The Right to Effective Legal Counsel in Criminal Proceedings

Jaime Campaner Muñoz

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Ciudad del Saber
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editorial COMARES

THE RIGHT TO EFFECTIVE LEGAL COUNSEL IN CRIMINAL PROCEEDINGS

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To my family, for tolerating my absences; to my team (Germán, Guillermo, and Irene) for intermittently covering for me so I could devote myself to this project; to Rosa (our brilliant "junior" attorney) for her constant support; to Marilén, for making life easier; to my clients, for their recognition and understanding; to Isabel Tapia, for keeping me at the University through kindness; to Fernando Gascón, for his guidance and insight, always spot on; and, finally, to all those lawyers (undoubtedly effective) who, from many different and distant cities, have helped me shape my judgment and understand –through a broader perspective– that the inefficacy of legal counsel is a global issue that transcends the borders of the Kingdom of Spain, and that states can learn from each other's regulations and experiences.

This monograph constitutes, in essence, a substantial part of the unpublished research project I defended on November 13, 2024, at the Faculty of Law of the University of the Balearic Islands, as the second examination in the competitive process for admission to the rank of Senior University Lecturer in Procedural Law. The evaluation was conducted by a selection committee chosen by public lottery and composed of Professors Francisco López Simó (Chair), Isusko Ordeñana Guezuraga (Secretary), and Alicia Bernardo San José (Member). To all of them, I extend my sincerest thanks for their observations, which have been taken into account for this publication. The project received the highest possible grade from the aforementioned Committee.

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by Gabrielle S. Friedman & John S. Siffert,
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A Lawyer Writing for Lawyers

The power of Jaime Campaner Muñoz's *The Right to Effective Legal Counsel in Criminal Proceedings* is that its author is a practitioner as well as an academic.Jaime Campaner is a scholar of procedural law, but also criminal defense lawyer who has felt the friction between ideals and institutions. His dual perspective keeps the discussion grounded in the real work of defense. He knows that ineffective counsel is not simply a question of ethics or talent—it is a structural problem produced by inadequate training, meager pay, and a judicial culture that might equate the presence of a lawyer with adequate representation.

1. The U.S. Standard: Effectiveness as a Constitutional Duty

Campaner devotes a central part of his analysis to the United States, where the Supreme Court's landmark decision in *Strickland v. Washington* (1984) clarified that the U.S. Constitution's Sixth Amendment right to counsel is

a right to *effective* counsel. The *Strickland* test requires defendants to show both that counsel's performance fell below "reasonable professional assistance" and that this failure prejudiced the result.It does not mandate "perfect" defense, but rather a minimum standard of effectiveness. While demanding and often deferential (*i.e.*, it is not easy for a defendant to get a verdict overturned on this basis), the framework at the very leastgives American judges and lawyers a vocabulary for naming and remedying defense failure.

As U.S. practitioners, we see what this means in practice: U.S. courts overturn convictions in cases of gross incompetence-- where lawyers sleep through parts of a trial, entirely fail to investigate, or mishandle plea offers. In certain continental systems, by contrast, it appears that a form of judicial silence dominates. Campaner shows that many courts tend to equate representation with attendance. When a trial goes wrong, the defendant may be told that any failure by his or her counsel is a private matter, not a constitutional injury. Campaner calls this the "taboo problem" of certain criminal justice systems including his own country's —a refusal to acknowledge that defense lawyers, like judges and prosecutors, can fail in ways that render proceedings fatally unfair.

2. The Continental Blind Spot

Campaner traces this silence through Spain's jurisprudence, where courts will assume that if a lawyer was present, the right to an adequate defense was satisfied. The Constitutional Court's doctrine focuses on formal presence rather than actual performance. Yet, as he notes, when court-appointed counsel are publicly funded and judicially supervised, their failures become matters of

state responsibility. The Spanish Constitutional Court, like many continental tribunals, treats "defenselessness" as a procedural error, not a failure of counsel.

Campaner argues that judges themselves must police the effectiveness of counsel, even replacing lawyers whose work is plainly deficient. That idea –judicial intervention to guarantee an effective defense– would not work in the in the U.S. adversarial system, where there are no investigating magistrates and judges are not positioned to second-guess defense strategy.[1] However, Campaner suggests that in an inquisitorial system, judicial intervention is not only possible—it may be the best safeguard.

Here Campaner makes his most pragmatic point: judges share the duty of vigilance. He proposes that when a judge perceives a manifestly deficient defense, the judge must intervene or replace counsel. Switzerland already codifies this duty; Spain does not. Using the American example to arrive at this proposal shows Campaner's deft deployment of comparative law.He takes the lesson but interprets it within the logic of Spanish legal procedure and legal culture. Rather than propose adopting the U.S. *Strickland* standard and the U.S. remedy (seeking post-conviction relief in an adversarial process), Campaner suggests a remedy consistent with the Spanish system.

By grounding this argument in Spanish constitutional principles –Articles 24 and 7 of the Organic Law of the

1 Many claims of ineffective assistance of counsel fail in the U.S. because what the convicted defendant later claims was incompetence of counsel is ruled to have a been a strategic defense decision that in the end did not avoid a conviction. Simply losing at trial, in other words, is not a grounds to overturn the verdict based on ineffective assistance.

Judiciary–Campaner transforms what many Spanish practitioners have treated as a moral issue into a matter of legal obligation. For practicing lawyers, this argument matters because it reframes judicial oversight not as interference but as protection—both for the client and for the integrity of the profession.

3. Learning from Comparative Models

Campaner's comparative survey of Italy, Denmark, and Switzerland demonstrates how institutional design shapes defense quality.

Italy restricts practice before the Supreme Court of Cassation to seasoned advocates who have passed a national exam after years of supervised litigation. The *cassazionisti* model enforces meritocracy and experience.

Denmark mandates a continuing-education requirement: fifty-four hours every three years, with compliance audited by the Bar and sanctions for default. Training is not optional; it is a condition of practice.

Switzerland, through Article 134 § 2 of its Code of Criminal Procedure, requires judges to replace a public defender whenever the defense relationship or competence breaks down. Judicial passivity, in that system, is itself a breach of duty.

Campaner uses these case studies to suggest potential inspiration forSpanish legal reform. The author calls Spain's situation a case of "legislative anemia" – where the legal culture proclaims rights but fails to enforce them.He proposes a remedy.

4. The Spanish Context: From Anemia to Accountability

Spain's new Organic Law 5/2024 on the Right to Defense uses the word "adequate" instead of "effective". To Campaner, that single word betrays a national reluctance to confront the real issue. There is training, but no enforcement; rights, but no remedies. His term "legislative anemia" captures a problem that will sound familiar to any American public defender: a system that proclaims fairness but starves the defense of resources. The result, he warns, is a framework that rewards compliance on paper while tolerating mediocrity in practice.

5. The U.S. Lesson: Confronting Failure

Campaner's discussion of *Strickland* and its progeny is not a call to imitate American jurisprudence wholesale. It is a call to emulate its clarity. By acknowledging ineffective assistance as a constitutional fault line, the U.S. has forced its legal culture to define competence, to train for it, and to correct failure. European systems, by contrast, conceal ineffectiveness under procedural formalism. For European practitioners, this silence is corrosive: it denies clients the remedy they deserve and denies the profession the discipline it needs.

Campaner applauds the Spanish Supreme Court's decision 383/2021 (May 5) for importing *Strickland*'s logic but warns that uncritical transplantation risks hollowing the concept. He proposes a standard that measures performance against reasonableness and fairness, but also urges judges to act *ex ante*, not only after the damage is done. Without clear *ex ante* safeguards – judicial oversight, training standards, and substitution mechanisms– the doctrine will remain symbolic. He urges a shift from retrospective blame to preventive structure:

a system that detects and corrects ineffectiveness before verdicts become irreversible.

6. Judicial Oversight and the False Dichotomy

Campaner also dismantles the myth that ineffectiveness afflicts only court-appointed counsel.He points out that both private and public defenders are bound by the same constitutional duties. The key question is not *who* represents the accused but *how*. Judicial vigilance, he argues, must therefore extend to all lawyers. Article 7 of the Organic Law of the Judiciary already mandates courts to prevent defenselessness; applying it to counsel performance would give the rule real meaning.

7. Procedural Consequences and Remedies

Campaner's proposal is to treat proven ineffectiveness as a ground for reversal.Campaner reasons that if a violation of defense effectiveness undermines the essential fairness of the process, the only remedy is to set aside the result and restore the right to an effective defense. He notes that Spanish jurisprudence already hints at this possibility, but he calls for explicit procedural mechanisms to make it real. The argument reframes claims of ineffective counsel from ethical grievances into justiciable rights.

8. Why Practitioners Should Read This Book

For defense lawyers on both sides of the Atlantic, this book offers a mirror and a warning. It shows how easily the right to counsel can become a hollow ritual when systems prize output over justice. Campaner's comparisons –Spain's minimal oversight, Denmark's strict training, Switzerland's judicial vigilance– invite us to re-examine

our own assumptions about competence and independence. He reminds us that constitutional rights mean little without enforceable standards to guarantee them.

9. From Formalism to Responsibility

Reading *The Right to Effective Legal Counsel in Criminal Proceedings* as an American lawyer is like watching a familiar debate unfold in a new language. Spain is wrestling with questions we have asked for decades: What does "effective" really mean? How much failure is tolerable before justice itself fails? Campaner's answer is uncompromising –effectiveness is not a luxury; it is the measure of justice. His work reminds us that the defense lawyer's competence is not merely professional– it is constitutional.

New York, November 20, 2025

Gabrielle S. Friedman
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FOREWORD

In recent years, the approach taken by public authorities towards any matter related to Justice has invariably been linked to efficiency. This *"magic word"* appears unfailingly in the titles and preambles of laws passed in our country and is a constant in the speeches of public officials as well as in the banners of conferences, congresses, and workshops that are organized. This phenomenon, of course, is not unique to us, but equally present in the countries around us. In Italy, for instance, the so-called *Cartabia Reform* of 2022 was implemented through two legislative decrees: one *per l'efficienza del processo civile* and the other *per l'efficienza del processo penale*. At the supranational level, it is worth recalling that since 2002 the Council of Europe has hosted the European Commission for the Efficiency of Justice (CEPEJ). In these contexts, moreover, the term *efficiency* is understood in the second meaning given by the Royal Spanish Academy Dictionary, that is: *"the capacity to achieve desired outcomes with the least possible resources"* [emphasis added].

The prevalence of this approach should not come as a surprise, since we live in times of austerity, where it must be assumed that public investment will no longer meet expectations, nor perhaps even cover expenses that were previously financed through that channel. Combining efficiency and justice therefore entails exploring how to make the most of available resources, in order to

secure the greatest possible protection for the rights and interests of those involved in legal proceedings, and to ensure that criminal prosecution takes place under the best possible conditions. Inevitably, this exercise also opens the door to justifying cutbacks in the very foundations of what defines the essence of the public sphere.

It is for this reason that we must be grateful when, in this efficiency-driven context, voices such as that of Jaime Campaner emerge to remind us of what is –or, at the very least, ought to remain– important: I refer to quality, a requirement which, in my view, should be considered as inherently part of the concept of efficiency, but which, perhaps deliberately, is often relegated to the background. Can it truly be said that a system is efficient if, precisely because of resource optimization, it fails to produce quality outcomes?

If justice does not meet minimum quality standards or thresholds, it does not deserve to bear that name.Among the means and resources required by our justice system for the protection of rights and the pursuit of criminal prosecution, the work of lawyers is, without a doubt, essential. It is they who are entrusted with the task of assisting those who are parties to a legal proceeding. More specifically, in the context of criminal prosecution, lawyers are the key element in ensuring the exercise of the right to defense for those who find themselves in the position of defendants throughout the various stages of the process.

This essential role of the legal profession has been officially reaffirmed by the very recent Organic Law 5/2024, of November 11, on the Right of Defense. The LODD, in fact, does not shy away from the subtleties and challenges of language when it comes to using qualifiers:

Article 4.1 equates *adequate legal assistance* with *effective legal assistance*; and Article 8 is titled The Right to the Quality of Legal Assistance, linking it to the quality of the service consisting of legal advice or representation in court. Regardless of the terms employed, it is evident that the legislator is not satisfied with merely "any legal assistance" to justify the functioning of the system; rather, such assistance must meet certain minimum standards which, by necessity, must be standards of quality.

Are *adequate legal assistance*, *effective legal assistance*, and *quality legal assistance* the same thing? It is hard to say, as the three notions at play –adequacy, effectiveness, and quality—are imprecise and operate on partially distinct levels. Any legal assistance should, in the abstract, be adequate to achieve the goal it serves: the defense– in this context, the defense of the accused in a criminal proceeding. The effectiveness of legal assistance, on the other hand, can only be measured in each specific case, taking into account the efforts made by the defense attorney in addressing the obligations incumbent upon them. Quality, finally, requires attention to the inherent properties of the service provided by the lawyer, which allow us to assess its value –typically in a positive light: in other words, we focus on how the service is delivered, not necessarily on the outcome– although, like it or not, a favorable result is often taken as a clear indicator of the quality of the legal service received.

Faced with this variety of terms and approaches, Jaime Campaner Muñoz has opted to focus on *effectiveness*, and that is why this book bears the title *The Right to Effective Legal Counsel in Criminal Proceedings*.

Effective legal counsel in criminal proceedings is a valid choice, because what matters –regardless of the terms–

is the specific aspect of reality to which this research is directed. And, indeed, underlying this work is a genuine concern for what is truly important: that every lawyer, in every case, whether appointed ex officio or privately hired, does a good job. How is that *good job* defined, especially when what is at stake is criminal defense? That is the leitmotif of the book now in the reader's hands.

Of course, I won't reveal here the author's full position (no spoilers, as one would say these days), but I cannot resist outlining what, in my view, should be the keys to taking the next step: recognizing not only the fundamental right to legal counsel, but the right to effective legal counsel –a much-needed advance.

a) First and foremost, there is the figure of the lawyer, an obvious conditioning factor that operates on two distinct levels. Before anything else, we must acknowledge the significance of each specific lawyer: lawyers are not replaceable, no matter how much we are told that artificial intelligence systems will soon take their place; their unique traits, without doubt, shape how they deliver their services. But on a general level, what should concern us are the institutional guarantees that ensure all lawyers meet minimum standards of quality. In my view, these guarantees must operate at least on three levels:1. Initial academic training – are university curricula sufficient to ensure that future lawyers acquire the knowledge and skills needed to provide quality professional legal services? 2. Specific filtering process to enter the legal profession – is the current bar examination, as implemented in our country, truly adequate and comparable, for instance, to the MIR exam used in the medical field? Is it reasonable that any lawyer be allowed to draft a cassation appeal, unlike what occurs in many of our neigh-

boring countries? *3*. Continuing education – would it be appropriate to move toward a model like the Danish one, which, as Jaime Campaner explains, is significantly more demanding in this regard?

b) Secondly, one must take into account how each lawyer performs their duties in each specific case. It is clear that a hypothetical fundamental right to effective legal counsel does not imply a right to successful legal representation; in this particular domain of service delivery, as in many others, we might speak of means-based obligations, not results-based ones. The manner in which a lawyer must carry out the provision of legal assistance can, again, be considered from two distinct but clearly complementary angles: (i) Of course, there is the minimum standard of what must not be done: it is impermissible to engage in malpractice or serious negligence that undermines the constitutional significance of criminal defense. From this perspective of the unacceptable –so vividly illustrated by Jaime Campaner– the Strickland doctrine, developed by the U.S. Supreme Court and now echoed in the jurisprudence of the Spanish Supreme Court's Second Chamber, has been constructed. (ii) Merely adhering to the above, however, is not, in my view, compatible with the notion of effectiveness (or even minimal quality): put plainly, one cannot say that a lawyer is effective simply because they are not grossly incompetent –unless we are willing to downgrade or redefine the very concept of effectiveness. Defendants– especially those facing criminal charges, and even more so when they are vulnerable –must be able to legitimately expect from their lawyer what the lawyer ought to do. I would summarize this, again in plain language, as follows: take the case seriously, with all the implications that entails.

c) *Last, but not least*, a fundamental right to effective legal counsel also requires that the lawyer's work take place within an appropriate institutional context. Again, I would like to focus attention on two interrelated, complementary elements: (i) It is not easy to demand effective legal defense when the legal framework applicable to the case –whether substantive law (the law itself and the jurisprudence interpreting it) and/or procedural law– is not up to the most basic standards of lex scripta, lex praevia, and lex certa. Let us acknowledge that it is not always easy to practice criminal defense in a system like ours, where we rely on a Code of Criminal Procedure that is outdated. This is especially true in times like ours, where, as Professor Dopico Gómez-Aller aptly points out, we are governed by what has come to be known as copypaste jurisprudence. Moreover, things are further complicated when the other key actors in the criminal process fail to perform their functions as they should: even though it ought not be the case, it is undeniably easier to conduct an effective defense when the investigating judge, the public prosecutor, or the presiding judge of the trial chamber do not venture, to put it euphemistically, "into the realms of the unpredictable."

It is within this contextual sphere, in my view, where quality most clearly collides with efficiency. To what extent does an institutional framework governed by the pursuit of efficiency undermine or condition the quality and/or effectiveness of criminal defense? It is difficult to avoid relying on intuition here, but I firmly believe that a system geared toward efficiency –one that seeks to achieve the most with the least resources– is not fertile ground for producing quality outcomes. With judges, prosecutors, and court offices under pressure and in a

constant state of overload, it becomes far more difficult to perform quality defense work. Undoubtedly, part of a lawyer's good practice must involve adapting to the circumstances: for instance, it is not good practice to prepare a one-hour oral argument when it is known in advance that the court will only allow fifteen minutes to present closing arguments in a criminal trial. And yes, in that sense, it is appropriate that those final conclusions be brief. Ultimately, it will always depend on the circumstances of each specific case. However, we cannot deny the evidence: in a low-cost justice model, achieving quality results becomes significantly more difficult. Another example is offered by the recently enacted Organic Law on Efficiency Measures in the Public Justice Service, which makes a clear commitment to plea bargaining as a mechanism to enhance efficiency: sentencing limits are removed, and plea deals become a central component of the new preliminary hearing, which now serves as the core piece of abbreviated criminal proceedings. I will refer the reader, at this point, to the pages that Jaime Campaner devotes to this matter under a particularly telling heading: "Plea Bargaining as the Primary Scenario for Ineffective Legal Assistance."

5. These and many other issues form the foundation of the excellent monograph now in the reader's hands. A mere glance at the table of contents is enough to gain a clear sense of what is addressed –directly, clearly, and concisely. With a robust comparative focus, Jaime Campaner carefully analyzes, with both rigor and precision, the very core of the right to legal counsel and the essential elements that, in his view, must define it to determine its effectiveness– and also its quality, in my view. The author, moreover, goes beyond that and offers proposals regarding the available remedies in cases of ineffective defense. This is, undoubtedly, one of the most

difficult issues to resolve on a general level; thus, it is necessary to have general frameworks and conceptual tools to be able to approach each case proportionally and provide the appropriate solution based on its specific circumstances. This is precisely what Professor Campaner accomplishes with rigor and clarity in his treatment of this issue.

And it is precisely because the quality of this work is directly proportional to the quality of its author. Jaime Campaner is an Associate Professor of Procedural Law at the University of the Balearic Islands and also a practicing attorney, specializing in criminal matters. His excellence as a lawyer is widely recognized, and it undoubtedly enhances his excellence as a scholar—both as a teacher (where practical experience greatly enriches the teaching of law, especially procedural law) and as a researcher. A distinctive feature of Jaime Campaner's academic work is his focus on complex legal matters that are, at the same time, of great practical relevance and vocation, always using as his reference point the guarantees afforded to suspects and defendants. This book is a clear example of that. Nor do I doubt that Campaner's academic rigor as a scholar is, to a great extent, a direct result of his quality as a lawyer: being one and the same person, there can be no separation between these roles.

For all these reasons, I am confident that the reader will both enjoy and learn from this book. It combines information, analysis, critique, and proposals of the highest standard. Beyond the individual reading experience, I also trust that its publication will spark discussion and debate—both in academia and the courts—helping to reinforce the value of good lawyers, support the consolidation of high professional standards,

and open the door to appropriately remedy the harm unjustly suffered due to ineffective legal assistance.

Madrid, January 3, 2025

Fernando Gascón Inchausti

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THE RIGHT TO EFFECTIVE LEGAL ASSISTANCE IN CRIMINAL PROCEEDINGS

I. Three Cases for Reflection

1.1. First Case

Ezequiel is being prosecuted by the Anti-Corruption Prosecutor's Office for a combination of offenses against public administration, whose common denominator lies in the inappropriateness of the factual account reflected in the first conclusion of the Prosecution's closing brief. His wife is accused –utterly unfoundedly– of a money laundering offense, with the predicate offenses allegedly generating the proceeds to be laundered being the same criminal types brought against public administration.

There are nine other defendants, all of whom, just minutes before the oral hearing, agree to penalties not exceeding two years of imprisonment, along with fines and disqualification sanctions, thereby avoiding incarceration. With the same aim, and unaware of the legal inappropriateness of the acts but with the clear veiled purpose of preventing his wife from being prosecuted, Ezequiel –advised by a lawyer who tells him that the charges are serious and that the co-defendants' statements would, *per se*, constitute sufficient

incriminating evidence to destroy the presumption of innocence– opts for a plea deal and accepts a sentence similar to that of the other defendants. In exchange, the Prosecutor drops the charges against his wife, thereby securing her acquittal.

The Criminal Chamber of the National Court validates the plea deal without verifying the constitutionality of the methods used to obtain the evidence (e.g., wiretaps, whose legality was never contested once the investigation secrecy was lifted), accepting instead only a judicial resolution authorizing the procedure using a standardized form. The investigating judge postponed a detailed ruling on the matter, referring instead to the proceedings regulated under Article 786.2 of the Spanish Criminal Procedure Act (LECrim), after merely repeating the question at hand. Given that the parties agreed, the legality of the agreed penalties and the absence of a specific provision on judicial oversight of evidentiary admissibility under Article 787 LECrim was never questioned.

1.2 SECOND CASE

Rash, an Israeli citizen, was arrested upon landing in Ibiza from Tel Aviv due to a European Arrest Warrant issued by the authorities of the Federal Republic of Germany, and was placed at the disposal of Central Investigating Court No. 5 of the National High Court.

The presiding judge of the aforementioned court convened the appearance stipulated in Article 51.5 of Law 23/2014 of November 20, regarding the mutual recognition of criminal judgments within the European Union, with the participation of the Public Prosecutor's Office and the detainee, who was assisted by a private attorney practicing in the island of Ibiza. Both the

detainee and the attorney appeared via videoconference from the duty court in Ibiza.

During the hearing –which closely followed the format established by Article 505 of the Spanish Criminal Procedure Act (LECrim)– the defense counsel limited himself to briefly presenting some remarks regarding the personal situation of the person sought, merely requesting provisional release. Meanwhile, the Public Prosecutor stated that there were no legal grounds for refusing surrender to the German authorities. A few days later, the Central Investigating Court issued an order agreeing to the surrender of the person sought, who, although he had not formally consented to it during the hearing, had not opposed it either, due to a lack of awareness of the legal grounds for refusal (such as the need to allege specific reasons). As a result, he was surrendered without further procedural examination.

