsel. Therefore the question of possible removal of retained counsel on the ground of ineffectiveness raises only if the accused has decided not to change counsel, even if counsel is ineffective, which in turn means that the court has to remove counsel itself and without the consent of the accused. Is it possible at all to remove retained counsel because of his ineffectiveness, is the subject I will discuss next, but even if it is, it must be understood that this constitutes a very serious restriction to the accused's right to choose his counsel. And even if counsel is appointed by the state, removal of counsel without the accused's consent means that the attorney-client relationship that has been formed and the trust developed between the accused and his counsel is broken and the accused has to build another relationship with his new counsel.

1.4 Removal of Counsel and the Consent of the Accused as a Prerequisite to Remove Counsel

The Code of Criminal Procedure provides four bases for removal of counsel. First, if basis provided for in § 20 (3^1) of the SLAA exist, the court shall remove counsel by a ruling on its own initiative or at the request of a party to the court proceeding (CCP, § 55 (1)). According to the first sentence of § 20 (3^1) of the SLAA the court shall, at the request of the recipient of legal aid or on its own initiative, remove an advocate from the provision of state legal aid by a ruling if the advocate has shown himself to be incompetent or negligent. Second, if counsel does not remove himself on a basis provided for in § 54 of the CCP (*i.e.* on a basis of conflict of interest), the court shall remove counsel by a ruling on its own initiative or at the request of a party to the court proceeding (CCP, § 55 (1)). Pursuant to § 54 clauses 1) and 2) a person shall not act as counsel if he is or has been a subject to criminal proceedings on another basis in the same criminal matter or in the same or related criminal matter, has previously defended or represented another person whose interests are in conflict with the

interests of the person to be defended.[517] Third, the court shall remove counsel if it becomes evident in a proceeding for removal provided for in §§ 56 and 57 of the CCP that counsel has abused his status in the proceedings by communicating with the person being defended, after the person has been detained as a suspect or arrested, in a manner which may promote the commission of another criminal offence or violation of the internal procedure rules of the custodial institution (CCP, § 55 (2)). Fourth, the court shall remove counsel if counsel violates the condition provided by § 46 (1^1) of the CCP, this violation prevents him from performing duties of defense properly and he has not appointed substitute counsel for himself (CCP, § 55 (3)). Pursuant to § 46 (1^1) of the CCP counsel has to refuse to assume the duties of defense in a criminal matter conducted pursuant to the general procedure or relinquish the duties of defense assumed by him no later than in a preliminary hearing if counsel is not able to participate in a court proceeding within three months after the preliminary hearing. The aim of the last basis for removal of counsel is to give the court an option to remove counsel in case counsel has an excessive workload or he has any other reason why he cannot participate in a court proceedings within the term of three months, and therefore to guarantee a speedy and efficient hearing of criminal matters sent to court to be conducted in adversarial procedure.[518] If counsel removes himself or is removed on a basis provided for in § 55 of the CCP, the person being defended may choose new counsel within the term granted by the court or new counsel is appointed for him (CCP, § 58).

The proceeding for removal of counsel is provided in §§ 56 and 57 of the CCP. The Supreme Court of Estonia has stressed in a court case no. 3-1-1-70-10 that rules of procedure provided in §§ 56 and 57 of the CCP are applied only if the party to the court proceeding has requested removal of counsel stating that counsel has abused his status in the proceedings.[519] If a request for initiation of a proceeding for the removal of counsel is submitted in a court proceeding, the court session shall be adjourned for up to one month (CCP, § 56 (3)). On the first working day following the date of receipt of a request for initiation of a proceeding for the removal of counsel, the judge schedules the time for a court session for the conduct of the proceeding and notifies the Prosecutor's Office which submitted the request, counsel to be removed, the person being defended by counsel and, if counsel to be removed is a member of the Bar Association, the leadership of the Bar Association of the scheduled time (CCP, § 56 (4)). Proceeding for the removal of counsel is conducted within five days as of the receipt of the request for the initiation of the proceeding (CCP, § 57 (1)). If counsel fails to appear, and he has a good reason for that, the proceeding is adjourned for up to three days (CCP, § 57 (3)). If counsel who has received a

[517] See further subsection 3.2 above.
[518] Explanatory Memorandum to the Act to Amend the Code of the Criminal Procedure and Other Related Acts. 599 SE, 11th Riigikogu. See further subsection 3.3.1 above.
[519] Judgment of the Criminal Chamber of the Supreme Court, 15 November 2010, court case no. 3-1-1-70-10, p. 26.

summons fails, without good reason, to appear in a court or if the reason for his failure to appear is unknown or if he fails to appear in a court session which has been adjourned, the proceeding for the removal of counsel is conducted in his absence (CCP, § 57 (4)). In a proceeding for the removal of counsel, the court hears the person who submitted the request for the removal, and counsel, and the person and counsel may submit evidence and pose questions to each other with the permission of the court (CCP, § 57 (5)). Very questionable is § 57 (7) of the CCP, according to which counsel who has been removed pursuant to the above described procedure, has the right to re-enter the criminal proceedings after the basis for removal provided for in § 55 (2) of the CCP has ceased to exist. Of course, it is possible that counsel stops abusing his status in the proceedings, but it is more than doubtful whether counsel acting that way should re-enter the criminal proceedings, because he has shown himself as a person who does not follow the rules.

Although the Code of Criminal Procedure does not provide rules of the procedure for removal of counsel in case basis for removal of counsel stipulated in § 55 (1) or (3) of the CCP exists, in my opinion the court should still conduct hearing, if it thinks that there might be a ground for removal of counsel. This principle and rules of that procedure should be added to the Code of Criminal Procedure. Conduct of hearing produces a court's record of this hearing, which is critical, because a removal action has potential consequences for both the resolution of the case itself and the participants. The trial judge's decision to remove counsel might form the basis on appeal of a claim of denial of the right to counsel of choice.[520] A written record is also necessary for collateral matters that might arise, involving trial counsel or the trial judge, *e.g.,* disciplinary actions against trial counsel or allegations of judicial misconduct on the part of the judge.[521] And last but not least, a written record is also necessary for a less obvious, but possibly more compelling reason: the potential for abuse on the part of the trial judge and the reputational harm suffered by the defense counsel.[522] The hearing, which is documented, disciplines the judge to reason his decision to remove counsel very carefully. The judge should definitely ask the position of counsel about this matter and also from the prosecutor, if necessary. To avoid a danger that a disqualification motion results in the disclosure of otherwise confidential information, which may then be used by the prosecutor against the accused,[523] the prosecutor should not attend the hearing itself, at least when a question about ineffectiveness concerning how counsel has prepared the case has arisen. In order to protect the attorney-client relationship and the strategy counsel has worked out for the case, before conducting a formal hearing, the judge should give counsel an opportunity to

[520] Burnett & Burnett, *Ethical Dilemmas Confronting a Felony Trial Judge: To Remove Or Not to Remove Deficient Counsel,* 1315, p. 1339.
[521] *Ibid*., p. 1340.
[522] *Ibid*., p. 1341.
[523] Green, *Through a Glass, Darkly: How the Court Sees Motions to Disqualify Criminal Defense Lawyers,* 1201, p. 1233.

explain his actions in private. If counsel gives an explanation that satisfies the judge, the proceeding with the formal hearing is not necessary. But when the formal hearing is conducted, the accused should be assured the right to be present at all hearings related to the possible removal of counsel[524] and at least to give an opinion about his counsel's work, even if he has not requested removal himself. Whether the court should act against the wishes of the accused is another question, but the court should at least listen to the accused and if it does not agree with his opinion, give its reasons.

Removal of counsel is not very common and it evokes different reactions. Once counsel has been hired or appointed, the common wisdom is that judges should take a hands-off approach.[525] But judges should be authorized to remove counsel in some circumstances: to prohibit judges from exercising removal options creates an ethical dilemma for judges who must sit back and relax while it is clear that because of counsel's ineffectiveness there is a possibility that the accused is left without defense,[526] and the adversary process will be distorted.[527] Removal of counsel with instructions to the accused to choose another one (which always means that the judge acts without the accused's consent) or removal of counsel with appointing new counsel to the accused (which may be with or without the accused's consent) are serious steps with high costs and if a judge decides whether to disqualify counsel, he must take into account the same consequences that arise from judicial supervision generally, but with the decision to remove counsel these consequences arise even more sharply. The judge should take into account that even prior to trial, a bond of trust is created between the accused and counsel, at least ideally. The trial judge should be reluctant to break that bond and compel the accused to go through the same process again with new counsel. Additionally, removal of counsel always results in a delay in the court proceedings. It is obvious that the court proceedings cannot continue unless new counsel is there and ready and in order to prepare the case a new counsel needs time.[528]

In Estonia before the 1st of January 2009 the courts had very limited competence in removing ineffective counsel: they were only allowed to remove counsel in the case of conflicts of interest and in cases counsel abused his procedural status in the proceedings. Today § 20 (3^1) of the SLAA together with

[524] Poulin, *Strengthening the Criminal Defendant's Right to Counsel,* 1213, p. 1249 and 1270.

[525] Burnett & Burnett, *Ethical Dilemmas Confronting a Felony Trial Judge: To Remove Or Not to Remove Deficient Counsel,* 1315, pp. 1317–1318. In the United States removal is typically encountered prior to trial in criminal cases when there is a conflict of interest in the representation of the accused. *Ibid.*, p. 1318 Note 6 and pp. 1333–1334.

[526] See also Marian Blank Horn, *Trial Judge's Perspective – Promoting Justice and Fairness while Protecting Privilege, A Essay,* 26 Fordham Urb. L. J. 1429 (1998–1999), pp. 1451–1452.

[527] Roach, *Wrongful Convictions: Adversarial and Inquisitorial Themes,* 387, p. 402; Burnett & Burnett, *Ethical Dilemmas Confronting a Felony Trial Judge: To Remove Or Not to Remove Deficient Counsel,* 1315, p. 1319.

[528] *Ibid*., pp. 1335–1336.

§ 55 (1) of the CCP enables the court, at the request of the accused or on its own initiative, to remove an advocate from the provision of state legal aid by a ruling if the advocate has shown himself to be incompetent or negligent. What "incompetent" or "negligent" means is not provided for neither in the State Legal Aid Act nor in the Code of Criminal Procedure. There are no guidelines of conduct of counsel in the criminal proceedings for the courts to use in Estonia either, which means that Courts' decision that counsel was "incompetent" or "negligent" is a result of case-by-case analysis. Pursuant to the second and third sentence of § 20 (3^1) of the SLAA the court may in advance request submission of explanations from the accused and the advocate and the court forwards the ruling concerning the removal of an advocate from the provision of state legal aid to the Bar Association for the commencement of the proceedings of the court of honor and, if necessary, for the appointment of a new provider of state legal aid. Subsection 20 (3^1) of the SLAA entered into force in afore cited wording on the 1st of January 2010. Before that amendment § 20 (3^1), which was valid since the 1st of January 2009 required the consent of the accused if court was planning to remove counsel. Today, as it is obvious from the wording of § 20 (3^1), that no consent of the accused is needed and the court is allowed to remove ineffective (according to the State Legal Aid Act wording incompetent or negligent) appointed counsel without consulting with the accused and even if the accused is against it. It would appear that this amendment was intended to regulate situations in which the accused need not yet be aware that counsel's assistance is ineffective, or the accused is aware but for some reason fails to demand that counsel be removed. In such case, the court must intervene on its own initiative. Nevertheless, no comment has been made concerning this amendment in the explanatory memorandum.[529]

On the 1st of September 2011 § 267 (4^1) of the CCP entered into force. According to this subsection a court may withdraw counsel from procedure if the person is not capable to act in court properly or has shown he is dishonest, incompetent or irresponsible in the court proceedings or he has maliciously impeded the correct and speedy hearing of the criminal matter or has failed to comply with the order of a judge repeatedly. After withdrawal of counsel the court immediately proposes the accused to choose another counsel within the term granted by the court. The court also notifies the Bar Association if counsel is an advocate (CCP, § 267 (4^2)). It is absolutely unclear what this "withdrawal" is. Formally it is not a basis for removal, because it has not been provided for in § 55 of the CCP, where all other bases for removal are. Not a word has been mentioned about this opportunity to withdraw counsel in the initial explanatory memorandum of the Code of Criminal Procedure or in the additional

[529] Explanatory Memorandum to the Act to Amend the Bar Association Act and Other Related Acts. 253 SE, 11th Riigikogu. Online. Available: http://www.riigikogu.ee/?page=en_vaade&op=ems&eid=288038& u=20110901162503, 29 April 2011.

memorandum.[530] And last but not least, the heading of section 267 is "Measures applicable to persons who violate order in a court session". Therefore, although the formulation of § 267 (4^1) of the CCP seems to indicate that it enables court to disqualify counsel from the proceedings indefinitely, in my opinion the above mentioned arguments overturn this conclusion, which in turn means that this may be a temporary measure. But it may be also that the Estonian legislator has added a new basis for removal, which is hidden in the Code of Criminal Procedure either because the aim of the legislator was to refrain from wider discussion by adding the basis for removal that at first remains unnoticed or it forgot to add the basis to the § 55 of the CCP. If it indeed was meant to be the basis for removal I condemn the attempt to bring a possibility to remove ineffective retained counsel (which a dishonest, incompetent or irresponsible person certainly is) from the proceedings without the consent of the accused into the Code of Criminal Procedure without proper discussion in society, as removal of retained counsel means removal of counsel that the accused has chosen himself, which means that the removal goes strongly against the accused's wishes.

The question of whether the removal of counsel due to ineffectiveness should be possible only with respect to appointed counsel or also with respect to retained counsel merits separate and thorough consideration. With answering this question the question whether the court should be allowed to remove appointed counsel without the consent of the accused is also answered as removal of retained counsel always occurs without consent of the accused: otherwise the accused would choose new counsel himself.

According to the Code of Criminal Procedure, retained counsel participates in the proceedings only so long as he has the approval of the accused. It can thus be asserted that wishes of the accused concerning retained counsel are considered important in criminal proceedings. If the accused decides that he is not pleased with how his counsel fulfills his duties, he has always the right to choose another counsel. Nevertheless, there might be situations where the accused does not or cannot see what the court can see: that counsel is not performing his duties correctly. And even if he has noticed his counsel's ineffectiveness or is notified by the court, he might decide not to react and not to replace counsel for some reason. Granting a court the right to remove retained counsel in cases where the accused does not agree to removal is very problematic. This would infringe both the independence of counsel and the right of the accused to freely choose counsel. On the other hand, as I have already discussed at length, it is the duty of the court to monitor that the rights of the accused, including the right to effective assistance of counsel, are not violated. It would be against the court's role as supervisor to the adversary proceedings to ask the judge to turn a blind eye towards counsel's ineffective representation and let the proceedings continue even if he can see that balance between the

[530] Explanatory Memorandum to the Act to Amend the Code of the Criminal Procedure and Other Related Acts. 599 SE, 11th Riigikogu.

parties is disturbed. In this case the accused's right to obtain private counsel of his own choice must be weighed and balanced against an equally desirable public need for the effective administration of criminal justice.[531] Maybe because of this deliberation the Estonian legislator added § 267 (4^1) into the Code of Criminal Procedure, if § 267 (4^1) of the CCP is considered to be a basis for removal at all. The legislator at least seems to be convinced that the court is responsible for retaining an adversary system and the right balance of parties in case counsel is appointed and has therefore brought § 20 (3^1) into State Legal Aid Act on the 1st of January 2009 to guarantee effectiveness of appointed counsel through the court's competence to remove ineffective defense counsel, which was amended a year later in the way that consent of the accused is not needed anymore. Therefore I am convinced that Estonia is moving towards preferring the right to effective assistance to the right to choose counsel and as long as the court is not going to misuse this competence, it advances the adversary system and the right to the accused to receive actual assistance from counsel during the proceedings.

Another basis for removal of counsel, which is also related to the in-effectiveness of counsel is counsel's excessive workload. As I already cited § 46 (1^1) of the CCP above, counsel has to refuse to assume the duties of defense in a criminal matter conducted pursuant to the general procedure or relinquish the duties of defense assumed by him no later than in a preliminary hearing if counsel is not able to participate in a court proceeding within three months after the preliminary hearing. Ability not to participate in a court proceeding within time set by the law is usually related to counsel's busy schedule. It does not matter if counsel is retained or appointed, according to § 55 (3) of the CCP the court removes counsel if counsel violates condition provided by § 46 (1^1) of the CCP, this violation prevents him from performing duties of defense properly and he has not appointed substitute counsel for himself. The addition "this violation prevents him from performing duties of defense properly" is a little bit confusing in § 55 (3) of the CCP. It is obvious that if counsel is not able to participate in a court proceeding within three months after the preliminary hearing, he is not able to perform the duties of defense properly, at least within this period. Therefore in my opinion § 55 (3) of the CCP should be interpreted in a way that if counsel is not able to participate in a court proceeding within three months after the preliminary hearing and he has not appointed substitute counsel for himself, he shall be removed by the court. This basis for removal does not require the accused's consent, which means that the principle of speedy trial is preferred over the accused's right to choose his counsel.

In addition to the removal of counsel without the accused's consent, the judge should obviously consider objections to the appointed counsel made by the accused.[532] This principle is provided for in the § 20 (3^1) of the SLAA. If at any time during the proceedings the accused makes a seemingly substantial

[531] Schwarzer, *Dealing with Incompetent Counsel – the Trial Judge's Role,* 633, p. 659.
[532] *Ibid*., p. 651.

complaint about the ineffectiveness of representation by counsel (here I mean appointed counsel, because retained counsel the accused can choose himself) the judge should conduct an inquiry and try to find out whether the complaint is justified or not. The court should discuss the matter with the accused, ideally *in camera*.[533] Then the judge can decide if grounds exist for a change of counsel.[534] Of course, it is understandable that courts are often wary of the motivations of an accused who alleges ineffectiveness of counsel. One possible reason for this guarded response is judges' concerns about being fooled by an accused's manipulative efforts to delay his trial. Another possible reason is a more general concern that, if given the opportunity, the accused will somehow abuse his rights and privileges in the judicial process.[535] Judges also attribute the accused's reluctance to counsel to a number of factors, including the accused's objection to being prosecuted and the accused's inability to work with other people.[536] But still the judge should at least listen to what the accused is complaining about and then decide whether reasons to remove counsel exist or not.

Sometimes counsels seek a permission to withdraw, but here they can also meet skepticism: this is partially because judges suspect that a defense counsel may make the claim for tactical reasons (*e.g.,* in order to delay the trial).[537] In Estonia, as it was discussed above, the bases for counsel to remove himself are provided for in § 54 clauses 1) and 2) of the CCP. In addition counsel has to refuse to assume the duties of defense in case of excessive workload (or for any other reason he is not able to attend the court session within the term provided by law) as it is provided for in § 46 (1^1) of the CCP. Counsel may also, on his own initiative and with the consent of the management of the law office, refuse to assume the duties of defense or relinquish the duties of defense assumed by him if counsel has been exempted from the obligation to maintain a professional secret pursuant to the procedure provided for in § 45 (5) of the BAA[538] or if the suspect or the accused has requested the performance of an act which is in violation of the law or the requirements for professional ethics (CCP, § 46 (1) 1)); if the performance of the duties of defense by counsel would be in violation of the right of defense (*e.g.,* existing conflict of interest) (CCP, § 46 (1) 2)) or the person being defended violates any of the essential conditions of the client contract (CCP, § 46 (1) 3)). In the Code of Criminal Procedure there are no

[533] Poulin, *Strengthening the Criminal Defendant's Right to Counsel,* 1213, p. 1264.
[534] Schwarzer, *Dealing with Incompetent Counsel – the Trial Judge's Role,* 633, p. 652.
[535] Goldstein, *View from the Bench: Why Judges Fail to Protect Trust and Confidence in the Lawyer-Client Relationship – an Analysis and Proposal for Reform, A Note,* 2665, p. 2691.
[536] *Ibid*., p. 2694.
[537] *Ibid*., p. 2693.
[538] According to § 45 (5) of the BAA in order to prevent a criminal offence in the first degree, an advocate has the right to submit a reasoned written application for exemption from the obligation to maintain a professional secret to the Chairman of an administrative court or an administrative judge of the same court appointed by the Chairman. A judge shall hear a submitted application immediately and shall issue or refuse to issue a written permission.

other grounds for counsel to refuse to assume duties of defense or relinquish duties of defense assumed by him. A serious breakdown of the attorney-client relationship is not a ground to relinquish assumed duties according to the Code of Criminal Procedure, although in my opinion it should be. It is obvious that if counsel and the accused are not able to work together towards the same goal because of differences, the right to effective assistance is not guaranteed to the accused. It might be that counsel is not motivated anymore because of differences between him and his client or the accused does not follow his advice anymore, because he does not trust his counsel. Then the accused is basically without defense and the assistance he should be provided by counsel. Therefore the breakdown of the attorney-client relationship should be grounds for releasing counsel from his duties. Because it is a very subjective ground and enables parties to a court proceeding to misuse their procedural rights, approval of the court should be necessary. That is why I propose that counsel's or the accused's claim that there has been a breakdown of the attorney-client relationship should be a basis for removal, which means that the court is the one that makes the final decision about the matter. Here the court has an opportunity to consider the removal of counsel also if counsel is the one who claims that he cannot defend the accused further because of a total breakdown in the attorney-client relationship.

2. Judicial Supervision in Appellate Courts and in the Supreme Court

2.1 The Form of Supervision in Higher Courts

One way to improve counsels' performance in the criminal proceedings is to give accused persons a chance to challenge counsel's mistakes in the appellate proceedings and in case of Estonia also in the cassation proceedings.[539] It is understandable that although the accused has an opportunity to do that,[540] he may face the reluctance of the higher courts. Courts have an interest in conserving resources that otherwise would be spent on additional proceedings. They seek to be fair to the prosecution, whose ability to try an accused successfully may diminish with the passage of time.[541] There is an important factor higher courts have to consider when they decide whether to annul the judgment made by the lower court. If the conviction is reversed and the criminal matter is returned to the lower court for a new hearing, the passage of time before the

[539] See about the United States Backus & Marcus, *Right to Counsel in Criminal Cases, a National Crisis, the,* 1031, p. 1130.

[540] According to § 24 (5) of the Constitution of the Estonian Republic Everyone has the right of appeal to a higher court against the judgment in his or her case pursuant to procedure provided by law.

[541] Green, *Judicial Rationalizations for Rationing Justice: How Sixth Amendment Doctrine Undermines Reform Colloquium: What does it Mean to Practice Law in the Interests of Justice in the Twenty-First Century,* 1729, p. 1730.

new trial may render the trial a pointless exercise because witnesses may have forgotten important aspects of the event.[542] In addition to what has already been mentioned, higher courts also seek the respect of society that may be of the opinion that "criminals are let loose because of technicalities".[543]

The Supreme Court of Estonia for instance held that it cannot assess counsel's tactical choices and condemn counsel's decision not to request an expert assessment before the prosecutor filed charges.[544] The Supreme Court also added that if the accused is not satisfied with the assistance provided by his appointed counsel, he has an opportunity to choose himself a retained counsel.[545] The last argument is easy to criticize, because an indigent accused is not able to do that due to his financial condition. Nevertheless, later has the Supreme Court evaluated counsel's effectiveness in order to verify if the right to defense was violated[546] and also in order to decide whether the state has to compensate for the accused remuneration paid to the chosen counsel in the case criminal proceedings were terminated.[547] In addition to that the Supreme Court regularly evaluates counsel's effectiveness when it decides fees payable to appointed counsel.[548] Therefore, it could be concluded that the Supreme Court of Estonia considers evaluation of counsel's effectiveness in the proceedings of lower court to be in its competence, but has not shown great enthusiasm about the matter.

Although the accused may encounter the reluctance of the higher courts, the appellate and cassation proceedings still have their own advantages. Where the higher courts take ineffective assistance claims seriously, defense lawyers have

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[542] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, pp. 772–773.

[543] Green, *Judicial Rationalizations for Rationing Justice: How Sixth Amendment Doctrine Undermines Reform Colloquium: What does it Mean to Practice Law in the Interests of Justice in the Twenty-First Century,* 1729, p. 1730.

[544] Judgment of the Criminal Chamber of the Supreme Court, 21 December 1999, court case no. 3-1-1-115-99, p. 4. Online. Available: http://www.nc.ee/?id=11&tekst=RK/3-1-1-115-99, 29 April 2011.

[545] P. 4 of the judgment.

[546] Judgment of the Criminal Chamber of the Supreme Court, 15 November 2010, court case no. 3-1-1-70-10, pp. 22-26.

[547] Judgment of the Criminal Chamber of the Supreme Court, 27 September 2010, court case no. 3-1-1-72-10, p. 18. Online. Available: http://www.nc.ee/?id=11&tekst=RK/3-1-1-72-10, 29 April 2011.

[548] A court may reduce the state legal aid fee subject to payment to an advocate who provided state legal aid if the advocate has failed to perform his or her duties upon provision of state legal aid with due diligence. The calculation of fees payable for the provision of state legal aid, the procedure for the payment and the amount of such fees, and the extent of and procedure for compensation for costs related to the provision of state legal aid. Approved by the Board of the Bar Association on 15 December 2009. Last amended by the decision of the Board of the Bar Association on 15 June 2010, p. 12.
The Supreme Court has for instance reduces fee in court case no. 3-1-1-2-11. Court Ruling of the Criminal Chamber of the Supreme Court, 16 February 2011, court case no. 3-1-1-2-11. Online. Available: http://www.nc.ee/?id=11&tekst=222532035, 29 April 2011.

reason to believe that their incompetent actions are followed by judicial condemnation. In addition to that if higher courts publicize their findings of ineffectiveness in judgments in which lawyers' names are mentioned, defense lawyers have significant reputational damage to fear.[549] Especially humiliating would be finding that his work was not effective to counsel, whose behavior is analyzed and criticized by the Supreme Court of Estonia, that presents its judgments online and is therefore easily accessible for everyone. In Estonia in addition to the appellate and the cassation proceedings, it is possible, at least theoretically, that the Supreme Court of Estonia evaluates counsel's performance in the review procedure, which I will discuss in the third subsection of this chapter.

The problem with a supervision performed by the higher courts (*i.e.* in Estonia the supervision performed by the circuit courts after the accused is convicted in the county court and by the Supreme Court of Estonia after the circuit court has made its judgment giving its opinion about the correctness of the judgment made by the county court) is that it alone is not likely to improve the quality of the assistance rendered by counsels in criminal proceedings. When done by the higher court, any assessment may prove too little, too late. When an ineffectiveness claim comes before a circuit court or the Supreme Court, the damage caused by the ineffective representation has already been done.[550] A circuit court or the Supreme Court sees only a record that may not reflect the whole performance of the defense counsel.[551] In addition to that a review performed by the higher court in case of a counsel's ineffectiveness claim requires two levels of second-guessing: it places in doubt counsel's effectiveness, and questions the judgment of the judge of the trial court who observed defense counsel's performance and actions in person. It is obvious that higher courts are reluctant to reverse judgments made by judges in lower court instances, especially if the accused refers to a subjective factor – the performance of counsel in a county court – unknown to the higher courts, because the higher court has not seen the performance itself.[552] And most importantly, the mere possibility of being found ineffective by the higher court may not change the defense counsel's attitude towards the quality of his work, because reversals for ineffective assistance are likely to remain infrequent because of the higher courts' reluctance.[553] Of course, if there was a considerable activity of the higher courts in the field of ineffective defense and higher courts were not

[549] Levine, *Preventing Defense Counsel Error – an Analysis of some Ineffective Assistance of Counsel Claims and their Implications for Professional Regulation,* 1275, p. 1428.
[550] See about the United States Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 4.
[551] See also Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronic's Call to Presume Prejudice from Representational Absence,* 827, p. 841.
[552] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, pp. 772–773.
[553] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, pp. 772–773.

reluctant to conclude that ineffective counsels really were ineffective, then supervision performed by the higher courts may be quite an efficient measure to improve the quality of counsel's performance.

2.2 The Test for Judging Ineffectiveness Claims

In order to work out a specific standard for higher courts to be used in evaluation of counsel's effectiveness, one has to keep in mind that the fact that a higher court is analyzing counsel's performance afterwards does not change the duties counsel had to fulfill during the trial. The question is rather, whether to work out a one step standard or two steps standard. This means that whether the court has only to verify that counsel did not fulfill duties or it has to verify a little bit more, *e.g.,* that the non-fulfillment of the duties had an effect on the outcome of the case. The second element of this standard, called also element of prejudice, is not a part of counsel's performance evaluation. Counsel's performance is evaluated on the first level of the standard and the outcome may be that counsel did or did not fulfill his duties. On the second level of the standard, the court decides after it has found that counsel did not fulfill his duties, whether there is a ground for annulling the judgment of the lower court, because breach of duties affected the outcome, but no matter if the final decision is to annul the judgment or not, it does not change the fact that the court has found that counsel breached his duties. The second element of the standard may be or may not be found acceptable, which I will discuss further below.

The question for the higher court evaluating counsel's performance is whether to do it in accordance with the evaluation *ex ante* or *ex post*. The United States Supreme Court has emphasized that a fair assessment of counsel's performance requires that "…every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."[554] Although evaluation *ex post* could be much more beneficial to the accused, it would be an approach with high costs for counsels and for the society generally. Counsel makes decisions at a certain instant and based on facts known to him then. If we say that the assessment of his performance afterwards should include every fact known to the assessor, we oblige counsel to know every single detail; including those not known to him at the time he makes a decision, which is obviously impossible. Therefore *ex ante* evaluation is the only possibility for assessing counsel's performance.[555]

[554] Strickland v. Washington, 466 U.S 689.

[555] But in the United States it has been discussed that even if counsel's performance is asked to be evaluated without hindsight, but still in order to establish counsel's ineffectiveness the determination that without counsel's flaws the outcome would have been different is mandatory*, i.e.* showing the element of prejudice is required, in practice it is almost impossible to exclude hindsight: judges simply cannot see the errors because psychological biases make it hard to imagine that things could have gone any differently. Most clearly it

2.2.1 The Burden of Proof

The initial burden of proving counsel's ineffectiveness must remain on the accused, as it is he who is challenging the veracity of the adversarial process and the starting presumption is that the proceedings were conducted fairly and properly.[556] Thus, the distribution of the burden of proof for ineffectiveness claims stem from the principle of finality. The accused must at least show that his counsel did not fulfill his duties in the criminal proceedings, after which the prosecutor has a chance to prove that counsel indeed fulfilled his duties. The question of whether the accused has to show that this affected the outcome of the proceedings or the prosecutor has to show that it did not, is the one I am going to answer when I discuss the element of prejudice further.

There is always a question which evidence should the accused present while challenging his counsel's performance and which evidence should the higher court take into account when deciding whether the performance of defense counsel was ineffective in the lower court proceedings or not. In order to answer that question, one has to grasp the two main breach of counsel's duty claims:

(1) Claims arising out of determinations made by the accused's lawyer long before trial or what counsel failed to do before trial (*e.g.,* did not investigate the facts of the case thoroughly). These claims also include claims arising out of the failure of counsel to preserve some other procedural right of the accused, if the decision was made before the trial.

(2) Claims arising out of decisions made in the course of trial or the decisions counsel failed to do during the trial. These claims also include claims arising out of the failure of counsel to preserve some

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can be seen in the context of outcome evaluation. Psychologists have repeatedly found that, in hindsight, people tend to think the eventual outcome was inevitable all along. This is related to another psychological bias: people tend to interpret new evidence so as to confirm their initial judgments. Consequently, courts might discount alleged counsel's errors, regarding them as irrelevant to the foreordained outcome. In the United States it has been suggested that one possible approach to get rid of the risk of hindsight is to establish clear checklists. Assessing compliance with those checklists would be more objective and less susceptible to bias. Stephanos Bibas, *Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel, the,* 2004 Utah L. Rev. 1 (2004), pp. 2–5. See also Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind,* 86 Cornell L. Rev. 777 (2000–2001), pp. 799–801. In my opinion establishing checklist does not actually help, if the element of prejudice is still compulsory to prove, because the court still has to decide whether the non-fulfillment of duties provided for in the checklist affected the outcome of the proceedings or not and this is a decision that might easily be influenced by psychological bias.

[556] Ekins, *Defence Counsel Incompetence and Post-Conviction Relief: An Analysis of how Adversarial Systems of Justice Assess Claims of Ineffective Assistance of Counsel,* 529, p. 556.

other procedural right of the accused, if the decision was made during the trial.[557]

The first category of ineffectiveness is something that the judge does not witness himself,[558] although he may see the consequences of it during the trial and therefore these mistakes may be reflected in the minutes of the court session. Thus, if the court had access to the rationale of counsel's pre-trial decisions, including why he did something or decided not to do something, the judge could determine whether or not counsel exercised informed and reasonable judgment. That is why the first category of ineffectiveness claims presumes recording of defense counsel's considerations. Therefore pre-trial conferences and worksheets that provide documented proof about counsel's action would be very useful for the higher courts. Another possible way to ensure that the higher court would be informed about the rationale behind counsel's decisions is to oblige every counsel to submit brief but reasoned description of decisions made before trial. The trial court would seal this description and give it to a higher court only in case of an ineffectiveness claim.[559] Nevertheless it would be necessary only if the judicial system does not enable pre-trial conferences or worksheets.

But not all counsel's decisions can be recorded. These are the second category judgments, the judgments made by the defense counsel during the courtroom proceedings. Then counsel has to make many decisions without adequate time for extended consideration and recording the reasoning, which makes claims arising from judgments made by counsel during the court proceedings difficult to evaluate by higher courts. One option would be to ask counsel to reason his judgments in writing after the trial, but it would be very burdensome for counsel as he has to make many decisions during the trial and he may not even remember what the specific considerations behind every decision were.

In addition to the above mentioned documented reasoning written by counsel, a conclusion made by the higher court may be based on the record, information given by the accused, the trial judge's view of the matter (at least in cases where the ineffectiveness charges involve trial conduct that might have been visible to the judge), testimony of witnesses who were present at trial and the statements of trial counsel.[560] But to assume that the ineffectiveness of counsel is shown from the record may be a very naive approach: ineffectiveness of counsel may not appear in the record precisely because counsel was

[557] See Lee, *Right to Effective Counsel: A Judicial Heuristic,* 277, pp. 297–298, who has similar distribution but who divides claims into three instead of two.
[558] Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel,* 105 Harv. L. Rev. 670 (1991–1992), pp. 721–722.
[559] Lee, *Right to Effective Counsel: A Judicial Heuristic,* 277, pp. 299–300.
[560] Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 88.

ineffective.[561] One opportunity for counsel's mistakes to be seen from the record is if the accused objects during the trial to his counsel's representation. But this is not likely to occur, because as I have already discussed before, the accused may be unaware of his counsel's failures or might fear the displeasure of either the judge or his own counsel.[562] In addition to that, because the trial record will be limited to defense counsel's performance during the trial, investigation and preparation will not be in the record at all.[563] Claimed deficiencies such as the failure to file a motion or cross-examine a witness are not reflected in a trial record either. It is even less likely that deficiencies related to the failure to sufficiently consult with a client or improperly advising him will be reflected in a trial court's record.[564] Therefore the higher courts cannot decide the matter by just reading the record and they have to take into account what the persons involved have to say.

Another obstacle for bringing a successful ineffective assistance of counsel claim is the difficulty involved in obtaining the cooperation of the lawyer, whose performance did not satisfy the accused. A successful claim often inquires into defense counsel's communication and conversations with the accused[565] and the two parties competent to testify as to those conversations are usually the accused and his counsel.[566] But to assume that counsel readily cooperates is also very naive.[567] When the ineffectiveness claim is presented, the lawyer's reputation is at stake and it does not make him happy and talkative. It is obvious that the lawyer has a significant interest in avoiding the humiliation associated with a court's determination that he rendered ineffective assistance to the accused.[568] The lawyer also knows that talking and revealing too much may prove his ineffectiveness and in turn lead to civil liability, disciplinary action and even losing prospective clients.[569] Thus, in case counsel decides to speak, the court has to evaluate the reliability of his words very carefully,[570] because

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[561] Bazelon, *Defective Assistance of Counsel, the,* 1, p. 29.
[562] Tague, *Attempt to Improve Criminal Defense Representation, the,* 109, p. 148.
[563] Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard Criminal Law,* 242, p. 279.
[564] Fred Metos, *Appellate Advocacy: Raising Ineffective Assistance of Counsel Claims on Appeal,* 24 Champion 53 (2000), p. 53; Zeidman, *To Plead Or Not to Plead: Effective Assistance and Client-Centered Counseling,* 841, p. 852.
[565] Duncan, *(so-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform, the,* 1, p. 27.
[566] Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights we Find there Symposium,* 9 Geo. J. Legal Ethics 1 (1995–1996), p. 7.
[567] Duncan, *(so-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform, the,* 1, p. 27.
[568] Douglas A. Morris, *Waiving an Ineffective Assistance of Counsel Claim: An Ethical Conundrum,* 27 Champion 34 (2003), p. 35.
[569] See also Duncan, *(so-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform, the,* 1, pp. 27–28; Tague, *Attempt to Improve Criminal Defense Representation, the,* 109, p. 155.
[570] *Ibid*.

there is much at stake for counsel and he may even be willing to distort the facts in order to avoid responsibility.

When the accused claims counsel's ineffectiveness, he waives the principle of confidentiality as far as the information refers to claimed breach of duties. Therefore if counsel decides to speak, he can explain his actions freely, because he is not tied to the obligation to keep information concerning the alleged violation of his duties confidential anymore.[571] The ABA Standards state that defense counsel whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the accusation to the extent defense counsel reasonably believes necessary, even though this involves revealing matters which were given in confidence.[572] However, the ABA Standards emphasize that counsel may only reveal that confidential information he reasonably believes to be related to the particular matters at issue.[573]

In addition to that the court has to take into account that at the same time the accused has his own interests. It is common that the accused seeks annulment of a court judgment no matter what. Even if the accused knows that in case the higher court annuls the trial court's judgment, he is not acquitted, but the case is sent back to the trial court for retrial, the accused is more than willing to do whatever it takes to achieve the annulment, because he still sees it as one possible way out. It may also be probable that an accused holds a grudge against his counsel, because he might think that the lawyer did not deliver what he expected of him – an acquittal.[574] That is why the court has to look into the reliability of the accused's words as thoroughly as into the counsel's words.

Consequently, objective means for monitoring counsel's behavior that would conclusively show what counsel did during the trial and what he did not do is an ideal solution in case an accused claimed that counsel breached his duties during the trial. One option is to ask from the trial judge or from witnesses, what happened in the courtroom. The other and more objective way is to use audio recording or video cameras placed in the courtroom. Both would record the proceedings, acting as a sound or video supplement to the trial record. Video recording of course is more effective, because it produces both a sound and video record. Rather than relying on courtroom participants who are either interested in the outcome or give their personal view about what happened, a reviewing court could simply hear the record or watch the video and after that make a decision. In addition, it would help to protect an accused's interests in the event no one other than him came forward with evidence, or the evidence did not illustrate the full extent of his counsel's mistakes.[575] Without the benefit

[571] Tague, *Attempt to Improve Criminal Defense Representation, the,* 109, p. 157.
[572] Standard 4–8.6 (d).
[573] Standard 4–8.6 commentary.
[574] Grunis, *Incompetence of Defence Counsel in Criminal Cases Articles and Addresses,* 288, p. 292.
[575] Kristina G. Van Arsdel, *Burdine v. Johnson: The Fifth Circuit Wakes Up, but the Supreme Court Refuses to Put the Sleeping Attorney Standard to Rest the Future of Patent*

of an audio- or videotaped record, appellate courts admittedly have difficulty evaluating qualitative claims of error.[576] Still it is obvious that an audio- or videotaped record would help in case the accused claims ineffectiveness of defense counsel during the court proceedings. If he claims that counsel did not fulfill his duties in the pre-trial stage of the proceedings and these mistakes did not come into view in the courtroom, this could be unnoticed from the record. In Estonia, the option to audio or video record the court session exists since the Code of Criminal Procedure entered into force. According to the § 156 (1) of the CCP if the case is tried in a general procedure, the court session is audio recorded and if the court finds it necessary, video recorded. Therefore the higher courts can use the audio or video record if the performance of counsel in trial court is challenged by the accused, and that is why it can be claimed that the Estonian Supreme Court's, over ten years ago, expressed standpoint according to which the Supreme Court cannot evaluate counsel's effectiveness, should be history by now.

