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## RESPONSIBILITY OF A CRIMINAL DEFENSE ATTORNEY

*Greta Van Susteren\**

The constitutional responsibility of a criminal defense lawyer is simply defined: It is to render “[a]ssistance of [c]ounsel.”<sup>1</sup> Unfortunately, the Constitution went no further in defining the responsibilities, and thus it fell on the shoulders of the United States Supreme Court to outline the duties of the defense counsel.

The plain truth is that the United States Supreme Court has been ineffective in defining what constitutes assistance of counsel—although admittedly, defining it might be an impossible task. The difficulty in defining the responsibilities may lie in the simple, and not surprising fact, that none of the current members of the United States Supreme Court can boast of having been a criminal defense attorney.<sup>2</sup> Hence, having the United States Supreme Court write guidelines or set standards may be analogous to asking a podiatrist to define competent heart transplant procedures.

To define the responsibility of a criminal defense attorney, you must have experienced the task. You must have stood next to an accused at a presentment and made a bail argument; counseled your client in both the cellblock behind the courtroom and the jail; tried to pull discovery from the unwilling prosecutor; investigated the case with usually no money; argued the law to the judge and the facts to the jury; and last, but not least, begged for mercy for your client. While doing this, you usually have suffered the criticism of a client who is sure you are not doing enough or who may not even be talking to you. Further, you have suffered at the

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1. U.S. CONST. amend. VI.

2. The landmark “ineffective assistance” case is *Strickland v. Washington*, 466 U.S. 668 (1984). It is interesting to note that the only Justice who dissented to the entire majority opinion in *Strickland* was Justice Thurgood Marshall. Justice Marshall was a trial lawyer, and he obviously understood criminal defense work.

hands of a community who thinks you are a fiend.

In its effort to define the constitutional responsibilities of a criminal defense attorney, the Supreme Court held that assistance of counsel must be effective.<sup>3</sup> But, as you might guess, gauging the effective assistance of counsel is much like critiquing beauty. It is in the “eyes of the beholder.”

Different groups define effective counsel differently. The courts who want to uphold convictions at almost all costs typically define effective assistance of counsel vastly different from how criminal defense lawyers define what is effective. Similarly, how criminal defense attorneys define effective assistance of counsel is vastly different from still another group—the convicted prisoners.

The convicted prisoners’ standard for effective assistance of counsel is usually equal to a miracle worker—in other words, a standard that cannot be met by mere mortals, let alone lawyers without resources. Clients have been known to demand that their lawyers make a silk purse out of a sow’s ear.

It also may not surprise you that a person may define effective assistance of counsel one way on one day and then suddenly after being indicted, convicted, and sent to prison, will define it differently than before. You encounter this frequently from politicians who have been convicted of a crime. This shift is akin to the adage that a conservative becomes a liberal once indicted.

One thing we all agree upon is that a warm body with a bar number is not enough. However, to make a point, it would not surprise me if a court said that a warm body with a bar number, which is able to stand up when the clerk bellows “all rise,” is enough. That is not enough for me and should not be for you. But, for those judges who feel the pressure of community clamor, it tragically may be enough. Community pressure and hatred of crime should never be factors in defining the responsibilities of a criminal defense attorney, but it happens often—too often. One component of the responsibility is the ability to be immune to those community pressures.

In the Supreme Court’s effort to define effective assistance of counsel, it defined the opposite: “ineffective assistance of counsel.”<sup>4</sup> In *Strickland v. Washington*, Justice Sandra Day O’Connor wrote: “The benchmark for judging any claim of ineffectiveness

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3. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

4. *Strickland*, 466 U.S. at 686.

must be whether [the] counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."<sup>5</sup> The Court went on to state that the defense lawyer must "perform reasonably"<sup>6</sup> and must act like a "reasonably competent attorney."<sup>7</sup>

At first glance, the United States Supreme Court's definition might seem appropriate. "Just results" ought to be the ultimate goal and lawyers should act "reasonably." However, in reality, this definition says nothing and offers no guidance. How do you measure whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result?