1.3 Third Case

Altamira is being accused of an alleged pyramid scheme based on events that the Public Prosecutor characterizes merely as a failed investment and, at most, a civil breach to be resolved before the civil jurisdiction. The private prosecution, in its provisional conclusions, proposes as its sole valid piece of incriminating evidence –aimed at undermining the presumption of innocence– the reading of the preliminary statement of the complainant, a 72-year-old woman, citing for such purpose Article 730 of the Criminal Procedure Act (LECrim), without any substantial legal reasoning. The Public Prosecutor submits written provisional conclusions calling for acquittal without proposing any evidentiary measures, and the defense of the accused merely denies the charges, without proposing the complainant's testimony nor challenging the evidentiary proposal of the private prosecution, des-

pite the absence of any grounds –either alleged or actual– justifying the admission of the complainant's preliminary statement under Article 730 LECrim. Moreover, it is worth noting that in said statement, no opportunity for contradiction existed, as it was taken prior to the formal accusation of the now-defendant.

In this context, the trial court issues an order admitting the evidentiary request and authorizes the reading of the complainant's preliminary statement.

1.4 APPROACH AND FRAMEWORK

The central issue around which this research work revolves may be summarized as how to ensure effective legal assistance, in terms of reasonableness, equality, and fairness of the process, and what should be the procedural consequence in the event of ineffective legal assistance. Additionally, beyond the scope of this investigation, it leaves open the question of potential responsibilities (civil, criminal, or disciplinary[2]) that may ultimately fall upon the lawyer.[3]

2 In the disciplinary field and criminal law, the work of GUT, T., *Counsel misconduct before the International Criminal Court. Professional responsibility in international criminal defence*, Studies in International and Comparative Criminal Law, Hart Publishing, Oxford and Portland, Oregon, 2012, is particularly relevant. The book, which was one of the objects of my research, emphasizes a valuable lesson learned from practice before the International Criminal Tribunal for the former Yugoslavia, the Special Tribunal for Lebanon, and the Special Court for Sierra Leone: that the most serious professional malpractice by lawyers "occur in significant numbers" and, in the vast majority of cases, remain unpunished (p. 49, free translation).

3 To illustrate the seriousness of these lines, I recall the Decision of 9 September 2024 by the First Chamber of the Constitutional

It is not my intention, far from it, to encourage a generalized scrutiny of the work of the defense attorney, thereby opening a tempting post-trial incident for the defendant dissatisfied with the judicial decision, who could easily be inclined to blame their lawyer. Such an approach, in fact, offers a glimmer of hope for reversing the judicial ruling.

More narrowly, I argue that there are certain minimum standards of professional competence and conduct in the proceedings that the defense attorney must not fail to observe, insofar as they define the lower threshold below which their actions may leave the defendant defenseless, or even harm them, under

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Court, which resolved a disciplinary procedure against a lawyer who had signed the complaint in case no. 1739-2024. In this very brief decision, the Constitutional Court upholds the sanction of a warning for failure to respect the dignity of the magistrates of the Chamber and the judicial institution itself, by including in the complaint a literal and selective summary of excerpts from nineteen judgments of the Constitutional Court, despite none of them being false. In addition to this decision, the Court also ordered that the ruling be forwarded to the Bar Association of Barcelona, which shall consider the disciplinary consequences applicable to the sanctioned lawyer. It seems that the court of guarantees overlooked what should have truly merited attention in this investigation:

"Not only did counsel, by proceeding in this way, [...] jeopardize the viability of the claim brought before the Court, but this was precisely a case in which inadmissibility had already been declared. Not because, as is currently relevant, the appropriate channel had not been used (Art. 553.1 LOPJ), but rather because the magistrates of the First Chamber responsible for resolving it [...] attributed to counsel the intention of dressing up as constitutional doctrine his own opinions drawn from excerpts of rulings that had little relevance to the facts of the case. Furthermore, the reading of those quotations reveals not only an argumentative substitution but also a distortion —

a "comfortable" procedural situation where the sole concern was to maintain rather than worsen the outcome, yet resulting in manifestly unfortunate actions (such as questions, evidentiary motions, etc.). In such a scenario, the essential core of the right to defense suffers due to causes attributable to the very person who, paradoxically, is entrusted with the mission of defending the accused. Strictly speaking, the right to legal counsel may have been formally or ostensibly fulfilled, but clearly, it will have been undermined by the lawyer themself and, in material terms, eroded to the point of becoming unrecognizable.[4]

II.- The Right to Legal Counsel

2.1.- Concept

The right to legal counsel is an essential corollary of the broader right to defense[5] (a right that stands in direct opposition to the right of accusation[6]) and constitutes one

4 In the words of BEKKER, P.M., "The right to counsel at trial for a defendant in the criminal justice system of the United States of America, including the right to effective assistance of counsel," *The Comparative and International Law Journal of Southern Africa*, vol. 38, no. 3, 2005, pp. 453–473:

"The Sixth Amendment would be annulled if no level of quality of legal assistance were ensured. The issue here is the 'performance of the attorney falling below an objective standard of reasonableness' and altering the outcome of the trial."

5 ARMENTA DEU, T., Lecciones de Derecho procesal penal (Tenth edition), Marcial Pons, Madrid, 2024, p. 59.

6 MORENO CATENA, V., "Sobre el derecho de defensa: cuestiones generales," Teoría & Derecho. Revista de Pensamiento Jurídico, 8, 2010, p. 20: "the right of the accused to mount an adequate defense, to repel this aggression that calls into question his most important legal interests, among them, his liberty."

of the two modalities (undoubtedly the most important) through which the latter is exercised. Indeed, every person has the right to defend themselves under the terms established by the legislature—that is, to intervene directly and personally in the criminal proceedings brought against them, but the Technical defense or through counsel freely chosen by the interested party[7] (heterodefense) is the only one that can guarantee the fairness of the trial and, ultimately, the effective equality of procedural arms, insofar as the procedural alter ego[8] of the investigated or accused individual is one who possesses technical knowledge and procedural tools for the protection of their fundamental rights in general, and their liberty in particular. Legal assistance, therefore, constitutes the quintessence of the right to defense and is materialized through a professional capable of confronting the accusation both procedurally and dialectically.

In its Ruling 35/2021, of February 18, the Constitutional Court emphasized that "the right to defend oneself does not end with self-defense, even if it is understood, in certain cases, as an alternative right to technical assistance, since it always possesses its own content, relatively autonomous, as an expression of the nature, in a certain way, of the criminal defense law, which is generally integrated by the joint participation of both

7 In the event of not doing so or being unable to afford the services of a lawyer, both Article 767 of the Criminal Procedure Law (LECrim), among others, and Article 27 of Law 1/1996 of January 10, on free legal assistance, stipulate that a court-appointed lawyer shall be designated, respectively, for free legal aid and free legal representation.

8 In the apt expression of GIMENO SENDRA, V., in VVAA, *Fundamental Rights and their Jurisdictional Protection*, Colex, Madrid, 2007, p. 494.

the accused and their defense lawyer, independently of the unequal protagonism of both."

Previously, Constitutional Court Judgments 42/1982 of July 5, 181/1994 of June 20, and 29/1995 of February 6 had clarified that the fact that the Constitution recognizes the right to self-defense does not imply that it may displace technical defense in those cases where the legislator has opted for the latter to be mandatory, nor does it allow dispensing with the required defense by a lawyer. Thus, it falls to the legislator to determine in each type of proceeding whether self-defense is an exclusive alternative or whether technical defense is mandatory and, therefore, the former is merely complementary. Practically fifteen years later, the words of MORENO CATENA still remain valid, who emphasized that "our criminal procedural law is extremely restrictive in allowing the participation of the accused throughout the proceedings, since it extraordinarily enhances the prominence and intervention of the lawyer to the detriment of self-defense, and the necessary means to carry it out are not made available to the accused."[9]

2.2.-REGULATION

At the national level, the Spanish Constitution (CE, hereinafter) enshrines the right to legal assistance as a fundamental right with dual application depending on whether it is exercised during preventive detention (Article 17.3 CE) or at a later stage (Art. 24.2 CE). Indeed, while Article 17.3 CE recognizes this right to the detainee as one of the guarantees of the right to liberty, Ar-

9 MORENO CATENA, V., "Sobre el derecho de defensa…", op. cit., p. 27.

ticle 24.2 CE does so within the broader framework of the right to defense and as a guarantee of due process for the accused (Article 24.1 CE).

On the other hand, the Criminal Procedure Law (hereinafter, LECrim) develops the right to legal assistance in Articles 118 and 520, in addition to including specific provisions regarding the expedited procedure in Articles 767 and 768 LECrim. Article 775 LECrim, for its part, regulates the initial appearance of the accused before the investigating judge, indicating their right to defense and the possibility of meeting privately with their lawyer both before and after giving a statement, except in the (exceptional) case where incommunicado detention has been decreed.[10] Once the oral trial is open, the accused is summoned to appear in the proceedings with a lawyer to defend them and a procurador to represent them, as established in Article 784.1 LECrim, in line with the provisions of Articles 542 and 543 of the Organic Law of the Judiciary.

At the international level, Article 14.3 of the International Covenanton Civil and Political Rights (ICCPR, hereinafter) provides for the right of any person charged with a criminal offense "to have adequate time and facilities for the preparation of their defense and to communicate with counsel of their own choosing" (paragraph b) and "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing" (paragraph d). Similarly, the Charter of Fundamental Rights of the European Union

10 In the case of statements made at police stations, this prior interview was not normalized in practice until the entry into force of Organic Law 13/2015, of October 5, which amended the Criminal Procedure Law to strengthen procedural safeguards and regulate technological investigation measures.

(hereinafter, CFREU) guarantees respect for the right of defense of every accused person.a criminal proceeding (Article 48.2), that is, to be "advised, defended and represented" (Article 47 II).

Article 6.3 of the European Convention on Human Rights (hereinafter ECHR) provides a series of minimum rights for every person accused of an offense: a) to be informed, as soon as possible, in a language he understands and in detail, of the nature and cause of the accusation against him; b) to have adequate time and facilities for the preparation of his defense; c) to defend himself in person or through legal assistance of his own choosing and, if he does not have the means to pay for it, to be given legal assistance free of charge when the interests of justice so require; d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; e) to have the free assistance of an interpreter if he does not understand or speak the language used in court.

At the community level, with Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013, on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third parties and with consular authorities while deprived of liberty, the application of the Charter of Fundamental Rights of the European Union (CFREU) was promoted, in particular, its Articles 47 and 48, developing what is established in Article 6 of the ECHR, in accordance with the interpretation of the ECtHR.

In order for the lawyer of the suspect or accused person to effectively exercise the fundamental aspects of

the right of defense in practice, Article 3 recognizes the right to have access to a lawyer without undue delay and, in any case, before being questioned by a law enforcement authority or judicial authority, during an investigative act or evidence-gathering procedure, from the moment of deprivation of liberty and with sufficient time before appearing before a court.

Furthermore, the content of the right to legal assistance is specified, including, among others, the right to meet privately and prior to questioning lawyer, the right of the lawyer to effectively participate when the suspect is being questioned and to attend investigative acts and the collection of evidence (lineups, confrontations, and crime scene reconstructions).

Additionally, the confidentiality of communications between the suspect and their lawyer is established as indispensable to guarantee the effective exercise of the right to legal assistance, in addition to constituting an essential part of the right to a fair trial. Therefore, according to Article 4, Member States must respect the confidentiality of meetings, correspondence, telephone conversations, and other forms of communication permitted in accordance with national regulations.[11]

Regarding persons subject to a European Arrest Warrant (hereinafter EAW), Article 10 of the aforementioned Directive establishes the right of access to a lawyer in the executing State as soon as detention occurs. Likewise, the person shall have the right to

11 This provision was reflected in Article 118.4 of the Spanish Criminal Procedure Act (LECrim), in the wording given by Organic Law 13/2015, of October 5, amending the Criminal Procedure Act to strengthen procedural safeguards and the regulation of technological investigation measures.

appoint a lawyer in the issuing Member State, whose role will be to assist the lawyer in the executing State. In fact, to ensure the effectiveness of legal assistance, if the person claimed does not have a lawyer in the issuing State, the authority of the executing Member State shall promptly inform the competent authority of the issuing Member State so that it may provide the requested person with information facilitating the designation of a lawyer in that State.

Ultimately, this Directive recognizes the indissoluble relationship between the right of defense and the right to legal assistance.[12] Indeed, the right to legal assistance is essential in criminal proceedings and, without a doubt, constitutes the core of the right of defense and, ultimately, the right to a trial with all guarantees.[13]

2.3.- JURISPRUDENTIAL DEVELOPMENT

In its Judgment 37/1988, of March 3, the Constitutional Court recalled and assumed that "the European Court of Human Rights (hereinafter, ECtHR) has declared that Article 6.3 (c) of the Rome Convention (with respect to which we reiterate the considerations previously stated regarding the 1966 Covenant in terms of its applica-

12 See: JIMENO BULNES, M., "Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer and communication in criminal proceedings: reality at last?", *Revista de Derecho Comunitario Europeo*, vol. 6, no. 48, Madrid, May/August (2014), p. 467.

13 See: BURGOS LADRÓN DE GUEVARA, J., *Modelos y propuestas para el proceso penal español*, Praxis, Seville, 2012, p. 93, where it is emphasized that "to affirm that the fundamental right to defense and the right to legal assistance is an essential element for a fair trial is something far from superfluous in the century in which we find ourselves."

tion and its value according to Articles 96.1 and 10.2 of our Constitution) guarantees three rights to the accused: to defend himself, to be defended by legal counsel of his choosing and, in certain circumstances, to receive free legal assistance" (*Pakelli* case, Judgment of April 25, 1983), without the option in favor of one of these three possible forms of defense implying the renunciation or impossibility of exercising the others, whenever necessary, to ensure effective reality in each case for the defense in a criminal trial."

Certainly, even in those cases in which the accused has refused to be assisted by a lawyer, the ECtHR has understood that the State is not exempt from ensuring the effectiveness of the right to defense if legal assistance is deemed necessary. In the ECtHR judgment of April 25, 1983 (*Pakelli* case), the Court considered that the appellant himself would not have been able to present the necessary legal arguments to defend himself adequately and, therefore, the State should have appointed a lawyer to guarantee his right to defense. Furthermore, the ECtHR determined that the effectiveness of the right to defense must also be ensured by the State during the appeal proceedings. This is consolidated doctrine, whose literal quotation continues to be repeated to this day (*vid*., *ad exemplum*, the aforementioned STC 35/2021).

In this context, there exists a solid *corpus* of constitutional doctrine that recognizes and reinforces the right to legal assistance. This is a conquest of the democratic Rule of Law developed through the maximum interpretation of the Constitution. In effect, the Constitutional Court has recognized the special projection that this right to legal assistance has in criminal proceedings "due to the complexity of the legal issues that are usually debated in it and because of the

importance of the legal interests that may be affected" (STC 162/1999, of September 27, F.J. 3).

The earlier STC 47/1987, of April 22, declared that legal assistance, as a subjective right, has the purpose of "ensuring the effective realization of the principles of equality of the parties and of contradiction, which impose on judicial bodies the positive duty to avoid imbalances between the respective procedural positions of the parties or limitations on the defense that may infer a result of defenselessness for any of them" (Legal Basis 2).[14] The Constitutional Court has also established that legal assistance is a guarantee of the "proper conduct" of the process (STC 29/1995, of February 6, Legal Basis 4) and a "structural requirement" of the same (STC 233/1998, of December 1, Legal Basis 3), stating that "in those cases where the law requires its mandatory intervention, it seeks to ensure an adequate technical defense" (STC 18/1995, of January 24, Legal Basis 2).

The fact of having adequate technical defense is closely linked to the right to a trial with full guarantees (Article 24.2 CE). As declared in the Judgment of the Spanish Supreme Court 1304/2000, of July 14: "The Spanish criminal process is structured in its main lines in our Constitution (see especially Articles 1, 9, 10, 24, 25, and 120 CE), where the right of the accused to a trial with all guarantees is recognized, among which must be cited as fundamental the right to defense, closely related to the right to legal counsel, since our legal system guarantees the right to technical defense through a professional of the legal profession (see S.T.C. 216/88)".

14 In the same vein, Constitutional Court Judgments (SSTC) 60/2003, of March 24, Legal Ground 4, and 141/2005, of June 6, Legal Ground 2.

It is within the context of court-appointed legal assistance that the jurisdictional bodies have especially ensured real and effective assistance, even though, as I will explain later, certain general terms are not acceptable, such as the dichotomy of court-appointed = ineffective and private = effective or competent. It is rather a problem of experience and, above all, specific training in the multiple specializations that exist today in the criminal proceedings, starting with juvenile jurisdiction or the new procedure before the European Public Prosecutor's Office, where prosecutors act as instructors; covering special procedures such as those followed before the Jury Court; and finally, in a wide range of procedural instances, including cassation or proceedings before.

The Constitutional Court (TC) has established a direct relationship between this right [to court-appointed legal assistance] and the principles of adversarial defense and equality of arms in the proceedings. Specifically, in its Judgment 162/1993, of May 18, the Court of Guarantees states that "[t]he right to effective judicial protection recognized in Article 24 of the Spanish Constitution entails the requirement that no situation of defenselessness may ever occur," which means that in any judicial proceeding the adversarial defense right of the contending parties must be respected, granting them the opportunity to assert and prove their rights and interests procedurally, as we have already stated in SSTC 112/1987, 251/1987, 114/1988 and 237/1988. This principle of adversarial defense must be complemented by the principle of equality of arms during the trial and throughout the appeals process, such that the opportunity to argue and present evidence is both real and effective for all parties involved. Precisely the protection of fundamental rights, and especially the rule or principle

of the prohibition of defenselessness, demands a careful effort on the part of the judicial body to preserve the defense rights of both parties [STC 226/1988]. Therefore, it is the responsibility of the judicial bodies to ensure that, throughout the process and appeals, proper contradiction exists between the parties, ensuring that they have identical opportunities to argue and present evidence, and ultimately, that they exercise their right to defense at every stage or instance composing the process. This duty becomes even more pressing in criminal proceedings, especially in cases of court-appointed defense, involving accused persons in prison and whose only procedural participation is in response to the charges brought by the public prosecution. As we stated in STC 112/1989, even in cases where no legal provision exists, the judicial body is not relieved of responsibility, and not even the Public Prosecutor's Office is exempt from "ensuring the respect for the right to defense of the accused, beyond mere compliance with procedural rules." Therefore, in light of Article 24.2 of the Spanish Constitution, which guarantees the right not to be convicted without being heard, and therefore not to be convicted without having been able to exercise the right to defense, court-appointed legal assistance becomes essential, especially in cases involving court-appointed counsel and judicial zeal. The judicial body must avoid, in the absence of express provision by law, situations of defenselessness that cannot be attributed to the defendant."

To establish the scope of this right, "it is also important to recall that the ECtHR itself, in its Judgment of May 13, 1980 (Artico case), stated that Article 6.3 (c) of the Convention 'enshrines the right to defend oneself adequately, either personally or through a lawyer, a right reinforced by the obligation of the State to provide legal

aid in certain cases,'" an obligation that is not fulfilled merely by the appointment or designation of a court-appointed lawyer, to use the terminology of our legal system, because Article 6.3 (c), as the ECtHR emphasizes, does not speak of "appointment" but of "assistance," a term identical, in fact, to that used in Article 24.2 of our Constitution, referring to the enjoyment of effective legal technical assistance. If the text of Article 6.3 (c) is interpreted narrowly and restrictively, "legal aid would risk becoming an empty word on more than one occasion."

According to the ECtHR judgment of May 13, 1980 (Artico case), the ECHR does not aim to protect merely theoretical or illusory rights, but concrete and effective ones, because the mere designation does not by itself guarantee the effectiveness of legal assistance, considering that a court-appointed lawyer may die, become seriously ill, suffer a permanent impediment, or shirk their duties.[15] Therefore, the ECtHR considered that "if the authorities have been warned of this, they must replace him or compel him to fulfill his obligation" and, in any case, remaining passive is not an option for the court.

Consequently, and within this realistic hermeneutical approach, the ECtHR condemned the respondent State in the Artico case, understanding that, even though the State cannot be held responsible for all deficiencies of a designated lawyer in terms of legal aid,[16] "in the given circumstances, it was incumbent upon the authorities of

15 In the same sense, vid. the ECtHR in the case *Vamvakas v. Greece* (no. 2), April 2015.

16 *Vid.* the ECtHR Judgments in the cases *Lagerblom v. Sweden*, January 14, 2003, and *Czekalla v. Portugal*, October 10, 2002.

that country to 'act in a manner ensuring the effective enjoyment of the right they had recognized'" (Cited judgment, Artico case, paragraphs 33 and 36) (STC 37/1998, of March 3, Legal Basis 6). Similarly, in the ECtHR case Güveç v. Turkey, of January 20, 2009, the Court held that "the young age of the applicant, the seriousness of the chargesthat were imputed to him, the apparently contradictory allegations made against him by the police and a prosecution witness (*vid.* sections 8, 18, 28, and 29 *supra*), the manifest incapacity of his lawyer to represent him adequately and, lastly, his numerous absences at the hearings, should have led the trial court to consider that the applicant urgently needed adequate legal representation. In fact, an accused has the right to be assigned a court-appointed lawyer "when the interest of justice so requires."

This same idea of a real and effective designation, and not merely a formal appointment of a court-appointed lawyer, can be seen in STC 105/1999, of June 14, FJ 3.

And along this line of reasoning, STC 178/1991, of September 19, further supports the argument with the following literal statement: "this Court has continued and developed, with respect to art. 24.2 of the Constitution, the doctrine elaborated by the European Court of Human Rights in relation to art. 6.3 c) of the European Convention. Thus, this Court noted that a primary objective of the Convention is to 'protect rights that are not theoretical or illusory but concrete and effective,' a statement that has special importance when referring to the right to defense; –precisely– for that reason, the cited art. 6.3 c) refers to 'legal assistance' and not to a mere 'appointment,' since what is guaranteed is the 'effectiveness' of the right to a public defender, as this may 'die, become seriously ill, suffer a permanent

impediment, or evade their duties,' and if the judicial authorities have been warned of this, they must 'replace him or compel him to fulfill his duty'; but, in any case, passive acquiescence is not a consistent legal option (case Artico, ECtHR, May 13, 1980, 33); consequently, if the defense counsel has not exercised their office at any time and has not shown any willingness to do so from the outset, the Court that protects fundamental rights 'is not here to validate the relevance or not of such explanations. It is enough to state that the applicant has not enjoyed effective legal assistance…', since 'if that is not the case, free legal assistance is at serious risk of becoming an empty phrase on more than one occasion' (*ibidem*). Similarly, among others, see the case *Pakelli*, ECtHR, April 25, 1983.

In sum, the fundamental right of a welfare nature to free legal assistance cannot lead to a mere appointment that results in a manifest absence of effective assistance, and, on the other hand, the legitimate option of the citizen for legal aid from the duty roster does not preclude the appellant from turning, in his case, to a lawyer of his own choosing (STC 37/1988, legal basis 7.º).