If counsel's failures are not apparent from the minutes of the court session, video or audio record and court file, the question arises whether the higher court should accept additional evidence. In circuit courts collection of additional evidence is possible (CCP, § 321 (2) 5)). Therefore it should be possible to interrogate the accused and examine witnesses and counsel on this matter and also examine the trial judge. Although according to § 66 (2) of the CCP the judge conducting the proceedings in the criminal matter is not allowed to participate in the same criminal matter as a witness, the Supreme Court of Estonia has held repeatedly that this principle does not mean a prohibition to examine the body conducting the proceedings about the course of investigative activity.[577] According to the recent judicial practice of the Supreme Court of Estonia, although the collection of new evidence is not allowed in the cassation proceedings,[578] when violation of procedural law is claimed, the higher court (including the Supreme Court of Estonia) can rely on documents that are not in the court file.[579]

Law: Institute for Intellectual Property & Informaiton Law Symposium: Note, 39 Hous. L. Rev. [i] (2002–2003), pp. 865–866.

[576] Robert C. Owen & Melissa Mather, *Thawing Out the Cold Record: Some Thoughts on how Videotaped Records may Affect Traditional Standards of Deference on Direct and Collateral Review the Decisionmaking Process,* 2 J. App. Prac. & Process 411 (2000), p. 432.

[577] For example Judgment of the Criminal Chamber of the Supreme Court, 18 March 2009, court case no. 3-1-1-7-09, p. 7. Online. Available: http://www.nc.ee/?id=11&tekst=RK/3-1-1-7-09, 29 April 2011.

[578] According to the § 363 (5) of the CCP the Supreme Court shall not establish facts.

[579] Court Ruling of the Criminal Chamber of the Supreme Court, 3 November 2010, court case no. 3-1-1-92-10, p. 10 Online. Available: http://www.nc.ee/?id=11&tekst=222528832&print=1, 29 April 2011. According to § 347 (2) 6) an appeal in cassation shall set out a list of documents which the appellant in cassation considers necessary to submit additionally in appellate procedure in order to establish a material violation of criminal procedural law.

For the accused the biggest problem with an ineffectiveness claim is the question: who will represent him. According to §§ 318 (1) and 17 (1) of the CCP the accused has the right to file an appeal to the circuit court. That means that he can draft and file an appeal himself in case he wants to and is able to do that. Therefore he does not have to rely on counsel who turned out to be ineffective in the court proceedings in the court of first instance and he does not have to choose a new one or ask the court to appoint a new one either. But only an advocate has the right to file an appeal in cassation to the Supreme Court of Estonia (§ 344 (3) 2 of the CCP). Thus if the accused wants to file an appeal in cassation or he is not willing or able to file personally an appeal to the circuit court, he evidently needs a new lawyer, because counsel cannot be expected to plead his own ineffectiveness, either because he sees no error in his actions or does not wish to uncover any error.[580] Then again, it must be taken in account that new counsel may be reluctant to challenge his colleague's work.[581] He knows or perceives what might happen to the colleague if his ineffectiveness is exposed. He also knows that when the case is over he will have to continue operating, professionally and sometimes socially, in the environment of other lawyers, who might not like the fact that he challenged the conduct of their fellow professional.[582]

In addition to that there are cases where the accused is unaware of his counsel's ineffectiveness and therefore does not express the wish to claim it in the appeal. If the same counsel continues in the appellate proceedings, it is almost certain that he is not challenging his behavior in the court of first instance proceedings. If the accused has new counsel for some reason in the appellate proceedings, whether new counsel raises the ineffectiveness problem, depends on his willingness discussed above and also whether he notices it at all or not. If the issue of trial counsel ineffectiveness is not record-based, it is unlikely that new counsel will identify and present the issue on appeal[583] unless the accused is aware of the former counsel's ineffectiveness and explains it to the new counsel. The ABA Standards provide that if defense counsel, after investigation, is satisfied that another defense counsel who served in an earlier phase of the case did not provide effective assistance, he should not hesitate to seek relief for the accused on that ground.[584] Here the ABA explains: "The

[580] Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims,* 679, p. 706; Place, *Deferring Ineffectiveness Claims to Collateral Review: Ensuring Equal Access and a Right to Appointed Counsel,* 301, p. 309; Tague, *Attempt to Improve Criminal Defense Representation, the,* 109, p. 148; Klein, *Emperor Gideon has no Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel, the,* 625, pp. 636–637; Fitzpatrick & Caravasos, *Ineffective Assistance of Counsel,* 67, p. 68.
[581] Tague, *Attempt to Improve Criminal Defense Representation, the,* 109, p. 152.
[582] Grunis, *Incompetence of Defence Counsel in Criminal Cases Articles and Addresses,* 288, p. 294.
[583] See also Place, *Deferring Ineffectiveness Claims to Collateral Review: Ensuring Equal Access and a Right to Appointed Counsel,* 301, p. 309.
[584] Standard 4–8.6 (a).

traditional position of the bar that a lawyer must stand ready to challenge the conduct of a colleague when that is necessary to the protection of a client's rights is essential to our system of justice. Nothing would be more destructive of the goals of effective assistance of counsel and justice than to immunize the misconduct of a lawyer by the unwillingness of other lawyers to expose the inadequacy."[585] The ABA is also convinced that "[s]ince counsel must zealously represent his or her client's interests at all times, where appellate counsel was also trial counsel, such post-trial representation should also include scrutiny of counsel's own representation of the client at trial. Where counsel concludes that his or her prior representation was ineffective, in the interests both of effective representation and avoidance of conflicts of interest, counsel should explain this conclusion to the client and seek permission from the court to withdraw from further representation on this basis."[586] But still, it could be claimed that the Bar's standpoint about the matter is a bit too idealistic and although looking good on paper, the duty of counsel to challenge colleague's and his own representation is of course much easier to say than to do, because it might happen that counsels do not want to admit that they or their colleagues have done a bad job.

2.2.2 The Element of Prejudice

Only if the accused has shown that the defense counsel's performance was below the level of required representation and the prosecutor has not managed to prove contrary, the question of element of prejudice arises. The burden of proving a violation of the right to effective defense is always on the accused, as it has been already discussed above. The prejudice requirement is an issue if and only if the accused has already established to the court's satisfaction that his lawyer's representation did not meet the relevant standard.[587] As I have already discussed, requirement to show prejudice does not mean that if counsel has failed to fulfill his duties and prejudice is not verified, counsel has not provided ineffective defense. *Vice versa*, counsel has provided ineffective defense, but because it did not affect the outcome of the proceedings, the higher court does not annul a lower court's judgment.

In the United States, the prejudice requirement is handled historically in three different ways. First, some theorists and practitioners say that no showing of prejudice is required and that any accused, who proves that he was given less than effective representation should be automatically entitled to relief, *i.e.* the judgment of the lower court should be annulled by the higher court.[588]

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[585] Standard 4–8.6 commentary.
[586] Standard 4–8.6 commentary.
[587] Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 72.
[588] "Once a defendant proves that counsel was constitutionally ineffective ... should the state be [not] permitted to prove harmless error. To do so would be to propose that a trial, which is by definition unfair, can be accepted as fair." Gabriel, *Stickland Standard for Claims of*

According to this standard the only thing that the Prosecutor's Office can do is to prove that counsel's performance met the standard although the accused claims otherwise. Others say that the accused is required not only to demonstrate conduct below the prevailing standard, but also to prove that this violation of his rights harmed him.[589] Here the prosecutor can prove either that counsel's performance met the standard or that the accused was not harmed by violation of the right to effective assistance of counsel. Finally, an intermediate position is to shift to the state the burden of proving an absence of prejudice once the accused establishes that his representation was ineffective. The last approach is called the harmless error rule.[590] The nature of this rule is that the state has to prove an absence of prejudice, *i.e.* that the mistakes counsel made were harmlessness beyond a reasonable doubt.[591] Of course, the prosecutor can also prove that the ineffective defense did not occur. Some commentators suggest that it should be counsel who proves a lack of prejudice. However, counsel in the process of defending themselves against multiple claims by former clients will have less time out of their already hectic schedules to dedicate to their other clients.[592] In addition to that, it is still the state that is responsible for conduct of the proceedings and that the rights of the accused are guaranteed in the course of that. Therefore I agree that no matter which standard to use, it is still the prosecutor who has to prove necessary elements or absence of those elements, not counsel.

The first proposal – automatic annulment of court judgment after it is verified that counsel has not been effective, means that besides counsel's failure to fulfill his duties there is nothing further to prove by the accused or the prosecutor. Therefore, to be exact, element of prejudice does not exist in this standard. How burdensome is this test for the principle of finality depends on

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Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of due Process, the Comment, [1290], p. 1285.

[589] This method is used in the United States by the United States Supreme Court and also for example in the New Zealand. Ekins, *Defence Counsel Incompetence and Post-Conviction Relief: An Analysis of how Adversarial Systems of Justice Assess Claims of Ineffective Assistance of Counsel,* 529, p. 548. In the United States, the system of ineffective defense claims is mixture of the first and the second approach to be more exact: when it comes to most serious forms of ineffective defense (*e.g.,* absence of counsel), prejudice is presumed and in case any other ineffectiveness is claimed, the accused has to show prejudice.

[590] Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, pp. 72–73.

[591] For instance very famous case Decoster I (United States of America v. Willie DeCoster, Jr. No. 72–1283, 487 F.2d 1197; 159 U.S. App. D.C. 326; 1973 U.S., October 4, 1973) created a three-step inquiry:

(1) Did counsel violate one of the articulated duties?
(2) Was the violation "substantial"?
(3) Has the government established that no prejudice resulted?

[592] Stacey L. Reed, *Look Back at Gideon v. Wainwright After Forty Years: An Examination of the Illusory Sixth Amendment Right to Assistance of Counsel, A,* 52 Drake L. Rev. 47 (2003–2004), pp. 64–65.

the element of ineffectiveness, *i.e.*, which failures of counsel constitute ineffective defense and which not.

The second proposal – the accused's burden to prove prejudice has been used by the United States Supreme Court since 1984.[593] Although classically the standard of prejudice means that the accused has to show that without the mistakes of his counsel he would not have been convicted, and that is how the Strickland Court understood the element of prejudice, it is not nowadays the only way to show element of prejudice according to the judicial practice of the United States Supreme Court. In 2003, the United States Supreme Court held in Glover v. United States[594] that an increase in the length of a prison sentence constitutes prejudice for the purposes of the Strickland standard, which made Glover "an important step in the right direction", as it was rejoiced in the United States.[595] As the Strickland Court had laid down a framework for ineffective assistance challenges to convictions and death sentences, it did not take a clear position on claims alleging merely that defense counsel's errors resulted in a longer sentence. But from Glover it is possible to extract a broad principle that convicted accused persons who bring length-of-sentence claims should be able to establish Strickland prejudice by demonstrating a reasonable probability that, but for defense counsel's errors, they would have received a shorter sentence.[596] Nowadays the Strickland standard and its requirement to element of prejudice essentially allows two types of accused persons to have any chance of winning an ineffective assistance of counsel claim. The first is a truly innocent accused, who is able to prove his innocence. The second is an accused who claims that if counsel would have been effective, he would have received a more lenient punishment.[597]

There are several arguments that support requiring the accused to show prejudice to ensure the annulment of the court judgment on the basis of ineffectiveness of defense counsel. First, it would seem that in order to have been really ineffective, defense counsel's performance must logically have had some adverse effect on the accused's rights, and only the outcome of the trial

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[593] Although as I already emphasized and as I will discuss further in chapter five, there are some exceptional circumstances, in case of which prejudice is presumed.

[594] Glover v. United States, 531 U.S. 198 (2001).

[595] Amanda Myra Hornung, *Paper Tiger of Gideon v. Wainwright and the Evisceration of the Right to Appointment of Legal Counsel for Indigent Defendants, the Symposium: Advocating for Change: The Status & Future of America's Child Welfare 30 Years After CAPTA: Note,* 3 Cardozo Pub. L. Pol'y & Ethics J. 495 (2004–2006), pp. 515–516.

[596] *Prejudice and Remedies: Establishing a Comprehensive Framework for Ineffective Assistance Length-of-Sentence Claims Note,* 119 Harv. L. Rev. 2143 (2005–2006), pp. 2144–2145. Here some United States courts have shown their concern about the ease with which an accused could demonstrate that his sentence might have been marginally shorter and have therefore adopted more rigorous prejudice requirements than it is provided in Strickland.Hessick, *Ineffective Assistance at Sentencing,* 1069, p. 1086.

[597] Gable & Green, *Wiggins v. Smith: The Ineffective Assistance of Counsel Standard Applied Twenty Years After Strickland Current Developments 2003–2004,* 755, p. 765.

can determine what that effect was.[598] The need to show prejudice limits the scope of appellate review to only those actions which have an effect on the determination of guilt,[599] and since 2003 in the United States also the length of sentence. It has also been proposed that meaning of prejudice should be changed and the burden of proving that counsel acted in a way that prejudiced the assertion of one or more of the accused's rights should be placed on an accused. This burden requires the accused to prove that a particular failure of counsel was not a valid tactical decision, *i.e.*, that counsel did not exercise a voluntary, knowing, and intelligent waiver of the accused's rights.[600] However, this proposal has not found attention in the special literature for some reason. It could actually be that this proposal would be suitable for supporters of prejudice standard, if it would be noticed, because according to this standard the accused also has to show that counsel's failures affected him, although not the outcome of his case, but his procedural rights. However, as counsel is the one who also provides the assistance to the accused, the breach of his duties may lie not only in waving the accused's rights, but also in failure in consulting with the accused and informing him about the course of the proceedings, very important counsel's duties, which form the basis of communication between the accused and counsel, which means that this standard is not without its flaws either. Secondly, the supporters of the element of prejudice claim that in the society, there is always interest in preserving the finality of the court judgments[601] and if the accused fails to show an effect his counsel's failures had on the outcome of the proceedings, there is no need to repeat the adjudication. Therefore, a prejudice requirement is supported by a number of pragmatic concerns. It reflects a realistic view that lawyers cannot perform perfectly in every trial and therefore avoids spending time and money on a second trial likely to end in the same way result as the first trial.[602] After all, it seems somewhat wasteful to reverse for "ineffective assistance" when there is no "reasonable probability" that the result in the case would have been different. One always has to keep in mind, that when an accused is retried, it means the expenditure of substantial additional resources.[603] In addition to that, an abolishment of prejudice claim

[598] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, p. 769.
[599] Bazelon, *Defective Assistance of Counsel, the,* 1, p. 29.
[600] Robert J. Conflitti, *New Focus on Prejudice in Ineffective Assistance of Counsel Cases: The Assertion of Rights Standard, A Note,* 21 Am. Crim. L. Rev. 29 (1983–1984), pp. 43–44.
[601] A presumption of prejudice would lead either to a flood of retrials or to judicial tolerance of outrageously bad performances by defense counsel. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard Criminal Law,* 242, p. 284. See also Klein, *Emperor Gideon has no Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel, the,* 625, p. 635.
[602] Peter A. Joy & Kevin C. McMunigal, *Has Gideon's Promise been Fulfilled Ethics,* 18 Crim. just. 46 (2003–2004), p. 47.
[603] Weaver, *Perils of being Poor: Indigent Defense and Effective Assistance Criminal Procedure Discussion Forum,* 435, p. 440.

would multiply the number of claims,[604] which means that even if court find most of those claims groundless, it still has to deal with them and solve them, *i.e.* to spend extra resources on them.

Yet, opponents to the prejudice element in the United States emphasize that promoting finality cannot be an acceptable goal if the process which led to the judgment was unfair in the first place.[605] The right to effective assistance should ensure that "convictions are obtained only through fundamentally fair procedures"; otherwise we emphasize efficiency over fairness.[606] The system's ultimate goal is not to convict the guilty no matter what, but to ensure a fair proceeding "designed to end in just judgments."[607] The prejudice prong, on the contrary, inherently assumes that no injury is caused solely by the denial of procedural due process.[608]

When it comes to the meaning of prejudice that the United States Supreme Court used since 1984 until 2003 it has been claimed that requiring the accused to show that his counsel's ineffectiveness was likely to have led to the finding of guilt in effect obliges the accused to demonstrate that the prosecution did not prove its case, *i.e.* the accused has to prove his innocence, which is a requirement against the presumption of innocence.[609] When it comes to judicial

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[604] Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel Note,* 147, p. 163.

[605] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, p. 769; Gabriel, *Stickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of due Process, the Comment,* [1290], p. 1286. If the principle of finality is considered to be superior in the context of ineffective defense claims, it can be concluded that the costs of maintaining the system and ensuring finality falls almost entirely on the poor, because usually the problem with ineffective defense arising in a relation with appointed counsels, but appointed counsels are the ones who mostly defend indigent persons. See also Ekins, *Defence Counsel Incompetence and Post-Conviction Relief: An Analysis of how Adversarial Systems of Justice Assess Claims of Ineffective Assistance of Counsel,* 529, p. 551; Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads Symposium: Broke and Broken: Can we Fix Out State Indigent Defense System: Boots on the Ground: The Ethical and Professional Battles of Public Defenders,* 75 Mo. L. Rev. 771 (2010), p. 776.

[606] Marcus Procter Henderson, *Truly Ineffective Assistance: A Comparison of Ineffective Assistance of Counsel in the United States of America and the United Kingdom Note,* 13 Ind. Int'l & Comp. L. Rev. 317 (2002–2003), p. 334.

[607] Oregon v. Kennedy, 456 U.S. 667 (1982), 456 U.S. 672; Garcia, Right to Counsel Under Siege: Requiem for an Endangered Right, the, 35, p. 103.

[608] Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel Note,* 147, p. 169.

"The argument that a defendant who receives a fair trial is not prejudiced by ineffective assistance of counsel is powerful but ultimately myopic and too results-oriented." David A. Perez, *Deal Or no Deal? Remedying Ineffective Assistance of Counsel during Plea Bargaining,* 120 Yale L. J. 1532 (2011), p. 1577.

[609] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, p. 770. "The test eliminates the procedural requirement by which the goal of a just result is to be attained. Absent the procedural

practice of the United States Supreme Court after 2003, it seems that most authors are rather happy, because the Supreme Court has widened the notion of prejudice and what they do in the law reviews is to figure out in which cases the Glover findings are actually applied.[610] Nevertheless, it has been emphasized in the special literature that once ineffectiveness of defense counsel is determined, the accuracy of the finding of guilt (and imposing of punishment) is always called into question:[611] after establishing counsel's ineffectiveness, the accused has demonstrated that he was convicted without a full adversarial hearing which is supposed to be critical to the adversary system[612] and therefore the result obtained that way should have no legacy.[613] In an adversarial system, one is never "clearly guilty" until one has been convicted through fair procedures.[614] The opponents of the element of prejudice do not spend much attention to the problems related to spending additional resources. They just stress, that if a higher court annuls the lower court's judgment, it does not mean that the accused escapes conviction, but rather receives a new trial with a better shot at

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requirement, the test allows a court to presume guilt before it is certain that the accused has been convicted through the properly functioning processes of the adversary system." Gabriel, *Stickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of due Process, the Comment,* [1290], p. 1261 and additionally p. 1277. See also Richard Klein, *Constitutionalization of Ineffective Assistance of Counsel, the Symposium: Gideon – A Generation Later,* 58 Md. L. Rev. 1433 (1999), p. 1468. The practice of the United States Supreme Court, which embodies a strong belief that criminal trial counsels provide adequate representation sets enormous burden of proof on the accused, seems to almost negate the idea that person is innocent until proven guilty. William, *Criminal Law – the Sixth Amendment Right to Counsel – the Supreme Court Minimizes the Right to Effective Assistance of Counsel by Maximizing the Deference Awarded to Barely Competent Defense Attorneys – Florida v. Nixon the Ben J. Altheimer Symposium: Courtroom with a View: Perspectives on Judicial Independence in Honor of Judge Richard Sheppard Arnold: Note,* 149, p. 171.

[610] About more specific problems in applying the Glover approach in the United States' penal system see *Prejudice and Remedies: Establishing a Comprehensive Framework for Ineffective Assistance Length-of-Sentence Claims Note,* 2143 .

[611] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, p. 770. "… [W]hen the fairness of a trial is frustrated or jeopardized by manifest incompetence of counsel, due process may be denied as surely as if no hearing had been held." Schwarzer, *Dealing with Incompetent Counsel – the Trial Judge's Role,* 633, p. 640.

[612] Ekins, *Defence Counsel Incompetence and Post-Conviction Relief: An Analysis of how Adversarial Systems of Justice Assess Claims of Ineffective Assistance of Counsel,* 529, p. 549.

[613] Gabriel, *Stickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of due Process, the Comment,* [1290], p. 1266.

[614] "Stated more simply, one is innocent until proven guilty, and guilt or innocence must be determined in a constitutionally adequate trial." *Ibid*., p. 1281. The burden of the accused to show prejudice suggests that the end justifies the means in the precise circumstance where the legitimacy of the end is dependent on the legitimacy of the means. Thus, the result is elevated above the means by which this result is to be achieved. But the theoretical basis of the adversarial system is that one cannot know the "correct" result without first allowing the process to operate properly. *Ibid*., p. 1266.

an accurate verdict.[615] Moreover, every reversal teaches a general lesson about counsel's obligations, and potentially requires a greater investment in defense resources from state and from counsels themselves.[616]

The opponents of the prejudice standard also claim that if no prejudice is found, but it has been determined that counsel did make some serious mistakes, poor lawyering is left unremedied in the criminal proceedings when a new trial is denied. This erodes the faith of the accused and the public in the fairness and integrity of the adversary system.[617] In addition to that already in 1973 the Judge Bazelon warned that courts can misuse the requirement of prejudice very easily: in order not to deal with ineffectiveness claims the prejudice element allows courts to make a presumption that as long as there was a lawyer seated at the defense table, the defense was adequate.[618] The experience of the United States has shown this warning has to be taken seriously: lots of scholars and journalists have reported that where there was overwhelming proof of guilt at trial, malpractice is excused even if that malpractice involves sleeping, taking drugs, drinking during trial or suffering through a psychotic break.[619]

In addition to the above mentioned objections to the element of prejudice it has been claimed that the ones who support the accused's burden to show prejudice tend to forget that this is an element which is almost impossible to prove and it is often impossible to conclude whether there was a reasonable probability that the outcome would have been different.[620] Although the prejudice requirement assumes we can accurately assess the impact of bad lawyering on the outcome of the case, in reality such an assessment is very difficult.[621] One reason for that is the psychological bias of people I have discussed above. Secondly, it can be asserted that when counsel does an ineffective job, the prosecution's case always looks overwhelming, because it was unopposed.[622] It

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[615] Bernhard, *Exonerations Change Judicial Views on Ineffective Assistance of Counsel,* 37, p. 38.
[616] *Ibid*.
[617] Joy & McMunigal, *Has Gideon's Promise been Fulfilled Ethics,* 46, p. 47.
[618] Bazelon, *Defective Assistance of Counsel, the,* 1, p. 29.
[619] Bernhard, *Exonerations Change Judicial Views on Ineffective Assistance of Counsel,* 37, p. 38. However, in 2002, the United States Supreme Court let stand the Fifth Circuit decision that condemned as ineffective a defense attorney's sleeping through parts of a capital trial. (Cockrell v. Burdine, 535 U.S. 1120 (2002) (mem.)). The Burdine case marks a significant change, since less than 10 years earlier the Court had denied relief when attorney had also slept through long portions of his client's capital trial. (McFarland v. Texas, 519 U.S. 1119 (1997) (mem.)).
[620] Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel Note,* 147, p. 169.
[621] Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads Symposium: Broke and Broken: Can we Fix Out State Indigent Defense System: Boots on the Ground: The Ethical and Professional Battles of Public Defenders,* 771, p. 776.
[622] Ira Mickenberg, *Drunk, Sleeping, and Incompetent Lawyers: Is it Possible to Keep Innocent People Off Death Row Honorable James J. Gilvary Symposium on Law, Religion, and Social Justice: Evolving Standards of Decency in 2003 – is the Death Penalty on Life Support,* 29 U. Dayton L. Rev. 319 (2003–2004), p. 324.

can be even that the absence of effective representation may "…have had an effect on the entire proceeding that was so pervasive that it is not possible to accurately determine the degree of prejudice."[623] In addition to that, court decision, especially the judge's decision about punishment is based on an infinite variety of subjective data, and one can rarely state that it is reasonably probable that a court would have reached a different result than it did.[624] When it comes to determination of punishment, it must be remembered that often judges not only decide the amount of punishment, but also what kind of punishment should be imposed. The effect of counsel's performance on an accused's sentence is very difficult to assess because a judge may elect to impose a particular sentence for any number of reasons, and it may not be clear – even to the sentencing judge himself – how much weight was assigned to various sentencing factors. Therefore it is difficult for the higher court to conclude how any particular argument or evidence affected a sentence, which in turn makes it difficult to assess the impact of counsel's performance.[625] So the higher court has to determine the effect of errors on this subjective decision and also remove itself from the context of the decision[626] trying to figure out what types of mitigation arguments defense counsel should have investigated.[627] Carissa Byrne Hessick explains the situation and it could be said that these words describe the situation very accurately: "There is an irony associated with ineffective assistance claims at sentencing: the greater the discretion afforded to the sentencing judge to identify mitigating factors and determine the final sentence, the more important defense counsel's performance may be in reducing her client's sentence. But the more discretion the sentencing judge has, the more difficult it becomes for a defendant to obtain judicial review of the adequacy of counsel's performance at sentencing."[628]

It is not clear whether an accused could prove in Estonia that a lighter sentence would have been imposed by the court if counsel's assistance had been effective, given that the only requirements for a specific sentence is that it has to be justified and in accordance with bases of punishment provided for in § 56 (1) of the Penal Code[629]. It is, therefore, possible that even if counsel submits mitigating evidence, a court will find the guilt of the accused to be such as merits the same sentence as would be imposed without any mitigating

[623] Klein, *Emperor Gideon has no Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel, the,* 625, p. 641.
[624] Gabriel, *Stickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of due Process, the Comment,* [1290], p. 1281.
[625] Hessick, *Ineffective Assistance at Sentencing,* 1069, pp. 1087–1088 and p. 1103.
[626] Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel Note,* 147, p. 169.
[627] Hessick, *Ineffective Assistance at Sentencing,* 1069, p. 1107.
[628] *Ibid*., p. 1099.
[629] Penal Code. Passed 6 June 2001. Entered into force 1 September 2002. Last amended 1 September 2011 – RT I, 30.06.2011, 9.

circumstances. Therefore I find it probable that the element of prejudice could be proven in Estonia primarily where counsel has failed to present evidence that would prove that the act does not involve the elements essential to the offence, the act is not unlawful, or the defendant is not capable of guilt or there are other circumstances which preclude guilt. In such a case, the accused could clearly claim that if counsel had provided effective assistance, the criminal proceedings would have culminated in an acquittal. The possibility that a reviewing court would actually find that a failure to present important mitigating evidence by counsel also constitutes grounds for annulment of the decision of the lower court cannot still be completely ruled out either.[630]

As proving that without counsel's mistakes the punishment would have been more lenient is almost impossible because of the above mentioned reasons, prejudice element usually boils down to the accused's attempt to prove that without counsel's mistakes he would have been acquitted. In addition to the fact that this goes strongly against the principle of presumption of innocence, it should be also added that it means that in a case in which the prosecutor has extremely strong evidence against the accused does not have to prepare at all, because defense counsel owes his best effort only to the accused with a hopeful case.[631] Therefore, the question arises why the state needs to bother to supply an effective counsel or even counsel to represent the accused with a weak defense position.[632] In that sense the prejudice requirement seems to demand effective representation only for the innocent.[633] Nevertheless the aim to "reduce the chance that innocent persons will be convicted" is only a narrow purpose of the right to counsel, as I have discussed in detail in chapters one and two.

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[630] Soo, *An Individual's Right to the Effective Assistance of Counsel Versus the Independence of Counsel: What can the Estonian Courts do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?* 252, p. 258.

[631] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, p. 768. Yet it is the accused confronted with the strongest case against him who is most in need of an effective defense: a lawyer needs to become increasingly diligent and aggressive as the strength of the evidence against his client increases. Klein, *Constitutionalization of Ineffective Assistance of Counsel, the Symposium: Gideon – A Generation Later,* 1433, p. 1467; Klein, *Emperor Gideon has no Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel, the,* 625, p. 645; Goodpaster, *Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases, the Colloquium: Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise been Fulfilled,* 59, p. 78; Stephen B. Bright, *Gideon's Reality: After Four Decades, Where are we,* 18 Crim. just. 5 (2003–2004), p. 8. See also Strickland v. Washington, 466 U.S. 710–711, Justice Marshall, dissenting.

[632] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, p. 769.

[633] Vanessa Merton, *What do You do when You Meet a Walking Violation of the Sixth Amendment if You'Re Trying to Put that Lawyer's Client in Jail Symposium: Case Studies in Legal Ethics,* 69 Fordham L. Rev. 997 (2000–2001), p. 1025; Duncan, *(so-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform, the,* 1, p. 24; Newman, *Ineffective Assistance of Counsel: The Lingering Debate,* 659, p. 680.

Procedural rights should extend not only to the factually innocent, but also to "guilty" accused persons as well, *i.e.* to all people charged of crime.[634]

The last proposed standard, a harmless error rule means that it is the prosecutor who has a burden to prove that counsel's mistakes did not affect the outcome. This standard is in accordance with presumption of innocence, because the accused does not have a burden to show prejudice: therefore it is consistent with the basic concept of justice that the state has the burden of proving the accused's guilt.[635] That way the standard is much more lenient for the accused, because the accused does not have to face the difficulties that he has when he is asked to prove prejudice, but it still ignores the understanding that the right to effective assistance of counsel can be violated even if counsel's mistakes did not have an effect on the outcome of the proceedings.[636] As the right to effective assistance of counsel is so important to protect the accused's other rights and provide him with the opportunity to be an equal contestant to the prosecutor, I generally agree with those who claim that the courts should not require the accused to establish element of prejudice in counsel ineffectiveness cases as they should not allow the prosecutor to prove that counsel's mistakes did not prejudice the accused. In my opinion this principle should apply to the most egregious mistakes of counsel, which means that the accused should be granted a relief after he has managed to prove that his counsel made the "egregious mistake", and the prosecutor cannot argue here that the conviction should not be overturned, because counsel's mistake did not affect the outcome. If it can be concluded that the right to effective assistance of counsel was violated even if it is possible to say that in case counsel would have not done this kind of mistake, the result would have been the same, rights of the accused and his position in the adversary proceedings are better guaranteed. The society has an interest in the criminal process beyond guaranteeing accuracy of result. That is why it is necessary to overturn a guilty verdict, notwithstanding the overwhelming evidence of guilt, because the procedure for obtaining that verdict was unfair in the way that counsel who participated in the proceedings made an egregious mistake.[637] But here it should be decided, what to do with cases where counsels made mistakes not listed as "egregious".

In the United States it has been suggested that justice and the specific goals of the right to counsel would be better served if courts, after analyzing a list of minimal criteria essential to effective representation, were to reverse convictions without requiring a showing of prejudice when counsel unjustifiably failed to satisfy one of these basic components (*i.e.* his mistake was

[634] Strickland v. Washington, 466 U.S. 711, Justice Marshall, dissenting.
[635] Klein, *Constitutionalization of Ineffective Assistance of Counsel, the Symposium: Gideon – A Generation Later,* 1433, p. 1469.
[636] Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims Notes and Comments,* 413, p. 440.
[637] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, p. 767.

"egregious").[638] If the accused claims that although his counsel fulfilled all duties described in the list was nevertheless ineffective under the special circumstances of a case, the court should look into the facts and declare an action "basic" and therefore necessary if the circumstances of the case indicate that counsel's actions prejudices the accused.[639] Abandoning the prejudice requirement for at least many of the ineffectiveness claims would send a powerful message to those responsible for guaranteeing to accused persons effective assistance.[640] It is probable that abandoning the prejudice element produces an immediate increase in ineffective assistance claims and also in reversals, which is still a short-term effect.[641] In the long run, reversals will likely decrease as defense counsels become better acquainted with the requirements of the new approach. In addition, a short-term increase in reversals could produce several positive side effects: trial judges would react in case of poor performance by counsel more willingly; the Bar would receive a strong message if the same defense counsels consistently are declared ineffective by courts and client would be less ready to retain those counsels. There is another possible positive side effect also, that I only mention here and will not discuss further: frequent reversals could yield negative publicity, that might in turn encourage the passage of remedial legislation such as increased expenditures for appointment of counsels.[642] On the other hand, losing the prejudice prong and asking prejudice to prove only in exceptional situations means that courts have to have an adequate standard for evaluating defense counsel's performance. Otherwise the result would be chaotic and arbitrary. But it is almost impossible not to agree with the opinion that it is extremely hard to devise a standard for evaluating defense counsel's performance that captures all the cases in which one would conclude that counsel performed inadequately,[643] which means that in order to protect an accused persons interests and the principle of finality at the same time, it is obvious that the prejudice prong has to be retained, at least for some ineffective counsel claims.

When it comes to the judicial practice of the ECtHR one has to take into account that the ECtHR does not search for a ground for annulment of the state court's judgment, but only establishes violations of the European Convention on Human Rights and it is up to the state after the ECtHR has established the violation to decide whether to annul the judgment or not. Therefore the ECtHR does not have to consider the principle of finality and in turn does not have to restrict itself with the element of prejudice. However, in my opinion the ECtHR

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[638] Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims Notes and Comments,* 413, p. 417.
[639] *Ibid*.
[640] Joy & McMunigal, *Has Gideon's Promise been Fulfilled Ethics,* 46, p. 47.
[641] Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims Notes and Comments,* 413, p. 444.
[642] *Ibid*.
[643] Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment,* 78 Iowa L. Rev. 433 (1992–1993), p. 505.

seems not to have a clear opinion about the element of prejudice when it comes to ineffective assistance claims. Although some authors claim that the right to a defense is absolute in the sense the fact that the applicant has not suffered any damage from the non-fulfillment of the requirement under Article 6 paragraph 3 (c) does not exclude that this provision has been violated by the state.[644] But if one analyzes ECtHR's case law, the picture is not that clear anymore. In Artico v. Italy the ECtHR held that Article 6 paragraph (3) c does not indicate that proof of prejudice is necessary. According to the Court's understanding, the existence of a violation is conceivable even in the absence of prejudice.[645] Although the Court stated that it cannot be proved beyond all doubt that a substitute for an applicant's lawyer would have pleaded statutory limitation and would have convinced the Court of Cassation, the Court added that in the particular circumstances it appears plausible that this would have happened,[646] which means that in the Court's opinion there is a possibility that the outcome of the case would have been different. In Alimena v. Italy[647] the Court noted, citing Artico, that a violation of the European Convention on Human Rights is conceivable even where no damage arises. The Court concluded that the competent Italian authorities were under a duty to take steps to ensure that the accused enjoyed effectively the right to which they had recognized he was entitled, namely the possibility of being represented by a lawyer at the examination of his appeal, but added that Italian authorities deprived the accused of legal assistance which could have helped him in his attempt to secure an unqualified acquittal.[648] This again refers to the possibility that when counsel would have been present, the outcome of the case could have been different. Therefore, although word for word denying need to prove element of prejudice, the ECtHR has still gradually incorporated it into some of its judgments that deal with ineffective assistance claims. In order to get some clarity, one has to wait for further judgments from the ECtHR.

In this thesis I refrain from suggesting the prejudice prong for counsel's most egregious mistakes because I am convinced that all accused persons should be treated equally and they all should be guaranteed the same procedural rights, including the right to effective assistance of counsel. If the right to effective assistance is violated, the proceedings have not been fair, because the basis for adversary proceedings is a diligently acting counsel, an equal or basically equal contestant to the prosecutor. If the proceedings have not been fair, the outcome of it cannot be valid. Because I agree with authors in the United States that claim that in order to lose the prejudice element, a specific standard for counsel's performance should be worked out, because otherwise

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[644] Theory and Practice of the European Convention on Human Rights (Pieter van Dijk et al. eds. Fourth Edition ed. 2006), p. 637; Trechsel, *Human Rights in Criminal Proceedings*, *p*. 248.
[645] Artico v. Italy, § 35.
[646] *Ibid.*
[647] Alimena v. Italy. *Application no. 11910/85*. 19 February 1991.
[648] § 20 of the judgment.

judicial practice in the field of ineffective counsel claims would be unpredictable and chaotic, I am going to try to elaborate a standard for higher courts in Estonia that in my opinion consists of absolutely essential duties of counsel, *i.e.* the duties, which non-fulfillment always constitutes violation of the right to effective assistance of counsel and therefore should always result in annulment of a lower court's judgment. However, when it comes to counsel's violations that are not listed, but which the accused could still claim to be egregious under special circumstances, in order to respect principle of finality, the prejudice prong should be retained. Otherwise it would be possible to conclude that every mistake of counsel can lead to annulment of the court judgment, which would put an enormous burden on the justice system and society overall. In order for the accused not to be obliged to prove his innocence, it should be the prosecutor who has to prove that mistake the accused claims to be egregious did not affect the outcome of the case or the accused's rights in the proceedings.

2.3. The Outcome of Supervision

The ECtHR has given its opinion about how the state should act when a person's rights are violated depending on whether the case has already reached the ECtHR or not. The ECtHR has stressed that in case the ECtHR has established violation of the accused's rights, it is not its duty to impose new proceedings in a new form on a state. A state has the right to decide for itself what means it will use to put the applicant, as far as possible, in the position he would have been in had there not been a breach of the European Convention on Human Rights. In so doing, the means chosen by the state must be compatible with the conclusions of the ECtHR and the rights of the defense.[649] In Quaranta v. Switzerland, the Court stressed that a state should mend the defect before the case reaches the ECtHR at all. According to this judgment, if a person's right to the assistance of counsel has been breached in a lower court, the case should be tried anew, in a higher court.[650] If limitations on the cases within the jurisdiction of the court render this impossible, the person should be guaranteed new proceedings in a lower court.[651]

According to § 339 (1) 3) of the CCP violation of criminal procedural law is material, and therefore results in an abolishment of the court judgment, if a court proceeding is conducted without the participation of counsel, although the participation of counsel was mandatory in court proceedings, which means that violation of procedural law is material if the right to have counsel present was violated. Clause 339 (1) 12) of the CCP provides another relevant material violation of criminal procedural law: violation of criminal procedural law is material if in the course of the court hearing the principle of a fair and just court

[649] Sannino v. Italy, § 71.
[650] Quaranta v. Switzerland, § 37.
[651] Dijk et al., *Theory and Practice of the European Convention on Human Rights*, *p*. 637.

procedure is violated. Clause 339 (1) 12 was brought into the Code of Criminal Procedure on the 1st of September 2011 with the argument that the principle of the right to a fair and just trial is also provided in Article 6 paragraph (1) of the ECHR.[652] Pursuant to § 339 (2) of the CCP a court may declare any other violation of criminal procedural law to be material if such violation results or may result in an unlawful or unfounded court judgment. Until the 1st of September 2011 the Supreme Court of Estonia considered violation of the principle of a fair and just trial to be material violation of procedural law in the meaning of § 339 (2) of the CCP.[653] It is in the competence of the Estonian courts to specify what the principle of "fair" and "just" trial means, but in the context of this dissertation I suggest that the right to effective assistance of counsel is the right that should be followed in order to declare a trial "fair" and "just". Therefore I propose that violation of § 339 (1) 12) can be concluded if counsel has not fulfilled the duties, I am going to suggest shortly, are essential to effective assistance of counsel or if counsel has not fulfilled any other duty and the prosecutor is not able to prove that it did not affect the outcome of the case.