The Supreme Court's failure is that its definition is so vague that it merely enables courts to do as they please, whether it is to rarely declare a lawyer ineffective or commonly declare the lawyer effective. Armed with this definition, a fact finder—a judge—can render, with justification, virtually any finding of effectiveness. The definition is so imprecise, or so fluid, that it allows courts to achieve the agenda of choice—whether the court wants to declare a lawyer ineffective or effective. Usually, the court finds the lawyer to be effective since few judges want to incur the wrath of the community by giving a defendant a new trial. That doesn't seem right. The law should be more precise.

To say that the system should "work" is to say that trials should be fair and that the accused should have an effective lawyer. I am not saying that the guilty should go free—only that the system be fair and that an accused have an effective lawyer, one who takes seriously the responsibility of a criminal defense attorney and who can actually perform the tasks required.

So what is the responsibility of a criminal defense lawyer? The answer is to do *all* that you can, consistent with the Constitution, the law, and the codes of professional responsibility,<sup>8</sup> to defeat the prosecution's case—regardless of how guilty your client is, what your client has done, or how right the prosecutor is. You, as the defense attorney, are not the judge; you are not the jury. You

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5. *Id.*

6. *Id.* at 675.

7. *Id.* at 687 (quoting *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970)).

8. *See, e.g.*, THOMAS D. MORGAN & RONALD D. ROTUNDA, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, MODEL RULES OF PROFESSIONAL CONDUCT, AND OTHER SELECTED STANDARDS INCLUDING CALIFORNIA RULES ON PROFESSIONAL RESPONSIBILITY (1995).

are an advocate for one client, just as the prosecutor is the advocate for one client, the state.

It means to know your client is a serial killer yet feel professionally able, and obligated, to persuade a court to throw out all the evidence of guilt in a pretrial motion. In some ways you must momentarily "suspend" your personal morality and make a firm commitment to the system of justice. The commitment is to put the government to its test by doing all that you can, consistent with the Constitution, the law, and the codes of professional responsibility to get your client "off the hook."

Our system is an adversarial one—you do your job, and the prosecutors do their job. You are *not* to do the prosecutor's job, and the prosecutor is *not* to do yours. You have both agreed to play by the rules and that sets your limits—in essence, no lying, cheating, or stealing. If there is a defect in the prosecution's presentation of the evidence, you must jump on it and point it out to the jury. To look the other way and not point it out to the jury is to violate your commitment as a lawyer and to deprive your client of constitutional rights.

The criminal defense attorney in the courtroom with a "conscience" or the criminal defense attorney who worries about reputation is not an advocate. Such a lawyer is no different than the prosecutor who "throws" the case. Both are equally dishonest to the client represented.

Incidentally, in "suspending" your own morality for the duration of your representation of a defendant charged with heinous crimes, there is nothing wrong with wanting the prosecutors to do their job. After all, you are a citizen, and presumably, you abhor crime and want our communities to be safe. You should want a prosecutor to win when the evidence rises to the level of proof beyond a reasonable doubt but only winning by doing so "fair and square."

Finally, a criminal defense attorney is entitled to feel disappointed when losing a case. It is only human to enjoy winning even when, in a pure and perfect world, you should not win. But, at the same time, if justice were truly achieved and your client was effectively represented and convicted by evidence properly presented and beyond a reasonable doubt, then it is "okay" for a criminal defense attorney to be satisfied.

Ultimately the goal is justice—for both the defendant and the accuser. If your client received effective assistance of counsel—

*real*, effective assistance of counsel, not that vague description outlined by the Supreme Court—and if the evidence proved beyond a reasonable doubt that your client was guilty—the system worked.

Of course, the problem with the above is that it presumes adequate resources allowing criminal defense lawyers to perform their jobs. This is rare. There simply are not enough resources, and few citizens are enamored with the idea of “giving” money so that “criminals can go free.” The concept of the Constitution is too ephemeral when balanced against the reality of crime.