In application of the doctrine just set out, the right to legal assistance cannot be understood as guaranteed merely because a lawyer is present at the corresponding procedural action –I will focus, essentially, on the hearing–. And this, in my view, regardless of whether the lawyer is from the duty roster or privately retained. What matters is the *what* (efficacy or inefficacy), not the *who* (duty or private). Moreover, when the constitutional court identifies duty roster lawyers as those who provide free legal assistance, it falls into a dichotomy that in no way aligns with the regulation of this matter. Indeed, "duty" and "free" are not synonymous and cannot be

equated; one thing is the mandatory appointment in the process and another is who covers the costs. Free legal assistance, provided for in Article 119 of the Spanish Constitution and developed in Law 1/1996, of January 10, on free legal assistance, necessarily implies the appointment of a court-appointed lawyer and solicitor (*arts.* 27 et seq.). However, a court-appointed designation does not imply gratuity unless it is proven that there is a lack of resources to litigate.

Nevertheless, the Constitutional Court has established that especially in cases of court-appointed legal aid, the judiciary has a duty to ensure the effective exercise of said assistance, such that an exception is made to the doctrine that holds that no violation has occurred if the situation of helplessness was caused by the party itself, whether by their representative or defender. In cases where a duty roster lawyer is appointed, the resulting instances of helplessness attributable to them should be considered contrary to the right to legal assistance.

This duty of the judicial bodies to ensure real and effective legal assistance is also applicable in cases of defense by lawyers appointed ex officio "nonexistent" relationship of trust, which "motivates special care and protection of individuals who find themselves diminished in their effective defense capabilities in such cases" (STC 91/1994, of March 21, Legal Ground 3).

Finally, this protection of citizens assisted by court-appointed counsel must be reinforced "in the case of persons subjected to situations of deprivation of liberty" (STC 184/1997, of October 28, Legal Ground 7).

In cases of "defendants assisted by court-appointed counsel", the Constitutional Court imposes on the judicial authority, and even on the Public Prosecutor's Office, a

"zeal" aimed at avoiding, "even in the absence of express provision by law," situations of defenselessness not attributable to the convicted person; as occurs when, in the appeal process, despite the court-appointed solicitor having been notified, he does not appear, nor does anyone on behalf of the convicted person, since the law does not foresee the need for personal notification to the defendant of the filing of the appeal (STC 112/1989, of June 10).

The court itself acknowledges without ambiguity the (supposed) lack of legal provision for the oversight of the effectiveness of legal assistance, but does not explain the reason why such oversight should be limited to the cases of defendants assisted by court-appointed counsel,[17] considering that those defended by privately retained counsel are holders of the same fundamental rights and the principle of equality among defendants must prevail. I will return to this idea later.

III.- The Effectiveness of Legal Assistance

3.1.- A Taboo Problem

There are sometimes taboo topics which, for some inexplicable reason, remain hidden in the depths of society

17 It should be noted that, although certainly exceptional, there are cases in which the Second Chamber of the Supreme Court has praised the competence of a court-appointed lawyer. Thus, in the recent STS 202/2024, of March 5, it can be read: "The appeal is thoroughly crafted, consistent and solid in its reasoning; it is yet another example –abundant in forensic practice– that court-appointed defense, with its stature, dedication, and technical quality, is in no way diminished, contrary to an unfair perception entrenched in some form in the collective imagination. It is a forensic brief of excellent workmanship."

at large and public authorities in particular. The existence of a problem is known, yet it is barely spoken of and, therefore, the affected party does not assert their rights and/or the competent authorities do not intervene in order to assign responsibility or, more narrowly, to reduce its occurrence in practice. It is commonly accepted that in an increasingly complex and specialized world, errors can occur –and, in fact, do occur– and that, furthermore, there are training deficiencies and a lack of diligence, rigor, or interest among professionals from various sectors.

Law is no exception, and these lines do not intend to generalize or conduct an arbitrary destructive critique, but rather simply aim to bring to light and visualize a practical problem, analyze it from the standpoint of legal and constitutional norms, and offer solutions to try to reduce its impact; but above all, to propose what the procedural consequence should be for the affected person due to ineffective legal assistance, regardless, I repeat, of who appointed the attorney.

The issue of the quality of legal assistance within the framework of criminal proceedings has generated extensive case law in the United States of America (hereinafter, the USA), largely concerning what is commonly referred to as negotiated criminal justice. A valuable illustration of this is the judgment delivered by the Supreme Court on November 5, 2013, in the case *Burt v. Titlow*,[18] where the Court recalled that the Sixth Amendment does not guarantee the right to obtain perfect advice, but rather the right to effective assistance, without even a violation of ethical standards by the attorney determining, *per se*, its ineffectiveness. In the specific case, and contrary to what was held by

18 571 U.S. (2013).

the Court of Appeals for the Sixth Circuit, the U.S. Supreme Court found that the fact that the defendant, who had already concluded a negotiation aimed at reducing the requested sentence (*plea bargaining*) with the prosecution while being assisted by a court-appointed attorney, changed counsel and that the new lawyer sought to revoke the plea agreement (*guilty plea*) instead of maintaining it –clearly highly beneficial– being carried away by the defendant's proclamations of innocence without thoroughly analyzing the possible strength of the incriminating evidence against him, and thus proceeding to trial and obtaining a much harsher sentence than that previously agreed upon, did not constitute a violation of the right to effective legal assistance afforded to every accused person.

Without leaving the USA,[19] PRIMUS explains how the right of many defendants to be represented by an attorney in criminal cases is systematically violated, precisely due to the incompetence of said attorney, and not due to other unfortunate factors such as the lawyer falling asleep during the trial or having abused alcohol or drugs.[20]

Therefore, there is no need to focus on extreme and flagrant cases, which I would dare say are, at most,

19 Indeed, even any novel set in the context of a court of justice refers quite naturally to the acronym *IAC* (*ineffective assistance of counsel*). See, for example, Grisham, J., *The Racketeer*, Hodder, 2013, p. 69, where the author states that ineffective legal assistance constitutes a common complaint among convicted defendants, although it rarely leads to the reversal of a conviction in cases where the sentence imposed does not carry the death penalty (*non-death-penalty cases*).

20 PRIMUS, E.B., "The illusory right to counsel", *Ohio Northern University Law Review*, 37, 2011, pp. 597–620.

anecdotal and isolated in Spain. But what cannot be overlooked or denied is the existence of a consistent problem related to the lack of training, responsibility, and expertise in certain court-appointed defenses within the criminal jurisdictional system.

Let us briefly address the classic and, by now, utterly unforgivable error of announcing and formalizing a cassation appeal for violation of a substantive criminal provision under Article 849.1º of the Criminal Procedure Act (LECrim) without respecting the established facts. A quick review of the latest rulings from the Second Chamber of the Supreme Court shows that this issue is consistently repeated in cassation appeals filed before the high court. A couple of examples are SSTS 380/2023, of May 19, and 342/2024, of April 25.

Moreover, there exists a whole amalgam of cases in which the high court reveals the flawed, exotic, and heterodox reasoning of the appealing attorneys. Especially illustrative in this regard is STS 256/2010, of March 8:

"5.– In a completely atypical manner, the lawyer who drafted the cassation appeal dedicates seventy-odd pages to an overwhelming and utterly useless transcription of doctrinal positions on the objective conditions of punishability and their differences from the conditions of procedural admissibility. After this unusual monographic work, we are left without any clear idea of the procedural flaw allegedly suffered by their client.

6.- Trying to guess her intentions, it seems that when invoking an exculpatory excuse, she claims that the complaint should not be admitted and should be rejected due to the action having been exercised. Simply put, the exculpatory excuse only takes effect once the existence

of the offense has been proven, which requires full processing of the proceeding up until the trial or hearing and the issuance of a ruling. In any case, the appellant is a stranger to the marital relationship, which means she could not benefit even from this excuse¨.

Therefore, it can be read in STS 1022/2010, of November 17, that a ground for cassation "contains a veritable avalanche of Penal Code articles crowded together without order or separation." And it adds:

1.- The drafting of the ground disregards the recommendations that have existed since its origin in article 874 of the Criminal Procedure Act, which requires that, in the formalization writing, the issues be set out in numbered paragraphs with the greatest conciseness and clarity.

(…)

3.- The entire ground should have been dismissed outright, and what is intended is completely alien to even the most elementary legal technique, since in two of the proven facts, there was no *dolus* (art. 1), that is, awareness and intent to intentionally commit the acts imputed. We hope that, despite the initial drafting, it is not claimed that the offense was committed through negligence. Article 5, also cited, makes it quite clear that there is no penalty without *dolus* or negligence. We have much to comment on regarding the appellant. Article 16 refers to attempt, and no better explanation is given as to why the appellant's lawyer finds this so surprising."

Equally revealing is STS 758/1997, of May 30, from which I highlight the following passages of interest to this investigation:

"As the third ground (sic) the appellant alleges the violation of article 850.1 of the Criminal Procedure Act, subparagraph 1, which is developed in distinct subparagraphs, and which the Public Prosecutor interprets as two different grounds. 1.° The witness claimed as decisive was conveniently not summoned, as he did not appear allegedly due to being abroad. The paradox of the appellant's claim, revealing the abuse of legal argumentation that the challenge itself represents, is that it is made by the complainant herself, who despite being represented by her Court-Appointed Prosecutor and defended by her appointed Counsel, did not appear at the hearing due to the decisions-sessions-days scheduled during the hearing. 2.° The expert witnesses did not appear at trial because the complainant did not comply with the legal formalities necessary for them to be summoned, so there was no procedural diligence or consequences. 3.° As for the witnesses and documentary evidence cited, no requested subpoenas appear in the final conclusions of said complainant party. 4.° Here, a supposed lack of defense is confusingly alleged due to the misplacement of the case file *(sic)*, which in turn allegedly resulted in the inability to present evidence, without specifying which. 5.° Following the surprising line of argument, now article 793.2 of the procedural code is invoked, along with articles concerning prior and special pronouncements, in relation to alleged infringements of fundamental rights, which in turn are derived from previously unadmitted evidence. 6.° Lastly, it is also claimed, within the procedural protection grounds, that article 850.1 grants *(sic)* that the lower court improperly rejected the bases that the complainant submitted for the assessment of damages, which he claimed to have submitted once the trial had been held and the case declared closed for sentencing. The reason for such a request within the alleged procedural protection is not

understood. It is difficult to respond to something so absurd in legal terms.

In this same ruling, one can read that "as a sixth ground (sic), a violation of constitutional provisions is alleged in such a gratuitous way that, once again, it must be said, it is difficult to answer the ten sections that this final argument contains." And it concludes that "[t]he inaccuracy, the lack of legal foundation, and the incoherence abound in this and the other studied challenges, revealing the commendable aim of pushing the legitimate right of defense to its last consequences."

The STS of October 15, 1990, describes the appeal for cassation as "atypical" and criticizes its unstructured and incongruent nature "due to the excessive accumulation of allegedly infringed provisions in a single argument, disregarding the provisions established by the legislator in article 874 of the Criminal Procedure Act."

More than thirty years later, and to conclude this section, I find it worthwhile to reproduce the following passage from STS 522/2023, of June 29:

"He invokes as the sole ground for appeal the violation of the presumption of innocence under the protection of art. 24.2 CE, error in the assessment of the evidence, violation of the law and misapplication of law, but when he elaborates on this, particularly with respect to the conviction for the offense of administrative malfeasance, as well as for the crime of fraud against the Administration, it turns out not to be simple allegations, but rather the exposition of the grounds on which they are based, which, given these circumstances, would be inadmissible, based on the provisions of art. 855.1° LECrim, and indeed, as stated by the Public Prosecutor in its response: 'the ground shows a clear lack of cassational

technique: a constitutional provision is invoked, due to violation of the right to the presumption of innocence, but no offers no legal basis whatsoever. It alleges violation of the law without indicating the substantive criminal provisions allegedly infringed and compared with the proven facts, which is essential in such matters. And it alleges misapplication of the law without specifying the rules that authorize it nor the procedural or sentencing defects. This cluster of irregularities renders the argument inadmissible at the very threshold."

Even so, some substantive consideration will be made, attempting to respond to those unfounded allegations, which we can only do regarding the complaint of violation of the presumption of innocence and error in the assessment of the evidence, on the one hand, and, on the other, for *error iuris*, which is what seems to be referenced when speaking of legal violation, without us knowing exactly what to argue in relation to the alleged misapplication of the law, because, although the grounds alleged fall among those listed in articles 850 and 851 of the Penal Code and none are mentioned, the vagueness of the complaint on this matter allows us to say that, after reviewing the actions, we have not found any of the defects that could justify the concurrence of any of them."

3.1.1. Minimum training and experience as a palliative: the Italian case

There is no doubt that these situations would not arise (or, at the very least, would be reduced) if measures were taken to tackle the root problem –that is, at the level of training and the requirement of minimum experience– so that the lawyer is qualified to lodge and formalize ex-

traordinary appeals, such as cassation.[21] The strict regulation adopted by Italy, where *cassazionisti* lawyers enjoy undeniable prestige because they have had to demonstrate a series of competencies to obtain authorization, contrasts with the flexibility in Spain on this matter, where practically any lawyer, even one newly admitted to the bar or with no experience whatsoever in the criminal jurisdiction, may announce and formalize appeals before the Second Chamber of the Supreme Court.

It is worth pausing for a moment to examine the regulatory framework governing authorization to

21 Returning to the United States, the *Criminal Justice Standards* published by the American Bar Association (*Criminal Justice Standards for the Defense Function*, Fourth Edition, 2017) outline the conduct that defense attorneys must observe when filing appeals. It is worth noting that although the text refers to "appeals," which literally translates as *apelaciones*, the term is used in a broader sense to include any type of remedy. I am grateful to my colleague Gabrielle Friedman for her explanations regarding the appeals system within the criminal jurisdiction of the United States.

Specifically, Standard 4-9.3 provides that:

"(e) Appellate counsel should be diligent in perfecting the appeal and expediting its prompt submission to the appellate courts and should be familiar with and follow all appellate rules, while at the same time protecting the client's best interests on appeal. (f) Appellate counsel should be accurate in referring to the record and to the authorities relied upon in presenting briefs and oral arguments to the court. Appellate counsel should directly present adverse authority in the controlling jurisdiction known to them that has not been presented by another lawyer in the appeal. (g) Appellate counsel should not intentionally refer to or argue facts outside the record on appeal, except for those matters of common public knowledge based on ordinary human experience or other matters of which the court may take judicial notice." (free translation).

These standards are available at: *Standards for the Defense Function* (last accessed: August 6, 2024).

practice before the Supreme Court of Cassation, based in Rome. Law no. 247 of December 31, 2012, which regulates the legal profession[22] with the clear objective of ensuring the professional suitability of registered lawyers in order to guarantee the protection of their clients (Article 1.2.a) — addresses this issue jointly for the so-called higher jurisdictions. This law regulates the procedures for access to the special register of lawyers authorized to appear before higher courts in Italy.

To practice this activity, lawyers must meet specific requirements such as long-standing experience in the profession, considerable skills and competencies, and the successful completion of a very complex and demanding exam, which qualifies them to register as *cassazionisti* lawyers.

Indeed, in a concise summary, Article 22 of Law 247 provides for the following means of access:

Registration in the Bar Association for at least five years, successful completion of a specific national exam held at the Ministry of Justice headquarters in Rome, and completion of a period of practice of at least five years in a firm that litigates before the Supreme Court of Cassation;

Having been admitted to the bar for at least eight years and having completed the course of the *Scuola Superiore dell'Avvocatura*, at the *Consiglio Nazionale Forense* (National Council of the Legal Profession), with meritorious results and having passed the final exam.

22 Published in the *Gazzetta Ufficiale* on January 18, 2013 (No. 15).

The *cassazionista* lawyer is the only professional authorized to file appeals before the Court of Auditors, the Council of State, the Supreme Court of Cassation, and the Constitutional Court.

Until this law came into effect –which occurred in 2013– it was not that the situation was like Spain's, but rather that for years prior there had already existed requirements that are nonexistent in Spain, such as having practiced as a lawyer for at least five years before certain courts, such as appellate courts, and requesting registration in the special register of cassation lawyers. Indeed, the Law of June 8, 1874, number 1938, regulating the profession of lawyer and *procurador*,[23] included these minimum requirements in its article 15.

3.1.2.- Mandatory continuing education as a solution: the Danish model

Another extremely valuable example taken from a country far removed from Spain both geographically and culturally, yet a member of the European Union, is the Danish system of mandatory continuing legal education[24] In fact, in Denmark, besides having completed a Bachelor's and a Master's degree, there is a mandatory three-year internship,[25] which is combined with specif-

23 Published in the *Gazzetta Ufficiale* on June 15, 1874 (no. 141).

24 In the context of acknowledgements, I must mention my colleague Niels Rex, a member of the directive board of the Criminal Justice Committee of the Danish Bar, who kindly participated in 2021, at the invitation extended to me when I was invited to give a seminar on the Spanish criminal justice system to Danish criminal lawyers within the framework of their mandatory continuing education.

25 In Denmark, graduates of the Master's program are required to work for three years as "legal assistants" in law firms, courts,

ic training consisting of eight courses and two exams,[26] totaling eight years of education before beginning practice. Continuing education for lawyers is mandatory. In fact, according to article 126.5 of the Danish Administration of Justice Act[27] and the Executive Order on Continuing Education,[28] all lawyers and legal assistants are required to continue their education, including both community lawyers practicing in Denmark and Danish lawyers themselves.who practice abroad.[29]Thus, all of them must regularly participate in fifty-four "mandatory continuing education courses of importance to the legal profession" over a period of three years,[30] which means an average of eighteen courses per year, i.e., more than one course per month. After each three-year period, the obligated subjects must report their training to the Bar Association,[31] which has an inspection service to verify that the alleged training is, in fact, real.

Of particular note is the level of detail provided by the Executive Order in specifying the obligations for continuing education of lawyers and legal assistants.

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or police stations in order to acquire practical procedural experience.

26 One of these exams is a legal practice test and the other is a trial simulation, in which the candidate must prove they are able to direct and surpass a trial hearing.

27 Danish Administration of Justice Act No. 1261 of October 23, 2007.

28 Executive Order from the Ministry of Justice on continuing education for lawyers and legal assistants dated December 12, 2007, amended by Executive Order 820 of June 25, 2010.

29 Article 1 of the Executive Order.

30 Article 3.1 of the Executive Order.

31 Article 12 of the Executive Order.

Thus, Article 3 establishes the conditions that a training course must meet in order to be counted as mandatory continuing education for the purposes of the law and the Order in question. In addition to the minimum number of lessons and duration already mentioned, there must be a course syllabus, a description of objectives, a description of the subject matter or a similar description of the teaching content; the professional competence of the instructor in the subject matter must be documented by the person teaching the course; and documentation of the obligated subject's participation in the course must be provided (for example, through a course certificate signed by the instructor).

Likewise, the Executive Order recognizes teaching activities as training up to a maximum of twenty-seven lessons every three years (Article 5), which is half of the minimum amount of continuing education required triennially.

The constantly referenced Order also counts as mandatory continuing education legal and non-fiction "research," as long as the work has been published (it seems to refer to a monograph); or is a legal article that has passed through the filter of an editorial board; or, finally, if the obligated subject has completed a doctoral dissertation (Article 6). The authorship of legal publications shall count as mandatory continuing education up to a maximum of eighteen lessons per triennium (PCS 2 of Article 6).

Failure to comply with the duty of continuing education under the terms of the Executive Order will be considered a violation of good legal practices, in which case the lawyer who fails to meet their obligations will face a sanctioning administrative proceeding before

the Bar Council (Article 15), which could even result in disqualification from the practice of the legal profession.

3.1.3.- The situation in Spain: a toast to the sun and legislative anemia in the face of procedural tragedy

This contrasts sharply with the isolated provision of Article 65.1 of the Spanish Legal Profession Statute,[32] which is nothing more than a true *"toast to the sun"*:

"Legal professionals have the right to access professional specialization through the accreditation of specific training, which, in the case of training provided by the corporate organization and to be effective throughout the national territory, must be approved by the General Council of Spanish Law."

Returning to the topic that is the focus of this investigation, neither Spanish doctrine nor case law has paid attention to this structural issue of the criminal process, which lies in the provision of ineffective legal assistance. Neither universities nor bar associations in Spain have addressed it. This is in stark contrast to the traditional[33] and growing concern expressed in the U.S.,

32 Royal Decree 135/2021, of March 2.

33 Particularly noteworthy is the now old article by Judge SCHWARZER, W.W., "Dealing with Incompetent Counsel – The Trial Judge's Role", Harvard Law Review, 93, 4, 1980, pp. 633–669, whose title, chosen nearly forty-five years ago, is suggestive enough of the concern held by the U.S. judges themselves: *"Dealing with incompetent attorneys – the role of the trial judge"* (free translation from English). In this article, the author focuses his efforts on raising awareness among judges who must intervene during trial to ensure an adequate *performance* by the courtroom attorney, tending to guarantee the accused's right to defense so that the insufficiency of remedies does not become a consummated eventuality of ineffective legal assistance. He does so with the clearly stated purpose that "the

where, for example, the New York City Bar Association concluded in a 2021 report that "the quality of the trial attorney is crucial to the fairness of the criminal justice system." Without competent representation, the accused has little or no opportunity to ensure their case is resolved fairly. Unjust conviction commissions highlight ineffective legal counsel as a key factor in the wrongful conviction of innocent individuals[34] (free translation).

Certainly, the problem becomes more acute in light of the legislative anemia: our regulations do not contemplate the existence of ineffective legal assistance, nor how the judicial body should act if it detects it, much less what procedural consequence should be attached to such a procedural tragedy.

Indeed, in Spain, the only attempt at regulation concerning the effectiveness and quality of legal counsel can be found in the recently enacted Organic Law 5/2024, of November 11, on the Right to Defense (LODD, hereinafter).[35] It is worth looking back to analyze the text and the legislative process of the Draft Organic Law on the Right to Defense (hereinafter, PLODF) approved by the Council of Ministers on April 4, 2023, at the proposal

incompetence of the attorney not be allowed to impair the fairness of the judicial process" (p. 651). And he concludes that although in the short term, the concern over the incompetence of the attorney may impose some additional burdens on the trial courts, the long-term benefits –namely, achieving higher performance standards among attorneys– more than make up for it (p. 669).

34 Available at: NYC Bar Memo May 2021 (last accessed: July 5, 2024).

35 Published near the closing of this edition in the Official State Gazette on November 14, 2024, with a *vacatio legis* of twenty days from then (Final Provision Nine).

of the Ministry of Justice, which remained practically paralyzed for almost a year[36] until February 2, 2024, when it was published –with relevant modifications concerning the subject of this monograph– in the Official Gazette of the Spanish Parliament (hereinafter, BOCG) [37]

The PLODF contains two key provisions. On the one hand, Article 4.1 proposes recognizing, for both natural and legal persons, the right to receive effective legal assistance for the exercise of their right of defense. It is particularly noteworthy that the term *effective*, which appeared in the earlier Draft Bill, was later replaced –a clear indication that the drafters sought to avoid the issue addressed in this study, since *adequacy* and *effectiveness* are not synonymous and cannot be treated as equivalent.[38]

36 The draft bill is available at the following link: *Anteproyecto de Ley Orgánica del Derecho de Defensa* (last accessed: February 4, 2024).