The violation provided for in 339 (1) 3) of the CCP leads to annulment of the judgment of the court of lower instance (either judgment of trial court or judgment of circuit court) and returns the criminal matter to the court of lower instance for a new hearing by a different court panel (CCP, § 341 (1), § 361 (2)). If material violation of criminal procedural law is ascertained in the course of a court session pursuant to the procedure provided for in § 339 (1) 12) of the CCP and the violation cannot be eliminated in the court session, the higher court has to annul the judgment of the court of first instance and return the criminal matter to the lower court for a new hearing by the same or different court panel[654] (CCP, § 341 (3); § 361 (2)). Therefore in case counsel is absent from the proceedings, the case always has to be retried in the lower court. In case counsel has been ineffective any other way, the higher court, if possible, can make a new judgment. If due to counsel's ineffectiveness the accused was wrongfully convicted or too severe a punishment was imposed on him, the higher court can accordingly acquit him or if possible impose a more lenient punishment. But if counsel's ineffectiveness did not affect the outcome, in accordance with the principle of fair trial, an only option is to annul the judgment of the lower court and to return the criminal matter to the lower court

[652] Explanatory Memorandum to the Act to Amend the Code of the Criminal Procedure and Other Related Acts. 599 SE, 11th Riigikogu.

[653] Judgment of the Criminal Chamber of the Supreme Court, 8 April 2011, court case no. 3-1-1-19-11. Online. Available: http://www.nc.ee/?id=11&tekst=RK/3-1-1-19-11, 29 April 2011.

[654] Explanatory Memorandum to the Act to Amend the Code of the Criminal Procedure and Other Related Acts (599 SE, 11th Riigikogu) does not explain in which case the case should be returned to the same panel and which case to the different panel. It seems that the case should be returned to the same panel if there is no need to start with the procedure all over again and a lower court can continue from the stage during which the mistake occurred.

for a new hearing, *i.e.* to give the accused a new chance to participate in the criminal proceedings with effective counsel by his side.[655]

Sometimes the court of higher instance notices the possible ineffectiveness of defense counsel occurred in the court proceedings of the court of lower instance itself, although the accused or his counsel (in case of the cassation proceedings the advocate) has not referred to it in appeal or in appeal in cassation. According to § 331 (2) of the CCP a circuit court hears a criminal matter within the limits of the appeal filed, which means that it does not have competence to ascertain violations that are not referred to in an appeal. The Supreme Court of Estonia has much wider competence. Pursuant to § 360^2 (3) of the CCP the Supreme Court of Estonia shall extend the limits of hearing a criminal matter to all the persons accused and all the criminal offences they are accused of regardless of whether an appeal in cassation has been filed with regard to them if incorrect application of substantive law which has aggravated the situation of the accused or a material violation of criminal procedural law becomes evident.[656] Therefore, at least according to law, the higher courts in Estonia (especially the Supreme Court of Estonia) should cure the consequences of ineffective assistance even it is not referred to in an appeal).

3. Ineffective Representation as a Ground for Review

Every effort should be made to deal with the claim of ineffectiveness of the defense counsel on a direct appeal rather than in a review proceeding because examining the conduct of trial counsel becomes increasingly difficult with the passage of time.[657] In Estonia the grounds for review are extremely limited and that makes it even harder for the convicted offender to claim successfully that his counsel has been ineffective in the criminal proceedings. Pursuant to § 365 (1) of the CCP review procedure means the hearing of a petition for review by the Supreme Court of Estonia in order to decide on the resumption of proceedings in a criminal matter in which the court decision has entered into force. The grounds for review are provided for in the § 366 of the CCP. According to clause 5 of this section the grounds for review are any other facts which are relevant to the just adjudication of the criminal matter but which the

[655] Soo, *Ebaefektiivne kaitse kriminaalmenetluses: mõiste ja probleemistik,* 359, p. 365.

[656] According to § 331 (3) a circuit court shall extend the limits of hearing a criminal matter to *all the persons accused* regardless of whether an appeal has been filed with regard to them, if a material violation of criminal procedural law or incorrect application of substantive law which has aggravated the situation of the accused becomes evident. In order to guarantee the rights of the accused with regard of whom the appeal has been filed, it is possible to interpret this provision in the way that the circuit court has to extend the limits of hearing to all criminal offences he is accused of, in order to assure that he is treated equally in respect of the accused persons, who did not file and whose counsel's did not file appeal at all.

[657] Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 87.

court was not aware of while making the court judgment or a court ruling in the criminal matter subject to review and which independently or together with the facts previously established may result in a judgment of acquittal or in mitigation of the situation of the convicted offender. Therefore, even if it is possible to interpret § 366 5) of the CCP the way that "any other facts which are relevant to the just adjudication" might be possible ineffectiveness of counsel, this clause clearly requires the showing of an element of prejudice.

In addition to that according to § 366 7) the grounds for review are satisfaction of an individual appeal filed with the European Court of Human Rights against a court judgment or ruling in the criminal matter subject to review, due to violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms or a Protocol belonging thereto if the violation may have affected the resolution of the matter and it cannot be eliminated or damage caused thereby cannot be compensated in a manner other than by review. From this clause it is also possible to deduce requirement of prejudice. Because the grounds for review are very limited and there is no case law about the subject, it is impossible to say whether the convicted person claiming that he did not know his counsel was ineffective in the criminal proceedings (and his other counsels and the courts did not know that either) would be successful or not. As the ECtHR itself is reluctant to hold violation of the right to effective assistance of counsel, as I have already discussed above, I do not have faith in § 366 7) of the CCP.

V. STANDARDS OF EFFECTIVENESS OF COUNSEL IN THE UNITED STATES

1. Why to Use the Experience of the United States as an Example?

As it has already been analyzed, the case law of the ECtHR is quite modest in the field of evaluating effectiveness of defense counsel according to standard. The only thing that the ECtHR has emphasized is that counsel has to be present and not remain completely idle. The standard to solve ineffectiveness claims seems to consist of one element only, as according to the judicial practice of the ECtHR it is not necessary for the accused to prove the element of prejudice (although in my opinion the ECtHR has expressed opinion contradictory to this principle at the same time[658]). As it seems that the ECtHR usually holds violation of Article 6 paragraph 3 (c) of the ECHR only if counsel has not participated or has been completely inactive in the proceedings, it must be stated that this is a very primitive standard to evaluate effectiveness of defense counsel and to be exact, this standard mostly helps to ascertain only whether the right to have counsel present, not the right to effective assistance, was violated.
In order to work out the Estonian standard for effectiveness of defense counsel, one has to look for examples from somewhere else, much farther away to be more exact. The judicial practice of the United States has recognized that the right to effective assistance of counsel does not just mean ascertaining whether counsel was there or not or whether he completely failed to fulfill his duties. The courts of the United States have taken a big step further and although maybe holding too much on to the principle of finality, in spite of that are trying to assess quality of counsel's participation too. That is why I am using the case law of the United States courts, especially the case law of the United States Supreme Court as an example of how to impose a proper standard for assessing the effectiveness of defense counsel in the criminal proceedings.

As in Estonia there is no such standard for the courts and the Supreme Court has handled this problem a couple of times very superficially, there is not much to take from the Estonian case law. In order to work out a standard for Estonian courts I also looked in addition to the United States into the experience of some other countries, mostly searching for judicial practice of countries with the adversarial criminal system, but also Germany, which has been a great role model for the Estonian legislator. I have to emphasize that I did not find a standard that has been developed so thoroughly and for so long a time, as it has been done in the United States.

Geoffrey Bennett has given an overview about the judicial practice concerning ineffectiveness of defense counsel in England, stating that there allegations of lawyer's ineffectiveness seem to have been comparatively rare. He continues: "Compared to the United States, with its Sixth Amendment pro-

[658] See the discussion in subsection 4.2.2.2 of this dissertation.

tection, English Law seems to contain relatively few cases where the competence of counsel has received exhaustive consideration at the appellate level. There is nothing to compare with the detailed analysis of the problem by the U.S. Supreme Court in for example, Strickland v. Washington and United States v. Cronic."[659] And finally he concludes: "… [I]t is curious how undeveloped English law appears to be in this area compared to American law."[660]

Dales E. Ives has described the judicial practice in Canada as follows. The Supreme Court of Canada had a goal to develop a distinctly Canadian approach to the interpretation of the rights of the accused, cautioning in several cases that the United States' approach to the right to counsel may not be suitable in the Canadian context. However, recently the Supreme Court of Canada ignored its own advice and simply adopted the United States' approach to ineffective assistance of counsel claims.[661] Dales E. Ives adds that Canadian courts rely on the lawyer-control model, in which counsel is given control over almost all conduct of the defense subject only to a few fundamental decisions, *e.g.,* the decision to plead guilty and the decision to testify on one's own behalf that are reserved for accused persons. This approach has significant implications for the solving of counsel's ineffectiveness claims and therefore appeal courts are reluctant to go behind trial counsel's strategic and tactical decisions in Canada.[662]

In Germany the court has no right to remove the retained counsel in case counsel turns out to be ineffective.[663] When it comes to appointed counsel, court's discretion is a bit broader. For instance the court is allowed to remove counsel if counsel refuses or is not able to perform his tasks, refuses to apply judicial remedies or to justify them. But the mere fact that counsel abuses

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[659] Geoffrey Bennett, *Wrongful Conviction, Lawyer Incompetence and English Law – some Recent Themes Criminal Procedure Discussion Forum,* 42 Brandeis L. J. 189 (2003–2004), p. 194.

[660] Bennett, *Wrongful Conviction, Lawyer Incompetence and English Law – some Recent Themes Criminal Procedure Discussion Forum,* 189, p. 196.

In Regina v. Ensor ([1989] 1 W.L.R. 497) it was stated that "…it should clearly be understood that if defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground for appeal." *Ibid.*, p. 500. In Regina v. Clinton ([1993] 1 W.L.R. 1181) the court concluded that counsel's conduct resulted in conviction being "unsafe" and "unsatisfactory" and annulled the lower court's judgment. In Regina v. Nangle ([2001] Crim LR 506) the court concluded that although there were some deficiencies in counsel's job, they had not caused "unfairness" to the accused. Bennett suggest that the dimension of the "fair trial" was brought into the judicial practice due to the European Convention on Human Rights and its sixth article.

[661] Dale E. Ives, *Canadian Approach to Ineffective Assistance of Counsel Claims, the Criminal Procedure Discussion Forum,* 42 Brandeis L. J. 239 (2003–2004), p. 239. In Regina v. G.D.B ([2000] S.C.R. 520) the Supreme Court held that "… [t]he approach to an ineffectiveness claim is explained in Strickland v. Washington…" *Ibid.*, p. 26.

[662] Ives, *Canadian Approach to Ineffective Assistance of Counsel Claims, the Criminal Procedure Discussion Forum,* 239, pp. 251–252.

[663] Rolf Hannich, Karlsruher Kommentar Zur StPO (2008), § 138a, I, 3, Column no. 3.

procedural rights or acts irrationally does not form a basis for removal of counsel.[664] The court should also consider in Germany removal of appointed counsel if the attorney-client relationship is permanently ruined. In order to decide that the court has to take into account "reasonable" accused's point of view.[665] The German Federal Court of Justice has found counsel's performance to be ineffective and consequently annulled judgments of the lower courts, if counsel participating in the proceedings did not have the right to act as an advocate,[666] if the court did not take into account the accused's wishes while appointing counsel,[667] if due to late appointment counsel had too little time to prepare the case[668] or due to the change of retained counsel new counsel did not have enough time to prepare the case.[669] In the latter case new counsels requested canceling the court session and repeating it, which is an opportunity in German criminal procedure, as I have already mentioned above. They claimed that they were not present when witnesses were examined and therefore missed an important stage of the court proceedings. The Federal Court of Justice emphasized that the lower court should have considered this opportunity. In addition to the above mentioned cases the Federal Court of Justice has held that if counsel is unable to appear to the court session, it is up to court, who is in charge of the proceedings, to decide whether to adjourn the court session, to ask the accused to choose another counsel or appoint counsel to the accused.[670] When it comes to actually assessing counsel's performance, the Federal Court of Justice has been extremely cautious. It has held that courts and Prosecutor's Offices are not obliged to perform supervision over the performance of counsel except in extreme circumstances.[671] As long as counsel is capable of acting appropriately, the court is not authorized to intervene into counsel's performance.[672] In the latter case the Federal Court of Justice even

[664] Michael Heghmanns & Uwe Scheffer, Handbuch Zum Strafverfahren (2008), VI Column no. 93.
[665] Gerd Pfeiffer, *Strafprozessordnung (StPO), Kommentar,* (2005), § 143, Column no. 1; BGH 1 StR 5/00, 16 February 2000.
[666] BGH 5 StR 617/01, 5 February 2002; BGH 4 StR 192/06, 20 June 2006.
[667] BGH 5 StR 408/00, 25 October 2000. According to § 142 (1) of the German Code of Criminal Procedure (Code of Criminal Procedure in the version published on 7 April 1987 (*Bundesgesetzblatt* (Federal Law Gazette) I, page 1074, 1319), as last amended by Article 3 of the Act of 30 July 2009 (Federal Law Gazette I, page 2437. Online. Available: http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1153, 29 April 2011) prior to the appointment of defense counsel the accused shall be given the opportunity to name defense counsel of his choice within a time limit to be specified. The presiding judge shall appoint such defense counsel unless there is an important reason for not doing so. In referred case the Federal Court of Justice concluded that there was no important reason to decline the accused's wish, although that is what the lower court did.
[668] BGH 5 StR 181/09, 24 June 2009.
[669] BGH 1 StR 537/99, 2 February 2000.
[670] BGH 1 StR 409/05, 19 January 2006; BGH 1 StR 169/06, 20 June 2006; BGH 1 StR 474/06, 9 November 2006.
[671] BGH 5 StR 495/00, 5 April 2001; BGH 1 StR 147/06, 27 July 2006.
[672] BGH 1 StR 341/07, 15 July 2007.

held that it is not necessary that appointed counsel is specialized in the penal law. However, the approach that it is not the court's duty to intervene is not in accordance with principles of the adversary system, as it is the role of counsel to be the accused's legal advisor and equal contestant to the prosecutor, and the court has an obligation to guarantee that counsel fulfills his role (see chapter four of this dissertation). For the same reasons counsel has to be specialized in penal law, as I discussed in the subsection 3.4.4. In sum, the German approach to the ineffective assistance claims does not suit for adversary systems.

In my opinion there is considerable experience in the United States in setting a standard for evaluating counsel's effectiveness, an experience that other states do not have, but from which many states, including Estonia, could learn a valuable lesson. The other aspect that makes the United States a good example is the fact that the criminal system in the United States is adversarial and our criminal system moves in that direction as well. That is why it can be concluded that counsel's role in the United States, the role of equal adversary to the prosecutor and zealous advisor to the accused, should ideally be the same as it should be in Estonian criminal proceedings. That makes the United State's approach suitable to our criminal justice system too, at least with some reservations I will soon discuss further.

Another thing that makes the United States a very good example is the fact that its experience in the field of setting a proper standard for assessing counsel's performance is long-lasting. That gives us a chance to see the ups and downs of the development of such standards, how the proponents and critics of certain standards have reacted to the imposing or overturning of that standard and what future will be predicted for the standards of effectiveness of counsel in the United States. It is not only interesting, it is also informative, because it gives us an opportunity not to make the mistakes that the United States has made in the course of history and only take over what seems to be successful and at the same time suitable for us. Of course, while trying to set our own standard, we have to take into account what is unique for us – the fact that our system is not as "adversarial" as the United States system, the fact that we have some of counsel's duties already provided for in the Code of Criminal Procedure and in laws and acts that are related to our Bar and the fact that Estonia is in Europe and for instance legislation of the European Union and the guideline of the Council of Bars and Law Societies of Europe has to be taken into account. In addition to that, there is also the European Convention on Human Rights we have to keep in mind.

2. Standards of Effectiveness of Counsel That Have Been Used in the United States

The oldest and for a long time the most commonly used test for judging claims of ineffective representation was in the United States "…where the circumstances surrounding the trial shocked the conscience of the court and made the

proceedings a farce and a mockery of justice."[673] The "mockery" test caused much irritation among critics who pointed out that this standard requires "…such a minimal level of performance from counsel that it is itself a mockery of the sixth amendment."[674] It is obvious that this standard was too narrow and too vague to set forth any of the elements of effective representation. In addition to that the test placed a heavy burden on the accused and showed clearly that courts do not look favorably on an accused, who claims that his counsel has not performed effectively: only the most egregious errors are the ones which meet the standard and even those are sometimes not enough.[675]

But there were justifications for implementation of the "mockery-of-justice" standard also. First it was claimed that its goal is to lessen the overwhelming caseload of most appellate courts and therefore it was justified with the need to decrease ineffective assistance claims.[676]Another justification for the "mockery-of-justice" test was the need to prevent cases of feigned ineffectiveness, because courts were afraid that a less demanding test would encourage counsels, separately or in conjunction with their clients, to conspire to intentionally mishandle a weak case in order to get the conviction overturned on appeal and gain a new trial, hoping that witnesses have forgotten most of the information by that time.[677] The critics of this test found those fears to be groundless and expressed their opinion that feigned ineffectiveness is an unlikely strategy, because lawyers are afraid of ruining their reputation and disciplinary action by the bar.[678] For accused persons, feigned ineffectiveness means a high risk, because they never know whether the higher court will annul the trial court's judgment or not and by agreeing with the less than the best possible defense they risk more severe punishment than they would have received if counsel would have been as effective as possible.[679]

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[673] Diggs v. Welch, 148 F.2d 667, 669–70 (D.C. Cir. 1945), cert. denied, 325 U.S. 889 (1945). See also Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 25; Chhablani, *Disentangling the Right to Effective Assistance of Counsel,* 1, p. 13; Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement,* 425, p. 431, all analyzing "mockery-of-justice" case law.

[674] Bazelon, *Defective Assistance of Counsel, the,* 1, p. 28.

[675] Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 26.

[676] See for example Diggs v. Welch, (D.C. Cir. 1945). See also Genego, *Future of Effective Assistance of Counsel: Performance Standards and Competent Representation, the,* 181, p. 188; Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 31.

[677] See for example State v. Dreher, 137 Mo. 11, 38 S.W. 597 (1897). See also Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, pp. 31–32.

[678] *Ibid*., p. 32.

[679] Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 32.

Another test, the "reasonable lawyer" test dates back to the Fifth Circuit's opinion in MacKenna v. Ellis.[680] Judge Wisdom, writing for the majority, wrote: "We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Therefore the Fifth Circuit looked directly into counsel's performance and left the characteristics of the proceedings as a whole aside. It can be said that this test was not so demanding for the accused than the "mockery-of-justice" standard was, but still it was quite hard to give meaning to the notion "reasonable", because the court did not explain anything further or tried to set specific guidelines. As state and federal courts one by one adopted the "reasonable lawyer" test, some of them soon began to require that prejudice must have resulted in order to conclude ineffective assistance of counsel.[681]

The "community standard" test was another alternative.[682] Representation was evaluated by comparing it not to the conduct of a hypothetical reasonable lawyer but to the level of practice actually prevailing in the area. This standard derived from language in the Supreme Court's opinion in McMann v. Richardson.[683] Like the "reasonable lawyer" test the "community standard" does not look into characteristics of the proceedings, At the same time the "community standard" test is more precise compared to the "mockery-of-justice" and to the "reasonable lawyer" standard, because it enabled courts to use for evaluating lawyer's performance specific rules, which were applied to the performance of lawyers in a certain community, *e.g.,* local bar guidelines.

Related to all "mockery-of-justice", "reasonable lawyer" and "community standard" there is a never ending discussion that has been held in the United States since different counsel's performance standards appeared in the case law of the United States courts. Thus, some courts and authors have tried to state that it is possible to test ineffectiveness claims by asking whether defense counsel's performance met a minimum standard of professional representation (*e.g.,* in case of "community standard" local bar guideline). If the standard of assessing counsel's performance is "mockery-of-justice" or "reasonable lawyer" standard, then the minimal duties of counsel are not specified and assessing counsel's performance is a matter of *ad hoc* analysis, which makes the standard vague and arbitrary, because every court, and every judge separately to be more exact, sees counsel's basic duties differently. That is why the minimum standard, *e.g.,* the "reasonable lawyer", is what the certain judge thinks it is in a certain case. It actually gives the judge the freedom to take into account that

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[680] MacKenna v. Ellis (280 F.2d 592 (5th Cir. 1960), order modified, 289 F.2d 928 (en banc), cert. denied, 368 U.S. 877 (1961)).

[681] Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement,* 425, p. 433. See more about prejudice from subsection 4.2.2.2 of this thesis.

[682] See for example United States v. Easter, 539 F2d 663, 666 (1976).

[683] Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 41.

there are more difficult and less difficult cases, in which counsel accordingly has to do more or less work, but it does not remove the possibility that different judges treat similar cases differently. Imposing a more specific standard would result in a decrease in arbitrariness by courts and would give counsels' a chance to get to know what they are expected to do in the criminal proceedings, at least the supporters to the minimum checklist say it would do.[684]

Consequently, in the United States there has been a long running antagonism between the "categoricalists" and the "judgmentalists". The "categoricalists" are the supporters of a checklist based approach. They believe that there are some essential duties of counsel that the courts could take into account while assessing counsels' performance.[685] Some authors even claim that the problem of ineffective assistance of counsel can only be solved by establishing a uniform categorical standard for reviewing ineffective assistance claims.[686] The enthusiasm of those authors is actually understandable. If the accused wants to claim successfully that his counsel was ineffective, he would have to prove that counsel failed to satisfy one or more of the rules from the list and nothing more.[687] Then the courts would have to take the accused's claim seriously and could not hide behind a vague understanding of "reasonable performance". Therefore, defense counsel's failure or inability to complete one or more of these necessary components of effective representation automatically establishes ineffectiveness of counsel and ordinarily provides *per se* grounds for granting the accused relief, unless for instance a harmless error rule in some form is used together with the categorical approach. Therefore the "categoricalists" do not support *ad hoc* analysis and believe that it is possible to make a list composed of duties that counsel has certainly to fulfill in the criminal proceedings.

The "judgmentalists", on the other hand, argue that categorical rules are inappropriate because each counsel and each trial is different and that therefore

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[684] See for example Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims Notes and Comments,* 413, p. 444; also Cawley, *Raising the Bar: How Rompilla v. Beard Represents the Court's Increasing Efforts to Impose Stricter Standards for Defense Lawyering in Capital Cases Note,* 1139, p. 1150 that summarizes thoroughly standpoints of supporters to minimum checklists.

[685] "... [I]n providing a statement of what effective representation is and not merely a negative shibboleth about what it is not, the lists offer an objective and uniform starting point from which all courts can determine what defense counsel should have done. The guidelines will aid appellate judges in the dispatch of their duties, providing a common ground from which they may develop a rational analysis and evaluation of the facts of each case." Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 53.

[686] Smithburn & Springmann, *Effective Assistance of Counsel: In Quest of a Uniform Standard of Review,* 497, p. 498.

[687] Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims Notes and Comments,* 413, p. 450.

ineffective assistance claims must be judged on a case-by-case basis.[688] Thus the "judgmentalists" do not believe that setting a guideline is possible – counsel has to perform his duties in the light of certain circumstances and even if there are some steps counsels usually take there is still no ground for imposing guidelines – there might be some cases where these steps are not necessary. The perfect example of this approach is the "reasonable lawyer" test: counsel has to render reasonably effective assistance and what is "reasonably effective" depends on the special circumstances of the case.

At first, when the courts in the United States started to argue over a proper standard of effectiveness, the United States Supreme Court was silent. To be more specific, the United States Supreme Court did not say anything about the standard of effectiveness of defense counsel until 1984. Before the United States Supreme Court finally expressed its opinion about ineffectiveness of defense counsel and created its own standard in 1984, there was a case in the United States Court of Appeals For The District of Columbia Circuit, a very well known case in the United States, which shows very clearly the adversity of the "judgmentalists" and "categoricalists". This case is United States of America v. Willie DeCoster, the case that has been discussed in law reviews almost as much as the United States Supreme Court's case Strickland v. Washington. It is not my goal to present a thorough overview of the case here, but I am going to give this case as a great example of how in the course of one criminal procedure categorical rules were rejected and the case-by-case analyses was found to be more preferable. In my opinion the final judgment of the Court of Appeals might even have been the one that the United States Supreme Court took as an example for Strickland v. Washington.

When the first appeal was before the Court of Appeals in United States of America v. Willie DeCoster, the opinion was written by the "categoricalist" Judge Bazelon. Judge Bazelon relied in his opinion on the ABA Standards and found the assistance of counsel provided to the accused in the court of first instance ineffective. The court remanded the accused's conviction and sentence for aiding and abetting in an armed robbery and assault with a dangerous weapon for a supplemental hearing on trial counsel's preparation and investigation. In court's opinion Judge Bazelon in addition to relying on the ABA Standards, was also strongly against the element of prejudice, saying that in the adversary system the burden is on the state to prove guilt. A requirement that the accused showed prejudice shifts the burden to him and makes him establish the likelihood of his innocence, which is against the principle of presumption of innocence. It is no answer to say that the appellant has already had a trial in which the government already proved his guilt, because the substance of his complaint is that the absence of the effective assistance of counsel has deprived him of a full adversary trial, which means that his guilt was found as a result of a possibly unfair trial. In addition to that, proof of

[688] Evaluating the quality of trial counsel's performance depends largely on the facts of the case. Griffin, *Right to Effective Assistance of Appellate Counsel, the,* 1, p. 32.

prejudice may well be absent from the record precisely because counsel has been ineffective, which makes the prejudice almost impossible to prove.[689]

The same matter reached to the court of appeal two more times. In the third judgment the court finally affirmed the accused's conviction for aiding and abetting an armed robbery.[690] The court held that in order to ascertain ineffective assistance of counsel, it had to be a serious incompetency that fell measurably below the performance ordinarily expected of fallible lawyers. In court's opinion the accused bore the burden of demonstrating likelihood that counsel's inadequacy affected the outcome of the trial. Once the accused made this showing, the burden passed to the government, and the conviction could not be sustained unless the government demonstrated that it was not affected by the deficiency, *i.e.* that no prejudice resulted.[691] So the judgmental approach with the element of prejudice was warranted in this judgment.

Justice Leventhal who wrote the opinion described ineffectiveness cases as a continuum. At one end there are cases of structural or procedural impediments by the state that prevent the accused from receiving the benefits of the right to counsel. The most obvious example is, of course, the failure of the state to provide any counsel at all. The next cases are multiple representation and possible conflict of interest. The problem of late appointment moves us farther along the continuum. At the other end of the continuum are cases, including the United States of America v. Willie DeCoster, in which the issue is counsel's performance when he is "untrammelled and unimpaired" by the state action. The ABA standards, Justice Leventhal continued, were not designed as a checklist of defense counsel's duties for courts. In application of whatever standard there must be room for judgment and for consideration of circumstances of the case. In addition to that Justice Leventhal emphasized that the claimed deficiency must fall measurably below accepted standards: to be "below average" is not enough, because this is the case almost half of the time. In connection with the element of prejudice the court did not require that the accused has to show an actual prejudice. In court's opinion the accused must demonstrate a likelihood of effect on the outcome.[692]

Now it was Judge Bazelon's time to disagree as he was the one who wrote the first opinion in the United States of America v. Willie DeCoster. In his dissent to majority opinion he emphasized that the ABA Standards summarize the consensus of the practicing Bar on the crucial elements of defense advocacy in the adversary system. Even though these standards were not intended to serve as criteria for judicial evaluation of effectiveness, they are certainly relevant guideposts for courts. Naturally, given the complexity of each case and the constant call for professional discretion, it is not possible to form a complete checklist with rules for counsel's performance. Nevertheless, preserving

[689] United States of America v. Willie DeCoster, 1973, pp. 1203–1204.
[690] United States of America v. Willie DeCoster, 1976.
[691] *Ibid.,* pp. 202–203.
[692] *Ibid.,* pp. 201–209 and 214–215.

flexibility does not mean that it is not allowed to establish minimum components of effective assistance, and here the ABA Standards are helpful guidelines. Relying on standard does not mean that a slightest departure from a checklist of counsel's duties establishes ineffectiveness and requires reversal. Since counsel's decisions must be adapted to the certain circumstances of the certain case, the proper performance of counsel's obligations necessarily assumes considerable discretion. The Sixth Amendment demands that counsel's conduct be conscientious, reasonable, and informed, not that it would be flawless.[693]

Therefore Judge Bazelon's opinion does not support a categorical approach in its absolute meaning, but he seems to think that the checklist is necessary (feature of categorical approach) although it does not have to be an absolute truth for courts (feature of judgmental approach), meaning that in the special circumstances counsel's performance could be declared ineffective although he fulfilled all duties described in the checklist and in some special circumstances the court could declare counsel's performance effective, although he did breach some duty described in the checklist. But what in my opinion makes Judge Bazelon's approach more categorical than judgmental is the fact that he thinks that the court should always rely its reasoning on the checklist. That way if the court wants to conclude that although counsel did not fulfill his duty described in the list, it has to give a very good cause for its opinion, which makes the court's reasoning easy to follow and courts' decisions less arbitrary, which is one of the main goals of categorical approach.

In addition to what Judge Bazelon wrote about the checklist-based approach, he found the element of prejudice unacceptable and claimed that "the majority's position confuses the defendant's burden of showing that counsel's violation was "substantial" with the government's burden of proving that the violation was not "prejudicial". The former entails a forward-looking inquiry into whether defense counsel acted in the manner of a diligent and competent attorney; it asks whether, at the time the events occurred, defense counsel's violations of the duties owed to his client were justifiable. In contrast, the inquiry into "prejudice" requires an after-the-fact determination of whether a violation that was admittedly "substantial," nevertheless did not produce adverse consequences for the defendant." The Judge continued: "Moreover, "prejudice" to the defendant may take many forms. The likelihood of acquittal at trial is not the only touchstone against which the consequence of counsel's failures is to be measured. The duties of an attorney extend to many areas not necessarily affecting the outcome of trial."[694] Consequently, in Judge Bazelon's opinion the element of prejudice in the meaning that the accused has to prove it, is improper when the court is solving ineffective assistance claims.

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[693] United States of America v. Willie DeCoster, 1976, pp. 276–277 and 281. Judge Bazelon, dissenting.

[694] *Ibid.,* pp. 287–288 and 293, Judge Bazelon, dissenting.

As it can be seen United States courts, legal practitioners and theorists were active in the field of ineffective defense long before the United States Supreme Court decided to give its opinion about the matter. There are two issues argued most in the United States when it comes to the standard of effectiveness of defense counsel. First, whether the approach should be categorical, *i.e.* focused on fixed guidelines, or judgmental, *i.e.* based on the case-by-case analysis and whether the element of prejudice should be part of the test or not and who has to prove existence or absence of it. Therefore the question has been whether the standard should consist of one or two prongs and what the content of those prongs should be.

3. Standards of Effectiveness of Counsel That Are Used in the United States

Finally the day came when the United States Supreme Court decided to express its opinion about the proper standard of effectiveness of defense counsel, a day that courts, legal practitioners and theorists had waited for a long time. As with every judgment made by the highest court, some of them were disappointed and some of them rejoiced.

In Strickland v. Washington the accused claimed that counsel failed to present mitigating evidence during the capital trial and that the failure of counsel constituted an ineffective defense. Now it was time for the Supreme Court to assess counsel's performance and it did.

With Strickland the Court set forth a two-prong standard, requiring the accused to show first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the accused so as to deprive the accused of a fair trial. According to the Court's judgment, in order to claim that counsel's performance was deficient, the accused has to show that counsel's representation fell below an objective standard of reasonableness. The Court explained: "More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel", not specifying particular requirements of effective assistance."[695] Norms of practice as reflected in ABA Standards are guides to determining what is reasonable, but they are only guides and nothing more.[696] The Court also added that judicial scrutiny of counsel's performance must be highly deferential ("It is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable."[697]), and every effort has to be made to eliminate the effects of hindsight. Therefore the courts have to reconstruct the circumstances of counsel's challenged

[695] Strickland v. Washington, 466 U.S. 688.
[696] *Ibid.*, 466 U.S. 688.
[697] *Ibid.*, 466 U.S. 689.

conduct, and to evaluate the conduct from counsel's perspective at the time. In addition to that, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the accused must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy".[698] Therefore the proper standard to evaluate counsel's behavior is an objective standard of reasonableness and while assessing counsel's performance, courts have to interpret every suspicion about whether counsel rendered ineffective defense or not to the favor of counsel.

With regard to the requirement to show prejudice, in Court's opinion the proper standard requires the accused to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different: "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[699] The Court continued: "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."[700] A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.[701] The Court also emphasized that the standard does not establish mechanical rules: the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court does not even need to first determine whether counsel's performance was deficient before examining the prejudice suffered by the accused as a result of the alleged deficiencies.[702] The Court emphasized: "The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims do not become so burdensome to the defense counsel that the entire criminal justice system suffers as a result."[703]

Of course, the Court's judgment in Strickland v. Washington has been criticized a lot.[704] It has been argued that the Strickland judgment reflects the

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[698] Strickland v. Washington, 466 U.S. 689.
[699] *Ibid.*, 466 U.S. 694.
[700] *Ibid.*, 466 U.S. 691–692.
[701] *Ibid.*, 466 U.S. 695.
[702] *Ibid.*, 466 U.S. 696–698.
[703] *Ibid.*, 466 U.S. 697.
[704] Backus & Marcus, *Right to Counsel in Criminal Cases, a National Crisis, the,* 1031, p. 1088.
"An analysis of the Court's holding will demonstrate that what has been presented as a standard is largely a concept without workable substance." Hagel, *Toward a Uniform Statutory Standard for Effective Assistance of Counsel: A Right in Search of Definition After Strickland,* 203, p. 209.

Court's characteristic refusal to look beyond *sub judice* and consider the systemic consequences of decision,[705] which is in my opinion absolutely true. Deciding that there was nothing wrong with the Strickland lawyer's performance was one thing, but to set a standard which is extremely burdensome to all accused persons who claim ineffectiveness of their counsel and which will be followed by all courts in the United States, is something else. It has been claimed in the United States that "…the Strickland Court interpreted the requirements of the Sixth Amendment's right to effective assistance of counsel in such an ultimately meaningless manner as to require little more than a warm body with a law degree standing next to the defendant," which means that it set a very high bar for accused persons who seek to get their convictions reversed based on ineffective representation from counsel.[706] Therefore the Strickland judgment has even been referred to as "the breathing standard", so long as counsel draws breath and sits next to his client without doing anything aggressively stupid, the representation is not considered to be ineffective.[707]

In addition to that some authors think that the Strickland Court voiced the opinion in a manner which ensures that the courts will still apply the underlying elements of the "farce and mockery" test,[708] because it emphasizes the "ends"

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[705] Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard Criminal Law,* 242, p. 278.

[706] Klein, *Constitutionalization of Ineffective Assistance of Counsel, the Symposium: Gideon – A Generation Later,* 1433, p. 1446; George C. III Thomas, *When Lawyers Fail Innocent Defendants: Exorcising the Ghosts that Haunt the Criminal Justice Systems Symposium – Beyond Biology: Wrongful Convictions in the Post-DNA World,* 2008 Utah L. Rev. 25 (2008), p. 34.

"If a defendant is without counsel, many other constitutional rights become meaningless because the defendant and those rights have no champion in the courtroom. In order for the right to counsel to have meaning, the person representing the defendant must do more than just breathe." Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement,* 425, p. 474.

[707] Gregory J. O'Meara, *You can't Get there from here: Ineffective Assistance Claims in Federal Circuit Courts After AEDPA Symposium: Criminal Appeals: Right to Effective Assistance of Counsel,* 93 Marq. L. Rev. 545 (2009), p. 570; Zelnick, *In Gideon's Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion,* 363, p. 373; Garcia, *Right to Counsel Under Siege: Requiem for an Endangered Right, the,* 35, p. 84.

The Strickland test has been "…only half-facetiously described by advocates as being in reality a three-part test consisting of:
(1) a lawyer with a bar card;
(2) a breathing lawyer; and
(3) after substantial litigation and over strong dissent in a federal court of appeals in the sleeping lawyer cases in Texas, a lawyer who is conscious during trial." Stephen F. Hanlon, *State Constitutional Challenges to Indigent Defense Systems Symposium: Broke and Broken: Can we Fix Out State Indigent Defense System: Boots on the Ground: The Ethical and Professional Battles of Public Defenders,* 75 Mo. L. Rev. 751 (2010), pp. 768–769.

[708] Genego, *Future of Effective Assistance of Counsel: Performance Standards and Competent Representation, the,* 181, pp. 181 and 196; Fogelman, *Justice Asleep is Justice Denied: Why Dozing Defense Attorneys Demean the Sixth Amendment and should be Deemed Per Se Prejudicial,* 67, p. 84; Bright, *Neither Equal nor just: The Rationing and*

and not the "means".[709] It is most certainly true and does not match with the nature of the right to effective assistance of counsel. As I have already discussed, in an adversary system, the basic goal is to reach a verdict through contest between adversaries. Therefore, the verdict, *i.e.* the outcome, can only be called just if the procedural rules have been followed. Thus, it is absolutely inappropriate and against principles of the adversary proceedings to claim that even if one of the contestants was "missing" in the meaning that it did not exercise his duties, the outcome could still be called "fair".

So why does Strickland have no teeth at all? The answer is simple: as it leaves the first prong very vague and uses the element of prejudice as the second prong, it enables courts in the United States to consciously avoid overturning many convictions[710] and it actually gives the courts the impression that this was the United States Supreme Court's intent when it wrote Strickland. From the Court's opinion appears the sad fact: Court's absolute reluctance to deal with ineffectiveness claims and a strong wish to disregard those claims as conveniently and quickly as it is possible. If the Supreme Court gives such guidelines, it is almost certain that other courts will follow its lead and start to regard these claims with a strong indifference. And it is obvious that it has happened in the United States: the problem with quality of defense, especially with defense for an indigent is something that has been discussed and referred to over and over again in the law reviews, but nothing seems to get better as the Supreme Court has already expressed its so far unyielding opinion. In addition to that the Court's rules do nothing to improve the quality of criminal defense overall.[711]

When it comes to the first prong of the test the Court showed a great reluctance towards the categorical approach. As the Court noted: "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions."[712] The Court also expressed its opinion that the existence of detailed guidelines for representation could distract counsel: "There are countless ways to provide effective assistance in any given case. Even the best criminal defense

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Denial of Legal Services to the Poor when Life and Liberty are at Stake Crisis in the Legal Profession: Rationing Legal Services for the Poor, 783, p. 816.

[709] Klein, *Emperor Gideon has no Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel, the,* 625, p. 645.

[710] Bibas, *Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel, the,* 1, p. 2.

[711] Goodpaster, *Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases, the Colloquium: Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise been Fulfilled,* 59, pp. 59–60.