37 The Bureau of the Congress of Deputies commissioned a report from the Committee on Justice and also established a period for amendments.
Available at the following link: *121/000060 Proyecto de Ley Orgánica del Derecho de Defensa* (last accessed: February 4, 2024)

38 During the defense of the research project that served as the backbone of this monograph, Professor Isusko Ordeñana observed that the term *efficacy* originates from the field of economics and suggested, instead, the term *effectiveness*, clearly linked to the provisions of Article 24.1 of the Spanish Constitution, which recognizes the right to effective judicial protection without defenselessness. Indeed, the two are synonymous, and other terms such as *usefulness*, *efficiency*, *capacity*, or *aptitude* could also have been used; however, I chose to contrast the term with its antonym: *inefficacy*. In any case, I do not believe that the term *efficacy* should be confined to the realm of economics or that the latter can claim exclusive ownership of its use; moreover, both *efficacy* and, above all, *inefficacy* are terms with a long-standing tradition in case law..

The original intent was far more ambitious. On the other hand, Article 8 of the PLODF reads as follows: "The right of defense includes the provision of legal assistance or legal advice and representation at trial, ensuring the quality and accessibility of the service" (italics in the original).[39]

Beyond the fact that the PLODF does not address the aspects previously identified as areas of legislative anemia in our country, it is evident from the generic and imprecise nature of its limited provisions that they fall short of adequately addressing the quality of legal assistance. As stated in the report of the General Council of the Judiciary on the Draft Bill, dated January 26, 2023.[40]

"77.— Article 8 recognizes, in a merely declarative manner, the right to 'quality legal assistance,' without specifying in any way the parameters that should serve as a benchmark for determining what is to be understood by such quality, beyond adding in the second paragraph of the same provision that 'the applicable regulations in the field of technological and telematic means will be taken into account,' which, of course, contributes nothing to clarifying the scope and meaning of the previously mentioned prescription, which in no case can be subject to the reserve of organic law."

39 On this occasion, the wording does not present any significant changes in relation to the proposal set out in the Preliminary Draft.

40 Available at the following link: GENERAL COUNCIL OF THE JUDICIARY General Secretariat Plenary Certification approving the Report on the Draft Bill of the Organic Law on the Right of Defense (last accessed: January 21, 2024)

Previously, the Fiscal Council, in its report of December 29, 2022, on the Draft Bill,[41] expressed its agreement with the wording of the stated provision in terms as blunt as they were forceful: "There is no objection in this regard. The manner of ensuring the right to defense is precisely through quality legal assistance."

On March 20, 2024, the Official Gazette of the General Courts published the amendments to the PLODF,[42] among which the following stand out Parliamentary groups:

The Basque Parliamentary Group (EAJ-PNV) proposed amending Article 4 by adding that "[t]he right to receive effective legal assistance guaranteed by this provision also includes the requirement to make or request the necessary adaptations to ensure the right of cognitive accessibility for persons with intellectual and developmental disabilities to the legal proceedings in which they participate, requiring the use of technical, human, or professional means to guarantee the effectiveness of this right" (Amendment No. 76). Likewise, it suggested incorporating into Article 8 that "legal professionals shall undergo continuous and specialized legal training as appropriate" (Amendment No. 78).

Similarly, the Popular Parliamentary Group in Congress proposed the wording of Article 8 as follows:

41 Available at the following link: Report of the Public Prosecutor's Council on the Draft Bill of the Organic Law on the Right of Defense (last accessed: January 21, 2024)

42 Available at the following link: 121/000006 Draft Bill of the Organic Law on the Right of Defense (last accessed: June 26, 2024)

"[t]he right to defense includes the right to quality legal assistance, which includes the provision of legal assistance or legal advice in an effective manner and legal defense at trial that guarantee the quality and accessibility of the service. To this end, legal professionals shall undergo continuous and specialized legal training depending on the cases" (Amendment No. 101).

The Mixed Parliamentary Group, in order to guarantee the rights of persons providing public legal assistance services, suggested incorporating into Article 8 that "to guarantee the quality and accessibility of legal assistance or legal advice when such is provided as a consequence of the right-holder being entitled to free legal aid, the head of the service shall ensure a training system, access, remuneration and adequate social rights for the professionals providing it" (Amendment No. 137). Likewise, with special mention of assistance to detainees, it proposed adding the following paragraph to Article 12: "[f]or the purposes of guaranteeing adequate service provision by legal professionals and the Public Prosecutor's Office, the competent justice administrations shall develop a protocol for detainee assistance that effectively ensures such assistance and the rights intrinsically derived from it" (Amendment No. 141).

Subsequently, on June 14, 2024, the report of the committee was issued,[43] in among those accepted were, among others, Amendment No. 76 from the Basque Parliamentary Group (EAJ-PNV) to Article 4 of the PLODF and Amendment No. 78 from the Basque Parliamentary Group (EAJ-PNV), and No. 101 from the

43 Available at the following link Report of the Presentation (last accessed: June 26, 2024)

Popular Parliamentary Group in Congress to Article 8 of the PLODF, proposing their wording in the following terms:

"Article 4. Right to legal assistance.

Natural and legal people have the right to receive adequate legal assistance for the exercise of their right of defense. **The right to receive effective legal assistance guaranteed by this provision also includes the appropriateness of making or requesting the necessary adaptations to ensure the right to cognitive accessibility, for persons with intellectual and developmental disabilities, to the legal process in which they participate, requiring the use of technical, human or professional means to ensure the effectiveness of this right"** (emphasis in the original).

"Article 8. Right to the quality of legal assistance"

The right of defense includes the provision of legal assistance or legal advice and legal defense at trial, which guarantee the quality and accessibility of the service. **To this end, legal professionals shall undergo continuous and specialized legal training depending on the cases"** (emphasis in the original).

On June 26, 2024, the Justice Commission of the Congress of Deputies approved the PLODF[44] report by 20 votes in favor and 17 abstentions, which includes the committee's report and the approved transactional amendments, continuing its parliamentary processing.

44 Available at the following link: Session No. 5 of the Justice Committee of the Congress of Deputies (last accessed: June 26, 2024).

Once the forty-eight hour period had elapsed from the date of completion of the report, on July 4, 2024, the report of the Commission was published in the Official State Gazette (BOE), maintaining the wording of Articles 4 and 8 as previously stated, along with the supporting documents for amendments and votes specific votes were cast in defense before the Plenary.[45] Specifically, the Mixed Parliamentary Group expressed its willingness to return to debate and vote in the Plenary on amendments No. 137[46] and 141.[47] Nevertheless, in the extraordinary plenary session No. 54, held on July 11, 2024,[48] these amendments were rejected by 18 votes in favor, 321 against, and 7 abstentions.

On July 17, 2024, the Plenary of the Congress of Deputies published in the BOCG the approved PLODF[49]

45 Available at the following link: 121/000006 Draft Bill of the Organic Law on the Right of Defense. (last accessed: July 4, 2024)

46 "[T]o guarantee the quality and accessibility of legal assistance or legal counseling when such is provided as a consequence of having the right to legal aid, it shall be ensured by the service provider through a system of training, access, remuneration, and adequate social rights for the professionals providing such service."

47 "[F]or the purposes of guaranteeing adequate service provision by professionals of the Legal Profession and the Public Prosecutor's Office, the competent justice administrations shall develop a protocol of assistance to detainees that ensures the effectiveness of such assistance and the rights inherently derived therefrom."

48 Available at the following link:
Plenary Session No. 54 of the Permanent Deputation (Last accessed: July 30, 2024)

49 Available at the following link:
121/000006 Draft Organic Law on the Right to Defense (Last accessed: July 30, 2024)

and submitted it to the Senate,[50] maintaining the wording of Articles 4 and 8 as adopted by the Justice Committee.

Subsequently, on September 16, 2024, the BOCG published the amendments proposed by the senators from the various parliamentary groups.[51] Incomprehensibly, the Popular Parliamentary Group in the Senate submitted Amendment No. 24 to Article 4, proposing to replace "effective legal assistance" with simply "legal assistance." To make matters worse, the committee approved this amendment by majority vote, thereby including it in the report submitted to the JusticeCommittee,published in the BOCG on September 23, 2024.[52][53] Without engaging in mere wordplay, since the essential content of the right to legal assistance inherently implies that such assistance must be effective, the truth is that the removal of this qualifier is symptomatic of the limited interest in ensuring the effectiveness of legal assistance in Spain.

50 Available at the following link:
Text submitted by the Congress to the Senate (Last accessed: July 30, 2024)

51 Available at the following link: Amendments (Last accessed: October 7, 2024)

52 Available at the following link:
Report of the Working Group (last accessed: October 7, 2024).

53 "Natural and legal persons have the right to receive adequate legal assistance for the exercise of their right to defense. The right to receive effective legal assistance guaranteed by this provision also includes the possibility of making or requesting the necessary adaptations to guarantee cognitive accessibility for persons with intellectual and developmental disabilities to the legal process in which they participate, requiring the use of technical, human, or professional resources to ensure the effectiveness of this right" (emphasis in the original).

Thus, the recent approval of the LODD leaves untouched the issues raised by this monograph, despite the fact that it is, undoubtedly, a step forward in requiring (as implied by the use of the imperative) "continuous and specialized legal training according to each case." Nonetheless, there are more doubts than certainties to the extent that the provision is extremely generic and, above all, it does not entail consequences for non-compliance with the training obligation. This contrasts with the mandatory training imposed by the Anti-Money Laundering Act[54] on obligated parties (among them, lawyers in the extraprocedural field[55]) and its dissuasive sanctions.[56] The LODD is, without a doubt, a missed opportunity.

54 Law 10/2010, of April 28, on the Prevention of Money Laundering and Terrorist Financing.

55 Section ñ) of Article 2.1 includes "[l]awyers, court representatives, or other independent professionals when they take part in the design, execution, or advisory services of operations on behalf of clients relating to the purchase and sale of real estate or commercial entities, the management of funds, securities, or other assets, the opening or management of checking accounts, savings accounts, or securities accounts, the organization of the contributions required for the creation, operation, or management of companies, or the creation, operation, or management of trusts, corporations, or similar structures, or when they act on behalf of clients in any financial or real estate transaction."

56 Article 57 of Law 10/2010, of April 28, on the Prevention of Money Laundering and Terrorist Financing provides that: "1. For the commission of serious infringements, the following sanctions may be imposed: a) a fine, the minimum amount of which shall be 60,000 euros and the maximum amount of which may reach the greater of the following figures: 10 percent of the obligated party's annual turnover, the amount of the economic content of the transaction plus 50 percent, three times the amount of the profits derived from the infringement,

3.2.- A LOOK TOWARD THE UNITED STATES OF AMERICA: THE STRICKLAND STANDARD

In its ruling *Strickland v. Washington*,[57] the Supreme Court of the United States of America developed homogeneous standards for determining whether a conviction should be overturned due to ineffective legal assistance.[58]

After emphasizing that "the mere presence of a person who happens to be a lawyer at trial alongside the accused is not sufficient to satisfy the constitutional mandate" and that "[t]he Sixth Amendment recognizes the right to counsel because it envisions that the lawyer plays a role that is fundamental to the ability of the adversarial system to produce just results," the Supreme Court declared that "1. The right to counsel under the Sixth Amendment is the right to effective assistance of counsel, and the benchmark for judging any claim of

where such profits can be determined, or 5,000,000 euros. For the purposes of calculating annual turnover, the provisions of Article 56.2 shall apply. b) Public reprimand. c) Private reprimand. d) In the case of entities subject to administrative authorization to operate, the temporary suspension of such authorization. The sanction provided for in letter a), which shall in all cases be mandatory, shall be imposed simultaneously with one of those provided for in letters b) to d) (...). 4. In all cases, the sanctions imposed shall be accompanied by a requirement for the offender to put an end to the conduct and to refrain from repeating it."

57 466 U.S. 668 (1984).

58 VANBUREN, S.K., "The Ineffective Assistance of Counsel Quandary: The Debate Continues Strickland v. Washington," *Akron Law Review*, Vol. 18, Iss. 2, Article 8, 1985, p. 337, laments that the Supreme Court missed the opportunity to articulate uniform standards for addressing complaints of allegedly ineffective legal assistance. Instead, he argues that the standards set "may potentially contribute to the chaotic and confusing state of the issue in the lower courts" (own translation).

ineffectiveness must be whether 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."

Likewise, the Court stated that "The claim of a convicted defendant that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense to such an extent that it deprived the defendant of a fair trial."

In the opinion of the Supreme Court, judicial scrutiny of counsel's performance must be highly deferential. A fair assessment of attorney 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. A court must indulge a strong presumption that counsel's conduct falls within the wide range of "reasonable professional assistance."

Finally, the Court emphasized that "the rules do not establish automatic standards; the ultimate inquiry must be whether the proceeding was fundamentally fair whose result is being challenged."

Judge MARSHALL's dissenting opinion is quite interesting: "My objection to the Court's decision is that it is so malleable that, in practice, it will have no effect and will not produce any real variation in the way different courts interpret and apply the Sixth Amendment. Telling lawyers and lower courts that the attorney of a criminal defendant must behave 'reasonably' and act as a

'reasonably competent attorney' is, practically speaking, to say nothing at all."

MARSHALL rightly posed the following questions: Is a "reasonably competent attorney" one who is reasonably competent and adequately paid in private practice, or a reasonably competent court-appointed lawyer? It is also a fact that the quality of representation available to ordinary defendants in different parts of the country varies significantly. Should the performance level required by the Sixth Amendment vary according to location? He replied that "the majority gives no guidance for appropriate answers to these questions."

Thus, in the opinion of this judge, which I fully share, "[e]veryone accused has the right to a trial in which their interests are vigorously and conscientiously defended by a capable lawyer. A trial in which the accused does not receive meaningful assistance to confront the forces of the State does not, in my view, constitute due process."

But in fact, as recently pointed out by PRIMUS, the scholar who has paid the most attention to this subject in the U.S., analyzing the potential ineffectiveness of legal assistance solely under the Strickland standard constitutes a biased view of the Supreme Court's case law in the U.S., which has recognized up to four different modes of ineffective assistance of counsel, given that the Strickland test would only be useful for one of them.[59] This may explain, in part, why the aforementioned test

59 PRIMUS, E. B., "Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness," *Stanford Law Review*, 72, 2020, pp. 1581–1653.

has proven so difficult to satisfy for litigants,[60] who might have better framed their complaint with the goal of satisfying, in each case, one of the other three standards. Ineffective assistance of counsel can be either structural or personal. And, likewise, it can be episodic or systemic. PRIMUS notes that these two distinctions interact, such that the ineffectiveness of lawyers may be: structural and episodic, structural and systemic, personal and episodic, or personal and systemic. The Strickland test, properly understood, would only apply to the personal and episodic form.

A lawyer can be structurally ineffective not because of their own fault, but due to external factors. Think of a public defender who must handle 19,000 cases per year, which would allow them an average of seven minutes per case.[61]

The other distinction PRIMUS makes –between episodic and systemic ineffectiveness– does not refer to the cause of the deficient performance of the attorney, but rather to its scope in the particular case of the

60 Since ancient times, legal doctrine has come to describe petitions for annulment based on *Strickland* as practically impossible to win. See, for example, BERGER, V.O., 'The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?', *Columbia Law Review*, 86, 1986, pp. 9–116.

61 The author draws on other examples taken from the case law of the Supreme Court, whose common denominator is, in essence, that it is the courts themselves that prevent counsel from carrying out their work (by refusing to entertain motions, precluding prior interviews, etc.). However, I take the view that, since the violation of fundamental rights is clearly attributable to the judge or the court, and given that specific remedies exist to address such violations, such situations should remain outside the scope of this research, which focuses on the conduct of counsel.

accused. A lawyer who mishandles or misunderstands a specific legal issue and, therefore, fails to request the exclusion of clearly illicit evidence is ineffective in that sense, but such ineffectiveness could be seen as an isolated fact within a proceeding in which, otherwise, the attorney had been competent. On the contrary, if a lawyer fails to appear at trial, the ineffectiveness is systemic. It taints the entire proceeding and is not limited to a single aspect.

The Supreme Court's case law on the Sixth Amendment right to counsel essentially recognizes these four different forms of ineffective assistance of counsel (without using the author's own terminology, which, in a commendable effort at systematization, succeeds in conveying the North American landscape to the reader). From an evidentiary standpoint, the Court's requirements vary depending on the type of ineffectiveness at issue; nevertheless, U.S. courts have on occasion redirected any claim concerning ineffective assistance of counsel[62] to the *Strickland* framework, even when it was a clearly structural case, and therefore had nothing to do with the lawyer's competence as such or with strategic decisions, where the evidentiary standard for the defendant is more demanding and the case law more "state-friendly."[63]

It is enough to examine the factual cases that gave rise to the two most famous rulings of the U.S. Supreme

62 Not without reason, the aim of the article is 'to encourage litigants, courts, and scholars to think more carefully about the different forms of ineffectiveness when analyzing the right to effective assistance of counsel' (p. 1592, author's translation)."

63 The defendant will have to prove that the conduct of their attorney caused them harm, demonstrating "a reasonable probability that, but for the attorney's unprofessional errors, the outcome of the proceeding would have been different."(Free translation)

Court on the (in)effectiveness of legal assistance to see that they deal with very different issues. Indeed, in the well-known *Strickland* ruling, the accused, sentenced to death for kidnapping and murder, claimed that his lawyer had been ineffective during the trial because, in his opinion, he committed several errors (omissions, strictly speaking), such as not requesting a continuance, not seeking the drafting of a psychiatric report, not calling witnesses or other evidentiary elements, and not questioning the medical experts who testified at trial. In contrast, in the *Cronic* case,[64] the adjudicating authority appointed a young attorney specialized in real estate law to defend someone accused of postal fraud and gave him twenty-five days to prepare for trial, even though the defense had requested at least thirty days. After his conviction in the first instance, *Cronic* was deemed that, given the complex nature of the crimes he was accused of, the time granted to his lawyer to prepare for trial was insufficient, which led to a finding of ineffective assistance of counsel.

3.3.– The landing of Strickland in Spanish courts

A few years ago, the Second Chamber of the Supreme Court adopted the doctrine emanating from *Strickland* in its Judgment 383/2021 of May 5, which precisely addressed the debate on effective legal assistance.[65] This

64 *United States v. Cronic*, 466 U.S. 648 (1984).

65 Months earlier, in Judgment STS 47/2021 of January 21, the same presiding Justice had already made a nod to *Strickland*, citing that decision and its significance. Nevertheless, due to the peculiar circumstances of the case –where, despite the defective appeal under review, other defendants had presented grounds that were upheld and whose reasoning applied equally

ruling is based on the premise that defense counsel must be "competent"[66] and that investigated or accused,[67] for which reason the conditions of the right to legal defense require "establishing conditions that guarantee its effectiveness" and these bind "both the public authorities and the professionals to whom the assistance is entrusted."

This ruling also adds that "as emphasized by the European Court of Human Rights, the State must act diligently to ensure *[for those who require legal assistance] the real and effective enjoyment of the rights guaranteed by Article 6 of the ECHR. There must be an adequate institutional framework to guarantee the effective legal representation of individuals entitled to it and a sufficient level of protection of their interests"* – see ECtHR, case Staroszczyk v. Poland, March 22, 2007; case Bakowska v. Poland, January 12, 2010." (Legal Ground 2.3).

The Ruling of July 7, 2017, adopting the doctrine of the ECtHR –Kamasinski v. Austria, December 19, 1989 and Mayzit v. Russia, January 20, 2005– highlighted the obligation derived from Article 6.3 (c) of the European

to the "defenseless" appellant or one not assisted in a minimally effective manner– the High Court found no need to delve further into the fundamental right to legal assistance.

66 Citing the U.S. Supreme Court's decision in *Engle v. Isaac*, 456 U.S. 844 (1977), which recalls that the Sixth Amendment guarantees "the right to be assisted by competent counsel" (STS 383/2021, Legal Ground 2.3).

67 The Supreme Court Order of July 7, 2017, recalled the case law of the European Court of Human Rights –*Airey v. Ireland*, Judgment of October 9, 1979; *Artico v. Italy*, Judgment of May 13, 1980; and *Kamasinski v. Austria*, Judgment of December 19, 1989– to affirm that "the mere appointment of a lawyer does not in itself guarantee the effectiveness of his or her assistance" (Legal Ground 3).

Convention for "the competent national authorities to intervene when the omission of appointed counsel becomes evident, that is, when legal counsel fails, in a manifest or sufficiently eloquent manner, in their attempt to effectively represent their client." (Legal Ground 3).

For the High Court, the effectiveness of the right to defense is reflected in the professional obligations established by law and in the "degree of technical adequacy of the activity carried out for the purposes of defense." The first canon poses no difficulties; on the contrary, the determination of when professional conduct "is ineffective due to technical inadequacy" does. The "lack" of "defensive effectiveness" –Judgment Airey of October 9, 1979; also *Artico v. Italy*, May 13, 1980; and *Kamasinski v. Austria*, December 19, 1989– to declare that "the mere appointment of counsel does not in itself guarantee the effectiveness of their assistance" (Legal Ground 3).The "lack" of "defensive effectiveness" that may affect the right to a defense must be clearly evident.[68] (STS 383/2021, Legal Ground 2.4).

In this position, to "evaluate technical competence" and "defensive incompetence," in light of the regulatory vacuum,[69] the Second Chamber resorts to the so-called Strickland standard.

68 The Supreme Court relies on the case law of the European Court of Human Rights (ECHR), which requires respect for the independence and autonomy of the legal profession, except when, as reiterated, "the deficiency of the [court-appointed] lawyer is manifest" (Legal Ground 2.4).

69 The Supreme Court rightly laments that Royal Decree 135/2021 of March 2, concerning the Statute of the Legal Profession, "does not specify any objective standard for assessing ineffective legal assistance." It only regulates "disciplinary measures for breaches of professional duties, such as that contained in

To specify what defensive competence consists of, it has been defined as "reasonable professional assistance in light of the prevailing professional standards and norms." One must: "first, identify an objective standard of reasonableness in performance; second, begin with a strong presumption that the lawyer's conduct falls within the wide range of reasonable professional assistance; third, determine whether the appointed professional carried out all reasonable investigations [actions] or whether the reasons for considering some investigations [actions] unnecessary are themselves reasonable. Thus, decisions made as a result of a reasonable investigation, considering all plausible strategic options, should not be second-guessed. Meanwhile, strategic decisions made after an incomplete investigation should only be deemed reasonable to the extent that the standards of performance justify such defensive limitation; fourth, assess the defensive deficiency at the time the assistance was provided, avoiding retrospective analysis. Excessively severe scrutiny, in addition to encouraging a proliferation of ineffective assistance claims, would result in the undesirable effect of 'lawyers limiting the paramount mission of vigorously defending the accused's cause' by adopting more conventional and conservative strategies. Therefore, the lawyer must have sufficient 'wide latitude' to make 'reasonable tactical decisions'" (STS 383/2021, Legal Ground 2.5)

The conclusion reached by the Spanish Supreme Court (TS) is that "if the indifference, negligence, technical error or lack of skill of the professionals appointed

Article 126(g), which classifies as a minor offense: 'Failure to handle matters arising from the duty roster with due diligence, when such failure does not constitute a serious or very serious infraction'" (Legal Ground 2.7).

ex officio to ensure adequate defense is devoid of all material substance, the constitutionally prohibited effect of defenselessness cannot be ruled out" (STS 383/2021, Legal Ground 8).

This ruling points out that "the costs of a defense derived from errors or ineffective actions must be borne by the party," except "when they irreducibly and seriously compromise the constitutionally protected core of the right to a fair trial and always, moreover, when judicial authorities, in cases of manifest deficiencies, have remained passive in their duty to guarantee the right to effective legal assistance" – see, in this regard, ECtHR, case Feilazoo v. Malta, of March 11, 2021, in which Articles 6 and 34 ECHR were declared violated due to defensive ineffectiveness, because the national court did not activate corrective mechanisms despite being able to detect serious failings of the appointed counsel, such as the absence of any defensive contact, omission of information to the assisted person about the development of the proceedings, passivity and abandonment of the defense before even appointing a new defender, etc." (Legal Ground 2.8). In this sense, in the ECtHR case Vasenev v. Russia, of June 21, 2016, the Court stated that "although the effectiveness of legal assistance does not necessarily require a proactive approach on the part of the lawyer and the quality of legal services cannot be measured by the number of requests and objections presented by the lawyer before a court, a manifestly passive attitude on the part of the lawyer in court could at least raise serious doubts about the effectiveness of the defense."

Undoubtedly, the decision of the Second Chamber to focus the analysis on the conduct of the lawyer ex

ante is a wise one,[70] avoiding an ex post ("excessively severe") scrutiny, as the judge or court cannot abstract from the knowledge acquired a posteriori, that is, when the technical defense has "failed," there is a high risk of incurring the so-called (hindsight bias[71]) and, closely related to the above is also the so-called (outcome bias),[72] which can easily cloud the judgment of someone who must evaluate a case ex ante from an ex post position,

70 Like any other decision made under conditions of uncertainty, it must be borne in mind that, in general, such a decision will have been taken within a context of bounded rationality. On this subject, see the original and early work by Simon, H., "A Behavioral Model of Rational Choice," The Quarterly Journal of Economics, 69(1), 1955, pp. 99–118. At the national level—and although situated within the demanding framework derived from the doctrine of objective imputation in criminal law (undoubtedly far removed from the focus of this study)—the comprehensive article by Alonso Gallo, J., "Las decisiones en condiciones de incertidumbre y el derecho penal," Indret: Revista para el Análisis del Derecho, No. 4/2011, is of particular interest.

71 See FISCHHOFF, B., "Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment under Uncertainty," *Journal of Experimental Psychology: Human Perception and Performance*, 1(3), 1975, p. 288. In the field of criminal law, the explanations offered by LUHMANN, N., *Soziologie des Risikos*, De Gruyter, Berlin, 1991, p. 21; and ROBINSON, P. H., *Structure and Function in Criminal Law*, Clarendon Press, Oxford, 1997, p. 153, are particularly noteworthy.

72 Also of interest are Gino, F., Moore, D. A., & Bazerman, M. H., "No harm, no foul: The outcome bias in ethical judgments," Harvard Business School, Working Paper 08-080, 2008; and Strohmaier, N., Pluut, H., Van der Bos, K., Adriaanse, J., & Vriesendorp, R., "Hindsight bias and outcome bias in judging directors' liability and the role of free will beliefs," Journal of Applied Social Psychology, Wiley Periodicals LLC, 2021, 51, pp. 141–158.

once the outcome is known.[73] Therefore, it is evident that the high court acted cautiously when it came to opening a window for complaints regarding the possible lack of effectiveness of legal assistance. In my opinion, although this caution is understandable, preventing a potentially abusive avalanche is not, in itself, sufficient reason to relax the protection of the core of the fundamental right to defense—especially considering that Article 11.2 of the LOPJ expressly provides for the rejection of petitions "that are manifestly abusive of the law or constitute fraud of law or procedure."

The Order of the Second Chamber of the Supreme Court of July 7, 2017, after warning that the judicial obligation of oversight cannot "open a pathway that involves judicial interference in the details of the defense strategy," outlines the contours of what could be considered minimum standards of effectiveness in legal assistance:

"Verification that the defense is endowed with substantive content (primarily when the accused does not report inadequacy or disagreement with the form of its

exercise), entails confirming that the accused could communicate with their defender, noting over time: 1°) That the lawyer has not neglected the procedural activity normally observed in forensic practice regarding similar cases; 2°) That the defense tools employed have shown a certain procedural operability."

73 On both biases, the clear explanation by Silva Sánchez, J. M., in his editorial "In hindsight… beware of cognitive biases," *Indret: Journal for the Analysis of Law*, No. 3/2021, is particularly useful, as is the work of Muñoz Aranguren, A., "The influence of cognitive biases on judicial decisions: the human factor. An approach," *Indret: Journal for the Analysis of Law*, No. 2/2011.

In the extradition context, the Ruling (Auto) of the Fourth Section of the Criminal Division of the National Court (Audiencia Nacional) 544/2021, of September 24, relied on the Strickland doctrine to downplay the absence of objection or protest by the court-appointed attorney at the appearance hearing in relation to the lack of information provided by the Central Investigating Court to the person requested for extradition regarding his right to appoint a lawyer in the issuing State in order to assist the counsel of the executing State. In this way, such passivity did not prevent the upholding of the nullity raised by the requested person's technical defense. Indeed, the court held that this omission affected the constitutionally protected core of the right to defense through effective legal assistance, especially relevant in a proceeding initiated by a detention and surrender order issued by the United Kingdom.

In my opinion, it makes no sense that in its *leading case* (STS 383/2021, of May 5), the Supreme Court saw the need to resort to precedents from the United States of America (*Strickland*) and, more remarkably, to the case law of the ECtHR (case *Sakhnovskiy v. Russia*, of November 2, 2010[74]), without being able to rely on the hermeneutical guidance of the Constitutional Court, whose doctrine, needless to say, is of mandatory compliance (Articles 1.1 and 5.1 LOTC). There is an evident lack of constitutional doctrine on the (in)effectiveness of legal assistance.

74 In this case, the European Court of Human Rights concluded that the measures adopted by the Supreme Court –such as appointing a lawyer before the hearing without allowing sufficient time to prepare the case, or organizing a videoconference for the defendant to communicate with his lawyer– had been inadequate and failed to ensure the applicant's effective legal assistance.

However, in the constitutional appeal (recurso de amparo) 7890-2022, which raised the need for the constitutional court to set doctrine on this matter, the Constitutional Court dismissed the claim for not appreciating in it "the special constitutional relevance which, as a condition for its admission, is required by Art. 50.1.b) LOTC." In that case, what was being challenged was Ruling 716/2022 of the First Section of the Criminal Division of the National Court, dated November 2, by which the appeal for reversal was dismissed against the ruling of October 29, 2022, of Central Investigating Court No. 5 granting the execution of the EAW (European Arrest Warrant) issued by the authorities of Germany against the requested person for the purpose of prosecution.

In the stated complaint, it was alleged that at the hearing provided for in Article 51 of Law 23/2014 ("Hearing of the detainee and decision on surrender"), the judge only asked the requested person for his name and "whether he consents and agrees to be surrendered for this," yet at no point did he inform the detainee of the content of the European arrest and surrender order issued against him. That is, the judicial authority not only failed to inform the requested person of the content of the brief "SIS form" that had prompted his arrest, but also failed to inform or provide him with the only document upon which the extradition procedure must be based and decided: the EAW form provided for in Article 36 of Law 23/2014.

The court-appointed duty lawyer who assisted the requested person also did not have the form referred to in Article 36, and the hearings under Articles 51 and 53 of Law 23/2014 were conducted continuously within just a few minutes. In short, the requested person was absolutely helpless at the time of being brought

before the court, since at the time of the hearing under Article 51, he did not have the most basic information to determine the potential existence of grounds for refusal of surrender (form under Article 36), with the acquiescence, moreover, of his then defense counsel: the right of defense in general and the hearing under Article 51 in particular were left empty of content and revealed themselves as a mere exercise in formal procedural ritual. The legal assistance was, in sum, absolutely superficial and ineffective.

In the case under discussion, the then defense lawyer of the appellant in the constitutional protection claim should have raised the refusal of the EAW due to lack of title and elements justifying the existence of grounds to refuse surrender. And, subsidiarily, the suspension of the hearing in order to become familiar with the proceedings and, of course, the form that, in any case, had not been included in the case file, which is what led the public prosecutor to condition his position regarding the possible concurrence of grounds for refusal of surrender ("With the facts we have at this moment"). Even more so: it would be difficult for the court-appointed defense lawyer to argue that there were grounds for refusal of surrender when, more limitedly, the legality of the detention under the terms provided in Articles 51.1 in fine of Law 23/2014 (which guarantees the right of defense and makes express reference to the LECrim[75],

75 In this regard, the provisions set forth in Articles 118.1(b) and 520.2(d) of the Spanish Criminal Procedure Act (LECrim) become fundamental, as they guarantee the accused in criminal proceedings the right to examine the case file in due time and, in any event, prior to making a statement, as well as the right to access the essential elements necessary to challenge the lawfulness of the detention.

[76]) and 7.1 of Directive 2012/13/EU was not challenged of the European Parliament and of the Council, of May 22, 2012, regarding the right to information in criminal proceedings (expressly applicable to EAW proceedings, according to Article 2.1 *in fine*).[77]

Fortunately, the Public Prosecutor requested the provisional release of the requested person, but this does not remedy the lack of essential information, which, for this reason as well, should have been demanded by the former defense counsel. A *logical prius* to minimally defend the requested person was having the EAW form.

Law 23/2014 does not impose the speed with which action was taken in this case, despite the absence of the Public Prosecutor and the defense of the minimal material necessary to argue causes for refusal. Furthermore, such

76 STC 180/2020, of 14 December, argues that "for the detainee or prisoner to be able to challenge the lawfulness of his or her detention, he or she must be promptly and adequately informed of the factual and legal grounds on which it is based, so that, if such information is not provided, the right to contest the lawfulness of the measure is devoid of effective substance (ECtHR judgments of 12 April 2005, case of Shamayev and Others v. Georgia and Russia, §§ 413 and 432; 13 July 2010, case of Dbouba v. Turkey, § 54). In logical terms, as we shall later reiterate, the absence of due knowledge of the essential elements of the case file necessary to challenge the lawfulness of the deprivation of liberty entails a violation of the right to judicial review of the lawfulness of the custodial measure under Article 5(4) ECHR."

77 "When a person is subject to arrest or deprivation of liberty at any stage of criminal proceedings, the Member States shall ensure that the person detained or their lawyer is provided with those documents relating to the specific case file that are held by the competent authorities and that are essential to effectively challenge, in accordance with national law, the legality of the arrest or detention."

an interpretation clashes head-on with the judicial duty imposed by Article 7 of the Organic Law of the Judiciary (LOPJ), which obliges courts and tribunals to safeguard fundamental rights, avoiding any defenselessness, in the following terms:

"1. The rights and liberties recognized in Chapter Two of Title I of the Constitution bind, in their entirety, all Judges and Courts and are guaranteed under the effective protection of those rights.

In particular, the rights set out in Article 53(2) of the Constitution shall, in all cases, be recognized in accordance with their constitutionally declared content, and judicial decisions may not restrict, impair, or render inapplicable that content.

The Judges and Courts shall protect the rights and legitimate interests, both individual and collective, without, in any case, allowing for a situation of lack of legal defense. […]".

If the law requires a form with specific sections (Article 36 of Law 23/2014[78]) to the extent that its

78 "The European arrest warrant shall be drawn up using the form set out in Annex I and shall expressly include the following information:(a) the identity and nationality of the requested person (b) the name, address, telephone and fax numbers, and e-mail address of the issuing judicial authority; (c) an indication of the existence of a final judgment, an arrest warrant, or any other enforceable judicial decision having the same effect as provided for in this Title; (d) the nature and legal classification of the offence; (e) a description of the circumstances in which the offence was committed, including the time, place, and the degree of participation of the requested person; (f) the sentence imposed, where there is a final judgment, or alternatively the scale of penalties prescribed by law for the offence; (g) where possible, other consequences of the offence."

absence or defective nature will result in the failure of the European extradition procedure (Article 32.1.c of the aforementioned Law[79]), it is because the existence of such mechanisms does not permit the erosion or undermining of the fundamental rights and procedural guarantees that assist every requested person, nor an abdication of the judicial function.

The appellate body, aware that *quod non est in actis non est in mundo*, ultimately acknowledged the possibility that the OEDE form had not indeed been delivered to the then court-appointed defense attorney of the person claimed ("it will be delivered or not before the hearing the OEDE form that was sent by the German authorities at 10:07 am on the same day"), and concluded that, in the end, no lack of legal defense could arise from this absence of documentary transfer since it contained, Supposedly, "the same data" was included in both the OEDE form, on the one hand, and in the SIRENE, on the other.

However, in order to determine whether there had been a violation of the fundamental rights of the petitioner for amparo to effective judicial protection without defenselessness (Article 24.1 of the Spanish Constitution), to defense and to a process with all guarantees (Article 24.2 of the Spanish Constitution),

79 A provision which, in relation to the "general grounds for refusal of the recognition or execution of the requested measures," establishes that "the Spanish judicial authorities shall not recognize or execute orders or decisions transmitted in the cases provided for under each mutual recognition instrument and, as a general rule, [...] where the form or certificate that must accompany the request for the adoption of the measures is incomplete, manifestly incorrect, or does not correspond to the measure requested, or where the certificate is missing, without prejudice to the provisions of Article 19."

it is irrelevant that ex post a supposed identity between both forms was found, so that what the appellate body should have reviewed is whether, ex ante, at the time the requested person was made available, he had the essential elements to, in his case, oppose the surrender and, in his case, whether his defense attorney was or was not "competent" in the defense of his interests.

Nevertheless, what is truly relevant is that, once the right to legal assistance has been consolidated, in an increasingly specialized and complex world, it is time for the Constitutional Court to rule on the potential procedural consequences of ineffective legal assistance, regardless of whether the lawyer was appointed from the legal aid roster or freely chosen by the defendant. It is pointless to recognize and proclaim rights if their effective enforcement is not monitored and, above all, if no procedural consequences are attached to their violation.

3.4.- A PARTIAL COMPARATIVE CONCLUSION

Whereas in Spain no legal avenue has been opened, in the United States it is very common to request a review of convictions (in a broad sense, that is, not only through ordinary appeals) alleging the ineffectiveness of legal assistance. So much so that even penitentiary law manuals always include a chapter dedicated to reviewing convictions based on the famous *ineffective assistance of counsel*.[80]

Indeed, many inmates seek the review of their final convictions by alleging that, in reality, they were rendered

80 See, among the most recent and comprehensive works, Chapter 12 of the manual *A Jailhouse Lawyer's Manual*, 12th Edition, Columbia Human Rights Law Review, 2020, pp. 256–266.

defenseless due to the actions of their attorney. As the best legal doctrine points out, for a review request based on this ground to be successful, it is required, on the one hand, that "his lawyer must have breached professional standards during his representation," and, on the other hand, that there be a "reasonable probability" that the poor representation by his attorney negatively affected the outcome of his case.[81]

The case law on this subject is vast and highly extensive in the United States. I will highlight below a series of cases of ineffective legal assistance that have led to the overturning of convictions[82] and which, except for the first case, I believe would not, if raised in Spain, lead to any procedural consequence for the defendant harmed by the conduct of his counsel.

– Lawyer "not qualified to practice";

– Lawyer with a conflict of interest;

– Lawyer who does not investigate or carry out certain tasks of trial preparation;

– Lawyer who made a mistake in jury selection;

– Lawyer who did not pursue available lines of defense for his client;

– Lawyer who did not properly advise his client on a plea agreement;

81 AAVV, A Jailhouse Lawyer's …, op. cit., p. 256 (author's translation).

82 AAVV, A Jailhouse Lawyer's …, op. cit., pp. 263–265 (author's translation).

– Lawyer who, in the context of a plea agreement, did not advise his client of the risks of deportation due to the latter not having legal status in the country;

– Lawyer who did not use important evidence at trial (mainly, witnesses);

– Lawyer who did not challenge the opponent's illicit evidence at trial;

– Lawyer who did not request that the jury be properly instructed;

– Lawyer who did not object to irregular instructions given to the jury;

Abogado que no interpuso un recurso de apelación;

Abogado que no incluyó en su apelación un argumento que tenía posibilidades razonables de ser estimado;

Abogado cuya actuación en juicio "fue simplemente tan deficiente que resultó ineficaz".

The extremely broad scope of grounds for the review and reversal of convictions in the United States contrasts with their virtually unprecedented nature in Spain and in the rest of the Member States of the European Union.[83]

83 Following an initial, unsuccessful line of inquiry, my contacts with academics and practicing lawyers in the criminal justice systems of Germany, France, Portugal, Luxembourg, the Netherlands, Belgium, Italy, and Greece have been ongoing. The common denominator of the responses obtained from the interviews conducted with these colleagues –whom I sincerely thank for their time– is that, in their jurisdictions, the issue of ineffective assistance of counsel is not even raised and, consequently, there is no developed body of analysis regarding its causes and effects. Quite simply, as in Spain, it remains a taboo. At most, the issue of abuse of process by lawyers who

[84] And where complaints concerning ineffective assistance of counsel have not been unheard of, courts have taken a firm stance. By way of illustration, the Austrian Supreme Court's judgment of 30 June 2011[85] may be cited. In a case involving the submission of false evidence, in which the appellant argued that his right to defense had been violated due to the deficient performance of his defense counsel at first instance, the Austrian high court –after stating that the case law of the European Court of Human Rights only requires national courts to intervene "where the negligence of court-appointed counsel is manifest"– concluded that "[n]ot even habitual incompetence on the part of defense counsel in the proceedings before the court of first instance was alleged that had gone unnoticed by the appellate court, nor can such incompetence be inferred from the written submissions or the contents of the case file. Moreover,

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have engaged in an abuse of rights has been raised in Germany. Notably, in the disciplinary sphere, there are examples of lawyers who submit hundreds of filings with the sole aim of overwhelming the court; however, situations involving the technical incompetence of counsel are not contemplated. In this regard, see GUT, T., *Counsel misconduct before* …, op. cit., pp. 73–81.

84 Particularly noteworthy is the situation in France, where, in addition and as a protective perimeter preventing scrutiny of the route toward the recognition of the right of defense on grounds of ineffective assistance of counsel, Article 13 of the Ethical Rules of the Legal Profession (*Règlement Intérieur National de la Profession d'Avocat*) elevates, inter alia, the values of dignity, fraternity, delicacy, moderation, and courtesy—especially care in how lawyers address and refer to their professional colleagues.

85 I would like to express my sincere gratitude to my colleague Andreas Pollak for his valuable explanations concerning the Austrian system, as well as for his assistance in identifying the pertinent legal and jurisprudential sources.

the court is not required to examine or supervise the quality of defense counsel, nor to intervene (Achammer, WK StPO § 57 Rz 28".[86] (author's translation)

3.5.- A BRIEF FORAY INTO THE EXCEPTIONS IN COMPARATIVE LAW

The only countries in our region that have paid attention to the problem under investigation are Switzerland, on the one hand, and England and Wales, on the other.

3.5.1.- Switzerland

Switzerland offers us a more defined legal framework.[87] From the outset, Article 12 a) of the Law on Lawyers[88]

86 "According to the case law of the European Court of Human Rights (see ECtHR, 27 April 2006, Sannino v. Italy, no. 30961/03, ÖJZ-MRK 2007/9, 513), national courts are obliged to intervene (Article 6(3)(c) ECHR) where the manifest negligence of court-appointed counsel is apparent or where they have obtained sufficient knowledge of it by other means. However, nullity pursuant to Article 281(1)(a) cannot be based on this (see Ratz, § 281 Z 1a Rz 163 [with further references]). Paragraph 1(a) refers solely to the mere formal exercise of the defence function (12 Os 171/86). The proper sedes materiae are rather paragraph 4, § 362 (extraordinary reopening of proceedings), and § 23 (appeal on nullity); see Ratz, ÖJZ 2006, 323. Nevertheless, under the legislation currently in force, courts may only recommend the removal or new appointment of counsel in cases of habitual incompetence or manifest incapacity." (Free translation.)

87 I wish to express my gratitude to my colleague Sylvain Volainen for his invaluable assistance in identifying the law applicable to this matter.

88 Federal Act on the Free Movement of Lawyers (Loi sur les avocats, LLCA) of 23 June 2000.

obliges lawyers to practice their profession "with care and diligence".[89]

In the criminal procedural field, Article 134.2 of the Swiss Code of Criminal Procedure[90] clearly provides that if the relationship of trust between the defendant and the court-appointed defense counsel is seriously disrupted or if, for other reasons, an effective defense can no longer be guaranteed, the direction of the proceedings shall entrust the public defense to another person. Thus, the Public Prosecutor or the Court (depending on the stage of the proceedings) has the duty to ensure that the public defender provides the accused with competent, diligent, and effective legal defense. This provision establishes a duty of oversight on the part of the authorities, thus positively affirming the right to individual particular legal defense.

Indeed, as stated in the Circular of the Swiss Federal Council regarding the unification of criminal procedural law FF 2006 1057, "the effectiveness and commitment of the defense may be compromised [...] when the defense counsel objectively violates the duties of his/her position, and in such case the defense counsel must be replaced by another."[91]

The notion of effective defense is thus projected onto the litigant who benefits from a court-appointed defense attorney (Federal Court Ruling –hereinafter ATF[92]– of

89 "He or she shall exercise his or her profession with care and diligence."

90 Swiss Code of Criminal Procedure of 5 October 2007.

91 Page 1159.

92 Judgment of the Federal Supreme Court.

9 February 2016[93]), but also to the defendant who has retained a lawyer of their own choosing (ATF 124 I 185, consideration 3b; ATF 126 I 194, consideration 3.d.).

According to the case law of the Federal Court, the judicial authority *must* take measures to promptly replace a court-appointed lawyer who objectively violates the duties of their office and therefore endangers the defense of the accused, if it is considered that the defense is manifestly deficient (ATF 6B_307/2016, Federal Court Ruling of 17 June 2016, consideration 2.2).