[712] Strickland v. Washington, 466 U.S. 688–689.

attorneys would not defend a particular client in the same way."[713] Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation but to ensure that criminal defendants receive a fair trial.[714] In addition to that, as it was already mentioned, the Court stated that to satisfy the first prong of the test, an accused must overcome the court's strong presumption in favor of counsel effectiveness and its deference to counsel's tactical judgment. Therefore, in order to prevail, the accused must overcome the strong presumption that his lawyer's conduct was within the wide and unspecified range of reasonable professional assistance and was not based on tactical considerations.[715] The Court's decision granting trial counsel's performance such great deference indicates that the Court was overly concerned about judicial economy and counsels' reputations and not so concerned about the effectiveness of defense lawyers generally.[716] The Court also showed a concern over the principle of finality, stating that "[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges."[717] Thus, the Court used almost every argument that had been used by "judgmentalist" before it. Yet the Court did not specify how to give the meaning to the "reasonable", which in turn left the door open to uncertainty and arbitrariness, which is the most common objection supporters of the categorical approach make to the judgmental approach.[718]

It seems that the Court left the notion "reasonable" unspecified because it was afraid that courts in the United States would really start to evaluate counsel's performance and consequently overturn judgments. In his dissent to majority's opinion in Strickland v. Washington Justice Marshall criticizes: "To tell lawyers and the lower courts that counsel for a criminal defendant must behave "reasonably" and must act like "a reasonably competent attorney," ... is

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[713] Strickland v. Washington, 466 U.S. 689.

[714] *Ibid.,* 466 U.S. 689.

[715] Duncan, *(so-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform, the,* 1, p. 21; Fogelman, *Justice Asleep is Justice Denied: Why Dozing Defense Attorneys Demean the Sixth Amendment and should be Deemed Per Se Prejudicial,* 67, p. 78; Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer Essay,* 1835, p. 1858.

[716] Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims Notes and Comments,* 413, p. 427.

"In other words, a Strickland petitioner does not start on level ground in establishing an ineffective assistance of counsel claim. Rather, the Strickland petitioner starts in a hole of sorts and is required to climb out of that hole by overcoming each of these presumptions in order to reach level ground. After overcoming the strong presumptions, the petitioner must still go further in order to prove that he was constitutionally harmed." Duncan, *(so-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform, the,* 1, p. 21.

[717] Strickland v. Washington, 466 U.S. 690.

[718] Cawley, *Raising the Bar: How Rompilla v. Beard Represents the Court's Increasing Efforts to Impose Stricter Standards for Defense Lawyering in Capital Cases Note,* 1139, p. 1150.

to tell them almost nothing. In essence, the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes "professional" representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel."[719] Justice Marshall continues and asks: "Is a "reasonably competent attorney" a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney? It is also a fact that the quality of representation available to ordinary defendants in different parts of the country varies significantly. Should the standard of performance mandated by the Sixth Amendment vary by locale?"[720]

Second, once an accused has established that his counsel was ineffective, he must satisfy the second prong of the test by showing prejudice, *i.e.* that but for his counsel's ineffectiveness his trial would have resulted in an acquittal (as it has already discussed in 2001 the United States Supreme Court found it acceptable that the accused proves that without counsel's ineffectiveness he would have received more lenient punishment).[721] The Strickland test prejudice prong is considered to be an anomaly in constitutional jurisprudence. If a court finds that a lawyer fails the first prong, it basically finds that a constitutional violation has occurred. Yet the accused bears the burden of proof in convincing the higher court that this violation prejudiced him.[722] Although in the Strickland judgment the Supreme Court seems to show equal concern for ensuring a just adversarial process and just results, subsequent applications of Strickland reflect an undeniable bias for the latter goal. The judicial practice of the United States courts shows that once the higher court becomes convinced of an accused's factual guilt, prejudice is impossible to prove under Strickland and relief is denied, even if the adversarial process did not actually function.[723]

The opponents to the second prong of the Strickland test have used the same arguments against the prejudice element that are used generally. In their opinion the Supreme Court failed to notice that the prejudice inquiry is inappropriate in the context of defining an accused's Sixth Amendment rights.[724] If effective

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[719] Strickland v. Washington, 466 U.S. 707–708, Justice Marshall, dissenting.
[720] *Ibid.*, 466 U.S. 708, Justice Marshall, dissenting.
[721] See also Ekins, *Defence Counsel Incompetence and Post-Conviction Relief: An Analysis of how Adversarial Systems of Justice Assess Claims of Ineffective Assistance of Counsel,* 529, p. 538. Even if the first prong of the standard is appropriate, the Supreme Court added a result-oriented prejudice test that would allow a reviewing court to hold a trial fair even after an accused showed that counsel really was ineffective. Gabriel, *Stickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of due Process, the Comment,* [1290], p. 1276.
[722] Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel Note,* 147, pp. 175–176.
[723] Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronic's Call to Presume Prejudice from Representational Absence,* 827, p. 838.
[724] Gabriel, *Stickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of due Process, the Comment,* [1290], p. 1277.

defense counsel is really essential to a fair trial, then the showing of ineffective assistance is proof of an unfair trial[725] and the accused does not have to show prejudice. Even if a prejudice requirement is justifiable, placing the burden of proving prejudice on the accused effectively shifts the burden of proving a harmless error from the state to the accused.[726] The Court's prejudice prong assumes that there are some instances in which an accused's substandard counsel will deliver a fair result and the Court seems to think that this is the norm not exception by setting an unreasonably high bar for proving errors that would satisfy the deficiency prong of the effectiveness test.[727]

Thus, in the Strickland case the Supreme Court used the notion, "reasonable", which meaning was left open and added the prejudice element in the meaning that it is the accused's responsibility to prove that his counsel's mistakes affected the outcome of the case, which is a really heavy burden for the accused.[728] Therefore it has been even argued that the Strickland test does not have any practical importance to solving ineffectiveness claims. Actually, it is not quite true, the Strickland test has an effect: it enables not to solve ineffectiveness claims in favor of accused persons. It is true that explaining that sufficiency of the performance should be measured against an "objective standard of reasonableness" in light of prevailing professional norms offers as little help if one really wants to look into counsel's behavior. But if one wants to disregard the claim quickly, this standard is more that useful. It is true also that saying that prejudice turns on whether there is a "reasonable probability"

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[725] Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard Criminal Law,* 242, pp. 278–279.

[726] Gabriel, *Stickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of due Process, the Comment,* [1290], p. 1278. In Chapman v. California (386 U.S. 18 (1967)) the United States Supreme Court held: "Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error, ... there may be some constitutional errors which, in the setting of a particular case, are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." In the context of Chapman and Strickland cases it can be concluded that ineffectiveness of counsel is so "unimportant and insignificant" that it does not result in automatic reversal. Yet, the United States Supreme court stated in Strickland that the denial of the effective assistance of counsel is equivalent to the denial of any counsel. Thus, the denial of the effective assistance of counsel should never be considered harmless. *Ibid*., pp. 1285–1286. Still, two-part Strickland test places a heavy burden on the accused to that he has received ineffective counsel which prejudiced the outcome of his case. Mary Ross, *What Justice Requires: A Case of Ineffective Assistance of Counsel Note,* 2 N. Y. City L. Rev. 83 (1998), p. 102.

[727] Allen, *Free for all a Free for all: The Supreme Court's Abdication of Duty in Failing to Establish Standards for Indigent Defense,* 365, p. 380.

[728] Therefore it is almost impossible to agree that Strickland decision ended longstanding judicial confusion as to the standards by which to measure counsel's performance, although Jennifer Golm expresses this opinion Jennifer Golm, *Criminal Procedure: Walker v. State-Dooming Challenges to Appellate Counsel's Effectiveness Note,* 51 Okla. L. Rev. 601 (1998), p. 603.

that the result would have been different absent counsel's errors is a very vague guideline, but it actually serves the same purpose.[729] In sum, one can agree with the critics of Strickland that the United States Supreme Court's approach to ineffectiveness claims in Strickland is fundamentally wanting and itself ineffective,[730] failing to assure even a minimal level of effectiveness.[731] In addition to that Strickland employs a double presumption that counsel is always effective: first the Court stressed that it is necessary to presume that the lawyer gave adequate assistance; second, the Court instructed lower courts to ignore even failed assistance unless the accused can show that adequate counsel would have produced a different result.[732]

But it would be unfair to claim that the Strickland judgment fundamentally wrong: there are some advantages of Strickland worth to mention here too. First, Strickland directed courts to assess outcome determination from "the totality of the evidence before the judge", which means the hindsight has no role in determining the impact of counsel's errors upon the outcome.[733] This truly is justified in the light of principle of finality and respect to duties of counsel. Second, since the Strickland judgments the United States Supreme Court made it clear, that the issue of whether counsel performed effectively or not is decided by counsel's performance in the particular case. Consequently, even the most experienced counsels can be found ineffective in a certain case, and counsels who just passed the Bar may not: the answer to the ineffectiveness inquiry depends on how counsel acts in a particular case and not on who he is.[734] By focusing on counsel's performance in a certain case, the accused's right to effective assistance of counsel is most certainly guaranteed, if the court uses at the same time an adequate standard.

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[729] April Trimble, *Defense Counsel Rendered Ineffective Assistance at the Sentencing Phase of a Capital Trial by Failing to Find Mitigating Evidence Contained in the Defendant's Prior Conviction Record: Rompilla v. Beard Recent Decisions,* 44 Duq. L. Rev. 363 (2005–2006), p. 380.

[730] Sanjay K. Chhablani, *Chronically Stricken: A Continuing Legacy of Ineffective Assistance of Counsel 1984: How One Year Reshaped Criminal Procedure,* 28 St. Louis U. Pub. L. Rev. 351 (2008–2009), p. 392; Henderson, *Truly Ineffective Assistance: A Comparison of Ineffective Assistance of Counsel in the United States of America and the United Kingdom Note,* 317, p. 320.

[731] Weaver, *Perils of being Poor: Indigent Defense and Effective Assistance Criminal Procedure Discussion Forum,* 435, p. 441; Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet Symposium: The Legal Profession: Looking Backward,* 71 Fordham L. Rev. 1461 (2002–2003), p. 1464.

[732] George C. III Thomas, *History's Lesson for the Right to Counsel,* 2004 U. Ill. L. Rev. 543 (2004), p. 590.

[733] Foster, *Lockhart v. Fretwell: Using Hindsight to Evaluate Prejudice in Claims of Ineffective Assistance of Counsel Notes,* 1369, pp. 1392–1393.

[734] Kathy Swedlow, *When can Defense Counsel's Decision Not to Present Mitigating Evidence be Challenged as Ineffective Assistance Death Penalty,* 2002–2003 Preview U. S. Sup. Ct. Cas. 328 (2002–2003), p. 332.

But to use Strickland as an example is still very difficult, because it does not give clear guidelines to the effective counsel's performance: the assessment of ineffectiveness claims is based on facts of a certain case and no particular standard is applied. That is why cases in which counsel does nothing or next to nothing are easy to assess: counsel has to investigate his client's case and support his clients with advice, and if it is determined that counsel failed to do so, then his performance will be deemed ineffective.[735] However, the usual cases, cases where counsel does a little bit more than nothing or next to nothing, are much more difficult to evaluate.

As it has already been discussed, the second prong of the Strickland test requires the accused to demonstrate prejudice, which in other words means weighing of counsel's malfeasance against prosecutorial proof.[736] There are three situations in the United States where courts will presume prejudice and reverse a conviction without measuring how the counsel's performance affected the outcome. First, prejudice is presumed when counsel and the accused are divided by a completely antagonistic relationship, which means that there is irreconcilable conflict between counsel and the accused.[737] It has to be mentioned that this approach has not been approved by the case law of the United States Supreme Court. Second, prejudice is presumed in some cases of conflicts of interests, which I have already discussed above.[738] Third, prejudice is presumed when an accused can claim that representation was so inadequate as to constitute a complete deprivation of counsel.[739] The latter applies to the cases where there has either been: l) a complete deprivation of counsel at a

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[735] Roe v. Flores-Ortega, 528 U.S. 470 (2000) (applying Strickland to a claim of ineffectiveness based on counsel's failure to file a notice of appeal); Williams v. Taylor, 529 U.S. 362 (2000) (applying Strickland to a claim of ineffectiveness based on counsel's failure to investigate and present substantial mitigating evidence during capital sentence proceeding); Kimmelman v. Morrison, 477 U.S. 365 (1986) (applying Strickland to counsel's failure to file a suppression motion); Darden v. Wainwright, 477 U.S. 168 (1986) (applying Strickland to a claim that trial counsel failed to adequately present mitigating evidence).

"In general, United States courts will uphold counsel's behavior in the courtroom if counsel is conscious, participates (however badly) in the trial, and is not laboring under a conflict of interest." Ekins, *Defence Counsel Incompetence and Post-Conviction Relief: An Analysis of how Adversarial Systems of Justice Assess Claims of Ineffective Assistance of Counsel,* 529, p. 544.

[736] Bernhard, *Exonerations Change Judicial Views on Ineffective Assistance of Counsel,* 37, p. 38.

[737] United States of America v. Carl Dexter Moore. Nos. 92–10026, 97-15412, 159 F.3d 1154. United States Court of Appeals for the Ninth Circuit. April 13, 1998, Argued and Submitted; September 23, 1998, Filed.

[738] Holloway v. Arkansas. See subsection 3.2 of this dissertation.

[739] United States v. Cronic. See also Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronic's Call to Presume Prejudice from Representational Absence,* 827, p. 842.

critical stage in the life of a criminal case;[740] or 2) where counsel has been asked to provide representation in an unusually difficult situation;[741] or 3) where counsel fails "to subject the prosecution's case to meaningful adversarial testing",[742] which has been interpreted very narrowly by the Supreme Court, as I will discuss further below.

The conflict of interests, completely antagonistic relationship and a situation where counsel has been asked to provide representation in an unusually difficult situation invoke a "no lawyer could" rationale stating that regardless of counsel's actual performance at trial, no lawyer could have provided effective representation because of an outside influence beyond the lawyer's control. There is no need to scrutinize the counsel's actual conduct once these circumstances are established.[743] When it comes to the meaning of "critical stage of the trial", it is obvious that not all stages of the trial are critical for the United States Supreme Court. If the Court had intended the entire trial to constitute a critical stage, it would have pointed that out, not explicitly mention "critical stage". Rather, by listing specific trial moments that constitute "critical stages", the Court signaled that not all trial absences will trigger a presumption of prejudice.[744]

The most confusing position of the United States Supreme Court is the nature of situations where counsel fails "to subject the prosecution's case to meaningful adversarial testing". Although at first it seemed that United States v. Cronic made bringing an ineffective assistance claim easier for those appellants who are alleging such conduct, in the later case of Bell v. Cone,[745] the United States Supreme Court refused to make the exception where counsel fails "to subject the prosecution's case to meaningful adversarial testing" meaningful by interpreting it narrowly.[746] The Court held in Bell v. Cone that under Cronic,

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[740] "Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." United States v. Cronic, 466 U.S. 659. See also Perry v. Leeke, 488 U.S. 272 (1989), 488 U.S. 280.

[741] "Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." United States v. Cronic, 466 U.S. 659-660.

[742] "…[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." United States v. Cronic, 466 U.S. 659. See also Bernhard, *Exonerations Change Judicial Views on Ineffective Assistance of Counsel,* 37, p. 38.

[743] Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronic's Call to Presume Prejudice from Representational Absence,* 827, p. 853.

[744] *Ibid*., p. 861.

[745] Bell v. Cone, 535 U.S. 685 (2002).

[746] Hornung, *Paper Tiger of Gideon v. Wainwright and the Evisceration of the Right to Appointment of Legal Counsel for Indigent Defendants, the Symposium: Advocating for Change: The Status & Future of America's Child Welfare 30 Years After CAPTA: Note,* 495, p. 513.

counsel's failure to test the prosecutor's case must be complete. If the accused argues not that his counsel failed to oppose the prosecution throughout the sentencing proceeding, but that he failed to do so at specific points, his claim has to be evaluated according to Strickland's performance and prejudice components.[747] The practice of the United States Supreme Court indicates that as long as a defense counsel does something more than sits quietly in the courtroom, prejudice cannot be presumed. Therefore, as long as the accused is not denied counsel totally and as long as counsel participates in the trial, the only way the accused is afforded a presumption of prejudice under Cronic is if the circumstances are such that even competent counsel would not be able to effectively assist the accused.[748] Consequently, the exception "fail to subject the prosecution's case to meaningful adversarial testing" has lost its meaning – according to the Court it means that counsel was completely silent at every stage of the trial, but this situation resembles a Cronic scenario of a complete deprivation of counsel.[749] Consequently, as in case of conflict of interest the prejudice is usually presumed, with Cronic the Supreme Court suggests that counsel's duty of loyalty is more fundamental than the duty of competence.[750]

Therefore, when it comes to the element of prejudice, the current test for ineffective assistance in the United States is the following: in rare instances, ineffective assistance can be presumed from the facts surrounding the case. In the majority of cases, the accused has to prove that specific errors were unreasonable and prejudicial.[751]

Soon after the United States Supreme Court established the test for assessing the effectiveness of defense counsel during criminal proceedings with Strickland, it considered whether the ineffective assistance doctrine was applicable to plea bargains.[752] The Court concluded that the test announced in Strickland could apply to a plea bargain that an accused had accepted as a result of ineffective assistance. While the prong related to the deficiency of counsel

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[747] Bell v. Cone, 535 U.S. 693–698.

[748] William, *Criminal Law – the Sixth Amendment Right to Counsel – the Supreme Court Minimizes the Right to Effective Assistance of Counsel by Maximizing the Deference Awarded to Barely Competent Defense Attorneys – Florida v. Nixon the Ben J. Altheimer Symposium: Courtroom with a View: Perspectives on Judicial Independence in Honor of Judge Richard Sheppard Arnold: Note,* 149, p. 170.

[749] Rebecca Klaren & Irene Merker Rosenberg, *Splitting Hairs in Ineffective Assistance of Counsel Cases: An Essay on how Ineffective Assistance of Counsel Doctrine Undermines the Prohibition Against Executing the Mentally Retarded,* 31 Am. J. Crim. L. 339 (2003–2004), p. 345.

[750] Berger, *Supreme Court and Defense Counsel: Old Roads, New Paths-A Dead End, the,* 9, p. 90.

[751] Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel Note,* 147, p. 157. The United States Supreme Court's latest cases in which the Court asks an accused to establish both deficient performance and prejudice are for instance: Knowles v. Mirzayance, 556 U. S. ____ – 07-1315 (2009); Harrington v. Richter, 562 U. S. ____ – 09-587 (2011); Cullen v. Pinholster, 563 U. S. ____ – 09-1088 (2011).

[752] Hill v. Lockhart, 474 U.S. 52 (1985).

remains the same in assessing ineffective assistance related to a guilty plea, the prejudice prong was altered to require a showing of reasonable probability that, but for counsel's error, the accused would have insisted on proceeding to trial.[753]

The latest United States Supreme Court's cases in which the Court tried to specify the first prong of the ineffectiveness test (at least many authors think the Court tried it) are from 2000, 2003, 2004, 2009 and 2011. Cases of Williams,[754] Wiggins,[755] and Rompilla[756] were quite detailed analysis of trial counsel's preparation and investigation,[757] as well as Knowles v. Mirzayance[758] and Harrington v. Richter[759]. Although the first three were death penalty cases, it was suggested that the issues in these cases are not limited to cases involving the death penalty.[760] Stephen F. Smith explained the issue: "The need for attorneys to make strategy decisions, in noncapital and capital cases alike, implies a corresponding need for courts to scrutinize those decisions to ensure that they comported with professional standards of competence. Failing such scrutiny, serious attorney error will potentially undermine the reliability and accuracy of the criminal proceedings."[761] And it turned out he was half right as the United States Supreme Court scrutinized counsels' performance very attentively in Knowles v. Mirzayance and Harrington v. Richter, although neither of these cases was a death penalty case, but still remained highly deferential[762] to decisions of counsels, which at least gives the impression that the Court

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[753] Hill v. Lockhart, 474 U.S. 59. See also Anthony E. Rufo, *Opportunity Lost – the Ineffective Assistance Doctrine's Applicability to Foregone Plea Bargains Note,* 42 Suffolk U. L. Rev. 709 (2008-2009), p. 718. The Supreme Court has reassured its opinion lately for example in Premo v. Moore, 562 U. S. ____ (2011).

[754] Williams v. Taylor, 529 U.S. 362 (2000).

[755] Wiggins v. Smith, Warden, et al. 539 U.S. 510 (2003).

[756] Rompilla v. Beard, 545 U.S. 374 (2004).

[757] Robert R. Rigg, *T-Rex without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel, the,* 35 Pepp. L. Rev. 77 (2007–2008), p. 94; O'Meara, *You can't Get there from here: Ineffective Assistance Claims in Federal Circuit Courts After AEDPA Symposium: Criminal Appeals: Right to Effective Assistance of Counsel,* 545, p. 575.

[758] Knowles v. Mirzayance, 556 U. S. ____ – 07-1315 (2009).

[759] Harrington v. Richter, 562 U. S. ____ – 09-587 (2011).

[760] It was already discussed before those cases: Timothy W. Floyd, *How Bad must a Defense Lawyer be for a Federal Court to Reverse in a Capital Case Habeas Corpus,* 1999-2000 Preview U. S. Sup. Ct. Cas. 47 (1999-2000), p. 51; and afterwards: Stephen F. Smith, *Taking Strickland Claim Seriously,* 93 Marq. L. Rev. 515 (2009), p. 537 and 539.

[761] *Ibid*., p. 539. See also *ibid.,* p. 537. Professional standards do not simply speak to capital cases; they also provide important guidance as to how defense counsels should represent clients in other criminal cases. *Ibid*., p. 540. See also Hessick, *Ineffective Assistance at Sentencing,* 1069, p. 1113.

[762] It is interesting to note that as in Williams, Wiggins and Taylor the Court does not mention "highly deferential" as regards to the counsel's performance, but in Knowles v. Mirzayance and Harrington v. Richter the Court does that.

believes that the courts have much more freedom to assess counsel's behavior in death penalty cases than in the other cases.[763]

As the Strickland took a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, then looking at the language of Williams, Wiggins, and Rompilla, the Supreme Court seemed to abandon this presumption in favor of a more detailed analysis of the claimed breach of duty,[764] which provided some reason for optimism in the United States.[765] This optimism was grounded in the fact that these three cases stand for the proposition that the ABA Standards should be used as norms for determining what is objectively reasonable representation.[766] As the Court stated in Wiggins referring to Williams: "In highlighting counsel's duty to investigate, and in referring to the ABA Standards for Criminal Justice as guides, we applied the same "clearly established" precedent of Strickland we apply today."[767] Some authors even rejoiced that after nearly twenty years, Strickland v. Washington has finally been given teeth.[768]

After Williams it was also claimed that it is obvious that the Supreme Court wants to distinguish between counsels' blunders masquerading as "strategy" from tactical decisions that are exercises in sound professional judgment and thus really deserving of judicial deference.[769] All of these cases present the

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[763] See Kara Duffle, *Harrington V. Richter: AEDPA Deference and the Right to Effective Counsel,* 6 Duke J. Const. L. & Pub. Pol'y 54 (2011), pp. 68 and 69 where Kara Duffle is discussing the reasons why the Supreme Court will not likely find Richter's counsel's performance ineffective, mentioning that one of the reasons might be that it is not a capital case.

[764] The same can be concluded from Knowles v. Mirzayance and Harrington v. Richter, although in both of these cases counsels were found effective by the Supreme Court.

[765] Rigg, *T-Rex without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel, the,* 77, p. 98.

[766] John H. Blume & Stacey D. Neumann, *It's Like Deja Vu all Over again: Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel,* 34 Am. J. Crim. L. 127 (2006–2007), p. 129. "Although the Strickland majority had been concerned that a guidelines approach might become a straightjacket leading to excessive, futile work on behalf of attorneys and courts, the reality was that in the hands of most state courts and many federal courts of appeal, the Strickland performance prong was license to do nothing. In essence, the Supreme Court realized that Strickland was part of the problem, not a solution to poor representation in capital cases. Capital defendants were frequently being represented by ineffective counsel, and the high threshold of the Strickland standard tied the hands of appellate courts from doing much about the problem." *Ibid*., p. 153.

[767] Wiggins v. Smith, Warden, 539 U.S. 522. But Justice Scalia wrote in his dissent that in Strickland the Court specifically stated that the very ABA standards upon which Williams later relied "…are guides to determining what is reasonable, but they are only guides." *Ibid.,* 539 U.S. 543. Justice Kennedy expressed the same opinion in his dissent in Rompilla v. Beard, saying that the majority, by "…parsing the guidelines as if they were binding statutory text, ignores this admonition."

[768] *Constitutional Law the Supreme Court, 2002 Term – Leading Cases,* 117 Harv. L. Rev. 226 (2003–2004), p. 278.

[769] Smith, *Taking Strickland Claim Seriously,* 515, p. 538.

scenario in which counsel performs some investigation but makes what appears to be a poor choice based on that investigation.[770] The notion set forth since Williams was that the Supreme Court will not evaluate whether the decisions counsel made were, in fact, bad, but will look at the process leading up to counsel's decision, is similar to the business judgment doctrine: directors and officers (and counsels) are not liable for poor strategic decisions, but only for failing to reasonably investigate prior to making these strategic decisions.[771] Consequently, in these cases the United States Supreme Court finally accepted examining a trial counsel's investigation and preparation before determining whether that lawyer's strategic choices were effective or not.[772] Further, in these cases the Court deemed counsels ineffective even though counsels' conduct was neither nonexistent nor egregiously deficient, which represents an important shift in ineffective assistance jurisprudence. Some even hoped that courts in the United States will take these decisions as an example and decide to take a stronger stance against poor lawyering.[773]

It still must be mentioned that not all were happy with Williams, Wiggins, and Rompilla, stating that although with these judgments the United States Supreme Court did try to reduce the damage it has done with Strickland, it actually failed for two reasons. First, although referring to ABA standards, the Supreme Court still requires courts to use Strickland's performance prong and apply "an objective standard of reasonableness" and therefore the Court sticks to the vague standard for courts to use in case of ineffectiveness cases.[774] In my opinion this is actually understandable because the courts cannot use the whole of ABA Standards to evaluate counsels' performance in case the accused claims counsel's ineffectiveness in appeal. It has to be taken into account that the ABA Standards are attorneys' ethical guidelines that are composed to be a basis for disciplinary actions and not for annulling courts judgments. If courts use them for the latter purpose, it makes violations of the bar professional standards both ethical violations and constitutionally ineffective counsel,[775] which means in

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[770] See about Wiggins Swedlow, *When can Defense Counsel's Decision Not to Present Mitigating Evidence be Challenged as Ineffective Assistance Death Penalty,* 328, p. 332.

[771] Elizabeth Connelly, *Striking Similarities between the Business Judgment Doctrine and the Strickland Test, the Current Developments 2004–2005,* 18 Geo. J. Legal Ethics 669 (2004–2005), p.675–676.

[772] Mickenberg, *Drunk, Sleeping, and Incompetent Lawyers: Is it Possible to Keep Innocent People Off Death Row Honorable James J. Gilvary Symposium on Law, Religion, and Social Justice: Evolving Standards of Decency in 2003 – is the Death Penalty on Life Support,* 319, p. 326.

[773] Cawley, *Raising the Bar: How Rompilla v. Beard Represents the Court's Increasing Efforts to Impose Stricter Standards for Defense Lawyering in Capital Cases Note,* 1139, pp. 1179–1180.

[774] Kelly Green, *There's Less in this than Meets the Eye: Why Wiggins Doesn't Fix Strickland and what the Court should do Instead Note,* 29 Vt. L. Rev. 647 (2004–2005), p. 673.

[775] David M. Siegel, *The Role of Trial Counsel in Ineffective Assistance of Counsel Claims: Three Questions to Keep in Mind,* 33 Champion 14 (2009), p. 15.

turn that these standards would have a strong effect on the principle of finality. Therefore, courts can use these standards as a guide, but they have to take into account that only the most basic duties from these standards form a basis for annulment of court judgments. Second, the Supreme Court did not change the prejudice prong:[776] the Court's increased use of the ABA Standards is only relevant to the performance component of ineffective assistance of counsel claims. Strickland's prejudice prong, which requires the accused to prove that there is a reasonable probability that the outcome would have been different, was not modified with Williams, Wiggins, and Rompilla.[777]

Although there was a general rejoicing after Williams, Wiggins, and Rompilla, and many authors seemed to think the time for moving towards the categorical approach has come, in Bobby v. Van Hook[778] the Court seems to take one step away from what it had said about the ABA standards in Williams, Wiggins and Rompilla. "*Strickland* stressed, however, that "American Bar Association standards and the like" are "only guides" to what reasonableness means, not its definition. ... We have since regarded them as such. ... What we have said of state requirements is *a fortiori* true of standards set by private organizations: "[W]hile States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.""[779] Justice Alito added in his concurrence that the American Bar Association is a venerable organization with a history of service to the bar, but it still is a private group with limited membership. The views of the association's members do not necessarily reflect the views of the American bar as a whole. It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in order to meet the obligations imposed by the Constitution, and there is no reason why the ABA Guidelines should be given a privileged position in making that determination.[780] Therefore, although it had been almost sure for a while that counsels' conduct could be assessed in accordance to the ABA Standards or at least those standards could be taken into account to form courts' own standard, right now it seems that the United States Supreme Court is back to its vague "objective standard of reasonableness".[781]

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[776] Green, *There's Less in this than Meets the Eye: Why Wiggins Doesn't Fix Strickland and what the Court should do Instead Note,* 647, p. 673.

[777] See also Blume & Neumann, *It's Like Deja Vu all Over again: Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel,* 127, p. 164.

[778] In Bobby v. Van Hook, 558 U. S. ____ (2009). In Padilla v. Kentucky, 559 U. S. ____ (2010) the Court emphasized once more that the ABA Standards are only the guides.

[779] Bobby v. Van Hook.

[780] Bobby v. Van Hook, Justice Alito, concurring.

[781] Bobby v. Van Hook. "The Sixth Amendment entitles criminal defendants to the " 'effective assistance of counsel' "—that is, representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms." *Strickland* v. *Washington*, 466 U. S. 668, 686 (1984) (quoting *McMann* v. *Richardson*, 397 U. S. 759,

So what we can learn from the judicial practice and theoretical discussions in the United States? First that there is a strong opposition between "categoricalists" and "judgmentalist", so strong even that representatives of the approaches seem to not notice that their opponent's arguments may also make some sense. It is true that each case is different and therefore there is no point in working out rigid guidelines and to oblige counsels to follow them no matter what. At the same time, limitation of the right to efficient defense to the assertion that counsel has to provide reasonably competent assistance will end up with discontent, confusion and arbitrariness, even a fall in the quality of defense. Therefore in my opinion any imposed standard has to be detailed, but at the same time leave room for the courts to decide whether counsel was ineffective or not based on specific facts of the case. In order to form such a standard, it has to be figured out, what are the universal duties of counsel in all criminal cases, which should be listed in the guidelines. Other duties, duties that arise from a specific case, would be up to court to assess and to declare obligatory or optional to follow.

Before I am going to give further justification for imposing a specific standard for effectiveness of counsel, there is one other thing I have to mention. Although plea bargaining is not an adversarial procedure in its classical sense, I agree with the United States Supreme Court that it is possible to assess counsel's performance in plea bargaining also. As counsel is the one who has a principal role as an advisor to the accused during the plea bargaining, his duties in the course of plea bargaining should be related to this role. Therefore in this thesis I will propose a standard for conduct of counsel in plea bargaining as well.

4. Why to Impose a Specific Standard and How to Work Out a Proper Standard?

As it can be seen from the judicial practice of the United States Supreme Court, the Supreme Court seems to be supporting rather a "judgmental" approach than "categorical". Lawyers' and courts' fear against setting a standard for defense counsel's performance is understandable. Lawyers are afraid of losing their independence and courts fear that by analyzing counsel's performance in the light of a certain standard, the balance of the adversary process is impaired, because counsel who follows the standard loses his freedom to make tactical

771, n. 14 (1970)). That standard is necessarily a general one. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." 466 U. S., at 688–689. Restatements of professional standards, we have recognized, can be useful as "guides" to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place. *Id.*, at 688.

decisions and form his strategy.[782] In addition to that courts fear that every deviation from the standard would result in an annulment of judgment of the lower court, which would significantly impair the principle of finality, not to mention the fact that if other accused persons see the success of ineffectiveness claims, this would end up with flood of appeals to the higher courts.

Yet the fear of standards is premature. Lawyers are professionals and their performance should be judged by the standards as courts use standards to judge other professionals as well. It is somehow puzzling why lawyers, who demand so much of other professionals, ask so little of themselves.[783] As a minimum, all lawyers should do three things: consult with the accused, investigate both the law and the facts, and make all the motions necessary.[784] This would already form a strong basis for working out a proper standard, which in fact could be used for counsels in plea bargaining also as counsel has the same duties in the course of plea bargaining too.

Determining, especially after the trial, whether defense counsel acted competently and professionally is and will always be difficult and highly fact-specific, therefore a huge challenge for courts. This challenge could be made a little bit less difficult if specific guidelines for the performance of counsels are imposed in order to evaluate defense counsel's behavior in the light of professional standards of practice.[785] Erin Rieger notes: "Without rules setting forth the boundaries for acceptable and unacceptable behavior, the system would run afoul of its purpose, leaving thousands of defendants at the mercy of counsel's personal standards for professional conduct."[786] Still, as I have already discussed I agree with those who claim, some room should be left to consider specific facts of the case and therefore those standards should be used in a case by case analysis.[787] Hence, even when one meets the reluctance by

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[782] "Courts need to maintain a highly deferential level of review for ineffective counsel claims because doing so allows attorneys to serve as zealous advocates for their clients. … If a defense attorney knows that the appeals court will be highly deferential to the attorney's trial decisions, that attorney can more easily make legitimate strategic decisions." Jacque St. Romain, *State v. Grier and the Erroneous Adoption of the Punishment-Based Standard of Review for Ineffective Assistance of Counsel Claims Based on all-Or-Nothing Strategies Notes and Comments,* 85 Wash. L. Rev. 547 (2010), p. 570.

[783] Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus,* 927, p. 928.

[784] Tague, *Attempt to Improve Criminal Defense Representation, the,* 109, p. 117. The work done by counsel always involves preparing for a trial, conferring with one's client, making timely motions and filing a notice of appeal, duties which could profitably be made the subject of uniform standards. Strickland v. Washington, 466 U.S. 709, Justice Marshall, dissenting.

[785] Ekins, *Defence Counsel Incompetence and Post-Conviction Relief: An Analysis of how Adversarial Systems of Justice Assess Claims of Ineffective Assistance of Counsel,* 529, p. 556.

[786] Erin N. Rieger, *Role of Professional Responsibility in the Ineffective Assistance of Counsel Claim in Roe v. Flores-Ortega, the Note,* 29 N. Ky. L. Rev. 397 (2002), p. 410.

[787] See also Bazelon, *Defective Assistance of Counsel, the,* 1, pp. 32–33.

courts and lawyers, a detailed standard would be very useful for a specific case and for the overall quality of defense, because it enables courts to act equably. In my opinion the goals of the standard outweigh the reluctance expressed by a profession, although one has to take into account the need to preserve independence of counsel and to honor the principle of finality, the basic objections "judgmentalists" express against the categorical approach. In relation to principle of finality, it has to be taken into account that not all of counsel's mistakes form a basis for annulment of the judgment made by the lower court. Therefore in order to set an adequate standard one has to describe only duties of counsel absolutely essential to effective assistance in the criminal proceedings. The standard for trial courts could be a little bit stricter for counsels and enable courts to react towards less serious breach of duties, because the trial courts do not annul any judgments, the most it could do is to replace counsel, which does not affect the principle of finality.

When it comes to tactical decisions, which are the main expression of independence of counsels in criminal proceedings, the standard must be set in the way that it would protect reasonable tactical decisions and therefore independence of counsel. This means that the court does not ask whether counsel's decisions were correct, but rather whether they were objectively reasonable under all the circumstances.[788] It must also be taken into account that not all counsel's errors are "tactical": there are a number of errors that suggest totally inadequate preparation or a complete lack of awareness of the applicable rules.[789] The court should not allow counsels to hide behind strategy if these kinds of errors have occurred.

Obviously, counsels have the right to work out the strategy for a criminal case and act in accordance with that. Therefore it is understandable that courts are reluctant to evaluate counsel's actions when the accused refers to counsel's failure in evolving a strategy. Most of the facts upon which counsel formulates his strategy are revealed during counsel's investigation and, because of rules of confidentiality, will never be exposed to judicial scrutiny, unless the accused waives the confidentiality. Therefore it is understandable that courts are willing to give substantial deference to counsel's decisions as strategic choices;[790] "If counsel did not have room to determine strategy and tactics, a client would have fewer options in order to present a defense."[791]

Yet what is matter of strategy and tactics, and what is not, is by no means clear. The vagueness of the rule makes it a convenient tool for the courts to

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[788] Gabriel, *Stickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of due Process, the Comment,* [1290], p. 1285.

[789] Paul J. Jr Kelly, *Are we Prepared to Offer Effective Assistance of Counsel Speech,* 45 St. Louis U. L. J. 1089 (2001), p. 1092.

[790] Griffin, *Right to Effective Assistance of Appellate Counsel, the,* 1, p. 33.

[791] Henderson, *Truly Ineffective Assistance: A Comparison of Ineffective Assistance of Counsel in the United States of America and the United Kingdom Note,* 317, p. 351.

avoid analysis and refuse to consider counsel's actions.[792] There are three problems with courts paying too much respect to counsel's tactical decisions worth to mention here. First, isolated analysis of individual errors ignores the importance of having an overall, competent strategy for representation. The second problem is that labeling a decision as one of the available tactical choices can mask the fact that no choice was made at all, because counsel even did not know that there was the option to make a choice. The third problem with too much respect for tactical choices is that it ignores the decision underlying the tactical choice:[793] the decision is either bad or good, either informed or not and if one denies court's competence evaluating the former one, there is no question that courts should be allowed to assess how well was counsel prepared when he made the decision. That is why it would be better to apply the rationale behind the rule, *i.e.* that where counsel makes an informed choice between alternatives, his discretion should not be questioned unless it was clearly erroneous. In order to obtain the decision to be found clearly erroneous, an accused has to prove that counsel failed to make a decision that was objectively reasonable in light of all of the circumstances of the case.[794] So the crucial inquiry, especially for judges in higher courts is whether the record indicates that counsel was aware of the problem, considered the alternatives, and made a reasonable decision.[795] In order to make assessment of counsel's tactical choice easier to courts one can require counsels to document their reasons for choosing a given tactic. Martin C. Calhoun explains: "Such a requirement would eliminate the common practice of courts "racking their brains" to find a rational explanation for counsel's apparent error by creating a hypothetical "tactical choice" that may never have even crossed counsel's mind."[796]

Even if one agrees that it is possible and necessary to impose a standard of conduct of counsels in criminal proceedings, while composing this standard one has to be extremely careful. The standard too detailed will harm the independence of the defense counsel and does not take into consideration the fact that different criminal cases need a different approach.[797] The classic objection to

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[792] Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 20.

[793] See more about these three problems Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel Note,* 147, pp. 165–168.

[794] Gabriel, *Stickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of due Process, the Comment,* [1290], p. 1284; Finer, *Ineffective Assistance of Counsel,* 1077, p. 1080.

[795] Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 1, p. 20.

[796] Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims Notes and Comments,* 413, p. 435.