In Switzerland, this situation is accepted quite naturally and without resistance, either in jurisprudence or in doctrine. One of the most prestigious commentaries on the Swiss Code of Criminal Procedure states unequivocally:

"The authority shall [...], if it is found that the conditions of CPP 134 II are met, automatically revoke the mandate of the official defense attorney and appoint a new one. What is at stake is the material safeguarding of the defendant's rights, and the State's obligation is fulfilled with the mere appointment of a new court-appointed defense counsel."[94]

In this context, "[t]he direction of the proceedings has the duty to ensure that the official defense counsel

93 ATF 6B_1078/2014, recital 4.2.3.

94 JEANNERET, Y., KUHN, A., PERRIER DEPEURSINGE, C. (eds.), Commentaire Romand – Code of Criminal Procedure, 2nd ed., 2019, Art. 134, para. 13. (Free translation.)

provides the defendant with competent, diligent, and effective legal representation."[95]

The Swiss Federal Court has also declared that the accused's interests are not sufficiently protected when the defense attorney does not devote the time it is necessary to prepare the defense (ATF 1B_67/2009, Swiss Federal Court Judgment of July 14, 2009, consideration 2.3). There exists an entire amalgam of ineffective legal assistance behaviors compiled by JEANNERET, KUHN, and PERRIER:

"The interests of the accused are not sufficiently defended, particularly when the defense attorney repeatedly fails to attend investigative hearings, particularly during interrogations; repeatedly fails to fulfill their representational obligations; does not get involved in safeguarding the right of their client to submit evidence; does not visit their client during pre-trial detention; does not file their own pleadings and merely acts as a mouthpiece for the accused, without critical thinking, for example, by merely reading notes written by the accused during hearings; remains unreachable for long periods without apologizing or being replaced; fails to consult the case file over extended periods; does not devote necessary time to preparing the defense; is absent during proceedings or refuses to argue or does so in a clearly inadequate manner; suggests being convinced of their client's guilt while the latter maintains innocence;

95 JEANNERET, Y., KUHN, A., PERRIER DEPEURSINGE, C. (eds.), *Commentaire Romand – Code…*, op. cit., Art. 134, para. 19. *(Free translation.)*

misses a deadline, thereby allowing a procedural right of their client to lapse".[96]

In the words of CHAPPUIS, "[t]he diligence required of an attorney implies that they make every effort possible to achieve the desired outcome".[97]

Recently, the Swiss Federal Court has stated that an excessively passive and uncommunicative demeanor by a court-appointed defense attorney over several years can lead to the alienation of the trust bond between an accused person and their public defender (ATF 1B_479/2022, Swiss Federal Court Judgment of March 21, 2023). Clearly, the breakdown of the trust relationship must be substantiated and objectively supported by concrete and significant indicators. Still, the high court objectively finds it understandable that an accused may progressively lose the necessary trust in their public defender when the latter behaves in an overly passive and uncommunicative manner for several years.

It is worthwhile to reproduce a series of excerpts from the aforementioned Judgment of March 21, 2023:

"The complainant states, among other things, the following: If there had ever been a relationship of trust with the court-appointed lawyer, it had been extinguished due to his behavior. Any accused person who has been defended by appointment and "has not been visited or contacted by their court-appointed lawyer once detained during a criminal proceeding lasting more than three

96 JEANNERET, Y., KUHN, A., PERRIER DEPEURSINGE, C. (eds.), *Commentaire Romand – Code…*, op. cit., Art. 134, para. 20. *(Free translation).*

97 CHAPPUIS, B., *The Legal Profession*, Vol. I: The Legal Framework and Fundamental Principles, 2nd ed., 2016, p. 53.

years," who holds "views diametrically opposed to the course of the proceedings and the defense strategy," and who also claims to have "been left without assistance in individual hearings," would immediately have their court-appointed lawyer replaced. It is precisely "the appearance that the defense is compromised with the interests of the accused person" that is of paramount importance in forming a relationship of trust. The reference by the lower court to the fact that the defense is not merely the mouthpiece of the accused does not change this. The absence of court-appointed defense in the accused's appearances in a proceeding with mandatory defense violates the duty of legal assistance. During the procedure to request the replacement of the court-appointed defense, the accused also tried to contact their lawyer. He did not respond to his letters or phone calls. In this context, he complains specifically of a violation of Article 134, paragraph 2, of the Criminal Procedure Code.

The provision of paragraph 2 of Article 134 of the Criminal Procedure Code takes into account that an effective defense may be compromised not only in cases of objective breach of duty by the defense but also in cases of abuse of trust. The underlying idea is that a court-appointed defense must be replaced even in cases where the accused was defended by appointment but then changes their defense. However, if the accused puts their subjective perspective above all else, this does not mean that their feelings alone are sufficient to justify a change of legal representation. Rather, the breakdown of the relationship of trust must be based on specific and objective evidence (BGE 138 IV 161 E. 2.4). Within the bounds of careful and effective performance of the official mandate, the choice of legal strategy belongs in principle to the defense. It is true that the objective interests of

the accused must be protected as far as possible in mutual agreement and consultation with them. However, the defense does not act as a mere "spokesperson" who simply states what their client says during the trial. In particular, it falls within the defense's discretion to decide which procedural steps and legal positions are appropriate and necessary (in each individual case) (see BGE 126 I 26 E. 4b/aa; 194 E. 3d; 116 Ia 102 E. 4b/bb; rulings 1B_398/2013 of December 2, 2014 E. 2.1; 1B_110/2013 of July 22, 2013 E. 4.3).

There is no doubt that the court-appointed lawyer never visited or contacted the accused during years of pretrial detention to discuss procedural issues or to jointly define the defense strategy, and that this lawyer only met with the accused at the trial itself, where he was absent for long stretches during deliberations." The court-appointed defense attorney did not participate in several formal hearings. It is true that the lower court agrees that, in principle, it is up to the defense to decide, within the scope of its proper discretion, which motions for evidence and legal arguments it considers appropriate and necessary. However, to create and maintain the necessary trust with the client, it is also necessary that the defense ensure that important procedural steps are sufficiently discussed with the accused and that the procedural approach it has chosen is at least explained in broad terms and at appropriate intervals. The Court also notes that the court-appointed attorney declared during the proceedings before the first-instance court that he did not oppose the plaintiff's wish to change lawyers. He made no statement regarding the possible breakdown of the relationship of trust either in the proceedings before the lower court or before the Federal Supreme Court.

Contrary to the opinion of the cantonal authorities, the circumstances described above, taken as a whole, are objectively likely to progressively undermine the complainant's trust in an effective and sufficiently committed defense up to March 2022. This is not altered by the arguments of the cantonal instances that the court-appointed lawyer issued a "statement of conscience" indicating that he could no longer guarantee an effective defense, or that a "possible" lack of cooperation by the accused with the defense does not in itself constitute sufficient reason for a change of court-appointed attorney. Nor is it relevant that the complainant did not exercise his right to propose or elect a different legal representative in February 2019. He does not allege or substantiate that there was a lack of sufficient trust in 2019 for objective reasons. However, he states that the distancing developed gradually in the following years due to the conduct of the defense lawyer, whom he found excessively passive and not very communicative. It is objectively understandable that the complainant gradually lost the necessary trust in the court-appointed defense around March 2022 (the date of the request for change of attorney). The lower court's opinion that the complainant did not sufficiently demonstrate that the relationship of trust between him and the attorney had been significantly disturbed within the meaning of Article 134, paragraph 2, of the Criminal Procedure Code, cannot be upheld. Therefore, the request for a change of court-appointed defense attorney must be approved (free translation).

In terms of the procedural consequences of the acceptance of an appeal of this nature, in which the issue raised is the ineffectiveness of legal counsel, this same Chamber considers whether the change of court-appointed lawyer "should be ordered ex nunc

or retroactively." Thus, the referenced ruling reads as follows:

"It is understandable from a factual standpoint that the complainant may have lost the necessary trust in his legal representation since March 2022, which is why a change of defense counsel must be ordered. However, in the present case, this does not lead to the conclusion that the complainant was not effectively defended during the investigation proceedings that concluded earlier (with the indictment order on September 9, 2022). In any event, his allegations do not reveal any serious error or omission by the defense attorney that would require repeating parts of the investigation under federal law. For reasons of procedural fairness, the criminal court handling the case after the indictment has been issued must take into account the change of defense counsel in the main proceedings in the following manner:

If the new defense attorney submits the corresponding substantiated procedural writings, the criminal court must determine whether certain hearings, in which the former court-appointed attorney did not participate, must be repeated in the presence of the new defense attorney. If necessary, the defense will be given the opportunity to ask additional questions.

In this context, no evidence has been submitted or appears to exist that prohibits the use of evidence or investigative acts as invalid. Additionally, the criminal court must thoroughly question the accused and give the defense attorney the opportunity to ask supplementary questions.

As a result, the change of court-appointed defense counsel must be ordered with effect *ex nunc* and not

retroactively to March 21, 2022 (see Article 107, para. 2, of the BGG)" (free translation).

Likewise, regarding the procedural consequence of confirming ineffective legal assistance, the aforementioned ATF 124 I 185 ruling declared the nullity of the proceedings. Allow me, due to the particular nature of the case discussed, to reproduce a fragment of the ruling: "in the appeal proceedings, the appellant was not properly defended by her husband in a sufficiently professional manner, and it has in no way been demonstrated that she waived the right to free legal aid or that the conditions for obtaining it were not met." Under these circumstances, the Court of Appeal should have informed the appellant of this possibility. Failing to do so, the Court of Appeal violated her rights to defense as guaranteed by the Constitution and the Convention" (free translation).

The Swiss legal basis that serves as a guiding light for the Federal Tribunal in these cases is Article 32.2 of the Constitution, which, in its final clause, grants every accused person the opportunity to assert their rights through an "adequate" defense.

Lastly, in exceptional circumstances, the lack of diligence by counsel may even result in the costs of the proceedings being imposed not on the losing party, on the lawyer personally. This is how the Swiss Federal Tribunal has interpreted it in cases where, with minimal attention, the inadmissibility of the appeal can be immediately established — that is, when the appeal is manifestly unfounded (ATF 129 IV 206, consideration 2).

3.5.2 – England and Wales

In England and Wales,[98] errors committed by defense lawyers can lead to the conviction being considered "unsafe"[99] and therefore revoked. Still, if the lawyer's decision was made in "good faith," weighing the circumstances and having consulted the client when necessary, it is less likely that the Court of Appeal will overturn the conviction simply because the decision was taken against the client's instructions and without consulting them (see, in this regard, the judgment in the case *Clinton* [1993] 2 All ER 998).[100]

In any case, there has been no uniform standard to determine when the conduct of the defense lawyer becomes ineffective. A study of the Court of Appeal's jurisprudence shows that it has fluctuated between different criteria. In fact, while in the case *Ensor* ([1989] 2 All ER 586) it was required that the conduct of the lawyer be "flagrantly incompetent",[101] in the case *Richards* ([2000] All ER (D) 900), the court established that the applicable test was the one set forth in the case *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* ([1948] 1 KB 223), in relation to decisions made by public

98 I would like to place on record my gratitude to Stefan Hyman who, on occasion, has appeared as opposing counsel representing the interests of the Crown Prosecution Service of England, yet remains a valued colleague and friend for his support and patience in assisting with the identification of pertinent precedents.

99 (Free translation of the term "unsafe".)

100 Certainly, these requirements have been demanded in particular when assessing the decision whether or not to call the defendant to give evidence at trial.

101 See also the judgment in *Donnelly* ([1998] Crim. L.R. 131).

authorities, that is, "unreasonableness".[102] Indeed, in that ruling, the court limited its supervisory power over the decisions of public authorities to those cases where the resolution is so unreasonable that no reasonable authority could have reached it. Underlying this is the principle of proscribing arbitrariness by public powers, guaranteed in any Rule-of-Law-based State.[103]

In the already cited *Clinton* case, the Court of Appeal downplayed the importance of the test to be applied, emphasizing that what truly matters is determining whether the lack of competence of the counsel led to the conviction being unsafe.

However, in the *Nangle* case ([2001] Crim LR 506), the same appellate body declared that a test requiring "manifest incompetence" by the counsel might be incompatible with Article 6.1 of the European Convention on Human Rights. Thus, what really matters is assessing whether the defendant had a fair trial. If the lawyer's conduct impeded the effectiveness of this right, the court might have to intervene.

In the *Boodram* case against the State of Trinidad and Tobago ([2001] UKPC 20), the Privy Council of the United Kingdom held that if the defense lawyer's conduct reached the extreme of depriving the appellant of due process, the conclusion would be that the appellant did not have a fair trial and, therefore, the conviction should be quashed without the need to investigate the impact of the lawyer's failings on the trial's outcome.

102 See also the judgment in *Ullah* ([2000] 1 Cr. App. R. 351).

103 Article 9(3) of the Spanish Constitution.

Also of interest is what happened in the *Ekraireb* case ([2015] EWCA Crim 1936), where the focus of the appellant's complaint lay in the closing speech of their defense lawyer. The Court of Appeal, citing the decision in *Day* [2003] (EWCA Crim 1060), stated that "to establish the unsafety[of the conviction] in a case of incompetence, the appellant must go beyond mere incompetence and demonstrate that the incompetence led to errors or irregularities at trial, which by themselves undermine the fairness of the trial."[104] and ultimately concluded that there had not been a single case in which an appeal based on the ineffectiveness of defense counsel due to deficiencies in their oral submissions had been upheld, and, in short, this was not going to be the exception.

The Court of Appeal of England and Wales has naturally acknowledged the importance of the Blue Guide on proceedings before the Criminal Division of the Court of Appeal, known as the *Blue Guide* (its most recent version is from May 2023, with the first published in 1995).[105] Of particular interest here is section B.7.3, which states that new counsel taking over the appeal against a conviction *must* contact previous counsel and draw upon the information they can provide. It is even anticipated that if trial counsel does not respond within a reasonable time, then the new lawyer should seek other independent and objective evidence to support the appeal. The same applies to any information from the trial lawyer that contradicts the client's instructions.

104 *(Free translation.)*

105 Available at: *Guide to Proceedings in the Court of Appeal Criminal Division* (judiciary.uk) (last accessed: 18 August 2024).

In the *Achogbuo* case ([2014] EWCA Crim 567), the Court was very clear in stating that "before appeals based on alleged incompetence of trial representation are heard by this Court, we expect that steps are taken by the legal representatives to seek independent and objective evidence to support the appeal, including contacting the previous representatives where necessary, or identifying and obtaining the evidence which gives rise to the objective and independent basis for the appeal" (free translation).

3.5.3. – The Italian case

Although I have stated that the same approach prevails in the European Union as in Spain –namely, that no attention has been paid to the problem under study– the Italian regulatory [106] framework is nevertheless noteworthy, since, as will be seen, it shows that the legislature is aware of the existence of a real problem that, however, neither litigants nor courts have chosen to address. Italy has a solid body of legislation governing the conduct that lawyers are required to observe. In brief, this includes the Code of Professional Conduct (Codice deontologico forense, hereinafter CDF) of 31 January 2014; the aforementioned Law No. 247 of 2012, which regulates the legal profession; and Decree No. 55 of the Ministry of Justice of 10 March 2014, which approves the regulation laying down rules aimed at ensuring fair remuneration for lawyers.

By way of introductory contextualization, it should be noted that Article 20 of the CDF classifies as a

106 I would also like to express my gratitude to my colleague Lorena Morrone, whose assistance was instrumental in identifying relevant legislative materials.

disciplinary offense (*illecito disciplinare*[107]) the breach of the professional duties laid down in the Code itself, as well as of the ethical rules governing the legal profession. Pursuant to Article 22 of the CDF, depending on the seriousness of the lawyer's conduct, the sanctions may range from a warning (*avvertimento*), through a reprimand (*censura*) or a suspension (*sospensione*) from the practice of the profession for a period of between two months and five years, to, ultimately, disbarment (*radiazione*).

But, undoubtedly, what is most important is that the Criminal Procedure Code itself expressly contemplates in Article 105 a specific form of ineffective legal assistance, the abandonment of the defense (*abbandono di difesa*),[108] an expression that reflects situations in which the lawyer fails in their defense duties by neglecting a judicial signal of unjustified misconduct.[109] The issue is that, in such an eventuality, the lawyer will face the disciplinary sanctions

107 The disciplinary offence is defined in Article 51(1) of Law No. 247/2012.

108 The same provision establishes an identical regime for the refusal of the defence (*rifiuto della difesa*) by court-appointed counsel. Indeed, although the provision describes both situations –abandonment and refusal– jointly and in terms that may give rise to confusion, refusal applies exclusively to court-appointed defence (*difesa d'ufficio*), since privately retained counsel (*difesa di fiducia*) is under no obligation to accept a mandate and, therefore, is entitled to withdraw from it. By contrast, court-appointed counsel, having been designated by the court, is legally obliged to accept the defence and may not simply abandon it.

109 Article 105 of the Italian Code of Criminal Procedure likewise provides, in paragraph 5, for the (distinct) consequences of the abandonment of the defence by other participants in the criminal proceedings ("private parties other than the accused, the injured party, and the entities and associations referred to in Article 91"). In such cases, abandonment shall neither

succinctly outlined in the previous paragraph, but the criminal trial will continue with the appointment of a public defender, without such failure interfering with the disciplinary or criminal proceeding (Article 105.2 of the Criminal Procedure Code). Now well, having established that this rule does not influence or invalidate a proceeding on its own, it is true that the Criminal Procedure Codesituations (abandonment and rejection) in a way that could lead to confusion, rejection only applies to public defense (*difesa d'ufficio*), since private or trusted defense (*difesa di fiducia*) has no obligation whatsoever to accept a defense and, therefore, has the right to abandon it. Conversely, the public defender, being appointed by the court, is legally bound to accept the defense and cannot simply abandon it the exception in its Article 175 with the provision for the reinstatement of deadlines.[110] Indeed, this provision enables the procedural parties to request this exceptional measure in cases of force majeure or unforeseen circumstances. The Italian Supreme Court has not considered that ineffective legal assistance alone suffices to treat a missed procedural deadline as force majeure under Article 175 (see, for instance, Judgment No. 2112 of 16 November 2021). However, when the conduct of the lawyer has been particularly severe, it has admitted the characterization of defensive ineffectiveness in such exceptional cases. In fact, in its Judgment No. 30262 of 30 May 2023, the Italian high court applied this solution in a case where the lawyer failed to inform his client about his own disciplinary suspension, falsely assuring that he had appealed the first-

prevent the continuation of the proceedings nor result in the adjournment of the hearing.

110 The same applies in civil proceedings (Article 184-bis of the Italian Code of Civil Procedure).

instance conviction. The appeal deadline expired without the submission of any appeal, which is why the case involved the reinstatement of the deadline under Article 175 of the Code of Criminal Procedure—a request that was initially denied. This rejection was later overturned by the Italian Court of Cassation, which considered that the severity of the lawyer's failure to fulfill his duties did indeed constitute force majeure.

Nevertheless, the highly restrictive approach adopted by Italian courts in this area which in practice amounts to holding the client responsible on the basis of a form of *culpa in vigilando* with respect to the conduct of defense counsel is particularly burdensome in extradition matters (in a broad sense, including European arrest warrant proceedings). In such cases, the person concerned on whom case law imposes this alleged duty of supervision as a matter of elementary diligence is, in many instances, a foreign national who does not know the language in which the extradition proceedings are conducted.[111]

111 This has led some authors to advocate, almost by way of a subsidiary plea, for a relaxation of this case law in proceedings involving international judicial cooperation, notably extradition and the European arrest warrant, particularly where the requested person is in detention and therefore in a situation of heightened vulnerability. In this regard, see CANESTRINI, N., "Professional Misconduct of Defense Attorney in International Criminal Cooperation: Remedies?", available at: https://canestrinilex.com/en/readings/professional-misconduct-of-defense-attorney-in-international-criminal-cooperation-remedies (last accessed: 11 October 2024).

As this author explains, with whom I fully agree, in such cases a series of common factors tend to concur in the requested person, such as foreign nationality, lack of knowledge of the language of the requested State, absence of understanding of the proceedings, pre-trial deprivation of liberty and, lastly, the more than likely impossibility of communicating abroad.

Judgment No. 3631 of the Italian Court of Cassation of 20 December 2016 is especially stringent, particularly in view of the very short time limits for challenging convictions rendered *in absentia*:

"The failure or inaccurate performance by appointed counsel of the task of lodging an appeal, for any cause attributable to him, is not capable of constituting a fortuitous event or force majeure such as would justify the reinstatement of the time limit since it amounts to a false representation of reality that may be overcome through ordinary diligence and attention, and because it cannot be presumed that the assisted person is relieved of the duty to supervise the exact performance of the mandate entrusted, in cases where control over the proper exercise of the defense is not prevented for the ordinary citizen by a complex regulatory framework." (author's translation; emphasis in the original omitted)

Of particular interest is Judgment No. 5983 of the Italian Court of Cassation of 19 December 2023,[112] in which the high court declared inadmissible the appeal in cassation lodged by the requested person, a German national who had been arrested in Slovenia in connection with an Italian conviction to five years' imprisonment following *in absentia* proceedings before a court in Pordenone. The peculiarity of the case lay in the fact that the Italian lawyer initially retained by the requested

From this, he rightly concludes that the person concerned, in my view not even a national litigant, cannot be required to act with diligence and care in selecting the lawyer to be appointed and in supervising the conduct of his or her defence counsel.

112 I wish to express my gratitude to my colleague Nicola Canestrini, counsel before the Court of Cassation, for bringing this recent and noteworthy judicial decision to my attention.

person to seek the annulment of the conviction rendered in his absence failed to attach to the application the special power of attorney required under Article 629-bis(2) of the Italian Code of Criminal Procedure[113] as a procedural prerequisite. After the incident was declared inadmissible by the court for lack of standing, new counsel lodged an appeal in cassation, arguing that the error committed by the former lawyer was not attributable to the person concerned and that the latter had neither the duty nor the capacity to supervise the work of his defense counsel, since this constituted "an unforeseeable and unavoidable fortuitous event," particularly in light of his lack of knowledge of the Italian language and his custodial detention abroad. The Court of Cassation, however, remained consistent with the restrictive line of case law outlined above. In the Court's own words, whose interpretation in practice results in imposing on the alloglot litigant the dual burden of hiring an interpreter or translator and supervising the work of defense counsel under Italian procedural law:

"Indeed, in concrete terms, the decisive factor is that the requirements for standing to submit the application in question can be clearly inferred from the wording of the relevant statutory provisions. Accordingly, a reading of the regulatory provisions would have been sufficient to realize the need to attach the special power of attorney to the appeal."

113 The rigidity of the Italian courts is striking, particularly when contrasted with the well-established *pro actione* principle enshrined in Article 11(3) of the Spanish Organic Law on the Judiciary (LOPJ), which, in a case such as the one under consideration, would have justified granting the defence a period in which to remedy the failure to submit the required special power of attorney.

"Nor does the circumstance that the appellant is an alloglot matter. This is not only because nothing to that effect has been established, but also because a lack of knowledge of the Italian language –even in relation to facts committed in Italy (in breach of the clear obligation to attach the relevant document: Section 2, No. 17708 of 31 January 2022, Rv. 283059)– is of no relevance; and, above all, because, in any event, it would have been the appellant's responsibility to provide himself with an interpreter, precisely in order to comply with the supervisory obligations that, in any case, rest with the party." (author's translation; emphasis in the original omitted).