[797] One possible position is that standards of counsel's performance in pretrial and in trial should be in different degree of accuracy. At trial counsel needs the latitude to make strategic choices in hope to aid his client. In the pretrial context, however, competency is almost always merely a synonym of conscientiousness and therefore the rules which require a lawyer to perform specific pretrial actions will not interfere with counsel's strategic

categorical rules is that they "upset the institutional arrangement of the adversary system by interfering with the defense function"[798] and this may really happen if counsel, in order to meet the standard has to make tactical decisions in accordance with the standard. Thus, how to make strategic choices could be written in the standard (*e.g.,* in order to make a choice counsel has to know the facts of the case), but not what kind of choices counsel should make.

As the standard should not be too detailed, it should not be too vague either. A standard with no ultimate point of reference is likely to produce different results with each application and with each judge, which means that a standard too vague results in no standard at all. Such a standard does not provide judges with clear guidelines according to which they can monitor defense counsel's performance. Therefore, the shortcomings of this standard are a lack of predictability and objectivity, which is an advantage of the more detailed checklist-based standard.[799] In addition to that, such a standard will not give defense counsels guidance with sufficient particularity to lead them to adjust their behavior and actions in the way the more categorical rules would do.[800] Consequently, there is no point in wasting time to work out a standard, which is no help for courts, counsels and accused persons in certain cases and therefore does not improve the quality of the assistance of counsel generally.

In Estonia a starting point for an adequate standard may be found in the Code of Criminal Procedure and rules of conduct for advocates, in the United States it could be found in the ABA Standards. The basis for these standards already written is the belief that certain fundamental and specific tasks and duties must be performed in all criminal cases by counsel.[801] Although stating that the ABA standards are just guidelines, by repeatedly relying on these

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discretion. *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, p. 766. This is a statement I do not fully agree with. Conscientious counsel starts to build his strategy during the pre-trial proceedings and has to make quite many strategic decisions in the course of that, *e.g.,* whether it is wise to advise his client to confess or not, whether to enter plea bargaining negotiations or not, which witnesses to call to court *etc*. Lawyers need independence to make those decisions during the pre-trial stage of the criminal proceedings too.

[798] *Ibid*., pp. 766–767.

[799] Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims Notes and Comments,* 413, p. 448. The Strickland test, which denied ABA standards as possible checklist, although referred to these standards as possible guidelines, has been criticized for inconsistent application, leading to a new level of arbitrariness. Henderson, *Truly Ineffective Assistance: A Comparison of Ineffective Assistance of Counsel in the United States of America and the United Kingdom Note,* 317, p. 331.

[800] *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, p. 765; Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims Notes and Comments,* 413, p. 434.

[801] Blume & Neumann, *It's Like Deja Vu all Over again: Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel,* 127, p. 135.

standards, the United States Supreme Court has made it clear that general norms of professional criminal representation must be applied in evaluating counsel's performance.[802] At the same time it is notable that the ABA itself is very modest while describing the purpose of the standards: "These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances."[803]

Although the Constitution of the Estonian Republic and the European Convention on Human Rights do not stipulate code of conduct and do not refer to such, as the United States Constitution does not require counsels to act in accordance with the guidelines promulgated by the American Bar Association, standards of conduct of counsel in criminal proceedings are an important source for courts for evaluating whether counsel acts in a professional manner or not. Consequently, the relationship between professional standards and constitutional rights is a circular one – the evaluation of counsel's performance in light of the professional rules is necessary when a constitutional right may be violated. Likewise, when a constitutional right is violated, it is necessary to evaluate counsel's performance in light of professional standards.[804]

Professional standards provide the courts with guidance when evaluating the performance of counsel and obligate counsel to exercise reasonable professional judgment at all times, and to fulfill the duties that are essential to effective assistance of counsel in criminal proceedings: to zealously represent the client, to keep the client well-informed about the case, and to consult with the client regarding fundamental decisions, both preceding and during the course of trial.[805] These and some other duties of counsel are the essence of the assistance of counsel, which means that if they are not fulfilled, the accused is left

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[802] Renee Newman Knake, *The Supreme Court's Increased Attention to the Law of Lawyering: Mere Coincidence Or Something More?* 59 Am. U. L. Rev. 1499 (2010), p. 1567. It seems that the Court is likely to continue using ABA standards as guides for reasonable counsel behavior so long as the standard applied was in place at the time of the behavior in question. *Ibid.*, p. 1569.

[803] Standard 4.-1.1. In the commentary it is added that the standards are intended to provide defense counsel with reasoned and appropriate professional advice. They are also intended to serve as a guide to what is deemed to be proper conduct. Nonetheless, it is beyond the scope of the standards to attempt to determine the conditions under which deviation from the recommendations made in standards warrants reversal or vacation of a conviction.

[804] Deborah Cirilla, *Caribbean Fantasy – the Case of the Juror Who Misbehaved and the Attorney Who Let Him Get Away with it: Violation of Sixth Amendment Rights to an Impartial Jury and Effective Assistance of Counsel in Government of the Virgin Islands v. Weatherwax, A Note,* 42 Vill. L. Rev. 275 (1997), p. 317.

[805] Cirilla, *Caribbean Fantasy – the Case of the Juror Who Misbehaved and the Attorney Who Let Him Get Away with it: Violation of Sixth Amendment Rights to an Impartial Jury and Effective Assistance of Counsel in Government of the Virgin Islands v. Weatherwax, A Note,* 257, p. 288..

defenseless, at least in specific point. Thus, the ABA Standards and other similar standards in the field reflect the underlying premise of the right to counsel and the right to effective assistance of counsel, which both stand for the proposition that an accused enjoys the assistance of counsel for his defense provided by an informed, diligent defense counsel, who makes his decisions zealously and deliberatively.[806] As I have already discussed, it does not mean that courts should conclude ineffectiveness of counsel no matter what duty from these standards counsel has been breached. It still has to be remembered that these standards have been worked out for disciplinary actions, which means that courts should have their own standard, although while working this standard out, they could use Bar standards as guideposts.

Another question is whether the standard of conduct should be the same for retained and appointed counsel. On the basis of case law of the United States Supreme Court and the ECtHR it can be concluded that both the United States Supreme Court and the ECtHR have rejected the distinction between retained and appointed counsel when it comes to the claim of ineffective assistance.[807] The United States Supreme Court has stressed it word-for-word in Strickland v. Washington and the ECtHR has expressed the same with numerous decisions. For instance, if we analyze the two most important decisions of the ECtHR about ineffectiveness of defense counsel: while Mr. Artico had, from the outset, legal-aid counsel, Mr. Goddi had retained counsel of his own choosing.[808] To be honest there is no reason to argue both courts' conclusion that counsel's duties and responsibilities to the accused are the same whether counsel is retained by the client or appointed. Therefore there is no reason to deal with an appointed counsel ineffectiveness claim differently from a retained counsel ineffectiveness claim. Some authors suggest that more is likely to be demanded of appointed counsel: because the client's choice usually played little part in his selection, counsel is confronted with the more difficult task of establishing and maintaining the trustful attorney-client relationship.[809] In my opinion, this is something that cannot be reflected in the guidelines, but has to be taken into

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[806] *Ibid*., pp. 289–290.

[807] See about the United States *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 752, p. 763 Note 79; see also Thomas M. Place, *Ineffectiveness of Counsel and Short-Term Sentences in Pennsylvania: A Claim in Search of a Remedy,* 17 Temp. Pol. & Civ. Rts. L. Rev. 109 (2007–2008), p. 112.

[808] Trechsel, *Human Rights in Criminal Proceedings*, *p*. 287.

[809] Busch et al., *Lawyer's use of the Standards, the A Symposium: The American Bar Association Standards Relating to the Administration of Criminal Justice: Part 2,* 427, p. 438. "The client's desire to retain the lawyer gives the lawyer's persuasion greater standing with the client; the threat of withdrawal may be enough to discourage any inclination of the client to engage in impropriety or to demand it of the lawyer. By contrast, the lawyer who is appointed or who serves in an organized defender office must win the confidence of the client, who usually has had no say in the choice of an advocate. Such factors as the eminence of the lawyer will obviously affect the relationship, but it is clear that the nature of the employment will itself have an impact on the relationship." Standard 4–1.2 commentary.

account by the court if the accused claims that there has been a total breakdown in the attorney-client relationship and seeks the removal of his appointed counsel.

In addition to that in the case of ineffectiveness claims, it does not matter how long imprisonment was applied to an accused or whether the court imposed him imprisonment at all or instead of that, for instance imposed pecuniary punishment. Constitutional rights, as the right to effective assistance of counsel is, apply to all persons charged with crime and do not disappear when a person is charged with a less serious one. Therefore, the fact that an accused has received a short sentence or did not receive imprisonment at all does not extinguish his constitutional rights to argue counsel's ineffectiveness.[810]

As I have analyzed the case law of the United States, especially the case law of the Supreme Court, the case law of the ECtHR and the Supreme Court of Estonia, I am going to suggest a standard that is more similar to the "categorical" approach than "judgmental" approach, although it could be that it is a mixture of both. A specified standard which guides counsels through every stage of the criminal proceedings would be helpful for counsels, because they would know what is expected of them and to courts, because courts would be able to monitor more effectively the quality of representation the accused is receiving during the court proceedings and higher courts would have a guide to evaluate ineffectiveness claims. A standard would assist and guide counsel in the preparation of the defense in a criminal trial as well as would describe what is expected of him during the trial.[811] In addition to that the standard would enable accused persons to understand what is involved in the defense of a case and therefore would inform accused persons of what to demand from counsels.[812]

I also suggest that the standard for higher courts to evaluate the performance of counsel would be mainly two-step. First, the accused would have to prove that counsel failed to satisfy one of the components on the checklist, which is composed by the duties I consider most important. The prosecutor has an opportunity here to prove, that counsel either satisfied the component at issue or that any failure on defense counsel's part was so minimal that he did substantially satisfy the component. Second, the prosecutor can prove that the allegedly ineffective act or omission was justified. Here it can be claimed that defense counsel made a reasonable tactical decision under the particular circumstances of the accused's case and that this decision justified his failure to satisfy one or more of the basic components.[813] Nevertheless, I will also list duties that in my opinion are so essential to effective defense that if missing

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[810] Kirk J. Henderson, *Right to Argue that Trial Counsel was Constitutionally Ineffective, the the Pennsylvania Issue,* 45 Duq. L. Rev. 1 (2006–2007), p. 32.
[811] Klein, *Emperor Gideon has no Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel, the,* 625, p. 655.
[812] *Ibid*.
[813] Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims Notes and Comments,* 413, p. 441.

could never be justified, which makes up a part of the standard one-step. Therefore, the "categorical" approach I suggest here supported by proposals made by Martin C. Calhoun and William J. Genego in the United States does not deny counsel's discretion to make strategic decisions and moreover, it does not hide the fact that every criminal case is different.[814] To ensure that the checklist is a floor and not a ceiling for what constitutes reasonable representation, an accused must have the opportunity to prove that defense counsel was ineffective under the particular circumstances of his case even if counsel satisfied all components of the checklist,[815] which in turn enables the prosecutor to claim that either counsel fulfilled this duty, he made an informed judgment not to fulfill his duty or thirdly, that this duty was not essential to the effective assistance of counsel in a particular case. In order to prove that this duty was not essential in a certain case, the prosecutor has to prove that it did not have an effect on the defense position, which means that it either did not affect the outcome of the case or did not affect the exercise of the accused's rights.[816] Therefore, although I generally reject the element of prejudice as an element which goes strongly against the nature and principles of adversary trial, I still believe that here this element is required in order to protect the principle of finality and society's interest in conserving resources, because without applying the element of prejudice the list of counsel's mistakes that lead to annulment of judgments made by lower courts would be endless. Still, in order not to violate the presumption of innocence, I propose that it should be the prosecutor, who proves that counsel's failure(s) did not affect the outcome of the case or exercise of the accused's rights. The latter I add to the element of prejudice in my proposed standard, because I share the standpoint of authors in the United States that the purpose of the right to counsel is not only to guarantee that the outcome of the case would be accurate, but also to ensure that the accused receives a fair trial meaning that his rights are protected in the criminal proceedings. Therefore in my opinion the element of prejudice could not be considered to be something that must certainly have an effect on the outcome of the case.

[814] Genego, *Future of Effective Assistance of Counsel: Performance Standards and Competent Representation, the,* 181, p. 206.
[815] Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims Notes and Comments,* 413, p. 442.
[816] This is an approach which includes traditional understanding about element of prejudice and also suggestions made by Robert J. Conflitti I described in subsection 4.2.2.2 (Conflitti, *New Focus on Prejudice in Ineffective Assistance of Counsel Cases: The Assertion of Rights Standard, A Note,* 29).

VI. PROPOSED STANDARD FOR EFFECTIVENESS OF DEFENSE COUNSEL FOR ESTONIAN COURTS

Here I will propose two standards. One is a standard of effectiveness of defense counsel for trial (county) and circuit courts and for the Supreme Court of Estonia that gives a guidance for courts in case the court decides whether to remove counsel or not. The other is a standard for effectiveness of defense counsel for higher courts (circuit courts and the Supreme Court of Estonia) in case the court decides whether to annul the judgment of lower court or not. As for the higher courts an important principle, the principle of finality, which must be taken into account, raises, the standard for ineffectiveness of defense counsel should be different, which means that courts should be allowed to remove counsels more easily than annul judgments of lower courts.

When it comes to the standard for trial courts, as I have discussed above, I suggest that courts should have competence to remove both appointed and retained counsel. In relation to appointed counsels this competence comes for Estonian courts from § 20 (3^1) of the SLAA. In relation to retained counsels such ground for removal may exist since the 1st of September 2011 if § 267 (4^1) of the CCP, which allows the court to withdraw incompetent counsel, and is interpreted in a way that it allows the court to disqualify counsel permanently. This indeed results in a situation where such a ground for removal is not provided for in the § 55 of the CCP, where all other grounds for removal of counsel are provided, so it should be concluded that if the legislator has meant it to be ground for removal, it should be added to § 55 of the CCP. Even if § 267 (4^1) of the CCP means only temporary withdrawal, my proposed standard is nevertheless based on the idea that court's obligation to guarantee the right to effective assistance of counsel outweighs the accused's right to be assisted by certain counsel he has chosen, if counsel's failure to fulfill his duties is manifest. Then the court should be allowed to remove counsel and ask the accused to choose a new one or appoint new counsel for the accused.

The standard I propose here for the courts to use for removal of counsel consists of two parts. The first one is the one where counsel's most important mistakes are listed. The most important duties are the ones that in case they are breached, always result in violation of the accused's right to effective assistance of counsel. In order to end the violation and guarantee the right, counsel's behavior should be either corrected or if the mistake is repeated or egregious, counsel should be removed. But because the reality is always complicated, the list of counsel's mistakes is endless, which means that only a list of the most important duties is possible to compose. Nevertheless it could be that the court finds it unavoidable to remove counsel in a situation where any other breach of duties occur. Therefore courts should be allowed to declare any other violation of counsel's duties manifest when specific facts of the case so require, which means that the standard is not an exhaustive list and in case the court decides to remove counsel because of a mistake the standard does not include, it should give its reason for declaring the duty breached manifest.

For the courts of higher instances I will also a propose standard that consists of two parts. If duties that are described in the first part were not followed in the court proceedings of court of lower instance, it should give rise to annulment of the court judgment. After the accused has proved that counsel failed to satisfy one of the components on the checklist, the prosecutor should have an opportunity to prove, that counsel either satisfied the component at issue or he did substantially satisfy the component. Second, the prosecutor can prove that the allegedly ineffective act or omission was justified, maybe because of reasonable tactical choices or because of any other reason. Nevertheless, as some duties are essential to the function of defense, in case they are breached, the prosecutor should not be allowed to prove that the breach of duty was justified. The second part of the standard may include any other duty that the accused claims to be essential. Here the prosecutor can show the duty was not essential (it either did not affect the outcome of the case or did not affect exercise of the accused's rights) or similar to the first part of the standard that counsel made an informed judgment not to fulfill this duty. As I have already discussed, hearing the criminal matter in the absence of counsel is a material violation of criminal procedural law, which is a ground for annulment of a court judgment according to § 339 (1) 3) of the CCP. Any other ineffectiveness of defense counsel should in my opinion form a ground for annulment of court judgment according to § 339 (1) 12) of the CCP, a provision that came into force on the 1st of September 2011. As the annulment of judgment is a serious infringement of principles of finality and preservation of resources, one has to take into account that the list of mistakes that result in annulment of judgment should be thoroughly thought through and it should be composed only of the most important duties. If the higher court finds the duty that is not described in the standard to be essential, it should thoroughly justify its conclusion and it should take into account that its decision to declare the duty essential strongly affects those two principles.

It must be emphasized that if court has ascertained that counsel was ineffective, it does not mean that ineffectiveness of counsel was counsel's fault and some sanctions should follow for him automatically. As I have already discussed, reasons of ineffectiveness of defense counsel are manifold and ineffectiveness may be caused by state's activity also. Therefore these standards are not a basis for counsel's responsibility, but enable the accused to have new counsel or a new trial (in some cases just a new judgment).

1. Standard of Effectiveness of Defense Counsel that Forms a Basis for Removal of Counsel

In addition to counsel's behavior in the court proceedings in the court of first instance this standard also reflects counsel's proper behavior in the court proceedings of the courts of higher instances. Nevertheless, as it can be seen from the heading of this subsection, this standard is a basis for removal of

counsel, and other possible means the court could use to affect counsel's performance, not a basis for annulment of the court judgments.

1. Counsel's general competence
   1.1. Counsel should have thorough knowledge of criminal law and the law of criminal procedure generally. The court is allowed to remove counsel if he has shown himself to be incompetent in either or both areas.
   1.2. Counsel should be polite towards the court and other parties to a proceeding. If counsel does not behave himself in spite of court's remarks, court is allowed to remove him.
   1.3. Counsel has to be sober and not under the influence of drugs. The court may remove counsel immediately if it notices counsel's inadequacy either because counsel is drunk or under the influence of drugs. In case counsel is physically ill and it prevents him from fulfilling his duties as counsel even if he is provided with a support person, the court is allowed to remove him. In case counsel is mentally ill and it prevents him from fulfilling his duties as counsel, the court is allowed to remove him.
   1.4. Retained counsel has to be either an advocate or if he is a non-advocate, he has to have permission from the body conducting the proceedings. If an advocate is excluded from the Bar or disbarred he has to inform the court and he may continue to perform as retained counsel if he receives court's permission to do so. If he does not inform the court without delay about his exclusion or disbarment, the court shall remove him, as well as if he is suspended. If an advocate is appointed counsel and he is excluded from the Bar, disbarred or suspended, he is replaced pursuant to § 20 (3) of the SLAA.
   1.5. If it has been ascertained that counsel has broken the law in the course of providing legal assistance to the accused and as a consequence of it the accused's position in the criminal proceedings is prejudiced, the court is allowed to remove counsel.

2. Conflict of interest
   2.1. If counsel has not removed himself, court should remove him:
      2.1.1. If counsel is or has been subject to the criminal proceedings on another basis in the same criminal matter.
      2.1.2. If counsel previously defended or represented another person whose interests are in conflict or may be in conflict with the interests of the person to be defended.
      2.1.3. If counsel's own interests are in conflict or may be in conflict with the accused's interests. This basis for removal should be added to § 54 of the CCP.
      2.1.4. If a conflict of interest exists or there is a possible conflict of interest between the accused's interests and interests of the third

party related to counsel. This basis for removal should be added to § 54 of the CCP.

2.1.5. If counsel is defending more than one accused and there is a conflict of interest or may be a conflict of interest between persons being defended.

2.2. A suspicion of existence of such conflict is interpreted to the benefit of existence of such conflict.

2.3. In the case of multiple representation described in p. 2.1.5 of this standard counsel may defend the accused if there is a possible conflict of interest only if it is advantageous to the accused persons represented and all of them give their informed consent in writing.

3. Participation in the court proceedings and relevant pre-trial duties

3.1. Counsel has to be present in the court sessions all the time unless it is provided otherwise in § 45 (4) of the CCP. According to § 270 (2) of the CCP if counsel fails to appear in a court session, the court hearing shall be adjourned. If counsel fails to appear repeatedly, court is allowed to consider removing him.

3.2. Counsel should be always awake during the court sessions. If the court notices counsel sleeping repeatedly, it is allowed to remove counsel.

3.3. While present, counsel should participate in the proceedings. If counsel fails to reason his silence, court is allowed to remove counsel.

3.4. Counsel has to be prepared: he has to have knowledge of the facts of the case and also of relevant law. According to § 273 (4) if counsel is not familiar with the criminal matter, which should be interpreted in the way that counsel should know relevant facts and relevant law, the court may adjourn the court session for up to ten days. If counsel appears to the court session unprepared repeatedly, the court is allowed to remove counsel.

3.5. Counsel should prepare the statement of defense on time. If he fails to do that, court is allowed to remove him.

3.6. Counsel should submit all requests on time. If counsel has not requested collection of evidence or hearing a witness in the statement of defense although he was aware of the need to present that evidence or hear the witness at that time, the court should not dismiss the request for collection of additional evidence during the court proceedings, if the accused shows the extreme relevance of that evidence or witness (in the meaning that there is a probability that it could mitigate the accused's situation).

4. Relationship between counsel and the accused

4.1. The relationship between the accused and counsel should be based on trust. If there is a serious breakdown in the attorney-client relationship, the court is allowed to remove counsel. Possible indicators for breakdown of the attorney-client relationship are:

counsel has revealed confidential information, although it is not allowed by law; serious differences between counsel and the accused about possible strategy, counsel has made decisions that are in the sole competence of the accused *etc.*

4.2. Counsel should always consult with the accused. If the court learns that counsel has not consulted the accused, the court obliges counsel to do that. If counsel fails to consult the accused repeatedly, court is allowed to remove counsel.

4.3. If counsel expresses an opinion to the court that the accused is guilty and the accused has not admitted his guilt, the court should remove counsel.

5. Counsel's duties in the settlement proceedings

5.1. Before an accused agrees with a settlement, counsel should advise him fully of his rights and consequences of settlement. Counsel should also give reasoned advice to the accused whether in his opinion the accused should agree with the settlement or not. Counsel's advice should be based on investigation of relevant facts and law. If court ascertains that counsel has not fulfilled these duties, it should not convict the accused in accordance with the settlement and it should remove counsel.

5.2. If counsel coerces the accused to agree with the settlement or deceives him to get such agreement and the court is notified of such counsel's activity, it should not convict the accused in accordance with the settlement and it should remove counsel.

6. Other duties of counsel

The court may declare any other breach of counsel's duties manifest and therefore basis for removal of counsel under special circumstances of the case. While doing so the court should give thorough justification for its decision.

7. Counsel's performance in the appellate and cassation proceedings

7.1. While participating in the court proceedings of the court of higher instance, counsel has the same duties as described above as long as these duties are in accordance with the nature of court proceedings of higher court instance.

7.2. Counsel has to file a notification of appeal or appeal of cassation and appeal or appeal of cassation itself to the circuit court or the Supreme Court of Estonia on time. If counsel fails to do that without good reason, the court should remove him and give the accused a new term to choose counsel or ask the Bar to appoint counsel, who has within the term granted by court a chance to file a notification of appeal (appeal of cassation) or appeal (appeal of cassation) itself.

7.3. The appeal composed by counsel has to be in accordance with requirements provided for in § 321 of the CCP or appeal of cassation

with the requirements provided for in § 347 of the CCP. If the court refuses to hear an appeal or the appeal of cassation, because counsel has not eliminated the deficiencies on time, court should remove him and give the accused a new term to choose counsel or ask the Bar to appoint counsel, who has within the term granted by court a chance to file new appeal or appeal of cassation.

7.4. Before drafting the appeal or appeal of cassation counsel has to consult with the accused. Counsel can leave aside issues that are frivolous and also issues that are unimportant in counsel's point of view. When the accused claims that an important issue was left aside, he should be given a new chance to file an appeal or appeal of cassation if he is able to show that the neglected issue had sufficient merit, in light of the other available issues.

7.5. If the circuit court refuses to hear the appeal because counsel as appellant has not appeared to the court session, counsel should be removed and the accused should have a new chance for the court session.

The principle expressed in the previous standard should be added to the Code of Criminal Procedure. This basically means that if the appeal or appeal of cassation is refused to be heard by court and the reason for refusal is counsel's failure to fulfill his duties, counsel should be removed and the accused should be have a new chance to file the appeal or the appeal of cassation.

2. Standard of Effectiveness of Defense Counsel that Forms a Basis for Annulment of Court Judgment of Lower Court

8. Basis for annulment of court judgment *per se:* absence of assistance by counsel

8.1. Counsel was not present in the court proceedings, except for situations provided for in § 45 (4) of the CCP, no matter how short that time was. Absence of counsel in case the accused has more than one counsel should form a basis for annulment of court judgment under special circumstances of the case.

8.2. Counsel slept during the trial either:

8.2.1. During the substantial stage of trial, which may be, *e.g.,* when the prosecutor questioned the witness.

8.2.2. Through a relatively large portion of the overall trial proceedings.

8.2.3. During a large amount of time.

8.3. Counsel was drunk or under the influence of drugs during the court session. Counsel was physically or mentally impaired and it could be concluded that it refrained him from fulfilling his duties as counsel.

8.4. Counsel participated in the court proceedings although conflicts of interest existed. A suspicion of existence of such conflict is interpreted to the benefit of non-existence of such conflict.
8.5. Counsel participated in the court proceedings as an advocate, although he was excluded from the Bar or disbarred and he did not ask the permission from the court to continue as counsel in the criminal proceedings. Counsel participated in the court proceedings as an advocate although he was suspended.
8.6. Counsel participated in the proceedings without general knowledge of criminal law or law of criminal procedure.
8.7. Counsel participated in the court proceedings, although there was a total breakdown in the attorney-client relationship.

9. Basis for annulment of court judgment *per se:* manifest mistakes of counsel that may not be justified with the strategy or tactics
9.1. Counsel participated in the proceedings without knowledge of the facts of the case or knowledge of relevant law.
9.2. Counsel participated in the court proceedings without formerly consulting with the accused or the consultation was superficial.
9.3. Counsel has expressed an opinion to the court that the accused is guilty and the accused has not admitted his guilt and the trial court has not removed counsel.
9.4. It is ascertained that counsel was silent during the entire trial or an entire section of a trial (*e.g.,* failed to make opening statement).
9.5. Counsel failed to file a request for the collection of extremely relevant evidence (in the meaning that there is a probability that it could mitigate the accused's situation) that was known to him or should have been known to him on time.
9.6. The accused agreed with the settlement as a result of counsel's advice that was based on inadequate investigation of relevant facts or law or counsel coerced or deceived the accused to agree with the settlement, or it has been ascertained that counsel did not advise the accused at all.
9.7. On the basis on how counsel acted in the proceedings it could be ascertained that counsel did not have a strategy or he had inadequate strategy.
9.8. Counsel has failed to ask for an acquittal if there are circumstances that were known to counsel or should have been known to him that show that there are no grounds for the criminal proceedings, *i.e.* if necessary elements of an offence do not exist or it is possible to preclude unlawfulness of the act.
9.9. Counsel has failed to bring out an existing and known or should be known to the defense circumstance that precludes guilt.

10. Basis for annulment, if the prosecutor does not prove that non-fulfillment of the duty was based on counsel's reasonable decision

10.1. Although present, counsel refused to act during the specific point of the trial (*e.g.* during questioning one witness).
10.2. Counsel has failed to make an adequate opening statement.
10.3. Counsel has cross-examined witness inadequately.
10.4. Counsel has failed to make adequate closing arguments.
10.5. Counsel has failed to give an adequate opinion about the punishment required by the prosecutor. This opinion should be based on facts of the case and relevant law and both refer to mitigating circumstances and object aggravating circumstances.
10.6. Counsel has failed to object to unlawful evidence or to make other material objections or requests.

11. Not listed mistakes as bases for annulment, if the prosecutor does not prove that non-fulfillment of the duty was based on counsel's reasonable decision or that the non-fulfillment did not prejudice the defense position

The court may declare any other breach of counsel's duties manifest and therefore basis for annulment of the court judgment under special circumstances of the case. While doing so the court should give thorough justification for its decision.

12. Basis for annulment of court judgment *per se:* court's groundless interference into the attorney-client relationship.
12.1. It is ascertained that the trial court did not weigh the accused interests and public interests while it refused to ask the Bar to appoint an advocate preferred by the accused and with whom the accused has an agreement according to § 20 (1) of the SLAA.
12.2. It is ascertained that the trial court did not give permission for a non-advocate person who met the educational requirements provided for in § 41 (4) of the CCP to perform as counsel without a good reason or it withdrew its consent without a good reason.
12.3. It is ascertained that the trial court did not appoint additional counsel to the accused, although the accused requested it and there was a necessity for additional counsel.
12.4. It is ascertained that the trial court removed counsel without a good reason.

CONCLUSIONS

Right to the assistance of counsel is a right that every accused has in the criminal proceedings in any democratic society. It is usually stipulated in the constitution, like it is in the Constitution of the Republic of Estonia and in the Constitution of the United States of America. It is also guaranteed by the European Convention on Human Rights and Fundamental Freedoms and highly recognized by the European Court of Human Rights and the European Union. In addition to that it is often provided for in codes of criminal procedure, like it is in the Estonian Code of Criminal Procedure.

Whenever the content of the right to the assistance of counsel comes under discussion, things turn out to be a little bit more complicated. It is unequivocal that to every accused the right to the assistance of counsel should be guaranteed, but what it really means, is a subject that has been discussed over and over again. One thing is certain: the right to the assistance of counsel definitely means the right to have counsel present in the criminal proceedings. For instance, it can be seen very clearly from the Estonian Code of Criminal Procedure: according to § 339 (1) 3) of the CCP, conducting a court proceeding without the participation of counsel is a material violation of criminal procedural law. Pursuant to § 341 (1) of the CCP such violations result in annulment of the judgment of the court of lower instance by the court of higher instance and reversion of the criminal matter to the court of lower instance for a new hearing. But usually it is agreed that mere presence is not enough and this is where the standard of counsel's performance comes under discussion. It is said that as counsel should be an equal contestant to the prosecutor, especially in the adversary system, that is based on the principle of two competing parties and a neutral judge who finally makes a decision based on the parties' arguments, counsel should do at least a bit more than to be present in the proceedings, which means that in addition to the duty to be present counsel also has to be effective. Counsel as a legal professional is the one who should help the accused to understand and exercise other defense rights the accused has in the criminal proceedings and should present his side of the story to the court. Otherwise the accused who usually does not have a legal education is basically alone against the powerful state, which in turn results in the situation where the accused does not know how to exercise his rights and often even what rights he has. His side of the story is left unrepresented and he has lost the opportunity to defend himself against the charges. Therefore usually it is recognized, and I also agree with the position that accused persons do not only have the right to the assistance, but the right to effective assistance of counsel, which is an inseparable element of the right to the assistance of counsel.

But to recognize the accused person's right to effective assistance means to raise even more questions. What does it really mean? Whether it is a court's business to guarantee it? How should courts guarantee it? What happens if it is ascertained that it was not guaranteed to the accused during the proceedings?

These are the basic questions I tried to find answers in chapters two to six of this thesis.

The formal legal definition of effective assistance could be quite simple: effective assistance is the assistance the court has found effective as ineffective assistance is the assistance that the court has declared ineffective (If court's competence to assess counsel's performance in the criminal proceedings is not recognized, the one that assesses counsel's performance and gives a meaning to the notion "effective assistance" could be, for instance the Bar or also a civil court). But it does not actually clarify anything as courts usually do not have common understanding about what effective defense is. Here positions about how to define effective defense diverge dramatically: the two most common approaches are "categoricalism" and "judgmentalism". The first one supports developing a standard that courts could base their decision on about whether counsel has been effective during the proceedings or not. The supporters of the latter think that the best way to answer such a question is to use a case-by-case approach, which means that there is no standard and the court decides whether the assistance of counsel was effective or not based on specific facts of the case. There is also a middle way: that means that a standard of the most basic duties is composed and additionally a court can make its decision based on specific circumstances of the case if necessary. In this thesis I have proposed the middle way for two reasons. First, in my opinion, when no standard is imposed, there is a danger that judicial practice develops hectically and is arbitrary: two similar cases should result in similar conclusions. And it is easier to achieve it if there is a standard that could be used as a guide to make decisions. Second, if the standard would be conclusive, it would not take into account that every criminal proceeding is different and it might be that in addition to universally basic duties there are some duties that the court finds necessary to declare indispensable in certain criminal proceedings.

One thing is absolutely sure – effective assistance of counsel does not involve the outcome of the proceedings in the meaning that whenever the accused was not acquitted, it could be claimed that counsel was not effective. Rather, the effective defense means that counsel is diligent, makes everything possible and in accordance with law in order to achieve acquittal or the most lenient punishment and always supports the accused with his advice. In addition to that counsel exercises the accused's rights in the proceedings. If counsel has done that, he has been an equal contestant to the prosecutor, adequate supporter to the accused and diligent party to a proceeding, *i.e.* a full representative of the defense side.

In chapter three of my thesis I discussed the duties that are in my opinion most essential and therefore should be fulfilled by every counsel in all criminal proceedings. To be more exact I named there different types of ineffective defense no matter if it is a result of state's interference, conflict of interests or counsel's activity or inactivity and then discussed the duties that are behind every type of ineffectiveness. In my opinion counsel participating in the criminal proceedings should be active, awake and sober, in good health that

allows him to participate in the proceedings as counsel, without conflict of interest, with good knowledge of criminal law and law of criminal procedure generally, with good knowledge of the facts of the certain case and law applicable in that case. Of course, counsel also has to meet formal requirements provided for in § 42 (1) of the CCP, which means that counsel has to be either an advocate or in case a non-advocate person wants to be contractual counsel this person has to have legal education provided for in § 41 (4) of the CCP and achieve permission from the body conducting the proceedings. In addition to that while participating in the criminal proceedings counsel should observe deadlines, consult with the accused and try to develop a trustful attorney-client relationship with the accused. These and some other duties I have listed in standards I propose for the Estonian courts of first and higher instances in chapter six of the thesis.

While counsels are independent in their activities, which is a principle highly valued and repeatedly stressed for example by the European Court of Human Rights and the United States Supreme Court, a certain level of control over their performance must nevertheless be possible, to ensure that the right of the accused to effective assistance of counsel does not become an empty right. The basis of the arguments I present in my thesis is a belief that next to competition, judicial supervision is one of the most important mechanisms for reducing ineffective assistance of counsel, because it enables the courts to react preventively or if it is not possible at least in the same criminal proceedings where the ineffective assistance has occurred. Therefore the question about how courts should guarantee effective assistance of counsel could be answered by three words: by direct interference. The court directs the proceedings and gains a direct overview of counsel's performance, and therefore can react swiftly in cases of ineffective assistance. Even if the ineffectiveness claim is solved by the higher court, this court can still annul the judgment of the lower court and give an order to try the case once more, but this time with presence of an effective counsel. Other measures that could be used in case of ineffectiveness of counsel: civil actions and supervision by bars are measures that can be used after the criminal proceedings, which means that they always turn out to be a little bit too late. Civil court's finding that counsel was ineffective and has to pay damages does not change the fact that the accused was not guaranteed effective assistance of counsel during the criminal proceedings and neither does the disciplinary penalty that is imposed by the competent body of the Bar. That is why in this dissertation I propose the judicial supervision as an effective method to improve effectiveness of counsel. In addition to the fact that it enables to react already during the criminal proceedings and especially if performed by the judge in front of whom the ineffectiveness occurs, it allows immediate correction of counsel's performance as it also sends a powerful message to other persons that perform as counsels in the criminal proceedings: the court is there in the criminal proceedings and observes closely, detecting mistakes of counsel and reacting immediately. In addition to that I believe that the fact that counsel's performance is declared ineffective by the court that has

actually heard the case, is a great humiliation for counsel and it motivates him to improve his performance in the future as he realizes that he cannot continue to neglect his duties, because it will be noticed by the court in the criminal proceedings sooner or later.

As I have already emphasized, the standard for the courts to evaluate counsel's performance I have proposed here is two-fold, consisting of both listed guidelines and *ad hoc* assessment. In addition there are actually two different standards I propose in this dissertation: a standard for courts that are hearing the case and that have to decide whether to act during the proceedings, from making a remark up to removal of counsel, and a standard for higher courts that have to assess whether counsel has been ineffective during the proceedings of lower court, which in turn leads to annulment of the judgment of the court of lower instance. During the first case the court has several options in front of it and removal of counsel should be the last one, as it interferes into the relationship between the accused and his counsel most severely. Whether the court is allowed to remove counsel at all or not, which often means that it does it without the consent of the accused, is another question, but here the court's competence to do that should be acknowledged if it is acknowledged that it is the obligation of courts to guarantee effective assistance of counsel to the accused. Otherwise the obligation would be empty in the meaning that although it is recognized, courts do not have the means to fulfill their obligation, which in turn leaves the right to effective assistance hollow. Therefore I suggest in my thesis that courts should have the right to remove ineffective counsel, no matter whether it is with or without the accused's consent. But the one thing that has to be mentioned here is that removal does not have an effect on principle of finality, the most it does is that it affects the attorney-client relationship, which ceases to exist after the court has removed counsel.

Another issue is with annulment of the judgment. Mostly this means that the accused is entitled to new proceedings in a lower court, unless there is a ground for higher court to make a new judgment itself, for instance acquit the accused. But the new proceedings mean that extra resources are spent, and it strongly influences society's faith in adjudication. It is understandable that the members of society hope that the case is solved correctly at the first instance and the fact that the case is returned to a lower court for a new hearing undermines their belief in the justice system. Therefore the question arises, whether the mere finding that counsel has breached his duties is enough for annulment of the judgment or it should be ascertained that the breach of duties affected the outcome of the case, because if it affected the outcome, we can most certainly be ascertained that ineffective assistance had an effect on the situation of the accused. This is a question that is argued over and over again, especially in the United States: the question of element of prejudice. Some authors claim in the United States that the element of prejudice is necessary for the accused to prove as otherwise ineffective defense claims would be a huge burden for the justice system: counsels make many mistakes and if every mistake would result in annulment of judgment, there would be way too many annulments. The others

express their opinion that the accused's burden to prove prejudice is against the principle of presumption of innocence and therefore, although the element of prejudice itself is absolutely appropriate in the light of principle of finality, the absence of prejudice should be proved by the prosecutor, which means that the accused only has to prove that his counsel did not fulfill his duties, after which the prosecutor has an opportunity to prove that it did not affect the outcome. And there is a third approach also: some authors are in a position that the element of prejudice is not appropriate in the context of the accused's right to effective assistance of counsel. If the result of the assessment is that counsel did not fulfill his duties, it could be concluded that the accused's right to effective defense counsel was violated and therefore the right to fair trial was not guaranteed to the accused. Consequently, the reliability of outcome is always in question in case of ineffectiveness of counsel; even if other rights than the right to effective assistance of counsel were not breached in the course of the proceedings and effective assistance would have provided the same result. The last approach basically emphasizes that the right to effective assistance of counsel is an independent element of fair trial. As every accused is entitled to fair trial and the fact that the accused was guaranteed effective assistance of counsel is an indicator of fair trial, a trial can never be fair if the assistance of counsel was ineffective. This in turn means that whenever ineffective assistance has occurred, the accused should have an opportunity for a new trial.

The United States Supreme Court has taken the first position and asks accused persons to show element of prejudice. Only in rare cases element of prejudice is presumed, which means that the prosecutor should still have an opportunity to claim the contrary. One can imagine that the supporters of the harmless error rule (*i.e.* the principle that it should be prosecutor that always claims lack of prejudice) and abolishment of the element of prejudice are not happy with the position of the United States Supreme Court, which can be very clearly seen from the number of articles they have written to express their discontent.