It seems clear that the procedural burden of supervision imposed on the accused by the Italian high court is excessive, particularly in relation to technical matters that lie outside the knowledge of the lay citizen but nonetheless constitute-*sit venia verbo*-the very ABC of any legal professional. Just as a patient cannot be expected to scrutinize the work of a physician, a client is not in a position to closely examine the professional conduct of defense counsel. This is all the more evident in cases where as in the situation under consideration—the accused is an alloglot and, moreover, is subject to pre-trial detention abroad, with the proceedings governed by extremely short procedural time limits. The resulting lack of effective defense is so manifest that the absence of judicial protection on the part of the court is striking; even more troubling is the imposition of clearly disproportionate burdens that run counter to the duty of all courts to act as guarantors of fundamental rights. If anything, the responsibility for ensuring that the accused understands the relevant procedural requirements and certain peremptory deadlines lies with the court itself.

At the other end of the spectrum, it must of course be acknowledged that a system that routinely restores procedural time limits on the basis of the technical incompetence regrettably widespread in some cases of defense counsel would directly clash with the principles of legal certainty and equality of arms. Accordingly, such entirely avoidable technical errors should be addressed through disciplinary sanctions, in order to generate a deterrent effect that encourages greater professional diligence on the part of lawyers.

Returning to the issue of interpretation and translation, a separate matter is the lack of sufficient human and material resources for this purpose, as well as another factor that must be introduced into the equation: the often deficient quality of the interpreters and translators who work with the administration of justice, which ultimately renders the effective exercise of litigants' rights illusory. This is a problem that is evident in Spain[114] and to which Italy is no stranger. Indeed, recently Judge Attinà, of the First Section of the Florence Criminal Court, referred a question of

114 On this issue in Spain, see CAMPANER MUÑOZ, J., "El control jurisdiccional de la calidad de la interpretación y traducción en el proceso penal," in *la sección Tribunal del Diario La Ley*, No. 9619 (23 April 2020). See also CAMPANER MUÑOZ, J., and HERNÁNDEZ CEBRIÁN, N., "Guía de buenas prácticas relativas al derecho a la traducción y la interpretación de investigados y acusados," in ARANGÜENA FANEGO / DE HOYOS SANCHO / HERNÁNDEZ LÓPEZ (eds.), *Garantías procesales de investigados y acusados en procesos penales en la Unión Europea. Buenas prácticas en España*, Thomson Reuters Aranzadi, 2020, pp. 15–33.

constitutionality[115] to the Constitutional Court.[116] In Order No. 100 of 5 April 2024, issued in response to a request for the assessment of fees submitted by the interpreter concerned, the single-judge court asked the Constitutional Court to examine whether the Italian rules governing the paltry remuneration paid to interpreters comply with the constitutional legal order, particularly insofar as such remuneration is calculated on a gradual and regressive basis by time blocks (being reduced after the first block or package of two hours of interpretation).[117]

It is worth reproducing the following passage from the constitutional challenge:

"In this context, the undersigned considers that the harm is not only suffered by the professional –who should be entitled to fair compensation for their work– but also, and above all, by the administration of justice and the accused: the tiny amount of fees actually paid, in fact, creates a high the probability of negative effects on the quality of that person's work [...] in terms of the appreciable risk that underpaid individuals will not show

115 I wish to express my gratitude at this point to my colleague Amedeo Barletta for clarifying certain aspects of Italian legal terminology.

116 For a commentary on this judicial decision, see CANESTRINI, N., "Does Unfair Compensation of Interpreters Affect Fairness of the Trial?" (Tribunale di Firenze, April 24). Available at: https://canestrinilex.com/en/readings/does-unfair-compensation-of-interpreters-affect-fairness-of-the-trial-trial-fr-firenze-april-24 (last accessed: 18 October 2024).

117 As Judge Attinà explains, €14.68 for the first two-hour block, reduced thereafter to €8.15 per block (of two hours), which amounts to a gross remuneration of €4 per hour.

the necessary commitment in the performance of their duties" (free translation, emphasis not in the original).

In Attinà's opinion, an hourly wage of 4 euros gross, "lower than that provided for in collective agreements for far less qualified jobs, is absolutely insufficient to ensure the required quality in the performance of their work," and the fact that starting from the first billing period the interpreter's fees are reduced "appears to violate Articles 3[118] and 111[119] of the Constitution": indeed, it is an unreasonable provision that determines absolutely inadequate fees, which undermines the guarantee of the

118 "All citizens possess equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, or personal and social conditions. It is the duty of the Republic to remove obstacles of an economic or social nature which, by limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country" (free translation).

119 "Justice shall be administered through due process regulated by law. Every trial shall be conducted in accordance with the principle of adversarial proceedings, under conditions of equality before a court that is independent and impartial, and within a reasonable time guaranteed by law. In criminal proceedings, the law shall guarantee that the accused person be informed promptly and confidentially of the nature and grounds of the accusation brought against him or her; that he or she be afforded adequate time and facilities for the preparation of the defence; that he or she have the right to examine, or have examined, witnesses against him or her; that he or she obtain the summoning and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her; to obtain any other type of evidence in his or her favour; and to have the assistance of an interpreter if he or she does not understand or speak the language used in the proceedings. The taking of evidence in criminal trials shall be governed by the principle of adversarial proceedings" (free translation).

minimum quality necessary for the very nature of the judicial act.[120] Thus, in his view, the Italian regulation would violate the accused's right to an interpreter who is not a native speaker, as recognized by the Italian Constitution and by 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.

Judge Attinà highlights in his unconstitutionality question a notion that is fully aligned with the central theme of this research: the effectiveness of rights. Indeed, he goes so far as to link it to the content of Article 2.8 of the aforementioned Directive.[121] It is worth recalling that the ECtHR, in its judgment of 24 January 2019 in *Knox v. Italy*, clearly emphasized that "interpretation must allow the accused to know what they are being charged with and to defend themselves, particularly by providing the court with their version of the facts. The right thus enshrined must be concrete and effective".[122] Attinà ends by requesting that, in case of doubt regarding the interpretation of Directive 2010/64/EU,[123] the

120 Free translation.

121 "The interpretation provided in accordance with this Article shall be of sufficient quality to safeguard the fairness of the proceedings, ensuring in particular that the suspect or accused person in criminal proceedings has knowledge of the charges brought against him or her and is in a position to exercise the right of defence."

122 Free translation.

123 If the provisions of the Directive are to be interpreted as requiring Member States to create mechanisms intended to guarantee the sufficient quality of interpretation provided to the accused in criminal proceedings, including with regard to the remuneration of interpreters, and therefore

Constitutional Court refer a preliminary question to the Court of Justice of the European Union, in accordance with Article 267 of the Treaty on the Functioning of the European Union.

Undoubtedly, the response of the Italian Constitutional Court will be of great interest, as its line of reasoning could be extrapolated to the clear inadequacy of remuneration for public defenders, which, in my view (as will be elaborated later in section 3.7), is not the direct cause of the ineffectiveness of certain legal aid performances. This is because many lawyers, even with basic resources and no particular vocational inclination, understand economic drivers. Therefore, ineffective legal assistance is not limited to publicly appointed defense counsel.

Finally, by way of concluding the catalogue of remedies available under the Italian procedural system, in certain cases an accused who has been the victim of ineffective assistance of counsel (though not every instance of ineffectiveness, as will be seen) may seek the review of a final judgment pursuant to Article 630(1)(d) of the Italian Code of Criminal Procedure.[124] Ground (d)

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if the provisions of the said Directive are to be interpreted as precluding the existence of national legislation, such as the Italian legislation, which provides for a reduction in the remuneration of interpreters, after the first two hours of activity, to only 8.15 euros for each two-hour period.

124 In order to give effect to the judgments of the European Court of Human Rights, the Italian Constitutional Court, in its Judgment No. 113 of 4 April 2011, declared the unconstitutionality of Article 630 of the Code of Criminal Procedure, insofar as it did not provide for a different ground for review of a conviction judgment or criminal order so as to allow the reopening of the proceedings when this was necessary

for review consists in demonstrating that the conviction "was rendered as a consequence of the falsification of documents or of a judgment, or of another act provided by law as an offence." This provision must be read in conjunction with Article 380 of the Italian Criminal Code, which punishes professional disloyalty by a lawyer with fines and imprisonment. In essence, the latter describes a particular form of ineffective assistance of counsel: that of a lawyer who, by disloyally departing from his or her professional duties, causes harm to the client before the judicial authority (for example, by intentionally allowing a procedural time limit to lapse and thereby losing the case). Such conduct would undoubtedly fall within the ground for the review of final judgments under Article 630(1)(d) of the Code of Criminal Procedure.

3.6. A reflection from a comparative perspective

Returning to Spain, one notices a striking timidity –or perhaps indifference– when it comes to subjecting potentially ineffective legal assistance to the scrutiny of courts tasked with resolving appeals. Put simply, the issue is not even raised, as if it did not exist. I refer here to appeals, cassation, and amparo remedies, and of course, the narrow grounds for review set forth in Article 954 of the Spanish Criminal Procedure Act (LECrim), which in no way allow for a claim of ineffective legal assistance once a judgment has become final.[125]

to comply with a final judgment of the European Court of Human Rights.

125 "1. The review of final judgments may be sought in the following cases:

a) Where a person has been convicted by a final criminal

In my opinion, and at the risk of resorting to a cliché, we must avoid the extremes of the pendulum and seek a point of balance. It is neither reasonable nor does it

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judgment that relied as evidence on a document or testimony subsequently declared false, on a confession of the accused obtained through violence or coercion, or on any other criminal act committed by a third party, provided that such circumstances have been declared by a final judgment in criminal proceedings instituted for that purpose. A conviction shall not be required where the criminal proceedings initiated for that purpose are discontinued due to limitation, default, death of the accused, or any other cause that does not entail a determination on the merits.

b) Where a final criminal judgment has been rendered convicting one of the magistrates or judges who intervened by reason of a decision adopted in the proceedings in which the judgment sought to be reviewed was delivered, without which the ruling would have been different.

c) Where two final judgments have been delivered in respect of the same act and the same accused.

d) Where, after the judgment, facts or items of evidence become known which, had they been submitted, would have led to an acquittal or to a less severe conviction.

e) Where, after a preliminary issue has been decided by a criminal court, a final judgment is subsequently delivered by the competent non-criminal court for the determination of that issue which contradicts the criminal judgment.

A ground for review of a final autonomous confiscation judgment shall be the contradiction between the facts declared proven therein and those declared proven in the final criminal judgment that, where appropriate, is subsequently delivered.

The review of a final judicial decision may be sought where the European Court of Human Rights has declared that such decision was delivered in violation of one of the rights recognized in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, provided that the violation, by its nature and seriousness, entails effects that persist and cannot be remedied in any way other than through such review."

satisfy the minimal core of the right to a defense in general –and the right to legal assistance in particular– that this issue remains a taboo subject in Spanish courts. That said, there is no need to reach the level of scrutiny and puritanism found in the United States. What is essential at this point is the prior reasonableness of a minimally competent legal defense.

Paradoxically, American doctrine reveals open dissatisfaction, which is indicative of the depth, scholarly attention, and even ambition for improvement in this area—a matter traditionally overlooked in Spain. For instance, Ricks has criticized the absence of (extra-procedural) consequences for ineffective attorneys. In this regard, he argues that the defendant has no remedy whatsoever against a lawyer who has violated the right afforded to them under the Sixth Amendment. He adds that the problems arising from what he deems "a lack of repercussions and any real deterrent effect" lead to a system overloaded with frivolous claims, where outcomes are less reliable because the defense lawyer "falls on his own sword." Thus, in the author's view, "inadequate lawyers continue to provide inadequate legal assistance." He concludes that a system that fails to attach real consequences "to the ineffective attorney who, in practice, does not function as a lawyer, allows society to lose faith in the judicial system itself," and proposes that ineffective attorneys should either improve or be "removed." In doing so, "defendants would be more likely to receive a fair trial, and the overall level of skills and competencies among practicing lawyers would rise." As a result, the low bar set by Strickland might finally be raised.[126]

126 RICKS, J.H., "Raising the Bar: Establishing an Effective Remedy against Ineffective Counsel", *Brigham Young University Law Review*, Vol. 2015, 2016, pp. 1115–1150 (free translation).

Whereas in our legal culture it may be frowned upon, and even sanctioned at the deontological[127] level, for one lawyer to criticize the work of another. when a legal brief or pleading is based precisely on the ineffectiveness of the previous attorney, in the United States the *Criminal Justice Standards* published by the American Bar Association[128] serve as a genuine incentive. Indeed, these standards, which aim to guide the conduct of defense counsel (*Standard 4.1.1(b)*), after noting that the attorney has the "difficult task of serving simultaneously as officers of the court and as loyal and zealous advocates for their clients," and must ensure, among other things, that their clients' rights are protected (*Standard 4.1.2(b)*), are clear and precise in encouraging the lawyer who takes on the case to point out the possible ineffectiveness of the attorney who previously handled it:

"If appellate or post-conviction counsel believes [...] that another defense counsel who worked on an earlier phase of the case did not provide effective assistance,

127 Although it does not constitute a real obstacle to evidencing the ineffectiveness of another counsel, Article 59.1 of Royal Decree 135/2021, of 2 March, approving the General Statute of the Spanish Legal Profession, provides that "[m]embers of the legal profession must maintain reciprocal loyalty and mutual respect." For its part, Articles 84(d), 85(d) and 86(d) classify as disciplinary offences, very serious, serious and minor respectively depending on their gravity, "[a]cts of manifest disrespect towards colleagues in the exercise of professional activity."

128 Criminal Justice Standards for the Defense Function, Fourth Edition, 2017. Available at: Standards for the Defense Function (last consulted: 6 August 2024).

the new counsel should not hesitate to seek relief for the client" (*Standard 4.9.6(a)*).[129]

3.7.– The Duty of Supervision by Judicial Authorities: The False Dilemma of Court-Appointed or Private Counsel

By constitutional mandate under Article 9.2 of the Spanish Constitution, public authorities are obliged to "promote the conditions under which the liberty and equality of individuals [...] may be real and effective; and to remove obstacles that prevent or hinder their full realization."

Certainly, the litigant should not bear the consequences of the lack of professional competence of the lawyer who assisted them during their appearance, without prejudice to any administrative, civil, or criminal liability that may be incurred by the legal professional.

As rightly stated by Supreme Court Judgment 125/2010, of February 16: "[I]t is not acceptable to leave in the hands of a lawyer –no matter how legally skilled– the decision to allow, without proper warnings and legal advice, the self-incrimination of a fact that carries a serious penalty. The system cannot remain indifferent to the possible technical incompetence or the prejudicial advice that may come from the technical director, potentially leading to a confession with extremely serious consequences. The system reverses the order and places the responsibility on the competent authorities, primarily during the investigative stage, and thus the

129 Additionally, "if defence counsel concludes that he or she did not provide effective assistance at an earlier stage of the case, counsel must explain that conclusion to the client [...]" (Standard 4-9.6(b)).

investigating judge must personally and directly inform the accused individual of the punishable act attributed to them, explain the entirety of the rights comprising their defense, and inform them of the constitutional rights exempting them from the obligation to testify against themselves or to plead guilty. The judge must explain their procedural situation in detail, including the potential declaration of nullity of telephone interceptions, should they occur at that stage, so that, in view of all available possibilities, the individual may, in an adequately informed manner, decide whether or not to testify.

It is important to highlight that the ECtHR has emphasized that the State must act diligently to ensure that the accused "enjoy the real and effective exercise of the rights guaranteed by Article 6" (*vid.* ECtHR Judgments of 22 March 2007, case *Staroszczyk v. Poland*, and 12 January 2010, case *Bakowska v. Poland*).

In this regard, in its Judgment of 21 April 1998 (*Daud v. Portugal*), the ECtHR reiterated that the mere appointment of a defense counsel does not in itself ensure the effectiveness of the assistance that must be provided to the accused. As cited by the Court, the ECtHR Judgment of 24 November 1993 (*Imbrioscia v. Switzerland*) concluded that the accused did not benefit from "practical and effective" defense, since "the first court-appointed lawyer, before reporting sick,

had taken no steps as the defendant's counsel, who had unsuccessfully tried to defend himself" and the second lawyer, "whose appointment the applicant only learned of three days before the start of the trial (...), did not have the time necessary to study the case file, visit the applicant, or be present if needed to prepare the defense." The time that elapsed between the notification of the

substitution of the lawyer (...) and the hearing (...) was too short for such a serious and complex case in which no prior judicial investigation or trial preparation had been carried out." Likewise, the ECtHR Judgment of 19 December 1989 (*Kamasinski v. Austria*) confirmed that "all accused persons under criminal prosecution are entitled to receive, without delay, detailed information about the charges brought against them and of their rights of defense."

In its Order of July 7, 2017, the Second Chamber acted with prudence in stating that "[t]he analysis of the right to defense, from a jurisdictional perspective – especially from the position of this Supreme Court when ruling on a cassation appeal– must be situated in a space of strict neutrality with respect to the work performed by the defense attorney, regardless of their position in the proceedings, and of rigorous independence concerning the substance of the issue being raised therein. This means that, unless there is a flagrant violation of the principle of defense, the Court ruling on any instance of the proceedings cannot interfere in the work of defense of a party, nor, logically, in their procedural strategy. The better or worse legal quality of the forensic writings is something foreign to the judge, unless it is found to be nonexistent, that is, an absolute lack of defense

"In such a case," the Court continues, "the Court, upon noting that there is a will to appeal the judicial ruling that was unfavorable to the concerned party, is aware that the forensic defense brief lacks any kind of proper grounds for appeal, being limited to a mere defensive ritual without a substantive allegation, which, therefore, cannot fulfill the function of advocacy, as it is impeded by the adversarial principle of contradiction. It cannot turn a blind eye to such an appeal deficit. In

sum, the Court is aware that it cannot judge the better or worse quality of the defense, but only the greater or lesser effectiveness of the defensive arguments, which is the core of its jurisdictional function. This is why the criterion that governs such cases is very nuanced, as the court cannot become involved in the mode of defense, nor can it dismiss without more a claim that is not appropriately defended. This means that only in cases such as the one resolved in this judicial decision, where an absolute lack of defense is observed, may the Court notify the corresponding Bar Association to appoint a new attorney who can substantially restore the right of defense to which every party is entitled."

Returning now to the duty of judicial oversight, there is no reason to distinguish between court-appointed counsel and private attorneys, and yet we observe how the magnifying glass of jurisdictional control is especially extended over the former.[130] *Ubi lex non distinguit, nec nos distinguere debemus.* There is no distinction between a lawyer registered in the court-appointed duty roster and a lawyer acting on private designation, and indeed, the former, in Spain, does not work exclusively in the duty roster as a "public defender"[131] would, but rather combines duty roster assignments with private legal assistance. Nor is the training of the lawyer who acts

130 This discrimination has recently been criticized by ROCHA GARCÍA, A., "La asistencia inefectiva del letrado en el proceso penal ¿Puede provocar indefensión la actuación negligente del abogado?", *Indret: Revista para el análisis del Derecho*, No. 3/2024.

131 Public defender offices are well established in most Latin American countries. By way of example, the Mexican system offers ESQUINCA MUÑOZ, C., "La defensoría pública", in GARCÍA RAMÍREZ and ISLAS DE GONZÁLEZ, J., *Evolución del sistema penal en México. Tres cuartos de siglo*, Instituto Nacional de Ciencias Penales, Mexico City, 2017, pp. 151–160.

by court-appointed duty roster designation qualitatively or quantitatively different from that of a privately hired lawyer. I insist, it is the same professional, who in the first case (in the majority of instances) is paid by the State and in the second by the client. This sole fact does not entitle jurisdictional bodies to draw distinctions when monitoring the minimum effectiveness of legal assistance.

It is a different matter that practice shows that the remunerations of duty roster lawyers are so meager[132] that disinterest and neglect on the part of some professionals enrolled in the duty roster are not infrequent. But this is a different issue –and not exclusive to the duty roster– since examples can be found of privately hired attorneys who neglect their clients as well, since motivation has much more to do with the sense of professional responsibility of the lawyer and, to a large extent, with their vocation. And this should be completely unrelated to the *quantum* of remuneration. Every lawyer is free to choose whether or not to sign up for the duty roster,[133] and thus, low remuneration cannot serve as an excuse to neglect it."[134]

132 The remuneration of court-appointed lawyers in Spain is the third lowest in the European Union, according to the twelfth edition of the "EU Justice Scoreboard 2024", published on 11 June 2024. The results show that a court-appointed lawyer in Spain would receive 366 euros per case. Available at: The 2024 EU Justice Scoreboard (last consulted: 25 August 2024).

133 For example, the Regulations of the Duty Solicitor and Free Legal Aid Service of the Barcelona Bar Association provide, in Article 2, for the voluntary nature of joining the duty solicitor service, while Article 26 contemplates voluntary withdrawal from the duty roster.

134 It could be argued that in countries such as Sweden, Denmark and Norway, where the State remunerates lawyers, and where

At this point, in relation to the principles of legality, normative hierarchy, and the prohibition of arbitrariness of public authorities enshrined in Article 9.3 of the Spanish Constitution (CE), it is appropriate to recall the content of paragraphs 1 and 2 of Article 7 of the Organic Law of the Judiciary (LOPJ), insofar as, while the former determines the binding nature, in its entirety, of the rights and freedoms recognized in Chapter II of Title I of the Constitution, for all judges and courts, as well as their guarantee under the protection of the latter, the latter establishes that, in particular, the rights set forth in Article 53.2 CE shall, in all cases, be recognized in

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it could be said, albeit with little precision, that all lawyers are part of the duty roster, the quality of legal assistance meets more than acceptable standards. However, it has already been observed that the training requirements differ from those in Spain and that, fundamentally, the system in these Scandinavian countries is based on equality in access to justice and on the principle of the presumption of innocence, in the sense that every accused person, whether solvent or not, may choose a lawyer. If the accused cannot afford to pay the fees, or even if he or she can but prefers that the State initially bear the costs in a manner consistent with the presumption of innocence, the request for appointment as a public defender shall suffice. If the accused is acquitted, no inquiry will be made as to whether he or she could have afforded counsel, since it is accepted that even a wealthy individual should not have had to spend money defending his or her innocence against the State. In the event of a conviction, an express inquiry shall be conducted to determine whether the accused can reimburse the cost; if so, it will be covered by the State and, therefore, will be free of charge for the accused. If the inquiry reveals sufficient financial capacity, the convicted person must bear the cost of his or her defence, notwithstanding that the State has already advanced the lawyer's fees. The result is clear: lawyers act with the same commitment, independently of their client's financial means. In this regard, see DASH, S., "The Emerging Role and Function of the Criminal Defense Lawyer", *North Carolina Law Review*, Vol. 47, No. 3, 1969, pp. 598–632.

accordance with their constitutionally declared content, without judicial decisions being able to restrict, impair, or fail to apply such content. Then, guaranteeing the effectiveness of legal assistance forms part of the judicial function.[135] and no distinctions may be made on the basis of the origin of the appointment of counsel or the ownership of the funds with which their fees are paid.

Therefore, I consider erroneous, unreasoned, and unreflective the dual approach set out in STC 91/1994, of 21 March, as an immovable dogma:

"It is evident that the judicial body can neither nor should supervise, in all proceedings, the conduct of legal professionals, since, in the face of their passivity or lack of professional skill, there exist other legal mechanisms, whether arbitral or otherwise, to demand disciplinary or financial liability from them."