The European Court of Human Rights does not ask the applicant to prove element of prejudice, but at the same time it must be taken into account that the decision of the European Court of Human Rights does not have an effect to the validity of the underlying court judgment, because it is up to the state to decide whether to annul the judgment, which was made in the proceeding that the European Court of Human Rights has declared to have conducted in the way that violated Article 6 of the Constitution. In Estonia the Code of Criminal Procedure does not mention element of prejudice and also the Estonian Supreme Court has not required the accused to prove that. According to § 339 (1) 12 of the CCP, which came into force on the 1st of September 2011, violation of criminal procedural law is material if in the course of the court hearing the principle of a fair and just court procedure is violated. Here the question whether the right to effective assistance of counsel is an independent element of fair trial becomes extremely relevant. If it is, § 339 (1) 12 of the CCP should be interpreted in the way that ineffective assistance of counsel itself

is a material violation of criminal procedural law. If it is not, then the effect that counsel's breach of duties had on the outcome of the case is important.

In this thesis I propose that there exist duties of counsel that are so essential to the defense that in case they are breached, the element of prejudice, no matter if the burden of existence of it is on the accused or the burden of non-existence of it is on the prosecutor should be left aside and the annulment of judgment should result if the court has ascertained that counsel breached these duties. The participation of active and diligent counsel, equal contestant to the prosecutor is essential to the adversary system, which presupposes a match between prosecution and the defense. Only if this competition has occurred, the proceedings, which resulted in the judgment are fair and the result itself is fair. If the proceeding has not been fair because one contestant has been either missing or "missing" from the proceedings, the result cannot be fair either. Therefore in my opinion the adversary system values the proceeding itself as much or even more than the result. In order not to burden the justice system too much, only breach of the most essential duties of counsel should result in annulment of the court judgment. Therefore, a standard for removal of counsel should be different than a standard for annulment of judgment, an approach I have taken in my thesis as I propose two different standards. But in order to guarantee that the courts would still have opportunity to take into account special circumstances of the case, I also suggest that the list should be left open as it should be left open for the standard for removal of counsel and if the court sees any other duty not listed in the standard essential in certain case, it has an opportunity to declare it indispensable in this specific case if it gives a thorough reason for its decision. Here the precondition of prejudice as a requirement that protects principle of finality comes in and the prosecutor should have an opportunity to prove that the breach of this certain duty did not affect the defense position, *i.e.* it did not have an effect on the outcome of the case or exercise of the accused's rights. In addition to that the prosecutor should be allowed to prove that it was counsel's reasonable decision not to fulfill the duty. Also the prosecutor should be allowed to prove that it was counsel's reasonable decision not to fulfill the duty, if the accused claims that counsel breached a listed duty, although I also name some duties in my proposed standard, which should always be fulfilled and which non-fulfillment cannot be justified with "reasonable decision".

ABBREVIATIONS

ABA Standards	American Bar Association Standards for Criminal Justice. Prosecution Function and Defense Function
BAA	Bar Association Act
CCBE	Council of Bars and Law Societies of Europe
CCP	Code of Criminal Procedure
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
SLAA	State Legal Aid Act

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KOKKUVÕTE

Abinõud ebaefektiivse kaitse vastu. Kohtulik järelevalve kaitsja tegevuse üle Eesti kriminaalmenetluses

Käesolevas töös otsin vastust küsimusele, kuidas mõjutada kaitse kvaliteeti Eesti kriminaalmenetluses ning pakun välja kohtuliku kontrolli kui efektiivse võimaluse kriminaalmenetluse kestel kõigi menetluses osalevate kaitsjate töö kvaliteeti kontrollida ja puudustele reageerida. Selleks et kohtunikud reageeriksid sarnastes situatsioonides sarnaselt ja ei kuritarvitaks oma pädevust kaitsjate töö kvaliteedi hindamisel, tõstatan töös küsimuse, kas on võimalik välja töötada standard, mida Eesti kohtud saaksid kasutada kaitsja töö efektiivsuse hindamisel jooksvalt kohtumenetluse käigus ja ka siis, kui süüdistatav on kriminaalmenetluse kestel esitanud kaebuse ebaefektiivse kaitse peale kõrgemale kohtule.

Selleks et põhjendada kohtute pädevust kaitse kvaliteedi üle kontrolli teostamisel, otsin kõigepealt vastust küsimustele, mida tähendab õigus kaitsele (sellele küsimusele vastan töö esimeses peatükis); mida tähendab õigus efektiivsele kaitsele (sellele küsimusele vastan töö teises peatükis) ja kas see on olemuslikult seotud õigusega kaitsele (ka sellele küsimusele vastan töö teises peatükis). Üksnes sellisel juhul, kui tunnustada süüdistatava õigust efektiivsele kaitsele, saab hakata otsima põhjendusi sellele, miks kriminaalmenetlust juhtiv kohus on õigustatud kaitse efektiivsust kontrollima ja ebaefektiivsusele reageerima. Töö kolmas peatükk käsitlebki ebaefektiivset kaitset ja on kolmeks jagatud selle alusel, millised on ebaefektiivse kaitse põhjused. Igas alapeatükis toon välja kohustused, mis kaitsjal (erandjuhtudel ka riigil) täitmata jäävad ning arutlen iga kohustuse juures, kas see kohustus peaks kuuluma minu poolt kuuendas peatükis pakutavasse standardisse, mida võiksid kaitsja käitumisele hinnangu andmisel kasutada Eesti kohtud. Töö neljandas peatükis vastan ühele olulisemale küsimusele, st sellele, miks peaks kohtud olema need, kes kontrollivad kaitsja tegevust, ja kas kaitsja sõltumatuse põhimõtet arvestades peaks kohtulik kontroll kaitsja tegevuse üle üleüldse lubatud olema. Viiendas peatükis analüüsin USA kogemust kaitse kvaliteedi üle kohtuliku kontrolli teostamisel ja efektiivse kaitse standardi väljatöötamisel, ja ühtlasi põhjendan seda, miks selles valdkonnas peaks uurima just arenguid USA-s. Lühidalt öeldes on olukord järgmine: USA Ülemkohus on efektiivse kaitse standardi väljatöötamisega (eelkõige kohtuotsuste tühistamise kaalumise jaoks) tegelenud juba alates 1932. aastast ja seetõttu on just USA-st võimalik leida hulgaliselt häid ja halbu kogemusi. Lisaks on USA-s kriminaalmenetlus võistlev ning Eestiski on kriminaalmenetlus võistlevate elementidega, mis tähendab seda, et kaitsja funktsioonid on võrdlemisi sarnased (eelkõige just üldmenetluses, millele ma käesolevas töös peamiselt keskendungi). Loomulikult ei saa teisest riigist kunagi mitte midagi üks ühele ilma kriitilise analüüsi ja võimaliku modifitseerimiseta üle võtta, mistõttu Eesti standardi koostamiseks uurin nii USA-s kehtivat standardit, standardite ajalugu, kriitikat kehtiva standardi kohta kui ka ettepanekuid

standardi muutmiseks. Samuti tuleb arvestada, et Eesti asub Euroopas, mistõttu mööda ei saa selles õigusruumis kehtivatest õigusaktidest (pean siin eelkõige silmas Euroopa Liidu õigusakte ja Euroopa Nõukogu õigusakte) ja loomulikult Eesti enda õigusaktidest. Lisaks eelnevale on viiendal peatükil veel üks oluline funktsioon – selgitada, miks ma üldse pakun välja standardi, st miks ei võiks ebaefektiivse kaitse kaebusi lahendada ka edaspidi juhtumipõhiselt, mida siiani Eestis on tehtud. Ning viimases, kuuendas peatükis pakun välja standardid, mille järgi saaksid Eesti kohtud kriminaalmenetluses kaitsja töö kvaliteeti hinnata.

Käesolev eestikeelne kokkuvõte on midagi enamat kui lihtsalt kokkuvõte, proovides põhjalikult seletada töös toodud järelduste tagamaid. Seetõttu kasutan ka siin mitmetes kohtades viiteid, kuigi kokkuvõttes seda tavaliselt ei tehta. Samuti tuleb rõhutada, et kohati ma ei järgi kokkuvõttes töö struktuuri – seda põhjusel, et töös toodud seisukohtade lühidalt, kuid samas piisavalt põhjalikult seletamine tingis minu arvates parema arusaadavuse eesmärgil vajaduse mõned teemad ettepoole tõsta ja mõned tahapoole viia. Nii käsitlen kokkuvõttes esmalt esimese ja teise peatüki sisu, siis neljanda ja viienda peatüki sisu, ja viimaks toon lugejani kolmanda ja kuuenda peatüki sisu koos, mis annab mulle ilma kordamata võimaluse selgitada, miks ma ühe või teise kaitsja kohustuse enda poolt pakutud standardisse lisan. Standardi olemusele, st sellele, mitmest astmest koosneva standardi ma üldse välja pakun, annan aga põhjenduse juba viiendas peatükis, mistõttu kuues peatükk sisaldab töös nii kolmandas kui ka viiendas peatükis toodud järeldusi. Et aga kokkuvõtte sissejuhatus ei muutuks liialt keeruliseks, püüangi järgnevalt selgitada, milliseid teid pidi jõudsin kohtuliku kontrolli õigustamiseni ja efektiivse kaitse standardini, mille pakun välja Eesti kohtutele kaitsja töö kvaliteedi hindamiseks kriminaalmenetluses.

Õigus kaitsjale on süüdistatava üks olulisemaid õigusi kriminaalmenetluses. Euroopa inimõiguste ja põhivabaduste kaitse konventsiooni[817] (edaspidi EIÕK) artikli 6 lõike 3 punkti c kohaselt on igal kuriteos süüdistataval õigus kaitsta end ise või enda poolt valitud kaitsja abil või saada tasuta õigusabi juhul, kui õigusemõistmise huvid seda nõuavad ja süüdistataval pole piisavalt vahendeid õigusabi eest tasumiseks. Euroopa Inimõiguste Kohtu (edaspidi EIK) praktika selles valdkonnas on niivõrd laialdane, et siinkohal oleks ehk asjakohasem mainida erandjuhtu, mil EIK ei ole nõudnud konventsiooni artikli 6 lõike 3 punkti c täitmist: nimelt otsuses *Engel and Others* vs *Netherlands*[818] leidis Kohus, et selles sättes toodud õigust piirati, kuna isikutel ei olnud võimalik endale kaitsjat valida, kuid lisas, et rikkumist ei saa järeldada, sest kaasus oli niivõrd lihtne, et isikud olid ennast võimelised ise kaitsma.[819] Reeglina nõuab

[817] Euroopa Inimõiguste ja Põhivabaduste Kaitse Konventsioon. – RT II 1996, 11/12, 34. Jõustunud Eesti suhtes 16. aprillil 1996.

[818] Engel and Others v. Netherlands. Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72. 8 June 1976, § 91.

[819] Kaasuses *Engel and Others* vs *Netherlands* oli arutlusobjektiks distsiplinaarasi, milles EIK kohaldas küll põhimõtteid, mis tema arvates kehtivad kriminaalmenetlusele, kuid leidis siiski, et asja lihtsuse tõttu ei olnud kaitsja osavõtt menetlusest kohustuslik. On võimalik

Kohus aga alati, et süüdistatava õigus kaitsjale oleks siseriiklikus menetluses tagatud.

Eesti Vabariigi põhiseaduse[820] § 21 lg 1 sätestab: „Igaühele, kellelt on võetud vabadus, teatatakse viivitamatult talle arusaadavas keeles ja viisil vabaduse võtmise põhjus ja tema õigused ning antakse võimalus teatada vabaduse võtmisest oma lähedastele. Kuriteos kahtlustatavale antakse viivitamatult ka võimalus valida endale kaitsja ja kohtuda temaga." Kõne all oleva paragrahvi kaitseala eristab kahte isikute gruppi: igaüht, kellelt on võetud vabadus, kaasa arvatud kuriteos kahtlustatavad, ja kuriteos kahtlustatavad. Seega on kuriteos kahtlustataval võrreldes igaühega lisaõigus viivitamata valida endale kaitsja ja kohtuda temaga.[821] Paragrahv 21 esimese lõike teine lause on ainus, mis käsitleb põhiseaduses kaitseõigust.[822] Riigikohtu põhiseaduslikkuse järelevalve kolleegium on rõhutanud, et põhiseaduse § 21 on reservatsioonita põhiõigus, mida võib piirata üksnes mõne muu põhiõiguse või põhiseadusest tuleneva väärtuse kaitseks.[823] Kuigi põhiseadus nimetab üksnes kahtlustatavat, on ainuvõimalik § 21 lg 1 tõlgendus selline, et õigus kaitsjale on ka süüdistataval. Süüdistatava õigus kaitsja abile on sätestatud kriminaalmenetluse seadustiku[824] (edaspidi KrMS) § 34 lg 1 p-s 3 ja § 35 lg-s 2 (kahtlustatava õigus kaitsja abile on sätestatud KrMS § 34 lg 1 p-s 3), millele vastab KrMS § 8 p-s 3 sätestatud uurimisasutuse, prokuratuuri ja kohtu kohustus tagada kahtlustatavale ja süüdistatavale kaitsja abi KrMS § 45 lg-s 2 sätestatud juhtudel[825] või kui ta seda taotleb. Riigikohtu kriminaalkolleegium on märkinud, et KrMS § 8 p-des 2 ja 3 rõhutatakse kriminaalmenetluse käigu eest vastutavate subjektide – uurimisasutuse, prokuratuuri ja kohtu kohustust tagada kaitseõigus. Sellega seoses tuleb järeldada, et kaitseõiguse tagamise põhimõte tähendab eeskätt kriminaalmenetluse käigu eest vastutavate ametiisikute ja nende kaudu riigi vastavat kohustust, mistõttu nõustuda ei saa seisukohaga, et kaitseõiguse tagatuse küsimus on vaid kaitsealuse ja tema kaitsja vahekorra küsimus.[826]

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arutleda, et selles otsuses toodud järeldused kehtivadki üksnes distsiplinaarasjadele, kuna kriminaalasju ei saa kunagi pidada nii lihtsaks, et seal ei oleks kaitsja osavõtt kohustuslik, kui süüdistatav seda nõuab.

[820] Eesti Vabariigi põhiseadus. – RT 1992, 26, 349; RT I, 27.04.2011, 2.

[821] Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne. Teine, täiendatud väljaanne, 2008, § 21 kommentaar 3.

[822] *Ibid.,* § 21 kommentaar 6.

[823] Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi 18. juuni 2010. a otsus kohtuasjas nr 3-4-1-5-10, p. 38.

[824] Kriminaalmenetluse seadustik. – RT I 2003, 27, 166; RT I, 14.03.2011, 35**.**

[825] Kõne all oleva sätte kohaselt on kaitsja osavõtt kogu kriminaalmenetlusest kohustuslik, kui isik on pannud kuriteo toime alaealisena; isik ei ole oma psüühilise või füüsilise puude tõttu suuteline ise end kaitsma või kui kaitsmine on selle tõttu raskendatud; isikut kahtlustatakse või süüdistatakse kuriteos, mille eest võib mõista eluaegse vangistuse; isiku huvid on vastuolus teise isiku huvidega, kellel on kaitsja; isik on viibinud vahi all vähemalt kuus kuud; kriminaalasja menetletakse kiirmenetluses.

[826] Riigikohtu kriminaalkolleegiumi 2. augusti 2010. a otsus kohtuasjas nr 3-1-1-61-10, p 10.1.

USA-s on õigus kaitsjale sätestatud konstitutsiooni[827] kuuendas paranduses, kuid USA Ülemkohus tunnustas esimest korda süüdistatavate õigust kaitsjale (seda küll ainult nende süüdistatavate puhul, keda võis karistada surmanuhtlusega) alles 1932. aastal.[828] Võttis veel kolmkümmend aastat ja 1963. aastal leidis Ülemkohus lõpuks, et igal süüdistataval, olenemata tema vastu esitatud süüdistusest ja konkreetsest kriminaalasjast, on konstitutsiooni kuuenda paranduse järgi õigus kaitsjale.[829]

Süüdistatava õigust kaitsjale tunnustab ka Euroopa Liit. Euroopa Liidu Põhiõiguste Harta,[830] mis tulenevalt artikkel 51 esimesest lõikest kehtib küll liikmesriikidele üksnes liidu õiguse kohaldamise korral, sisaldab kuuendat peatükki pealkirjaga „Õigusemõistmine". Selles peatükis oleva artikli 47 teise lõike teise lause kohaselt peab igaühel olema võimalus saada nõu ja kaitset ning olla esindatud. Artikli 48 teine lõige sätestab, et iga süüdistatava õigus kaitsele on tagatud. Kuigi Euroopa Liit ei ole veel jõudnud õigust kaitsele puudutava direktiivi väljatöötamiseni, mis tulenevalt Nõukogu poolt 30. novembril 2009 välja antud teekaardist[831] on meede C kahtlustatavate või süüdistatavate menetlusõiguste tugevdamiseks kriminaalmenetluses, on Euroopa Liidu institutsioonid korduvalt rõhutanud, et isiku õigus kaitsjale on äärmiselt oluline, kuna aitab kaasa sellele, et ka tema teised õigused on kriminaalmenetluses tagatud.[832]

Eelnevast nähtub, et süüdistatavate õigus kaitsjale on õigus, mis tuleneb nii põhiseadustest, rahvusvahelistest ja Euroopa Liidu õigusaktidest kui ka menetlusseadustikest. Üks peamisi põhjusi, miks süüdistatavatele peab õigus kaitsjale olema tagatud on see, mida on rõhutatud Euroopa Liidu tasemel – kaitsja osavõtt menetlusest aitab kaasa sellele, et süüdistatava teised õigused on tagatud. On ju reeglina süüdistatav tavaline inimene, kellel ei ole õiguslikku haridust, mistõttu ta ei ole teadlik õigustest, mis tal kriminaalmenetluses on, ja isegi kui ta on neist teadlik, ei pruugi ta olla võimeline neid kasutama. Kuid õigusel kaitsjale on ka teine väga oluline eesmärk – tagada võistlevas menetluses olukord, kus võistlevad pooled on oma oskustelt vähemalt enam-vähem võrdsed. Ei ole vist kellelgi kahtlust, et kui süüdistatav osaleks menetluses ilma kaitsjata, ei saaks tasakaalust reeglina juttugi olla, arvestades

[827] The Constitution of the United States of America. Online. Available: http://supreme.justia.com/constitution/, 29 April 2011.
[828] Powell v. Alabama, 287 U.S. 45 (1932).
[829] Gideon v. Wainwright, 372 U.S. 335 (1963).
[830] OJ C 83, 30.3.2010, p. 389–403.
[831] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings OJ C 295, 4.12.2009, pp. 1–3.
[832] Nt Green Paper from the Commission – Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union (19 February 2003, COM(2003) 75 final). Identifying the basic rights, 2.5., p. 14. Teekaardi meetme C lühikirjeldus: kahtlustatava või süüdistatava isiku õigus saada kriminaalmenetluse käigus õigusnõustamist menetluse nii varajases järgus kui vajalik on õiglase menetluse kindlustamise põhialus; õigus saada õigusabi peaks tagama õigusnõustamise tegeliku kättesaadavuse.

asjaolu, et süüdistatava vastas on professionaalne jurist – prokurör – kelle selja taga on omakorda riik oma praktiliselt ammendamatute ressurssidega. Seega on kaitsja ülesanne olla menetluses (ja eelkõige kohtumenetluses, sest just seal võisteldakse) süüdistatava kõrval, anda talle nõu, esitada asjakohaseid tõendeid, mis aitaksid kinnitada süüdistatava versiooni toimunust ja lükata ümber prokuröri väiteid. Ühesõnaga, kui rääkida süüdistavast poolest ja kaitsepoolest, siis viimase puhul lasub raskuspunkt just kaitsjal. Siit aga tõusetubki esimene küsimus, millele püüdsin oma töös vastata: mida õigus kaitsjale tegelikult tähendab, st milline on selle sisu?

Et õigus kaitsjale hõlmab kindlasti kaitsja osavõttu menetlusest, on igati loogiline: kaitsja puudumise korral ei saaks kuidagi rääkida sellest, et süüdistatavale on õigus kaitsjale tagatud. Seda saab järeldada ka kriminaalmenetluse seadustikus sätestatust – tulenevalt KrMS § 339 lg 1 p-st 3 on kriminaalmenetlusõiguse oluline rikkumine, kui kaitsja ei ole kohtumenetluses osalenud, kuigi kaitsja osavõtt oli kohustuslik.[833] Kriminaalmenetluse seadustiku § 341 lg 1 kohaselt toob see rikkumine kaasa maakohtu otsuse tühistamise ringkonnakohtu poolt ja kriminaalasja tagasisaatmise maakohtule uueks arutamiseks teises kohtukoosseisus. Lähtudes KrMS § 361 lg-st 2 peaks samamoodi toimima ka Riigikohus. Aga – üksnes kohalolekust ei piisa,[834] ütlevad ameeriklased, mistõttu on USA kohtupraktika kantud ideest, et süüdistatavatele peab olema tagatud efektiivne kaitse, ja võistleva menetluse valguses on neil igati õigus. Aktiivne isiku kaitseõiguste elluviimine, tema nõustamine, kohtule tema versiooni esitamine toimunust jne, need on kaitsja ülesanded, mida ei saa täita siis, kui kaitsja magab, ei tunne asja, on menetluses oma huvide eest väljas vms. Tulenevalt KrMS § 47 lg-st 2 on kaitsja kohustatud kasutama kõiki kaitsmisvahendeid ja -viise, mis ei ole seadusega keelatud, et selgitada kaitsealust õigustavad, mittesüüstavad ja karistust kergendavad asjaolud, ning andma talle muud kriminaalasjas vajalikku õigusabi. Sellist kohustust ei saa täita kaitsja, kes on ainult kohal. Seega hüpoteesid, mis ma oma töös olen püstitanud: et kohtute poolt teostatud järelevalve on võimalik ja vajalik meede efektiivse kaitse tagamiseks nii konkreetses asjas kui ka õigussüsteemis tervikuna ja et on võimalik kehtestada standard, mida kohtud saaksid kasutada, hindamaks, kas kaitsja on oma tööd teinud efektiivselt või mitte, on kantud veendumusest, et õigus kaitsjale tähendab midagi enamat kui

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[833] Alates 1. septembrist 2011 ei ole kaitsja osavõtt kohtumenetlusest enam kohustuslik, kui süüdistatav ei soovi kaitsjat, ta on kohtu hinnangul võimeline enda huve ise esindama ning soovib loobuda kaitsja osalemisest:
1) teise astme kuriteo kohtulikul arutamisel kokkuleppemenetluses;
2) kohtuotsuse kuulutamisel lihtmenetluses;
3) lühimenetluses kohtusse saadetud kriminaalasja menetluses, kui süüdistatav vastab käesoleva seadusega lepingulisele kaitsjale kehtestatud nõuetele ning esitab kohtule kirjaliku põhistatud taotluse lubada kaitsta end ise (KrMS § 45 lg 4 p-d 1–3).

[834] Vt nt William W. Schwarzer, *Dealing with Incompetent Counsel – the Trial Judge's Role,* 93 Harv. L. Rev. 633 (1979–1980), p. 637; Anders v. California, 386 U. S. 738 (1967), 386 U. S. 744; Holloway v. Arkansas, 435 U. S. 475 (1978), 435 U. S. 491.

kaitsja kohalolek. Selguse mõttes olen oma töös kasutanud kahte mõistet: õigus kaitsjale, mis tähendab kaitsja kohalolekut ja õigust efektiivsele kaitsjale, mis tähendab seda, et kaitsja peab tegema midagi rohkemat kui olema kohal. Vaatamata sellele olen seisukohal, et mis õigusaktides sätestatud õigust kaitsjale puudutab, siis see hõlmab ka õigust efektiivsele kaitsele. Vastasel juhul tekiks olukord, kus saaks väita, et õiguslikult on tagatud üksnes kaitsja kohalolek, mis aga ei ole aga arvestades kaitsja funktsioone võistlevas menetluses mõistlik ja süüdistatava huvisid arvestav.

Ka EIK-l on mitmetes lahendites tulnud tegeleda kaitse efektiivsuse küsimusega, mille käigus on EIK kaalunud seda, kas süüdistatavale garanteeritud õigus kaitsjale oli konkreetses asjas praktiline ja efektiivne või teoreetiline ja illusoorne,[835] kusjuures EIK ei hinda kaitse efektiivsust juhtudel, kus isikul on olnud määratud kaitsja, erinevalt võrreldes juhtudega, kus isikul on olnud lepinguline kaitsja.[836] Kohtu seisukoht on, et kui kaitsja ei ole ükskõik millistel põhjustel võimeline oma ülesandeid täitma, on siseriiklikul kohtul kohustus tegutseda – vahetada kaitsja välja või kohustada teda oma ülesandeid täitma.[837] Igal juhul ei tohi siseriiklik kohus sellises situatsioonis jääda passiivseks.[838] Kaasusest *Kamasinski* vs *Austria* nähtub siiski selgesti see, et EIK hoidub võimaluse korral kaitsja töö sisulise külje käsitlemisest. Nimelt väitis süüdistatav, et rikutud oli tema õigust kaitsja abile, tuues selle kinnituseks välja mitmed väited, sh tema hinnangul kaitsja ebarahuldava esinemise kohtuistungil. Viitega lahendile *Artico* vs *Italy* leidis EIK, et riiki ei saa pidada vastutavaks iga puudujäägi eest kaitsja töös. Ühtlasi leidis EIK, et riik peaks sekkuma üksnes siis, kui puudujääk kaitsja töös on silmanähtav või mingil muul viisil kohtule esitatud.[839] Üldiselt jääb EIK lahenditest mulje, et kohus on siiani pidanud kaitsja töö efektiivsuse küsimusse puutuvalt EIÕK artikli 6 lõike 3 punkti c rikkumiseks üksnes selliseid olukordi, kus kaitsja ei ole üldse mingit ülesannet täitnud või kaitseülesannete täitmine tema poolt oli oluliselt takistatud.[840] Muudel juhtudel peab kohus aga kaitsjate töö sõltumatusele viidates paremaks

[835] Artico v. Italy. *Application no. 6694/74.* 13 May 1980; Goddi v. Italy. *Application no. 8966/80.* 9 April 1984; Kamasinski v. Austria. *Application no. 9783/82.* 19 December 1989; Daud v. Portugal. *Application no. 22600/93.* 21 April 1998, Czekalla v. Portugal. *Application no. 38830/97.* 10 October 2002.

[836] Vaadakem või kahte põhjapanevamat EIK lahendit ebaefektiivse kaitse valdkonnas – *Artico* vs *Italy* ja *Goddi* vs *Italy*. Kui hr Articol oli määratud kaitsja, siis hr Goddil oli lepinguline kaitsja. Mõlemal juhul vaagis EIK kaitse ebaefektiivsust samade põhimõtete järgi.

[837] Artico v. Italy, § 33.

[838] Sannino v. Italy. *Application no. 30961/03.* 27 April 2006, § 51.

[839] Kamasinski v. Austria, § 65.

[840] Kaasuses *Artico* vs *Italy* keeldus kaitsja süüdistatavale õigusabi osutamisest. Kaasuses *Goddi* vs *Italy* ei ilmunud kaitsja kohtuistungile. Kaasuses *Daud* vs *Portugal* ei osutanud esimene määratud kaitsja isikule üldse õigusabi, teine aga ei valmistanud kohtuistungiks ette. Kõigil juhtudel leidis EIK, et tegemist on EIÕK artikkel 6 lõige 3 punkti c rikkumisega, aga kõigil juhtudel oli samas tegemist olukorraga, kus kaitsja oli teatud ülesande üldse tegemata jätnud.

kaitse efektiivsust mitte hindama hakata.[841] Igal juhul ei ole EIK tuvastanud EIÕK artikkel 6 lõike 3 punkti c rikkumist üksnes süüdistatava väite tõttu, et kaitsja on küll üldises plaanis oma ülesanded täitnud, kuid ei ole mõnda oma ülesannet täitnud kvaliteetselt. Märkusena olgu öeldud, et viide kaitsja sõltumatusele ei ole kindlasti asjakohatu ja ka siseriiklikud kohtud peaksid seda põhimõtet kindlasti arvesse võtma. Kuigi Eesti kriminaalmenetluse seadustik ei sätesta kaitsja sõltumatust, on ometi ilmne, et kaitsja tegutseb kriminaalmenetluses oma kaitsealuse huvides ja ei ole vastaspoole ega kohtu dikteerida, kuidas kaitsja oma ülesandeid täidab. Kuivõrd enamik kriminaalmenetluses osalevaid kaitsjaid on Eestis advokaadid,[842] on põhjust kaitsja sõltumatuse definitsiooni otsida advokatuuriseadusest (edaspidi AdvS).[843] Advokatuuriseaduse § 43 lõike 1 kohaselt on advokaat õigusteenust osutades sõltumatu ning juhindub seadustest, advokatuuri organite õigusaktidest ja otsustest, advokaadi kutse-eetika nõuetest ning headest kommetest ja südametunnistusest. Kuna Eesti kriminaalmenetlus baseerub kahe võrdse poole vahelisel võistlusel, mille alusel langetab erapooletu kohus otsuse, võib järeldada, et selleks, et menetlus oleks aus ja õiglane, nagu seda nõuab KrMS § 339 lg 1 p 12, kehtib advokatuuriseaduses tooduga sarnane sõltumatuse põhimõte kõigi kriminaalmenetluses osalevate kaitsjate (ja loomulikult ka prokuröride) kohta.

EIK ettevaatlik lähenemine kaitsja efektiivsuse sisulisele hindamisele on mõistetav – kaitsjad on tõepoolest sõltumatud oma ametialases tegevuses ja kohtumenetluse poolena on neil õigus langetada otsuseid, ilma et teised kohtumenetluse pooled või kohus sellesse sekkuks. Pealegi, EIK poole ei saa süüdistatav pöörduda otse oma kaitsja vastu, vaid ta peab viitama riigi tegematajätmisele. Selleks aga, et jaatada riigi vastutust ebaefektiivse kaitse korral, tuleb esmalt tunnustada riigi kohustust tegutseda, mis võistleva kohtumenetluse kontekstis tähendab seda, et kohus, kes kannab neutraalse otsustaja rolli, saab endale pädevuse sekkuda sõltumatu poole tegevusse. On selge, et selline kohtu käitumine läheb mõningasse konflikti võistleva menetluse põhimõtetega. Teiselt poolt tähendaks riigi vastutuse eitamine seda, et ebaefektiivne kaitse tema suhtes läbi viidud menetluses jääb heastamata.[844] Sestap tuleb tõdeda, et kuigi tuleb tunnustada kaitsjate sõltumatuse põhimõtet, on kokkuvõttes just riik see, kes esitab isikule süüdistuse, viib tema suhtes läbi kohtumenetluse ja viimaks mõistab talle karistuse, milleks võib olla ka vabadusekaotus, mis tähendab seda, et riik on see, kellel lasub kohustus tagada

[841] EIK tõi kaitsjate elukutse sõltumatuse esimest korda välja kaasuses *Goddi* vs *Italy* ning on alates selles otsusest rõhutanud kaitsjate sõltumatuse põhimõtet korduvalt.

[842] Tulenevalt KrMS § 42 lg 1 p-st 1 võib lepinguliseks kaitsjaks olla advokaat ja teised KrMS § 41 lg-s 4 sätestatud haridusnõuetele vastavad isikud menetleja loal. Määratud kaitsjaks võib KrMS § 42 lg 1 p 2 kohaselt olla üksnes advokaat. Kuigi käesoleva ajani ei ole avaldatud statistikat selle kohta, kui palju kriminaalmenetlusi toimub advokaadist kaitsja osavõtul ja kui palju nö muu kaitsja osavõtul, julgen oma kogemuse põhjal siiski väita, et enamalt jaolt on kriminaalmenetluses kaitsjaks advokaadid.

[843] Advokatuuriseadus. – RT I 2001, 36, 201; RT I, 14.03.2011, 24.

[844] Ed Cape et al., Effective Criminal Defence in Europe (2010), p. 59.

selle menetluse kvaliteet, mida ta süüdistatava suhtes läbi viib. Seetõttu olen seisukohal, et asjaolu, et EIK ei pruugi ebaefektiivset kaitset tunnistada konventsiooni rikkumiseks, ei vähenda riigi kohustust efektiivne kaitse süüdistatavatele tagada. Sellest tõdemusest olen lähtunud ka käesoleva töö kirjutamisel.

Seega, olgu kaitsjad oma töös nii sõltumatud kui tahes, peab teatud kontroll nende tegevuse üle siiski võimalik olema seetõttu, et süüdistatava õigus kaitsjale ei taanduks kaitsja kohaloleku kriteeriumiks. Kohtulik kontroll on konkurentsi kõrval üks olulisemaid ebaefektiivse kaitse vähendamise mehhanisme. Kohus juhib menetlust ja omab vahetut ülevaadet kaitsja tegevusest ja seetõttu ka kiiret võimalust ebaefektiivsele kaitsele reageerida. Seejuures võib kohtu kontrolli kaitsja tegevuse üle jagada jooksvaks kontrolliks ja järelkontrolliks. Jooksva kontrolli all pean silmas kohtu võimalust esitada ebaefektiivset tööd tegevale kaitsjale asjakohaseid tähelepanekuid ja järelepärimisi kuni selleni välja, et kohtul on võimalik ebaefektiivne kaitsja menetlusest taandada. Järelkontrolli teostab kohus süüdistatava taotlusel eelkõige apellatsiooni- või kassatsioonimenetluses ja selle tulemus võib olla alama astme kohtu otsuse tühistamine ebaefektiivse kaitse tõttu ning süüdistatavale uue menetluse võimaldamine (erandjuhtudel ka kohe uue otsuse, nt õigeksmõistva otsuse tegemine). Käesolevast tööst olen välja jätnud kaitsjate tsiviilvastutuse ja advokaatide distsiplinaarvastutuse kui kriminaalmenetlusvälise järelkontrolli, ja seda järgmistel põhjustel.

Tsiviilvastutuse suurimaks puuduseks peetakse seda, et see ei muuda kriminaalmenetluse tulemust. Tõepoolest, rahaline kompensatsioon ei muuda seda, et süüdistatava suhtes läbi viidud menetlus oli ebaõiglane, ja mis veelgi hullem – et tema suhtes tehtud süüdimõistev kohtuotsus võib olla ebaõige.[845] Lisaks tuleb arvestada, et võimalus, et süüdistatav kunagi hiljem pöördub (kui üldse pöördub) tsiviilkohtu poole, on kriminaalmenetluse toimumise ajal niivõrd ähmane, et see ei pruugi mõjutada kaitsja(te) käitumist.

Ka distsiplinaarvastutusel on reeglina sama puudus, mis tsiviilvastutuselgi, olgugi et kui süüdistatav pöördub advokatuuri pädeva organi poole, võib juhtuda, et ebaefektiivsele kaitsele reageeritakse kriminaalmenetluse jooksul – näiteks heidetakse advokaat karistuseks advokatuurist välja, mis tähendab, et süüdistatav saab endale uue kaitsja, või juhul kui advokaadi suhtes kohaldatakse mõnd teist karistust, võib juhtuda, et see mõjutab teda edaspidi menetluses efektiivselt tegutsema. Igal juhul tuleb arvestada, et advokatuurile kui teatud isikuid ühendaval institutsioonile on igati loomupärane oma liikmeid kaitsta, mis võib viia selleni, et ebaefektiivse kaitse kaebusele ei reageerita

[845] Schwarzer, *Dealing with Incompetent Counsel – the Trial Judge's Role,* 633, p. 649; Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims,* 92 Cornell L. Rev. 679 (2006–2007), p. 700; Jay William Burnett & Catherine Greene Burnett, *Ethical Dilemmas Confronting a Felony Trial Judge: To Remove Or Not to Remove Deficient Counsel,* 41 S. Tex. L. Rev. 1315 (1999–2000), p. 1353; Asher D. Grunis, *Incompetence of Defence Counsel in Criminal Cases Articles and Addresses,* 16 Crim. L. Q. 288 (1973–1974), p. 289.

adekvaatselt.[846] Ka on oluline, et lepinguliseks kaitsjaks võib Eestis olla mitte-advokaadist kaitsja, mis tähendab seda, et sellest inimesest läheb distsiplinaarvastutus täiesti mööda. Ja viimaks, kui panna ennast ebaefektiivse kaitsjaga süüdistatava olukorda, siis distsiplinaarkaristus on veelgi vähem tulemust andev kui tsiviilvastutus: kui tsiviilmenetluse tulemuseks võib olla rahaline kompensatsioon, siis distsiplinaarvastutus tähendab üksnes seda, et advokatuuri pädev organ järeldab, et advokaat ei täitnud oma kohustust ja seetõttu tuleb tema suhtes kohaldada karistust.

Kui rääkida täpsemalt kohtulikust kontrollist, mida käsitlen põhjalikult käesoleva töö neljandas peatükis, siis tuleb tõdeda, et kaitse ebaefektiivsuse kaebuse esitamise võimalus pärast kohtuotsuse tegemist kõrgemale kohtule ei pruugi süüdistatava kaitseõigust tagada, kuna võib osutuda süüdistatava jaoks liiga suureks koormaks.[847] Juba ainuüksi etteantud tõendamisstandard võib määrata ära selle, et on peaaegu võimatu kaitseõiguse rikkumise kaebuse esitamisel edu saavutada. Teiseks ei pruugi kriminaalasja materjalid anda kaebust lahendavale kohtule piisavalt informatsiooni kaitsja tegevuse kohta kohtumenetluse käigus.[848] Kolmandaks tekib küsimus, kes selle kaebuse esitama peaks. Ringkonnakohtule saab Eestis kaebuse esitada süüdistatav ise, kuid Riigikohtule võib süüdistatav kaebuse esitada KrMS § 344 lõike 3 punktist 2 lähtudes üksnes advokaadist kaitsja vahendusel. See tekitab aga omakorda probleeme, kuivõrd võib oletada, et arvestades, et kaitsjad eelistavad ka edaspidi vähemalt mingil määral tööalaselt normaalseid suhteid säilitada, ei ole nad teab kui varmad üksteise peale kaebama. Ja isegi kui süüdistatav valib ringkonnakohtusse kaebust esitades võimaluse esitada kaebus ise, vältimaks kahe kaitsja vahel tekkida võivaid vastuolusid, siis ei ole üldse kindel, kas ta juriidilise hariduseta inimesena suudab asjakohased aspektid kõrgema kohtu jaoks välja tuua. Lisaks tuleb arvestada, et isegi kui kaitsja on menetluse jooksul teinud vigu, on alama astme kohtu otsuse tühistamine ja kriminaalasja uueks arutamiseks saatmine alati põhjalikku kaalumist vajav otsustus, kuivõrd uus protsess tähendab uusi kulutusi, riivab õiguskindluse põhimõtet ning garanteeritud ei ole, et tõendite kvaliteet on säilinud (nt tunnistajad võivad olla nähtu unustanud).[849] Kui tegemist on kaitsja veaga, mis oleks pidanud olema teada ka

[846] Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims,* 679, p. 700.

[847] Galia Benson-Amram, *Protecting the Integrity of the Court: Trial Court Responsibility for Preventing Ineffective Assistance of Counsel in Criminal Cases,* 29 N. Y. U. Rev. L. & Soc. Change 425 (2004–2005), p. 451.

[848] Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronic's Call to Presume Prejudice from Representational Absence,* 76 Temp. L. Rev. 827 (2003), p. 841; Richard Klein, *Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform, the,* 29 B. C. L. Rev. 531 (1987–1988), p. 566; Donald A. Dripps, *Ineffective Litigation of Ineffective Assistance Claims: Some Uncomfortable Reflections on Massaro v. United States,* 42 Brandeis L. J. 793 (2003–2004), p. 803.

[849] Bruce A. Green, *Judicial Rationalizations for Rationing Justice: How Sixth Amendment Doctrine Undermines Reform Colloquium: What does it Mean to Practice Law in the*

menetlust juhtinud kohtule, võib öelda, et reageerimine alles kõrgema kohtu tasandil on vastutustundetu ressursside raiskamine, kuna asja menetlev kohus oleks saanud ise kaitsja käitumist korrigeerida. Mõistetavalt on otstarbekam, kui kohus saab kaitsja ebaefektiivsele tööle reageerida koheselt menetluse käigus.

Põhimõtteliselt on kohtul, kes näeb pealt ebaefektiivset kaitset enda juhitud menetluses, kolm võimalust – ta kas jääb neutraalseks ja tegevusetuks, nagu ühele võistlevas menetluses menetlust juhtivale kohtule peaks idee järgi justkui kohane olema, võtab üle kaitsja ülesanded, mis tähendab seda, et kohtunik ja kaitsja on menetluses üks ja seesama isik, või suunab kaitsja kui kohtumenetluse poole käitumist, ise samal ajal tema positsiooni üle võtmata. Esimene ja teine võimalus on võistleva menetluse põhimõtteid arvestades vastuvõetamatu – igal juhul kaob võistlevale menetlusele klassikaliselt omane kolmnurk – süüdistus, kaitse ja otsustaja: esimesel juhul kaitsja ja teisel juhul kohtunik. Seega jääb üle üksnes kolmas võimalus, mis otseselt tunnustab kohtu kui menetluse juhi rolli kriminaalmenetluses. Edasi tekib loomulikult küsimus, kuidas kohus kaitsja käitumist suunama peaks, et ei tekiks olukorda, kus kohus sekkub kaitsja sõltumatusesse liialt või võtab kaitsja rolli üle.

Ühelt poolt ei keela miski kohtul teha kaitsjale menetluse käigus teatud ettekirjutusi – kohustada teda kriminaalasja materjalidega tutvuma, süüdistatavaga nõu pidama jne. Kriminaalmenetluse seadustiku § 273 lg-s 4 on kaitsja kohustus ennast kriminaalasjaga kurssi viia eraldi väljagi toodud. Nimelt võib kohus kohtuistungi kuni kümneks päevaks edasi lükata ning panna istungi edasilükkamisest tingitud kriminaalmenetluse kulud kaitsja kanda, kui kaitsja ei tunne kriminaalasja. Veelgi olulisem kohustus on loomulikult kohtuistungil osalemise kohustus, mis tuleneb KrMS § 270 lg-st 2. Alates 1. septembrist 2011 lisandus kriminaalmenetluse seadustiku KrMS § 267 lg 4^1, mis lubab kohtul kõrvaldada kaitsja menetlusest, kui isik ei ole võimeline kohtus nõuetekohaselt esinema või on kohtumenetluses näidanud end ebaausana, asjatundmatuna või vastutustundetuna, samuti kui ta on pahatahtlikult takistanud asja õiget ja kiiret menetlemist või jätnud korduvalt täitmata kohtu korralduse. Mida see säte täpselt tähendab, on selgusetu, kuna eelnõu seletuskirjas ei ole märgitud midagi muud, kui et sätte eesmärk on tagada võistlevas menetluses kohtusse saadetud kriminaalasjade tõhus ja kiire arutamine.[850] Paigutatud on see lõige paragrahvi 267, mille peakiri on „Kohtuistungi korda rikkuva isiku suhtes võetavad meetmed". Arvestades seda, et KrMS § 267 lg 4^2 näeb ette, et kohus teeb viivitamata kohtumenetluse poolele ettepaneku valida endale uus kaitsja, paistab olemuslikult tegemist olevat lepingulise kaitsja taandamist lubava sättega, kuigi KrMS § 55, kus on sätestatud kõik kaitsja taandamise, sh ebakompetentse määratud kaitsja taandamise alused, seda alust lisatud ei ole. Kuigi ma ei ole iseenesest vastu, et kohtule on antud pädevus ebakompetentne lepinguline

Interests of Justice in the Twenty-First Century, 70 Fordham L. Rev. 1729 (2001–2002), p. 1730.

[850] Kriminaalmenetluse seadustiku muutmise ja sellega seonduvalt teiste seaduste muutmise seaduse eelnõu seletuskiri. 599 SE, XI Riigikogu koosseis.

kaitsja taandada, taunin niivõrd olulise pädevuse andmist kohtule ilma, et eelnevalt oleks ühiskonnas toimunud põhjalik arutelu. Ei maksa unustada, et ebaefektiivse kaitsja taandamisega saab kohus sisuliselt võimaluse eemaldada menetlusest ka selline kaitsja, kes ei ole kohtule mingil põhjusel meelepärane (nt kaitseb süüdistatava õigusi liiga aktiivselt ja on kohtunikule n-ö ebamugav). Seetõttu peaks kohtule vastava pädevuse andmisele eelnema põhjalik arutelu, millised on ebaefektiivse kaitse tunnused, milline kohtu kohustus enda otsustust põhjendada, milline on kaebevõimalus, st kõik, mis puudutab kohtute poolset kuritarvituste vältimist. Seda arutelu ei toimunud enne ebakompetentse määratud kaitsja taandamise aluse sissetoomist kriminaalmenetluse seadustikku ega toimunud ka nüüd. Ja ei maksa unustada, et on neidki, kes leiavad, et süüdistatava poolt valitud kaitsja taandamine on niivõrd radikaalne sekkumine süüdistatava õigusesse valida endale kaitsja, et see ei tohiks üldse lubatud olla. Ka selle lähenemise pooldajatele peaks enne vastava kohtu pädevuse menetlusreeglitesse sisseviimist andma võimaluse oma argumente esitada.

Aga nagu ma juba mainisin, arutelude korraldamine enne kohtule pädevuse andmist süüdistatava ja kaitsja vahelisse suhtesse sekkumiseks paistab Eesti seadusandjale üldse põhimõtteliselt vastumeelne olevat. Nimelt tuleneb 1. jaanuaril 2010 jõustunud riigi õigusabi seaduse[851] (edaspidi RÕS) § 20 lg 3^1 esimesest lausest (taandamisaluse enda annab KrMS § 55 lg 1), et kohus kõrvaldab riigi õigusabi saaja taotlusel või omal algatusel määrusega advokaadi riigi õigusabi osutamisest, kui advokaat on end näidanud asjatundmatuna või hooletuna. 1. jaanuarist 2009 kuni 1. jaanuarini 2010 kehtinud redaktsioon nõudis kaitsealuse nõusolekut kaitsja taandamiseks, kuid nüüd süüdistatava nõusolekut enam ei nõuta. Kuigi võib arvata, et sellise muudatusega püüti reguleerida situatsioone, kus süüdistatav ei pruugi ise aru saada kaitsja töö ebaefektiivsusest või ta saab, kuid teatud põhjustel siiski kaitsja taandamist ei nõua, ei ole eelnõu seletuskirjas tehtud muudatust siiski kommenteeritud.[852] Ka seda, mida hooletus ja asjatundmatus tähendavad, ei ole siiani veel kusagil lahti seletatud.

Kõik eelnev tähendab kohtu võimalust sekkuda alles siis, kui ebaefektiivne kaitse on juba aset leidnud. Ameerika Ühendriikides on leitud, et tagantjärgi reageerimine pole just kõige otstarbekam, ning seal on tehtud ettepanek anda kohtule võimalus ka ennetavaks kontrolliks. Esiteks peavad USA kolleegid tähtsaks kohtunikupoolset selgitustööd: kohtunik peaks juba enne kohtumenetluse algust rääkima kaitsja ja süüdistatavaga, selgitamaks neile, milline on kaitsja funktsioon kriminaalmenetluses.[853] Kohtunik William W. Schwarzer on

[851] Riigi õigusabi seadus. – RT I 2004, 56, 403; RT I, 14.03.2011, 16.

[852] Advokatuuriseaduse ja sellega seonduvate seaduste muutmise seaduse eelnõu seletuskiri. 253 SE, Riigikogu XI koosseis.

[853] Peter W. Tague, *Attempt to Improve Criminal Defense Representation, the,* 15 Am. Crim. L. Rev. 109 (1977–1978), p. 161; J. Eric Smithburn & Theresa L. Springmann, *Effective Assistance of Counsel: In Quest of a Uniform Standard of Review,* 17 Wake Forest L. Rev. 497 (1981), p. 522. Isikuga, kes on korduvalt menetluses kaitsja olnud, ei ole siiski arvatavasti mõtet iga kord uuesti vestelda.

USA-s soovitanud kohtuistungieelset intervjuud.[854] See toimub tema nägemuse kohaselt selliselt, et enne kohtumenetluse algust kutsub kohus kaitsja enda juurde ning palub tal selgitada, millised on tema poolt süüdistatava kohtus kaitsmiseks tehtud ettevalmistused. Enne seda küsib kohus süüdistatavalt, sealjuures eelistatavalt nelja silma all, sest kaitsja kohaloleku puhul ei pruugi süüdistatav oma tõelist arvamust avaldada, kas ta on rahul kaitsja senise ja planeeritava tööga. Sellist lähenemist saab kasutada nii lepingulise kui ka määratud kaitsja puhul. Kui ollakse mures selle üle, et kohtunik saab teada infot, mida ta asja otsustajana ei peaks teadma, on võimalus, et intervjuu korraldab teine kohtunik või hoopis kohtuteenistuja.[855] Intervjuu eelis on, et see annab võimaluse saada nii teavet kui ka fikseeritud materjale selle kohta, mida kaitsja tegi ning miks ta teatud samme ei ole ette võtnud.[856] Intervjuud on soovitatud ka kokkuleppemenetluse korral,[857] kuna kokkuleppemenetluse olemusest lähtuvalt peaks kaitsja olema enne selle menetlusliigi süüdistatavale soovitamist ja enne ise sellega nõustumist veendunud, et just kokkuleppemenetlus tagab süüdistatava jaoks soodsaima tulemi. Seda saab kaitsja aga teada üksnes siis, kui ta on ennast kriminaalasja faktide ja kohaldatava õigusega piisavalt kurssi viinud, mida saabki kohtunik intervjuu käigus kontrollida.

Teine võimalus, mis ei ole niivõrd aega ja muid ressursse nõudev, on nn kontrollnimekirja süsteem. Kaitsjal tuleb täita kohtu poolt antud küsimustik selle kohta, mida ta on teinud ja mida mitte ning mida tal on veel plaanis teha. Süüdistataval on sellisel juhul võimalus kaitsja poolt täidetud küsimustik üle vaadata ning kui ta millegagi nõus ei ole, pöördub ta kohtuniku poole, millele järgneb juba vestlus süüdistatava ja kaitsjaga. Kui tal aga kaitsja poolt kirjeldatu osas vastuväiteid ei ole, ei edastata küsimustikku kohtunikule. Täidetud küsimustiku abil on võimalik lahendada ka hilisemad, pärast isiku süüdimõistmist esitatud ebaefektiivse kaitse kaebused.[858]

Käesolevas töös väljendan toetust just viimasele lähenemisele, kuna see ei ole niivõrd ressurssinõudev kui intervjuu ning kohtunik ei sekku sellisel juhul niivõrd intensiivselt süüdistatava ja kaitsja suhtesse, kui ta teeb intervjuu käigus. Lisaks sellele on Eesti selles suunas juba liikunud – alates 1. septembrist 2011 on kaitsjal pärast süüdistusakti koopia saamist kohustus hiljemalt kolm tööpäeva enne eelistungit kohtule esitada kaitseakt ning prokuratuurile selle

[854] Schwarzer, *Dealing with Incompetent Counsel – the Trial Judge's Role,* 633.

[855] Klein, *Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform, the,* 531, p. 581.

[856] Tague, *Attempt to Improve Criminal Defense Representation, the,* 109, p. 162; Barbara R. Levine, *Preventing Defense Counsel Error – an Analysis of some Ineffective Assistance of Counsel Claims and their Implications for Professional Regulation,* 15 U. Tol. L. Rev. 1275 (1983–1984), pp. 1433–1434.

[857] *Ibid*., p. 1434.

[858] Tague, *Attempt to Improve Criminal Defense Representation, the,* 109, p. 164. Siin tuleb muidugi välja tuua ka kontrollnimekirja peamine puudus – süüdistatav ei pruugi teada, mida ta oma kaitsjalt ootama peaks ning ei avalda seetõttu rahulolematust kaitsja poolt üleskirjutatu kohta. Sellisel juhul aga võib kohtul jääda sekkumata, kuigi objektiivselt oleks situatsioon seda nõudnud.

koopia (KrMS § 227 lg 1). Kaitseaktis märgitakse, millised on kaitse seisukohad süüdistuse ning süüdistusaktis nimetatud kahju kohta, sealhulgas millised süüdistusaktis esitatud väited ja seisukohad vaidlustatakse ja millised võetakse omaks; tõendid, mida kaitsja soovib kohtule esitada, viidates, millist asjaolu millise tõendiga tõendada soovitakse; nende isikute nimekiri, kelle kutsumist kohtuistungile kaitsja taotleb ning kaitsja muud taotlused (KrMS § 227 lg 3 p-d 1–4). Seega annab kaitseakt mingil määral ülevaate sellest, mida kaitsja on juba menetluses ära teinud ja mida ta plaanib veel teha. Vastavalt eelnõu seletuskirjale aitab kaitseakti koostamise kohustus paremini tagada poolte võrdsuse kohtumenetluses ning võimaldab ühtlasi viia kohtuliku menetluse läbi senisest ettevalmistatumalt ja seega kiiremini.

Kui kaitsja ei ole kohtumenetluses oma tööülesandeid kompetentselt täitnud ja süüdistatav ise või kohus ei ole sellele mingil põhjusel alama astme kohtus toimunud menetluse vältel reageerinud, oli Eestis süüdistataval võimalik vaidlustada alama astme kohtu otsus apellatsiooni- ja kassatsioonikorras enne 1. septembrit 2011 KrMS § 339 lõike 2 alusel, nüüd eelduslikult KrMS § 339 lg 1 p 12 alusel. Tulenevalt viimasena nimetatud sättest on kriminaalmenetlusõiguse oluline rikkumine, kui kohtulikul arutamisel on rikutud ausa ja õiglase kohtumenetluse põhimõtet. Eelnõu seletuskirjast nähtub, et ausa ja õiglase kohtumenetluse põhimõtte rikkumine peaks olema kriminaalmenetlusõiguse olulise rikkumisena seaduses eraldi välja toodud, kuna tegemist on kriminaalmenetluse keskse põhimõttega, mis on sätestatud ka EIÕK artikkel 6 esimeses lõikes. Kuni 1. septembrini 2011 käsitas Riigikohus ausa ja õiglase menetluse põhimõtte rikkumist olulise menetlusõiguse rikkumisena KrMS § 339 lg 2 tähenduses.[859] Käesoleval ajal sätestab KrMS § 341 lg 3, et tuvastades KrMS § 339 lg 1 p-s 12 nimetatud kriminaalmenetlusõiguse olulise rikkumise, mida ei ole võimalik apellatsioonimenetluses kõrvaldada, tühistab ringkonnakohus kohtuotsuse ja saadab kriminaalasja maakohtule uueks arutamiseks samas või teises kohtukoosseisus. Lähtudes KrMS § 361 lg-st 2 peaks samamoodi toimima ka Riigikohus. Kui ebaefektiivne kaitse on kõrgema kohtu arvates toonud kaasa isiku ebaõige süüdimõistmise või liiga raske karistuse, peaks lähtuvalt menetluse efektiivsuse põhimõttest kõrgem kohus ise õigeksmõistva kohtuotsuse ära tegema või mõistma süüdistatavale kergema karistuse, sest sellisel juhul on ebaefektiivse kaitsega tekitatud kahju süüdistatavale võimalik heastada ilma, et alamas astmes tuleks menetlust korrata.

Arvestades asjaolu, et kohtuotsuse tühistamine ning uue menetluse võimaldamine toob endaga kaasa täiendavad kulutused ja riivab tugevalt õiguskindluse põhimõtet, tekib õigustatult küsimus, millisel juhul tuleks alama astme kohtu otsus tühistada ebaefektiivse kaitse korral ehk Eesti seadustiku mõisteid kasutades – millisel juhul on tegemist kriminaalmenetlusõiguse olulise rikkumisega (st ausa ja õiglase kohtumenetluse põhimõtte rikkumisega)? Kas iga kaitsjapoolne ülesannete täitmata jätmine peaks kaasa tooma kohtuotsuse tühistamise? Sellele küsimusele on mitmeid erinevaid vastuseid.

[859] Riigikohtu kriminaalkolleegiumi 8. aprilli 2011. a otsus kriminaalasjas nr 3-1-1-19-11.

Näiteks USA-s said ebaefektiivse kaitse kaebused hoo sisse USA Ülemkohtu otsusega *Gideon* vs *Wainwright,* mis pani kohtud tõsiselt kaaluma seda, millal tuleks alama astme kohtu otsus tühistada. Siin tuleb eristada kahte aspekti. Esiteks saab rääkida kaitsja poolt tehtavatest vigadest, mis toovad kohtumenetluse käigus kaasa kohtu reageeringu, alustades märkustest ja lõpetades taandamisega, st vead, mille puhul me saame iseenesest rääkida ebaefektiivsest kaitsest. Teiseks saab rääkida standardist, mida kohtud kasutavad, otsustamaks, kas tühistada alama astme kohtu otsus, kui selgub, et kaitsja tegi sealses menetluses olulisi vigu. Lähtudes asjaolust, et kõrgema astme kohtu jaoks on kaalukausil nii süüdistatava kui ka õigussüsteemi huvid, tuleb ette, et isegi kui kõrgem kohus tuvastab, et kaitsja ei täitnud alama astme kohtus oma kohustusi nõuetekohaselt, st oli ebaefektiivne, ei pruugi sellest kõrgema kohtu jaoks piisata selleks, et õigustada kohtuotsuse tühistamist. Põhimõtteliselt tähendab see, et kõrgema kohtu jaoks on ebaefektiivse kaitse tõendamiseks vaja lisaks kaitsjapoolsete vigade äranäitamisele ka midagi muud, nt seda, et kaitsja vead mõjutasid menetluse tulemust. Selline standard on kaheastmeline. On standard üheastmeline, siis teatud kaitsjapoolsed vead (aga kindlasti mitte kõik, sest süüdistatav ei saa oodata perfektset kaitset[860]) tähendavad ebaefektiivset kaitset ja toovad automaatselt kaasa alama astme kohtu otsuse tühistamise. Kõige lihtsam on nimetatud kahe lähenemise erinevust selgitada USA Ülemkohtu praktika alusel.

Otsuses *Strickland* vs *Washington*[861] leidis Ülemkohus, et otsuse tühistamise toob kaasa see, kui kaitsja tegi oma tööd kvaliteediga, mis langes alla objektiivse mõistlikkuse taseme ja see mõjutas menetluse tulemust. Kohus rõhutas, et kaitsja ebaefektiivsuse kaebused tuleb lahendada juhtumipõhiselt ning et kindlasti tuleb välja selgitada ebapädeva töö kahjulik mõju. Kui kohus saab jätta kaebuse rahuldamata kahjuliku mõju puudumise tõttu, siis kaitsja tööle ei tulegi sisulist hinnangut anda. See Ülemkohtu otsus pani aluse kaheastmelise standardi kasutamisele selleks, et kindlaks teha, kas kaitsja tegevuse ebaadekvaatsus toob endaga kaasa alama astme kohtu otsuse tühistamise. Oluline on seejuures lisada, et USA kohtu praktika kohaselt peab mõlemad elemendid tõendama süüdistatav.

EIK, muide, erinevalt USA Ülemkohtust, ei nõua, et süüdimõistetu tõendaks ebaefektiivse kaitse kaebuse korral kahjustava elemendi olemasolu. EIK arvamuse kohaselt ei tähenda asjaolu, et süüdistatav ei kandnud mingit kahju seda, et tema õigust kaitsjale poleks rikutud.[862] Veelgi enam, kohus on märkinud, et Konventsiooni rikkumine tuleb kõne alla ka ilma selleta, et sellega

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[860] Delaware v. Van Arsdall, 475 U.S. 673 (1986), 475 U.S. 681.

[861] Strickland v. Washington, 466 U.S. 668 (1984).

[862] EIK ütles seda väga selgelt otsuses *Artico* vs *Italy*. Pisut arusaamatuks jääb lahendi *Artico* vs *Italy* kontekstis lahend *Alimena* vs *Italy.* (*Application no. 11910/85*. 19 February 1991). Siin kordas kohus küll *Artico* vs *Italy* lahendis toodud seisukohta, mille kohaselt ei ole süüdistataval vaja tõendada kahjustava elemendi olemasolu, kuid märkis siiski, et süüdistatav oli ilma jäetud õigusabist, mis oleks võinud aidata kaasa ta püüdlustele saavutada õigeksmõistev kohtuotsus.

oleks kaasnenud isiku jaoks kahjulik tagajärg. Kahjustav element on oluline üksnes EIÕK artikli 50 kontekstis.[863] Seega lähtub EIK erinevalt USA Ülemkohtust pigem üheastmelisest testist ning leiab, et kaitseõiguse rikkumine on võimalik ka sellisel juhul, kui kahjustav element puudub. Aga seejuures tuleb lisada, et EIK ei pea arvestama õiguskindluse põhimõttega, kuna erinevalt siseriiklikest kõrgema astme kohtutest ei otsusta EIK selle üle, kas alama astme kohtu otsus jääb jõusse või mitte: EIK üksnes järeldab Konventsiooni rikkumist, millele järgnevalt otsustab riik ise, kuidas EIK järeldusele reageerida.

Kahjustav element on see, mille tõendamise kohustus teeb *Strickland* vs *Washingtoni* kriitikutele suurt tuska. On neid, kes arvavad, et see element on põhimõtteliselt vastuvõetamatu ja on neid, kes leiavad, et õiguskindluse ja õigussüsteemi säästmise argumenti arvestades on see element igati vajalik, kuid lähtudes süütuse presumptsioonist peaks pigem prokurör tõendama selle elemendi puudumist kui süüdistatav selle olemasolu. Ülemkohus on ise teinud ebaefektiivse kaitse valdkonnas sellise mööndused, et kahjustava elemendi olemasolu eeldatakse juhul, kui kaitsja menetlusest puudus või tema tegutsemine oli takistatud[864] või kui kaitsjal oli huvide konflikt, millele menetlusosaline tähelepanu juhtis, kuid millele kohus ei reageerinud.[865] Need, kes eitavad põhimõtteliselt kahjustava elemendi kasutamise sobilikkust ebaefektiivse kaitse kaebuste lahendamiseks, leiavad, et õigus efektiivsele kaitsele on üks õiglase menetluse näitaja. See tähendab omakorda, et kui süüdistatavale pole menetluses tagatud efektiivset kaitset, pole tema suhtes läbi viidud menetlus olnud õiglane ja õiglane ei saa olla ka selle menetluse tulem isegi siis, kui saab väita, et uue menetluse läbiviimisel oleks tulemus tõenäoliselt seesama.[866] Rõhutatakse sedagi, et just võistlevas menetluses on kaitsja kui prokurörile võrdväärse vastase osavõtt äärmiselt oluline, mistõttu võib järeldada, et menetluse käik ja selle korrektsus on peaaegu et olulisemgi kui selle tulemus.[867]

Käesolevas töös toetan seisukohta, et raskemate rikkumiste korral ei tohiks kahjustava elemendi tõendamise nõue üldse kõne alla tulla, isegi kui selle olemasolu tõendamist ei nõuta süüdistatavalt, vaid selle puudumise tõendamist

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[863] EIÕK artikkel 50 sätestab: „Kui kohus leiab, et mõni Kõrge Lepinguosalise õigus- või muu võimu langetatud otsus või rakendatud abinõu on täielikult või osaliselt vastuolus konventsioonist tulenevate kohustustega ning kui osundatud lepinguosalise siseriiklik õigus lubab otsuse või abinõu läbi kahjustatule ainult osalist hüvitust selle otsuse või abinõu tagajärgede eest, võib kohus vajadusel oma otsusega määrata kahjustatud poolele õiglase hüvituse."

[864] United States v. Cronic, 466 U.S. 648 (1984).

[865] Holloway v. Arkansas.

[866] Martin C. Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims Notes and Comments,* 77 Geo. L. J. 413 (1988–1989), p. 440; Cape et al., *Effective Criminal Defence in Europe*, p. 4.

[867] Richard Ekins, *Defence Counsel Incompetence and Post-Conviction Relief: An Analysis of how Adversarial Systems of Justice Assess Claims of Ineffective Assistance of Counsel,* 9 Auckland U. L. Rev. 529 (2000–2003), p. 554; Richard L. Gabriel, *Stickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of due Process, the Comment,* 134 U. Pa. L. Rev. [1290] (1985–1986), p. 1266.

prokurörilt. Kui kaitsja on jätnud täitmata olulise kohustuse, ei ole kahjustav elemendi tõendamise nõue ebaefektiivse kaitse kaebuste lahendamiseks võistleva menetluse kontekstis sobiv. Kuna menetlust, kus tegutses kaitsja, kes rikkus oma olulist kohustust, ei saa pidada võistlevaks, siis ei ole otsus, millega menetlus kulmineerub, õiglase menetluse tulem. Seega ei ole kohane eraldi vaadata, millist mõju avaldas ebaefektiivne kaitse kohtuotsusele, mis välistab kahjustava elemendi kasutamise, ükskõik siis, kas sel viisil, et elemendi tõendamise kohustus on süüdistataval või selle puudumise tõendamise kohustus prokuröril. Käesoleva töö kuuendas peatükis toon rea kohustusi, mis minu arvates on niivõrd olulised, et nende rikkumine kaitsja poolt peaks automaatselt kaasa tooma alama astme kohtu otsuse tühistamise. Siiski on selge, et mitte iga kaitsja poolt tehtud viga ei saa kaasa tuua kohtuotsuse tühistamist ja uue menetluse võimaldamist süüdistatavale. Vastasel juhul oleksid ebaefektiivse kaitse kaebused õigussüsteemile liiga suureks koormaks, ja me justkui lähtuksime eeldusest, et inimene saab olla veatu, mis ei ole kuidagi kooskõlas tegelikkusega. Seetõttu pakun ma käesolevas töös lahenduse, mis seisneb selles, et ma toon välja minu hinnangul kõige olulisemad kohustused, mis lasuvad kaitsjal alati, olenemata sellest, millise kriminaalasjaga tegu on. Kui mõnda neist kohustustest on rikutud, saab järeldada, et kaitse on olnud ebaefektiivne, mis toob endaga kõrgema astme kohtu menetluses kaasa madalama astme otsuse tühistamise. Lisaks sellele on aga süüdistataval võimalik tõendada, et kaitsja jättis täitmata mõne teise, nimekirjas mitte toodud kohustuse. Sellisel juhul tõusetub teravalt vajadus kaitsta ressursside kokkuhoiu ja õiguskindluse põhimõtet, mistõttu otsus tuleks kohtul tühistada üksnes kahjustava elemendi olemasolu korral. Selleks et selline lähenemine ei oleks vastuolus süütuse presumptsiooniga, teen ettepaneku, et prokurör on see, kellel on kohustus tõendada kahjustava elemendi puudumist.

Nimekiri kaitsja olulisematest kohustustest on teema, mis on samuti USA-s palju arutelu tekitanud. Alustada tuleb sellest, et Ülemkohus sellist nimekirja Stricklandi lahendiga ei koostanud, mis tekitas umbes sama palju pahameelt kui kahjustava elemendi kasutamine. Kaitsetöö, mis „langeb alla objektiivse mõistlikkuse taseme“, on tõepoolest juhtnöör, millest ei ole kohtutele ebaefektiivse kaitse kaebuste lahendamisel teab kui suurt abi. Üldse jaguneb arvamus sellest, millise standardi alusel kaitsjate efektiivsust hinnata, USA-s kaheks. On nn kaasusepõhise otsustuse tegemise pooldajad ja etteantud nimekirja pooldajad. Vastasseis nende kahe lähenemise vahel kulmineerus ammu enne seda, kui Ülemkohus Stricklandi kaasuses oma arvamuse välja ütles.[868] Aasta oli siis 1976 ja ühe USA föderaalse apellatsioonikohtu ette jõudis juba kolmandat korda sama kaasus, milles vaidlus käis selle üle, kas süüdistatava kaitsja oli esimese astme kohtu menetluses ebaefektiivne või mitte. Esimesel korral võttis apellatsioonikohus konkreetse standardipõhise lähe-

[868] United States of America v. Willie DeCoster, Jr. No. 72-1283, 624 F.2d 196; 199 U.S. App. D.C. 359; 1976 U.S., October 19, 1976.

nemise, leides, et kaitsja efektiivsust saab hinnata ABA standardite[869] alusel. 1976. aastal tegi aga apellatsioonikohus *en banc* lahendi, milles leidis, et konkreetsete käitumisjuhendite kaitsjatele ettekirjutamine ei ole võimalik, kuivõrd iga menetlus on erinev. Lisaks rõhutas kohus seda, et ABA standardid on ühe eraorganisatsiooni välja töötatud käitumisjuhendid, mida ei ole kohtul kohane kaitsjate tegevuse hindamise aluseks võtta. Sarnasele seisukohale asus hiljem ka Stricklandi kohus, rõhutades seda, et kui üldse, siis ABA standardid saavad olla nn juhised, millest kohus võib, aga ei pea lähtuma. Kuigi lahendites *Williams* vs *Taylor*,[870] *Wiggins* vs *Smith*,[871] ja *Rompilla* vs *Beard*[872] pea kakskümmend aastat hiljem näis Ülemkohus astuvat sammu lähemale järeldusele, et ABA standardid ongi kaitsja töö kvaliteedi hindamise aluseks võetavad standardid, mis tekitas palju pahameelt USA Ülemkohtu konservatiivsemates kohtunikes, siis kauaks Stricklandi lahendi esimese elemendi kriitikutele siiski rõõmustada ei olnud antud – *Bobby* vs *Van Hook*[873] oli lahend, kus Ülemkohus pöördus ABA standardite staatuse küsimuses tagasi Stricklandi seisukohtade juurde. Seega on Ülemkohtu praegune seisukoht, et ABA standardid annavad üksnes juhtnöörid selle kohta, mida mõistlikkus kaitsetöö puhul tähendab, mitte ei ole mõistlikkuse definitsioon.

Ülemkohtu seisukohast võib aru saada. Advokatuur ei ole tõepoolest pädev organisatsioon otsustamaks, millal tuleks üks kohtuotsus tühistada ja millal mitte. Aga just sellise pädevuse omandaks advokatuur siis, kui kohtud hakkaksid kaitsja käitumise hindamisel lähtuma ainuüksi advokatuuri poolt oma liikmetele kehtestatud käitumisreeglitest. Sealjuures tuleb tähele panna, et kõik kaitsjad ei pruugi olla advokaadid (ja just Eestis see nii ongi – advokaatide kõrval leidub ka mitteadvokaatidest kaitsjaid) ja ebaefektiivse kaitse küsimuse otsustamine advokatuuri poolt kehtestatud käitumisreeglite järgi looks kummalise olukorra, kus mitteadvokaadid peaksid järgima käitumisreegleid, mis neile tegelikult ei kohaldu, kuna nad ei ole advokatuuri liikmed. Pealegi, advokaatide käitumisreeglite rikkumine toob advokaadile halvimal juhul kaasa distsiplinaarvastutuse, mitte ei tähenda kohtuotsuse tühistamist, mistõttu neid käitumisreegleid välja töötades ei ole keegi arvestanud vastuoluliste väärtustega, mida tuleb arvesse võtta tasandil uus menetlus vs õiguskindlus, mis annab omakorda aluse järeldada, et nii mõnedki käitumisreeglid, mille advokatuur on kehtestanud, on sellised, mis kohtuotsuse tühistamist kaasa tooma ei peaks.

Aga millega kaasusepõhise lähenemise pooldajad ei arvesta, on asjaolu, et kui kohtutel puudub kaitsja tegevuse efektiivsuse hindamiseks vastav juhtnöör, siis tulemused võivad kohtuti olla väga erinevad. See aga toob omakorda kaasa

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[869] Ameerika Advokaatide Ühenduse standardid. Üks olulisemaid standardeid on ABA Standards for Criminal Justice. Prosecution Function and Defense Function. Third Edition (1993).

[870] Williams v. Taylor, 529 U.S. 362 (2000).

[871] Wiggins v. Smith, Warden, et al. 539 U.S. 510 (2003).

[872] Rompilla v. Beard, 545 U.S. 374 (2004).

[873] Bobby v. Van Hook, 558 U. S. ____ (2009). Ka lahendis Padilla v. Kentucky, 559 U. S. ____ (2010) rõhutas ülemkohus, et ABA standardid on ainult juhtnöörid.

olukorra, kus sarnaste kaasuste lahendused ei pruugi olla sarnased, olukorra, mida peaks lähtudes võrdse kohtlemise põhimõttest püüdma vältida. Kas seda just täiesti ära hoida saab, on iseküsimus, kuid meelevaldseid lahendusi aitab kindlasti vähendada see, kui kohtud enam-vähem teavad, mida ühelt kaitsjalt menetluses nõudma peaks. Selline standard peaks olema kohtute ühine kokkulepe, mitte aga neile advokatuuri poolt ette kirjutatud nimekiri kaitsjate kohustustest kriminaalmenetluses. Seetõttu olengi käesolevas töös püstitanud hüpoteesi, et on olemas teatud kaitsjate kohustused, mis on universaalsed ja millest võib koostada standardi, mille alusel kohtud saavad kaitsjate töö efektiivsust hinnata. Mõningad kohustused peaksid seejuures olema sellised, mille täitmata jätmine on ebaefektiivne kaitse *per se* ja toob endaga kaasa kas taandamise või teatud eriti oluliste kohustuste täitmata jätmine ka kohtuotsuse hilisema tühistamise kõrgema kohtu poolt. Osad olulisematest kohustustest on aga minu arvates sellised, mille täitmata jätmist saab kaitsja põhjendada taktikaliste kaalutlustega, mis omakorda välistab kaitse ebaefektiivsuse ja kaitsja taandamise või otsuse tühistamise. Igal juhul tuleb aga arvestada asjaoluga, et iga kaasus on erinev,[874] mistõttu üks standard ei saa kunagi olla katus, vaid üksnes vundament.[875] Seega ei saa nimekiri kaitsja kohustustest, mille täitmata jätmine toob kaasa kaitsja taandamise või hiljem alama astme kohtu otsuse tühistamise, olla suletud. Ka siin tuleb arvestada, et nii mõnigi kord on nimekirjavälise kohustuse täitmata jätmine kaitsja kaalutletud otsus, mistõttu menetlust juhtival kohtul on igati mõistlik lasta kaitsjal oma kaalutlust selgitada[876] ja kui küsimus ebaefektiivsusest tõusetub apellatsioonitasandil, on prokurör see, kellel peaks olema võimalus tõendada, et kohustuse täitmata jätmine oli kaitsja mõistlik taktikaline otsustus. Seetõttu teen ettepaneku, et kui kaitsja on rikkunud kohustust, mida ei ole minu poolt toodud nimekirjas nimetatud, võib kohus kaitsja taandada pärast seda, kui kohus on järeldanud, et tegemist on kohustusega, mis on selles kriminaalasjas oluline ja kaitsja on andnud selgituse kohustuse mittetäitmise kohta, mida kohus ei ole pidanud rahuldavaks. Igal juhul lasub kohtul siinkohal ülesanne esitada üksikasjalikud põhjendused, kuna kohus viitab kaitsja kohustusele, mida ei ole nimekirjas. Kui süüdistatav väidab kaebuses alama astme kohtu otsuse peale, et kaitsja rikkus mõnda nimekirjavälist kohustust, on prokuröril võimalik tõendada seda, et kohustuse täitmatajätmine oli kaitsja mõistlik taktikaline otsustus. Lisaks sellele lisandub siin ka kahjustav element, mille eesmärk on tagada õiguskindluse põhimõtte austamine. Seega saab prokurör siin lisaks eelnevale ka tõendada, et kaitsjapoolne kohustuste rikkumine ei olnud süüdistatavale kahjulik, st et see ei

[874] William J. Genego, *Future of Effective Assistance of Counsel: Performance Standards and Competent Representation, the,* 22 Am. Crim. L. Rev. 181 (1984-1985), p. 206.
[875] Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims Notes and Comments,* 413, p. 442.
[876] *Ibid*., p. 441.

mõjutanud menetluse tulemust või ei kahjustanud süüdistatava õigusi menetluses.[877]

Töös tehtud analüüs näitas, et ei ole võimalik piirduda ühe standardiga, kuna kaitsja taandamine ja alama astme kohtu otsuse tühistamine on erineva ulatusega abinõud. Kui kaitsja taandamisega lõpetatakse advokaadi ja tema kaitsealuse vaheline suhe, siis kohtuotsuse tühistamine mõjutab oluliselt ressursside kokkuhoiu ja õiguskindluse põhimõtet. Seega jõudsin analüüsiga käesolevas töös kahe erineva nimekirjani kaitsja kohustustest – üks sisaldab selliseid kohustusi, mille rikkumine toob või võib kaasa tuua kaitsja taandamise ja teine selliseid, mille rikkumine toob kaasa või võib kaasa tuua (st juhul kui prokurör ei tõenda, et tegemist oli kaitsja taktikalise otsustusega) madalama astme kohtu otsuse tühistamise kõrgema astme kohtu poolt. Mõlemad nimekirjad on lahtised, nagu märkisin eelmises lõigus. Praktiline vajadus sellisele eristamisele on igati olemas, arvestades asjaolu, et üksnes otsuse tühistamine riivab õiguskindluse põhimõtet ja vaieldamatult toob see kaasa palju suurema ressursikulu kui menetluse kestel ühe kaitsja asendamine teisega. Loomulikult ei tohi kaitsja taandamine osutuda mugavaks tööriistaks kohtuniku käes ebameeldiva kaitsja taandamisel, mistõttu teen käesolevas töös ettepaneku, et kui kohus on ilma põhjuseta kaitsja taandanud viimase ebaefektiivsusele viidates, tuleks süüdistatavale anda võimalus uueks menetluseks koos endale meelepärase, varasemalt ebaefektiivsele kaitsele viidates taandatud kaitsjaga osalemiseks. Sellise võimaliku sanktsiooni olemasolu korral saaksid kohtunikud suurema tõenäosusega aru oma otsustuse tõsidusest ja põhjendamiskohustuse täitmise vajalikkusest, ning väheneks võimalus, et kohtunik oma positsiooni kuritarvitab.

Kui rääkida lühidalt põhjustest, miks kaitsjad oma kohustusi nõuetekohaselt ei täida, siis neid on mitmeid. Esiteks võib kaitsja olla lihtsalt halb jurist, teiseks võib kaitsja olla konkreetsel juhul võimetu tegutsema (nt haiguse, alkoholi tarvitamise või hõivatuse tõttu), kolmandaks võib kaitsjal olla liiga vähe aega või muud ressurssi, et asja ette valmistada, ja neljandaks võib seadus või kohus luua olukorra, milles kaitsja on võimetu tegutsema (nt liiga lühikesed menetlustähtajad).[878] Viiendana võiks välja tuua kaitsja motiveerituse, kuhu alla võib paigutada mitmeid märksõnu alates konkreetse asja atraktiivsusest kaitsja jaoks, lõpetades õiglase tasu saamisega.[879] Käesolevas töös toon välja järelduse, et ebaefektiivne kaitse peab saama olla kaitsja taandamise või kohtuotsuse tühistamise aluseks, olenemata sellest, milline on selle põhjus, kuid kuna ebaefektiivse kaitse põhjuseid on mitmeid, ei saa kohtu järeldusest, et kaitse on

[877] Käesolevas töös leian, et kahjustav element ei peaks hõlmama endast mitte üksnes kohtuotsuse, vaid ka süüdistatava menetlusliku positsiooni mõjutamise aspekti. Seda seetõttu, et võistlevas menetluses on olulisel kohal mitte üksnes tulemus vaid ka protsess.

[878] Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors do Justice,* 44 Vand. L. Rev. 45 (1991), p. 66.

[879] Anneli Soo, *An Individual's Right to the Effective Assistance of Counsel Versus the Independence of Counsel: What can the Estonian Courts do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?* 7 Juridica International 252 (2010), p. 252.

kriminaalmenetluses olnud ebaefektiivne, tuletada automaatselt kaitsja vastutust ja sanktsiooni kohaldamise vajadust. Analüüsi tulemusena pakun oma töös välja järgmised standardid.

1. Efektiivse kaitse standard kaitsja taandamise küsimuse otsustamiseks

1. Kaitsja üldine ebakompetentsus on kaitsja taandamise aluseks, kui
   1.1. Kaitsja ei tunne karistusõigust või kriminaalmenetlusõigust. *On selge, et üksnes isik, kellel on teadmised nendes kahes valdkonnas, saab süüdistatavat adekvaatselt kaitsta. Seetõttu peab kohus taandama kaitsja, kui selgub, et kaitsja ükskõik kumba või mõlemat valdkonda ei tunne.*
   1.2. Kaitsja eirab korduvalt kohtu märkusi suhtuda kohtusse või teistesse kohtumenetluse pooltesse lugupidamisega. *Selline alus tuleneb KrMS § 267 lg-st 4[1]. Kaitsja võimetus kohelda kohut või teisi kohtumenetluse pooli lugupidamisega ja täita kohtu korraldusi näitab kaitsja allumatust menetluse põhimõtetele ja reeglitele, ning viitab sellele, et kaitsja ei ole menetluses võimeline täitma oma ülesandeid kvaliteetselt.*
   1.3. Kaitsja on alkoholijoobes või on narkootilise või psühhotroopse aine mõju all. Kaitsja füüsiline puue takistab tal isegi koos tugiisikuga kaitseülesandeid täitmast või kaitsjal on vaimne haigus, mis takistab tal kaitseülesandeid täitmast. *Kui isik on alkoholi- või narkojoobes, on kaitseülesannete täitmine tema poolt häiritud. Füüsiline ja vaimne puue ei pruugi kaitsjal takistada ülesannetega toimetulemist (nt füüsilise haiguse korral võiks kaitsja kasutada tugiisiku abi), mistõttu kaitsja taandamine tuleb kõne alla üksnes siis, kui kaitsja ei suuda oma kohustusi seetõttu täita.*
   1.4. Advokatuuri liikmestaatuse kaotanud kaitsja osaleb ilma menetleja loata menetluses. *Vastavalt KrMS § 42 lg 1 p-le 1 peab mitte-advokaadist haridusnõuetele vastav isik saama kaitsjana menetlusest osavõtuks loa menetlejalt. Kui isik on Advokatuurist välja arvatud või välja heidetud, siis ta peab menetluses jätkamiseks küsima loa menetlejalt, kuna ta ei ole enam advokaat. Kui ta luba ei küsi, on see märk sellest, et ta tegutseb menetluses ebaausalt, st oma staatust varjates, mistõttu juhul, kui ta ei ole viivitamatult luba küsinud ja menetleja saab tema Advokatuurist väljaheitmisest või väljaarvamisest teada, siis peaks kohus ta taandama. Kohus peaks taandama ka isiku, kelle kutsetegevus advokaadina on peatatud (AdvS § 19 (3) kohaselt ei tohi selline isik õigusteenust osutada). Sarnased põhimõtted on sätestatud ka RÕS § 20 lg-s 3, mille kohaselt riigi õigusabi osutava advokaadi advokatuurist väljaarvamise või väljaheitmise või tema kutsetegevuse peatamise või advokaadi pikaajalise töövõimetuse või surma korral, samuti muul seaduses sätestatud juhul määrab advoka-*

tuur senise riigi õigusabi osutaja, riigi õigusabi saaja, kohtu, prokuratuuri või uurimisasutuse taotluse alusel või omal algatusel uue riigi õigusabi osutaja.

1.5. Kui on kindlaks tehtud, et advokaat on läinud õigusabi osutades seadusega vastuollu ja see rikkus tema ja süüdistatava vahelise usaldussuhte või see kahjustas süüdistatava positsiooni menetluses. *Ka see alus tuleneb KrMS § 267 lg-st 4[1].*

2. Huvide konflikt on kaitsja taandamise aluseks, kui

2.1. Kaitsja on olnud või on samas kriminaalasjas kriminaalmenetluse muu subjekt (KrMS § 54 p 1).

2.2. Kaitsja on varem samas või sellega seonduvas kriminaalasjas kaitsnud või esindanud teist isikut, kelle huvid on või võivad olla kaitsealuse huvidega vastuolus (KrMS § 54 p 2). *Kuigi KrMS § 54 p 2 nõuab tegelikku huvide konflikti, teen süüdistatavate õiguste parema tagamise eesmärgil ettepaneku, et taandamise alus on ka see, kui kaitsja on varem samas või sellega seonduvas kriminaalasjas kaitsnud või esindanud teist isikut, kelle huvid võivad kaitsealuse huvidega vastuolus olla.*

2.3. Kui kaitsja enda huvid on või võivad olla vastuolus süüdistatava huvidega. *See põhimõte tuleneb eetikakoodeksi[880] § 8 lg-st 1 ja tuleks lisada KrMS § 54.*

2.4. Kui kaitsjaga seotud teise isiku huvid on vastuolus või võivad olla vastuolus süüdistatava huvidega. *Ka see põhimõte tuleneb eetikakoodeksi § 8 lg-st 1 ja tuleks lisada KrMS § 54.*

2.5. Kui kaitsja kaitseb mitut süüdistatavat korraga ja nende süüdistatavate huvide vahel on või võib olla konflikt. *See põhimõte on sätestatud KrMS § 42 lg-s 3, kuid mitte eraldi taandamisalusena.*

Ühtlasi pakun käesolevas töös välja süüdistatava õiguste paremaks tagamiseks põhimõtte, et kahtlus huvide konflikti olemasolus tuleb tõlgendada selle olemasolu kasuks. Juhul kui kaitsjal on ühes kriminaalasjas mitu kaitsealust, on Ameerika Advokaatide Ühendus välja töötanud põhimõtte, et võimaliku huvide konflikti korral võib kaitsja kaassüüdistatavaid siiski kaitsta, kui see on kõigile tema kaitsealustele kasulik ja nad kõik annavad kirjalikult oma informeeritud nõusoleku. See ettepanek on mõistlik just seetõttu, et tihti võib mitme süüdistatava kaitsmise korral kõne alla tulla võimalik, kuid mitte kindel huvide konflikt, mistõttu sellisel juhul võiks süüdistatavatel olla võimalus sõna sekka öelda, eriti seetõttu, et kaitsmine ühe kaitsja poolt tähendab süüdistatavatele väiksemat õigusabikulu.

3. Kohus taandab kaitsja, kui

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[880] Eesti Advokatuuri eetikakoodeks. Vastu võetud Eesti Advokatuuri 8. aprilli 1999. a üldkogu otsusega nr 5. Muudetud Eesti Advokatuuri 5. Mai 2005. a üldkogu otsusega nr 4, Eesti Advokatuuri 13. märtsi 2007. a üldkogu otsusega nr 4, Eesti Advokatuuri 21. veebruari 2008. a üldkogu otsusega nr 4.

3.1. Kaitsja ei koosta kaitseakti õigeaegselt. *Kaitseakti koostamine on tihedalt seotud kohtumenetluse ettevalmistamisega ning kaitsjale koostamiseks kohustuslik alates 1. septembrist 2011. Tulenevalt KrMS § 227 lg-st 1 esitab kaitsja pärast süüdistusakti saamist hiljemalt kolm tööpäeva enne eelistungit kohtule kaitseakti ning prokuratuurile selle koopia. Kriminaalasja erilise keerukuse või mahukuse korral võib kohus kaitsja põhistatud taotlusel nimetatud tähtaega pikendada. Kriminaalmenetluse seadustiku § 227 lg 5 sätestab, et kui kaitsja ei esita kaitseakti ettenähtud tähtajaks, teeb kohus süüdistatavale ettepaneku valida endale uus kaitsja kohtu määratud ajaks või pöördub Eesti Advokatuuri poole uue kaitsja määramiseks. Ei ole põhjust, miks kaitseakti ette valmistamata jätmisel peaks lepingulisi ja määratud kaitsjaid erinevalt kohtlema, mistõttu teen ettepaneku, et kui süüdistatav ei soovi endale uut kaitsjat valida, võib kohus kohustuse täitmisest keelduva kaitsja siiski omal algatusel taandada.*

Eraldi toon siin välja tõendi kogumise taotluse. Lähtudes KrMS § 227 lg 3 p-dest 2 ja 3 peab kaitsja nii tõendid, mille ta esitada soovib kui ka tunnistajad, kelle ülekuulamist ta taotleb, loetlema kaitseaktis. Juhul kui kaitsja seda ei tee, kuigi ta oli teadlik tõendi esitamise või tunnistaja ülekuulamise vajadusest, on tal võimalik esitada kohtuistungil täiendava tõendi kogumise taotlus, mis tal on võimalik loomulikult esitada ka siis, kui ta tõendi esitamise või tunnistaja ülekuulamise vajadusest kaitseakti koostamisel ei teadnud või kui ta ei teadnud isegi tõendi või tunnistaja olemasolust. Seejuures tuleb tähele panna, et KrMS § 286^1 lg 2 p 2 kohaselt võib kohus keelduda tõendi vastuvõtmisest ja selle tagastada või keelduda tõendi kogumisest, kui tõendit ei olnud loetletud kaitseaktis ning kaitsja ei ole nimetanud olulisi põhjuseid, miks ta ei saanud taotlust varem esitada. Seetõttu juhul kui kaitsja on teadlik tõendi kogumise vajadusest, kuid seda kaitseaktis ei kajasta, riskib ta sellega, et kohus tõendit vastu ei võta. Vaatamata sellele teen ettepaneku, et juhul kui kaitsja ei ole tõendit, mille tähtsusest ta teadlik oli, kaitseaktis märkinud, peaks kohus selle siiski vastu võtma, kui süüdistatav näitab, et tõend on kriminaalasja lahendamise seisukohalt eriti oluline, mis tähendab seda, et on võimalus, et see tõend kergendab süüdistatava olukorda. Selline lahendus aitaks paremini tagada süüdistatava kaitseõigused ka ebaefektiivse kaitse korral ja vähendaks võimalust, et kõrgem kohus leiab hilisemalt, et on vajadus läbi viia uus menetluses, kuna kaitsja on menetluses olnud ebaefektiivne. See tagab ka, et süüdistatav ei ole tõendite esitamise osas üksnes kaitsja meelevallas, sest kaitseakti koostamise pädevus ja kohustus on üksnes kaitsjal ning süüdistataval puuduvad hoovad kaitsja otsustust selles osas mõjutada.

3.2. Süüdistatava ja kaitsja vaheline usaldussuhe on olulisel määral rikutud. *Selleks et kaitsja saaks oma kohustusi täita, peab tema ja süüdistatava vahel olema usalduslik suhe. Kui kohtuni jõuab süüdistatava kaudu teave, et tema ja kaitsja vaheline usaldussuhe on mingil põhjusel purunenud (siin saab rääkida üksnes määratud kaitsjast, sest lepingulise kaitsja puhul vahetaks süüdistatav kaitsja lihtsalt välja),*

peaks kohus asuma asja uurima ning vajadusel kaitsja taandama. Võimalikud usaldussuhte purunemise indikaatorid võiksid olla: kaitsja on avaldanud konfidentsiaalset infot, kuigi see ei ole seadusega lubatud; tõsised erimeelsused kaitsja ja süüdistatava vahel võimaliku kaitsestrateegia osas; kaitsja on süüdistatava eest teinud otsuse, mis on süüdistatava pädevuses jne.

3.3. Selgub, et kaitsja ei ole süüdistatavaga nõu pidanud, kuigi kohus on selleks juba korra korralduse andnud. *Kriminaalasjas on süüdistatavaks isik, keda kaitsja kaitseb, mitte kaitsja ise. Seega peab kaitsja süüdistatavaga nõu pidama, tema seisukohti kuulama, talle nõu andma jne. Kui kaitsja seda ei tee ja peab paremaks asja lahendada nii, nagu ta seda ise näeb, peab kohus kohustama kaitsjat süüdistatavaga ühendust võtma. Kui kaitsja kohtu korralduse korduvalt täitmata jätab, on kohtu pädevuses KrMS § 267 lg-st 4[1] lähtudes kaitsja taandada. Eelnev ei tähenda muidugi, et kaitsja ei võiks strateegia ja taktikaliste otsustuste osas langetada otsuseid, mis ei ole kooskõlas süüdistatava juhtnööridega, kuid see ei võta kaitsjalt kohustust süüdistatavaga kohtuda ja nõu pidada.*

3.4. Kaitsja avaldab vastupidiselt süüdistatava seisukohale arvamust, et süüdistatav on süüdistuses süüdi. *Üldlevinud on arusaam, et kaitsja ei ole süüdistatava marionett, vaid iseseisev menetlusosaline ja kohtumenetluse pool, mis annab talle võimaluse toimida teistmoodi, kui seda peab vajalikuks süüdistatav. On aga olukord, milles peetakse absoluutselt lubamatuks seda, et kaitsja asub süüdistatavaga võrreldes teisele seisukohale, ja see on olukord, kus süüdistatav ennast talle esitatud süüdistuses süüdi ei tunnista. Kuna kaitsja ei ole ise sündmuste juures viibinud, siis tema ei saa kunagi tõsikindlalt väita, kas süüdistatav on talle esitatud süüdistuses süüdi või mitte, ja seda isegi siis, kui kõik tõendid näivad süüdistatava süüd kinnitavat. Seetõttu peab kaitsja juhul, kui süüdistatav oma süüd ei tunnista, asuma süüdistatavaga samale positsioonile ja kujundama kaitsestrateegia sellest lähtudes. See põhimõte tuleneb ka Advokatuuri eetikakoodeksist, mille § 19 lg 3 sätestab, et kui kaitsealune eitab temale süüks arvatud teo toimepanemist, on advokaat seotud kaitsealuse positsiooniga.*

4. Kohus taandab kaitsja, kui kaitsja kohtumenetluses,

4.1. Jätab korduvalt kohtuistungile tulemata. *Lähtuvalt KrMS § 45 lg-st 4 on kaitsja osavõtt kohtumenetlusest reeglina kohustuslik. Kui kaitsja jääb kohtuistungile ilmumata, lükatakse kohtulik arutamine edasi (KrMS § 270 lg 2). Kuna kaitsjal on võimalik enne kohtuistungit enda mitteilmumisest kohut teavitada ja nimetada vajadusel asenduskaitsja KrMS §-st 44 lähtudes, siis minu ettepanek on, et kui kaitsja jätab korduvalt kohtuistungile tulemata, mis tähendab, et ta ei ole õigeaegselt tegutsenud selle nimel, et istung edasi lükataks või vastupidi, et see toimuks, võib kohus kaitsja taandada. Taandamine ei ole siiski*

kohtu kohustus, vaid võimalus, mis tähendab, et kohus võib kaitsja jätta ka taandamata, kui selgub, et kaitsjal oli mitteilmumiseks ja abinõude kasutusele võtmata jätmiseks mõjuv põhjus.

4.2. Jääb vaatamata kohtu märkustele korduvalt istungi käigus magama. *Võimalus kõrvaldada menetlusest kaitsja, kes on korduvalt jätnud kohtu korraldusele reageerimata, tuleneb KrMS § 267 lg-st 4[1]. On selge, et kui kaitsja jääb menetluse käigus magama, siis süüdistatav jääb selleks ajaks sisuliselt kaitseta, mistõttu peab kohus süüdistatava kaitseõiguste tagamiseks reageerima ja kaitsjat korrale kutsuma või siis vajadusel ta taandama.*

4.3. Ei osale kohtumenetluses, kuigi on kohal. *Tegemist on harva, kuid näiteks USA kohtute praktikas ette tulnud olukorraga, mida ka näiteks Saksamaa Ülemkohus on pidanud lahendama.*[881] *Põhimõtteliselt tähendab see seda, et kaitsja on kohal, kuid ei tee midagi, mis tähendab, et süüdistatav on sisuliselt kaitseta. Võib olla, et kaitsja jääb menetluses kuni teatud etapini passiivseks taktikalistel kaalutlustel (nt keeldub ühte tunnistajat küsitlemast). Seetõttu peaks kohus igal juhul kuulama ära kaitsja selgituse oma vaikimise põhjustest, enne kui otsustab kaitsja taandada.*

4.4. Ilmub kohtuistungile korduvalt selliselt, et ta ei tunne kriminaalasja faktilisi asjaolusid või kohaldatavat õigust. *On selge, et kaitsja saab süüdistatavale õigusabi osutada vaid siis, kui ta tunneb kriminaalasja faktilisi asjaolusid. Üksnes sellisel juhul teab kaitsja, kuidas konkreetsele tunnistajale läheneda, milliseid tunnistajaid kutsuda, milliseid prokuröri versioone vaidlustada, milliste tõendite uurimist taotleda jne. Enamik neist otsustest peab olema tehtud kaitseakti koostamiseks, kuid ka kohtuistungil peab kaitsja faktilistes asjaoludes orienteeruma, sest vastasel juhul osutuks mitmed istungi etapid – avakõne, tunnistajate küsitlemine jne – süüdistatava positsiooni seisukohalt kasutuks. Samal põhjusel peaks kaitsja lisaks üldistele teadmistele kriminaalmenetlus- ja karistusõigusest teadma ka konkreetses asjas kohaldatavat õigust. Tulenevalt KrMS § 273 lg-st 4 võib kohus kohtuistungi kuni kümneks päevaks edasi lükata ning panna istungi edasilükkamisest tingitud kriminaalmenetluse kulud kaitsja kanda, kui kaitsja ei tunne kriminaalasja. Leian, et kõne all olevat sätet tuleks tõlgendada selliselt, et see hõlmaks nii kriminaalasja faktilised asjaolud kui ka kohaldatava õiguse. Kui kaitsja ilmub ettevalmistamatult kohale korduvalt, näitab see tema ükskõikset ja lugupidamatut suhtumist õigusemõistmisesse, mistõttu kohtul peab olema lubatud selline kaitsja menetlusest kõrvaldada.*

[881] BGH 1 StR 341/07 15.07.2007.

5. Kokkuleppemenetluses jätab kohus kokkuleppe kinnitamata ja taandab kaitsja,[882] kui
   5.1. Selgub, et kaitsja on soovitanud süüdistataval sõlmida kokkulepe ja andnud ise nõusoleku kokkuleppemenetluseks, ilma et ta oleks teadlik kriminaalasja faktilistest asjaoludest ja kohaldatavast õigusest või kui selgub, et kaitsja ei ole süüdistatavale enne, kui süüdistatav kokkuleppemenetlusega nõustus, nõu andnud. *Teadupärast ei ole kokkuleppemenetluse kohaldamise eelduseks see, et süüdistatav ennast süüdi tunnistab, mistõttu kokkuleppe saab sõlmida ka süüdistatav, kes väidab, et tema talle esitatud süüdistuses süüdi ei ole. Kaitsja võib sellisel juhul põhimõtteliselt kokkuleppemenetlusega nõus olla, kuid selleks, et anda süüdistatavale adekvaatne hinnang selle kohta, et kokkuleppe sõlmimine on parim lahendus, peab ta kursis olema nii faktiliste asjaolude kui ka kohaldatava õigusega. Kui ta seda ei ole, siis sisuliselt on süüdistatav jäänud menetluses kaitsja abi ja toetuseta. Igal juhul on kaitsja kohustus menetluses süüdistatavat nõustada, mitte jääda neutraalseks kõrvalseisjaks.*
   5.2. Selgub, et kaitsja sundis süüdistatavat kokkuleppemenetlusega nõustuma või saavutas süüdistatava nõusoleku pettusega. *Kaitsjal võivad olla omad huvid, mille tõttu ta soovib, et süüdistatav nõustuks kokkuleppemenetlusega: näiteks võib kaitsja soovida vabaneda ebameeldivast asjast, saavutada lõpplahend kriminaalasjas ilma, et peaks selle nimel töötama jne. Kuna kaitsja kui professionaalse juristi nõuandel on tihti väga suur mõju süüdistatava otsusele selle kohta, kas kokkuleppemenetlusega nõustuda või mitte, siis kohus peaks kontrollima, et kaitsja ei ole oma positsiooni kuritarvitanud.*

Kuna tegelik elu on niivõrd rikas, et kõike ei ole võimalik standarditesse panna, teen oma töös ettepaneku, et kohus võib kuulutada ka mõne eespool nimetamata kaitsja kohustuste rikkumise oluliseks ja seega ka taandamise aluseks, kui konkreetse kaasuse asjaolud seda nõuavad. Et kohus ei hakkaks oma diskretsiooniõigust kuritarvitama, on ta seejuures seotud põhjendamiskohustusega.

Ka kõrgema astme kohtu menetluses võib ette tulla olukordi, kus kaitsja ei täida oma kohustusi, mistõttu kohus on sunnitud kas kaitsja taandama või muul viisil süüdistatava õiguste tagamiseks reageerima. Põhimõtteliselt on kaitsjal kõrgema astme kohtu menetluses samad kohustused, mis esimese astme kohtu menetluses, kuigi arvestada tuleb ka kõrgema astme kohtu menetluse eripära. Seetõttu teen käesolevas töös ettepaneku, et ka kõrgema astme kohtud saavad eespool toodud standardit teatud piirini kasutada, kuid lisaks sellele nimetan mõned aspektid, millega just kõrgema astme kohtud peaksid arvestama.

6. Kaitsja taandamise alused kõrgema astme kohtutes on minu ettepaneku kohaselt järgmised.

[882] Siin ei ole küsimus ainult kaitsja taandamises, vaid eelkõige peaks kohus tagama, et kinnitamata jääks kokkulepe, millega süüdistatav on nõustunud ebaefektiivse kaitse tulemusena.

6.1. Kaitsja peab apellatsiooni esitamise teate ja apellatsiooni või siis kassatsiooni esitamise teate ja kassatsiooni esitama õigeaegselt. Kui ta seda ei tee ilma mõjuva põhjuseta, peaks kohus kaitsja taandama ja andma süüdistatavale tähtaja uue kaitsja valimiseks või taotlema Advokatuurilt uue kaitsja nimetamist, kellel on kohtu poolt antud tähtaja jooksul võimalik esitada apellatsiooniteade/apellatsioon või kassatsiooniteade/ kassatsioon. *Ettepaneku põhjus on väga lihtne. Kui süüdistatav on kaitsja kätte usaldanud ülesande tagada kaebuse esitamise õigus kõrgema astme kohtule (Riigikohtusse ei saa süüdistatav üldse ise kassatsiooniga pöörduda), siis edasi puudub süüdistataval võimalus kaitsjat õigeaegselt tegutsema sundida. Loomulikult võib süüdistatav kaitsjalt küsida, kas viimane on juba nõutud dokumendid esitanud, kuid see ei tähenda veel, et kaitsja oma kohustusi täidab. Kui kaitsja jätab vajalikud dokumendid mõjuva põhjuseta esitamata, mis tähendab seda, et esitamise tähtaja ennistamiseks alust ei ole, kaotab süüdistatav sisuliselt edasikaebeõiguse. See on aga ebaõiglane, arvestades, et süüdistatav ei saa kaitsja tegutsemist mõjutada. Seetõttu olen seisukohal, et süüdistatav ei tohiks kaotada võimalust edasi kaevata kaitsja ebaefektiivsuse tõttu.*

6.2. Kaitsja poolt koostatud apellatsioon peab vastama KrMS § 321 nõuetele ja kassatsioon KrMS § 347 nõuetele. Kui kohus jätab § 323 lg 2 p 3 või § 326 lg 1 alusel apellatsiooni või KrMS § 350 lg 2 p 3 alusel kassatsiooni läbi vaatamata, kuna kaitsja ei ole puudusi etteantud tähtajaks kõrvaldanud, peaks kohus kaitsja taandama ja andma süüdistatavale tähtaja uue kaitsja valimiseks või taotlema Advokatuurilt uue kaitsja nimetamist, kellel on kohtu poolt antud tähtaja jooksul võimalik esitada nõuetekohane apellatsioon või kassatsioon. *Jällegi on küsimus selles, et süüdistataval puudub võimalus kaitsja tegevust mõjutada ja kaitsja ebaadekvaatse tegevuse korral kaotab süüdistatav edasikaebevõimaluse. Sellise tagajärje ärahoidmiseks tuleks kaitsja, kes ei suuda koostada nõuetekohast kaebust, menetlusest kõrvaldada.*

6.3. Kui ringkonnakohus jätab apellatsiooni läbi vaatamata, kuna kaitsja ei ole apellandina mõjuva põhjuseta istungile ilmunud, peaks kohus kaitsja taandama ja andma süüdistatavale võimaluse uueks kohtuistungiks ringkonnakohutus. *Tulenevalt KrMS § 334 lg-st 4 võib kohus jätta apellatsiooni määrusega läbi vaatamata või arutada kriminaalasja apellandi osavõtuta, kui apellant kohtuistungile ei ilmu ega ole teatanud ilmumata jätmise mõjuvast põhjusest või ei ole seda põhistanud. Seega võib süüdistatav kaitsja ebaefektiivsuse tõttu kaotada võimaluse, et tema asja arutatakse apellatsioonikohtus uuesti. Leian, et edasikaebeõiguse kaotamine sel viisil ei ole põhjendatud ja teen ettepaneku, et kaitsja ilmumata jätmine ei tähendaks süüdistatavale asja arutamise võimaluse kaotust.*

Seega olen käesolevas töös teinud ettepaneku, et süüdistatava kaebeõiguse paremaks tagamiseks peaks apellatsiooni- ja kassatsioonimenetluses kehtima põhimõte, et kui süüdistatav kaotab edasikaebeõiguse kaitsja ebaefektiivsuse tõttu, peaks kohus kaitsja taandama ja andma süüdistatavale uue võimaluse edasi kaebamiseks. Olen seisukohal, et see põhimõte tuleks lisada ka kriminaalmenetluse seadustikku.

Iseenesestmõistetavalt peab kaitsja enne apellatsiooni või kassatsiooni koostamist süüdistatavaga nõu pidama, sest lõplik sõna selles, kas apellatsioon või kassatsioon üldse koostada, on süüdistataval. Kohe tekib küsimus, kas süüdistatav peaks saama määrata apellatsiooni või kassatsiooni sisu. USA-s ollakse seisukohal, et kaitsja ei pea sisse võtma süüdistatava poolt pakutud argumente, mis on ebaasjakohased või tähtsusetud.[883] Põhimõtteliselt tähendaks see ka seda, et kaitsja ei peaks üldse apellatsiooni koostama, kui ta leiab, et kõik süüdistatava poolt pakutud teemad on tähtsusetud ja asjakohatud ning tal endal ei ole ka midagi paremat välja pakkuda. Lähtudes KrMS § 45 lg-tes 5–8 sätestatust sõltub Eestis siiski väga palju süüdistatavast ja tema tahtest ning selle taustal on väga raske teha ettepanekut, et kaitsja ei peaks üldse kaebust koostama, kui ta leiab, et tõepoolest ei ole ühtegi probleemi, mida tõstatada, kuigi ka see on iseenesest võimalus, mida ressursside efektiivsemaks kasutamiseks võiks kaaluda. Samas ei ole mingit põhjust, miks kaitsja peaks kaebusesse lisama kõik süüdistatava poolt pakutu, eriti kui see on täiesti ebaoluline. Igal juhul peaks süüdistataval olema võimalus kaitsja otsustus vaidlustada ja näidata, et kõrvale jäetud argumendil oleks olnud piisavalt edulootust, arvestades kõiki teisi võimalikke argumente.

2. Efektiivse kaitse standard madalama astme kohtu otsuse tühistamise küsimuse otsustamiseks

1. Pakun käesolevas töös välja, et oluliseks menetlusõiguse rikkumiseks ja kohtuotsuse tühistamise aluseks *per se* on kõigepealt kaitsja puudumine või „puudumine“[884] menetlusest, mis võib seisneda järgnevas:
   1.1. Kaitsja ei olnud kohtumenetluses kohal, välja arvatud KrMS § 45 lg-s 4 sätestatud erandjuhtudel. Seejuures ei oma tähtsust, kui pikk oli aeg, mille jooksul kaitsjat menetluses ei olnud. Tulenevalt Riigikohtu praktikast on ühe kaitsja puudumine menetlusest juhul, kui isikul on rohkem kaitsjaid kui üks, menetlusõiguse rikkumine erandlikel asjaoludel.[885]

[883] Penson v. Ohio, 488 U.S. 75 (1988), 488 U.S. 69–85.
[884] St, kaitsja on kohal, kuid erinevatel põhjustel ei osale ta menetluses sisuliselt süüdistatava kaitsjana.
[885] Riigikohtu kriminaalkolleegiumi 20. juuni 2003. a otsus kriminaalasjas nr 3-1-1-86-03, p 10.

1.2. Kaitsja magas kohtuistungil, kas
   1.2.1. Olulisel hetkel, nt siis kui prokurör küsitles tunnistajat.
   1.2.2. Suhteliselt suure hulga kohtuistungi ajast, nt 10 minutit 1-tunnisest istungist.
   1.2.3. Pika aja jooksul, nt mitmeid kordi 30-päevase kriminaalasja jooksul.[886]
1.3. Kaitsja oli menetluses alkoholi- või narkojoobes või psühhotroopsete ainete mõju all. Kaitsjal esines füüsiline või vaimne puue, mis takistas tal kaitsekohustusi täitmast. *Siin on süüdistatav jäänud sisuliselt kaitsja abita, mistõttu talle tuleks anda võimalus uueks menetluseks efektiivse kaitsja osavõtul.*
1.4. Kaitsja osales menetluses, kuigi eksisteeris huvide konflikt. *Kuna otsuse tühistamine riivab olulisel määral õiguskindluse põhimõtet, teen ettepaneku, et kui ei olda päris kindel huvide konflikti olemasolus, tuleks see tõlgendada konflikti puudumisena.*
1.5. Kaitsja osales menetluses advokaadina, kuigi ta oli Advokatuurist välja arvatud või välja heidetud ja menetlejalt osalemiseks luba ei küsinud. Kaitsja osales menetluses, kuigi tema kutsetegevus oli peatatud. *Sellisel juhul puudub menetlusest osavõttev kaitsja juba formaalselt, mistõttu süüdistatavale tuleb anda võimalus uueks menetluseks.*
1.6. Kaitsja osales menetluses ilma üldise teadmiseta kriminaalmenetlus- ja karistusõigusest.
1.7. Kaitsja osales menetluses, kuigi tema ja süüdistatava usaldussuhe oli oluliselt rikutud.

2. Kohustuste rikkumised, mille puhul ei saa küll rääkida kaitsja puudumisest või „puudumistest", kuid mis peaksin siiski kaasa tooma alama astme kohtu otsuse tühistamise *per se* on järgmised.
   2.1. Kaitsja osales menetluses, ilma et ta oleks teadnud kriminaalasja faktilisi asjaolusid või kohaldatavat õigust.
   2.2. Kaitsja osales menetluses ilma eelnevalt süüdistatavaga konsulteerimata või tegi seda pinnapealselt.
   2.3. Kaitsja väljendas kohtule veendumust, et süüdistatav on süüdi, kuigi süüdistatav ise oma süüd ei tunnistanud, ja kohus ei taandanud kaitsjat.
   2.4. On kindlaks tehtud, et kaitsja oli terve kohtumenetluse jooksul või ühe etapi jooksul (nt keeldus pidamast avakõnet) passiivne, st ta ei teinud mitte midagi. *Kui kaitsja võib taktikaliselt põhjendada seda, miks ta ühte tunnistajat keeldub küsitlemast, siis kindlasti ei saa ta põhjendada passiivsust terve menetluse jooksul või siis ühe menetluse etapi jooksul*

[886] Need ettepanekud on tehtud USA kirjanduse pinnal (Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement,* 75 Neb. L. Rev. 425 (1996), p. 469) ja nende sisuks on, et kui kaitsja magab olulise hetke maha, ta magab menetlusest suure hulga maha või ta magab menetluses hulga aega, juhtub, et prokuröril ei ole vastast ja süüdistatav jääb kaitseta. Sellises olukorras tuleb anda süüdistatavale võimalus menetluseks, kus kaitsja on siiski prokurörile enam-vähem võrdväärne vastane.

(siin pean silmas suuremat üksust kui ühe tunnistaja küsitlemist, nt avakõne, kõigi tunnistajate küsitlemine või lõpukõne vms).

2.5. Kaitsja ei esitanud kaitse jaoks eriliselt olulist tähtsust omava tõendi kogumise taotlust õigeaegselt, kuigi kaitsja oli selle tõendi olemasolust teadlik või pidi teadlik olema. *Eriliselt olulise tähtsusega tõendina pean siin silmas tõendit, mis võib kergendada süüdistatava olukorda.*

2.6. Süüdistatav nõustus kokkuleppemenetlusega, ning ta andis nõusoleku kas ilma kaitsjapoolsete soovitusteta või tema nõusolek põhines kaitsja soovitusele, mis oli antud ilma faktilisi asjaolusid ja kohaldatavat õigust tundma õppimata või mis põhines kaitsja sunnil või kaitsjapoolsel tegelike asjaolude moonutamisel.

2.7. Arvestades seda, kuidas kaitsja menetluses tegutseb, võib järeldada, et tal puudub strateegia täiesti või see ei ole kohane. *See on näitaja, mida kõrgemal kohtul võib olla väga raske hinnata, kuid on selge, et nii mõnigi kord, isegi kui kaitsjad endale faktilised asjaolud ja õigusliku külje selgeks teevad, suhtuvad nad süüdistatava kaitsmisesse kergekäeliselt ja ei kujunda strateegiat, mille järgi menetluses tegutseda. See aga mõjutab oluliselt süüdistatava olukorda, kuna kaitsja esinemine kohtus peaks põhinema arusaamal, millist lahendust kaitsja taotleb ja milliseid argumente, tõendeid ja vastuväiteid ta selleks esitab.*

2.8. Kaitsja ei ole suutnud välja tuua teo koosseisupärasust, õigusvastasust või süülisust välistavaid asjaolusid, kuigi need olid kaitsjale teada või oleksid pidanud teada olema. *Selge on, et siin ei ole enam küsimus asja tagasisaatmises, vaid kõrgema astme kohus peaks ressursside kokkuhoidmiseks võimalusel tegema ise õigeksmõistva otsuse.*

3. Edasi tulevad kohustused, mille täitmata jätmist saab kaitsja põhimõtteliselt taktikalise otsusega põhjendada. Apellatsiooni- ja kassatsioonimenetluse kontekstis tähendab see, et prokuröril, kes otsuse tühistamisele vastu vaidleb, on võimalus tõendada, et kohustuse täitmine põhines kaitsja mõistlikul taktikalisel otsustusel.

3.1. Kuigi kaitsja oli kohal, keeldus ta kindlal hetkel menetluses tegutsemast, nt ta ei küsitlenud ühte tunnistajat.

3.2. Kaitsja ei esitanud tavapärase põhjalikkusega avakõnet. *See, mis on esmapilgul ebaadekvaatne, võib kaitsja seletuste järgselt tunduda täiesti adekvaatne.*

3.3. Kaitsja küsitles tunnistajat ebaadekvaatselt.

3.4. Kaitsja ei esinenud kohtuvaidluses adekvaatselt.

3.5. Kaitsja ei andnud adekvaatset arvamust prokuröri poolt taotletava karistuse kohta. Arvamus peaks põhinema kaasuse faktilistel asjaoludel, seadusel ning kergendavatel ja raskendavatel asjaoludel.

3.6. Kaitsja ei esitanud vastuväidet lubamatule tõendile või jättis esitamata mõne muu olulise vastuväite või taotluse. *Siin peaks kohtul olema väga lai otsustusõigus koos sellega kaasneva põhjendamiskohustusega.*

Lisaks eelnevale peaks kõrgemal kohtul olema jällegi elu mitmekesisust arvestades võimalus kuulutada oluliseks kriminaalmenetlusõiguse rikkumiseks ja seega kohtuotsuse tühistamise aluseks mõni teine kaitsja viga, lähtudes konkreetse kaasuse asjaoludest. Ka siin peaks prokuröril võimalik olema tõendada, et kohustuse mittetäitmine oli kaitsja mõistlik taktikaline otsustus ja lisaks sellele on prokuröril võimalik tõendada, et kohustuse täitmine ei mõjutanud menetluse tulemust ja süüdistatava positsiooni menetluses.

4. Viimase kohtuotsuse tühistamise alusena toon oma töös välja kohtu põhjendamatu sekkumise süüdistatava ja kaitsja vahelistesse suhetesse, mis võib seisneda järgmises:
   4.1. On kindlaks tehtud, et kohus ei kaalunud süüdistatava ja avalikkuse huvisid, kui ta keeldus menetlusse lubamast advokaati, keda süüdistatav oma senisele määratud kaitsjale eelistas. *Tulenevalt RÕS § 20 lg-st 1 võib riigi õigusabi osutava advokaadi ja riigi õigusabi saaja kokkuleppel asuda isikule samas asjas õigusteenust osutama teine advokaat, kes on nõus temale riigi õigusabi osutamise kohustuse üleandmisega. Uus riigi õigusabi osutaja määratakse kohtu, prokuratuuri või uurimisasutuse taotluse alusel RÕS §-s 18 sätestatud korras. Vastavalt EIK kohtu praktikale võib süüdistatavapoolset määratud kaitsja valikut piirata just õigusemõistmise huvidest lähtuvalt.*[887]
   4.2. On kindlaks tehtud, et kohus ei andnud menetlusse sisenemiseks põhjuseta luba mitte-advokaadile, kes vastas KrMS § 41 lg-s 1 sätestatud nõuetele või kohus võttis selle loa põhjuseta tagasi.
   4.3. On kindlaks tehtud, et kohus ei nõustunud lisakaitsja määramisega, kuigi süüdistatav seda taotles ja oli vajadus kaitsja määramiseks. *Eesti kriminaalmenetluses on määratud kaitsjate arv piiratud – nimelt võib KrMS § 42 lõike 2 järgi isikul olla kuni kolm lepingulist kaitsjat. Mõistlik ja kooskõlas võrdse kohtlemise põhimõttega on sama arvulist piirangut rakendada ka määratud kaitse puhul. Kuigi ei kriminaalmenetluse seadustikust ega riigi õigusabi seadusest ei tulene üldse, et isikule võiks määrata rohkem kui ühe kaitsja, võib ette tulla niivõrd keerukaid kriminaalasju, kus ühe kaitsja määramisega ei ole süüdistatava õigus kaitsjale tagatud. Sellisel juhul peaks mitme kaitsja määramine olema võimalik, ja kui kohus on mitme kaitsja määramist sellisel juhul takistanud, tuleks süüdistatavale tagada võimalus uuele menetlusele.*
   4.4. On kindlaks tehtud, et kohus taandas kaitsja ilma põhjuseta.

[887] Lagerblom v. Sweden. *Application no. 26891/95.* 14 January 2003.

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List of publications

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