[...]

"There is, of course, a difference in approach in cases where counsel has been appointed ex officio, since in those cases in which legal assistance is freely designated, it is based on a prior relationship of trust with the legal professional so that he assumes, with all its consequences, the defense of his interests before the courts. A relationship of trust that is absent in cases of

135 As will be seen in greater detail in the following paragraphs, the Second Chamber of the Supreme Court held, in its STS 1117/2009 of 11 November, that in a situation in which the lawyer appointed for the defence failed to fulfil his obligations, thereby causing a defence contrary to constitutional guarantees, there is no doubt that "the judicial authorities should have adopted the appropriate measures for him to be replaced by another," which resulted in a violation of the accused's right of defence.

ex officio appointment, which has led to special care and protection of individuals whose effective possibilities of defense in such cases are diminished."

Trust is projected *intra* between the client and the lawyer and lacks, *per se*, procedural significance. However, the satisfaction of the essential core of the right to legal assistance is projected *extra* toward the judicial body and, therefore, has procedural significance in a regulated framework where, as has been seen, the judge or court has a duty of vigilance.

It should also be noted that, from the perspective of technical competence, the Madrid Bar Association requires court-appointed lawyers handling EAW (European Arrest Warrant) and extradition procedures to have specific qualifications in the matter, precisely due to the specialization of such proceedings which are far removed from those initiated for the commission of crimes.

These lawyers must have been members of the bar for a minimum of ten years and must also necessarily have completed specific training courses in the field, as provided in Article 2 of the Rules Regulating the Duty Shift, approved by the Governing Board on September 15, 2023. In Madrid –unlike in the Bar Association of the Balearic Islands– there is, ultimately, a specific and dedicated court-appointed duty shift for EAW and extradition procedures, which, in my opinion, lacks justification if that requirement is not met, given that jurisdiction over EAW and extradition proceedings corresponds exclusively, in Madrid (Article 88 of the Organic Law on the Judiciary), to the National Court, not to regular courts are less than tourist and second-residence areas of foreign citizens, as is the case of the Balearic Islands, which generate a significant volume

of this type of procedure, resulting in, at a minimum, the first legal assistance being provided in the province where the arrest takes place.

This issue also has crucial importance for the effectiveness of the right to dual legal defense,[136] recognized in Article 10 of Directive 2013/48/EU of the European Parliament and of the Council, of October 22, 2013, on the right of access to a lawyer in criminal proceedings and in proceedings related to the European arrest warrant, and on the right to have a third party informed upon deprivation of liberty and to communicate with third parties and with consular authorities while deprived of liberty[137]

136 That is to say, to appoint one lawyer in the issuing State and another in the executing State.

137 Article 10 Right to be assisted by a lawyer in European arrest warrant proceedings (italics and bold in the original) "4. The competent authority of the executing Member State shall inform the requested person, without undue delay after deprivation of liberty, that he or she has the right to appoint a lawyer in the issuing Member State. The role of that lawyer in the issuing Member State shall be to assist the lawyer in the executing Member State by providing information and advice with a view to ensuring that the requested person is able effectively to exercise the rights conferred on him or her by Framework Decision 2002/584/JHA. 5. Where the requested person wishes to exercise the right to appoint a lawyer in the issuing Member State and does not already have one, the competent authority of the executing Member State shall promptly inform the competent authority of the issuing Member State thereof. The competent authority of that Member State shall, without undue delay, provide the requested person with information to facilitate the appointment of a lawyer in that State."

138 139

As GLERUM has pointed out, despite the fact that the preamble of the Directive is not very enlightening regarding the potential advantages that legal assistance in the issuing State would entail for judicial cooperation, the explanatory memorandum of the Draft Directive of the European Parliament and of the Council on the right to a lawyer in criminal proceedings and the right to communicate upon detention sheds[140] further light on this matter insofar as it provides two examples of

138 Recital 46 of the Directive provides interpretative guidance as to the measures Member States must take to ensure the prompt appointment of a lawyer in the issuing State: "Without undue delay from the moment it becomes aware that the requested person wishes to appoint a lawyer in the issuing Member State, the competent authority of that Member State must provide the requested person with information intended to facilitate the appointment of a lawyer in that Member State. Such information could include, for example, an up-to-date list of lawyers, or the name of the duty lawyer in the issuing Member State, who may provide information and advice in matters relating to the European arrest warrant. Member States could request that the relevant bar association be responsible for drawing up such a list."

139 Within the Spanish legal framework, Article 50 of Law 23/2014 of 20 November on mutual recognition of criminal decisions in the European Union imposes the judicial obligation to inform the requested person of his or her right to dual defence (paragraph 3), as well as of the waiver thereof (paragraph 4).

140 Available at: Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate at the time of arrest (last consulted: 8 August 2024).

legal assistance in the issuing State;[141] which leads the referenced author, in an opinion I share, to conclude that these examples presume that the lawyer from the issuing State has the specialized knowledge and the required experience to support both the client and the lawyer from the executing State.[142]

On its part, Article 5 of Directive 2016/1919/EU of the European Parliament and of the Council of October 26, on legal aid for suspects and accused persons in criminal proceedings and for persons sought under a European Arrest Warrant,[143] recognizes the right to free legal aid in EAW proceedings, and imposes on the executing Member State the obligation to safeguard

141 The possibility of making effective the right of defence of the requested person by invoking a ground for refusal of surrender or by expediting consent to surrender if such grounds do not actually exist.

142 GLERUM, V., "Directive 2013/48/EU and the requested person's right to appoint a lawyer in the issuing Member State in European Arrest Warrant proceedings", *Review of European and Comparative Law*, XLI, 2020, Issue 2, pp. 7–33.

143 Article 5 Free legal aid in European arrest warrant proceedings (italics and bold in the original) "1. The executing Member State shall ensure that persons sought have the right to free legal aid from the time of their arrest pursuant to a European arrest warrant until their surrender, or until the decision not to execute the surrender becomes final. 2. The issuing Member State shall ensure that persons sought pursuant to a European arrest warrant for the purposes of conducting a criminal prosecution who exercise their right to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State, in accordance with Article 10(4) and (5) of Directive 2013/48/EU, have the right to free legal aid in the issuing Member State for the purposes of such European arrest warrant proceedings in the executing Member State, insofar as free legal aid is necessary to ensure effective access to justice."

this right for persons sought from the moment of their detention, under the mandatory European arrest warrant, until their surrender or until the decision to refuse surrender becomes final. Indeed, the second paragraph of this provision establishes that the issuing Member State of the arrest warrant, in accordance with paragraphs 4 and 5 of Article 10 of Directive 2013/48/EU, has the duty to ensure the appointment of a lawyer in that country, so that he or she may provide assistance together with the defense lawyer of the executing country, thus guaranteeing effective judicial protection in its dimension of the right to free legal aid, whenever necessary.

The same Regulatory Rules of the Duty Shift System of the Illustrious Bar Association of Madrid require lawyers who wish to file a cassation appeal or participate in a criminal proceeding before the National Court to have a minimum of ten years of professional experience and to have completed a specific course on the subject (Article 2). The inevitable question then arises: why can a newly licensed lawyer or one without experience in cassation file such an appeal if he or she has been freely appointed by the client, when in fact the system itself would distrust a professional without such background?

Undoubtedly, there is a structural training problem that must be addressed first and foremost by universities and bar associations. This problem equally affects privately hired lawyers and public defenders, despite the efforts of the bar associations to ensure a minimum level of experience and training for lawyers assigned to the duty shift in certain particularly sensitive cases.

Undoubtedly, there exists a structural training problem that must be addressed in the first instance by Universities and Bar Associations, which affects equally

private counsel and court-appointed counsel, despite the efforts made by the bar associations to ensure a minimum level of experience and training of the lawyers assigned to the duty roster in certain particularly sensitive cases.

It must not be confused that the structural, historical, and perhaps age-old inequality of arms between lawyers and prosecutors[144] is not attributable to the judicial body such that it may disengage when the lack of skill or technical inferiority of counsel does not contribute, even minimally, to the defensive function that he is called upon to perform in the proceedings, as the natural antagonist and counterbalance to the prosecution.

144 Without a doubt, the arduous access system to the career of prosecutor, which contrasts with the laxity with which a law graduate can gain admission to the bar as a lawyer after simply completing a master's degree in access and, without a continuity exam or state exam, becomes a member, shows an extremely high pass rate. Indeed, in response to a public information request on this matter dated August 17, 2024, via the Transparency Portal of the General Administration of the State, the Director General for the Public Justice Service issued the following information by resolution dated October 5, 2024 (included as an annex):

2021, 1st call: 6,219 candidates, 5,829 passed;

2021, 2nd call: 1,131 candidates, 1,093 passed;

2022, 1st call: 6,346 candidates, 5,790 passed;

2022, 2nd call: 1,547 candidates, 1,463 passed;

2023, 1st call: 6,370 candidates, 6,016 passed;

2023, 2nd call: 1,427 candidates, 1,295 passed; and

2024, 1st call: 6,189 candidates, 6,109 passed.

From the data above, it is easily inferred that there is no real entry exam. If we take as a base the data provided by the General Directorate, we find that for the period 2021–2024, the lowest pass rate was 89.96% (1st call of 2022) and the highest was 98.71% (1st call of 2023), and that in any case, the average pass rate for that period was around 93.34%.

It may seem obvious, but as emphasized by the U.S. Supreme Court in the *Cronic* ruling, citing the *Anders v. California* case[145], the adversarial system requires that the accused "be provided with a lawyer acting in the role of an advocate."[146] In the words of American judge WYZANSKI, "while a criminal trial is not a game in which the participants are expected to enter the ring with equal skills, neither is it a sacrifice of unarmed prisoners to gladiators."[147]

Closely related to the above, in the practice of Spanish criminal courts, there exists a constant tension between the general right to defense and, in particular, the right to legal counsel (Article 24.2 of the Spanish Constitution), on the one hand, and the prohibition of bad faith and abuse of rights (Article 11.1 and .2 of the Organic Law of the Judiciary) in connection with the constitutional value of Justice enshrined in Article 1.1 of the Constitution, and the right to proceedings without undue delay (also Article 24.2 of the Constitution), on the other. In certain cases, which are frequent, the accused decides to forgo the services of their lawyer with such short notice that it becomes impossible for another lawyer to provide effective legal assistance, simply because they do not have enough material time to properly prepare the defense; or in other cases, for whatever reason, the lawyer has been unable to communicate with the accused (the most frequent cases have to do with the lawyer's passivity, while in other cases –especially in extradition and EAW [European Arrest Warrant] matters– very short deadlines, the urgency

145 Anders v. California, 386 U.S. 738, 743 (1967).

146 Free translation.

147 *United States ex rel. Williams v. Twomey*, 510 F.2d 634 (7th Cir. 1975) (free translation).

of proceedings, and sometimes unexpected transfers of detention centers prevent communication).

Precisely applying Article 6.3.b of the European Convention on Human Rights, the ruling of the 2nd Section of the Provincial Court of Santa Cruz de Tenerife 218/2018, dated June 26, declared the nullity of a sentence upon finding that "the appellant's lawyer may not have had the time necessary to prepare the defense of her client and that, consequently, she may not have been able to provide an effective defense." This ruling elaborates that:

"The right to a fair trial entails, among other things, the 'right to have adequate time and facilities for the preparation of one's defense' (Art. 6.3.b ECHR) and this includes 'everything necessary to prepare for trial' (ECtHR H. v. the Netherlands, 25-10-2017), which comprises the steps prior to the start of the trial that may prove necessary to organize the defense (ECtHR Campbell and Fell v. the United Kingdom, 28-6-1984; Mattozzi v. Italy, 25-7-2000; GB v. France, 2-1-2002)."

In the words of the judgment from the Civil and Criminal Chamber of the High Court of Justice of Madrid 87/2018, citing the aforementioned Art. 6.3.b of the ECHR:

"It is obvious that this assistance must extend to the need for effectiveness, lest it be considered an empty or merely formal right, as nothing is more logical and natural than to think that an adequate defense and legal assistance requires the prior condition of intelligible interpersonal communication and even fluid interaction in such a crucial matter as the transmission to the lawyer not only of facts but also of experiences and appreciations by the accused, and from the perspective

of their trial role, their cooperation in proposing evidence. And this obviously fits naturally, without major integrative effort, within the bundle of rights that has already been indicated, specifically in the provision of time and facilities necessary for the preparation of the defense of the accused [Art. 6.3.b of the Convention]."

In balancing terms, the Supreme Court Judgment 795/2017, of December 11, stated:

"[...] in the criminal process, very different legal interests converge. The need to achieve a balance among all these rights requires the judicial authority to weigh, based on each specific case, what degree of sacrifice is acceptable to impose on the parties when one of them introduces a surprising incident that may disturb the ordinary course of the proceedings."

With greater detail, the Supreme Court Judgment 686/2020, of December 14, stated:

"1. The doctrine of the ECtHR, the Constitutional Court (CC), and the Supreme Court (SC) may be summarized in the following points: 1º.- The constitutional right of defense, which includes the right to be defended by a lawyer of one's choosing, generally allows for the change of counsel when such trust has been lost or when the accused wishes to waive court-appointed counsel and designate a lawyer of his choosing on the grounds that he considers himself insufficiently defended, given that the power of free designation implies that counsel may be changed whenever the interested party deems it appropriate in defense of his interests. 2º.- This right is not unlimited, as it is subject, among other circumstances, to the legal obligation of the Court to reject those requests that entail abuse of rights or procedural fraud pursuant to Article 11.2 of the LOPJ. 3º.- The invocation of abuse

of rights cannot become a general or routine criterion for denying a request to change counsel, since it constitutes a limitation on the exercise of a fundamental right, whose essential content must be respected. 4º.- The situations in which the change of designated counsel may be rejected by the Court on the basis of abuse of rights are those in which the request is arbitrary, that is, unreasoned or motivated in an unreasonable manner: a) either because the court-appointed defense in the proceedings does not reveal any deficiency in its task before the Court; b) or because the deficiencies or disagreements alleged by the accused with respect to the defense carried out by his lawyer appear irrelevant or manifestly unjustified; c) or because a dilatory strategy is revealed by unjustifiably delaying the request until the very moment of the trial; d) or because a calculated decision is observed to avail oneself of the right of defense. 5º.- In any event, it is incumbent upon the Court to state expressly in the judgment the reasoning for that denial, if it has occurred at the oral trial. 6º.- Ultimately, the relevant standard of assessment for determining whether or not there has been a violation of the constitutional right of defense is the assessment of whether the accused has had or has not had an 'effective defense.' (STS No. 821/2016, of 2 November)."

In my opinion, just as constitutional doctrine has interpreted the contours of the right to evidence quite broadly (Constitutional Court Judgments 169/1996, of October 29 and 80/2011, of June 6[148]), the right to legal assistance cannot be a mere formality and, except in those cases where bad faith or abuse of rights exists,

148 This doctrine was adopted by the Second Chamber of the Supreme Court. *See, for example*, Supreme Court Judgments (SSTS) 114/2001, of May 31, and 72/2014, of January 29.

the change of counsel should be accepted, along with the postponement and rescheduling of the trial. Otherwise, it would mean that the judicial body forces the existence of legal assistance that is either null or entirely new, having lacked the necessary time to prepare a defense. Indeed, in many cases, the appointed lawyer (who may remain silent before the court in resignation, despite not being ready or not having had time), was not in a position to effectively prepare the defense of their client."

3.8.- THE PROCEDURAL CONSEQUENCE OF THE FINDING OF INEFFECTIVE LEGAL ASSISTANCE

As seen in previous paragraphs, the Second Chamber of the Supreme Court itself has accepted that a scenario of ineffectiveness in legal assistance would entail a violation of the right to defense for the accused. The question is, therefore, how to channel and substantiate such a serious complaint in our legal system.

In order to provide the judicial body with reparative tools, it seems appropriate, in my opinion, to frame this issue within some of the nullity causes of procedural acts under article 238 of the Organic Law of the Judiciary (LOPJ). Everything seems to indicate that the third cause of the aforementioned provision[149] is the most suitable, as it contemplates the violation of the right to defense *as a conditio sine qua non*.[150] However, a difficulty arises:

149 "Acts of procedure shall be null and void as a matter of law in the following cases:

[...]

3º. When essential procedural rules are disregarded, provided that, as a result, a situation of lack of defense may have arisen."

150 "STS 370/2021, of 4 May, which compiles abundant constitutional doctrine on this issue, is a good example of this,

what would be the essential rule of the procedure that is alleged to have been omitted? Even while being aware that this is a very narrow passage,[151] a reading of article 546.1 of the LOPJ[152] in relation to article 7 of the same legal corpus[153] in light of constitutional law seems

> stating that both the Supreme Court (SC) and the Constitutional Court (CC) require that the lack of defense be material and not merely formal or apparent:
>
> [...] there is no lack of defense of constitutional relevance, nor of procedural relevance either, when, even if an irregularity occurs, it does not effectively produce a real and effective impairment of the right of defense, resulting in real and effective prejudice to the interests of the affected party, either because there is no connection between the facts sought to be proven and the rejected evidence, or because it is established that the interested party was able to proceed with the defense of his rights and legitimate interests [...] It is not sufficient, therefore, for the reality and existence of a procedural defect to be present if it does not imply a limitation or impairment of the right of defense in relation to some interest of the person invoking it, without mere situations of expectation or risk being comparable (STC 90/88, 181/94 and 316/94).'"

151 This issue did not go unnoticed by Professor Alicia Bernardo during the defense of my research project, and it gave rise to a highly interesting debate with the aforementioned member of the Selection Committee of the competitive examination, in which, in essence, she suggested that it might be somewhat contradictory to emphasize the substantive nature of the right to legal assistance and, nevertheless, subsequently to anchor it in a normative provision of a procedural character. All in all, an integrative view of the legal system and the clear mandate of Article 546.1 of the LOPJ allow, in my view, the thesis of this monograph to be upheld.

152 "It is the obligation of the public authorities to guarantee the defense and legal assistance of a lawyer or the technical representation of a Social Graduate under the terms established in the Constitution and the laws."

153 "1. The rights and freedoms recognized in Chapter Two of Title I of the Constitution are binding in their entirety on

appropriate. The fundamental right to legal assistance allows us to conclude that in those cases where the judicial authority does not guarantee the assistance (in the broad sense) of a lawyer "under the terms established in the Constitution," that is, minimally competent and effective legal assistance, the judge or court will have abandoned its duty of supervision and, with it, will have disregarded the most essential procedural rules. In any case, without forcing the argumentation or overextending the meaning of article 546.1 of the LOPJ, the essential procedural rules breached can be reduced to the violation of the fundamental right to effective legal assistance from a double perspective: on one hand, the deficient performance of the lawyer, and on the other hand, the failure of the jurisdictional duties of supervision. In this way, such a violation of the fundamental right could be invoked as a "supercause" implying nullity, perfectly subsumable under article 238.3° of the LOPJ.[154,155]

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all Judges and Courts and are guaranteed under the effective judicial protection of the same. 2. In particular, the rights set out in Article 53.2 of the Constitution shall be recognized, in each case, in accordance with their constitutionally declared content, without judicial resolutions being able to restrict, diminish, or impair said content.

The Judges and Courts shall protect the rights and legitimate interests, both individual and collective, without, under any circumstances, being able to produce a denial thereof."

154 I am deeply grateful to Fernando Gascón for his reflections on this subject, as he has helped me understand (and support) that it is not necessary to cling to a (nonexistent) particular provision in order to assert that the protection of the fundamental right to defense via nullity may be achieved through an interpretation that guarantees the validity of the aforementioned right.

155 The objection or reservation raised by Professor López Simón during the defense of the research project in the public examination process was very accurate in highlighting that,

Indeed, the presence of a lawyer is not synonymous with mere physical presence and cannot be equated as such. In this sense, STS 1117/2009, of November 11, clearly concludes that the right of defense "is not satisfied with the mere nominal designation of a lawyer, but requires that the accused have access to effective legal defense."

Needless to say, legal assistance should not be synonymous with mere physical presence accompanied by manifestly deficient performance.

With regard to the first issue, *mutatis mutandis* the context and scenario, it is useful to recall how police officers used to interpret the right to legal assistance provided for in Article 520.2(c) of the Spanish Code of Criminal Procedure (*LECrim*)[156] until the reform carried out by Organic Law 5/2015, of April 27.[157] And

according to current constitutional doctrine, the Constitutional Court does not consider that indefensibility exists when it is attributable to the party, and of course, the lawyer is a party in the procedural sense (see, *ad exemplum*, SSTC 205/1988, of November 7, and 112/1989, of June 19). However, and recognizing this difficulty, the truth is that precisely where this thesis finds its justification is in the legal assistance provided, its limits and consequences for the justiciable, and the Constitutional Court has not yet managed to create clear doctrine on this issue, which is why, as noted, the Second Chamber of the Supreme Court has had to turn to North American jurisprudence and has imported the Strickland standard.

156 "The right to appoint a lawyer and to request their presence so that they may assist in police and judicial questioning procedures, as well as participate in identification lineups, if applicable."

157 Organic Law 5/2015, of April 27, which amends the Criminal Procedure Act and Organic Law 6/1985, of July 1, on the

it is indeed the case that those responsible for police departments used to consider in a unanimously agreed way that the right was fulfilled by the mere physical presence of the lawyer, despite the fact that this was an illogical, absurd, and arbitrary interpretation that emptied the fundamental right of any content and clashed with constitutional doctrine of mandatory compliance (Article 5.1 of the Organic Law of the Judiciary - LOPJ),[158] with the rest of the legal system[159] and, for the past few years, with the clear provisions of Directive 2013/48/EU of the European Parliament and of the Council, of October 22, 2013, concerning, among other matters, the right to legal assistance in criminal proceedings. This Directive obliges Member States to ensure that the suspect has the right to be assisted by a lawyer from the moment they are informed that they are suspected or accused,

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Judiciary, in order to transpose Directive 2010/64/EU, of October 20, 2010, on the right to interpretation and translation in criminal proceedings, and Directive 2012/13/EU, of May 22, 2012, on the right to information in criminal proceedings.

158 In the words –systematically ignored in practice– of the Constitutional Court in its Judgment 196/1987, of December 11, the intervention of the defense lawyer during the interrogation of the detainee "responds to the aim, in accordance with Article 520 of the Criminal Procedure Act, of ensuring, through their personal presence, that the detainee's constitutional rights are respected, that no coercion or incompatible treatment with their dignity and freedom to testify is exercised, and that they receive proper legal advice on the conduct to be observed during questioning, including the right to remain silent, as well as on the right to verify, once the statements have been made and concluded in the presence of counsel, the accuracy of what is recorded in the statement presented for signature" (*emphasis not in the original*).

159 Organic Law 5/2000, of January 12, regulating the criminal liability of minors, includes prior legal assistance as provided in paragraph 2 of Article 17.2.

and, in any case, before being questioned by the police (paragraph a) of Article 3.2), implying that this right to legal assistance includes a private interview between the suspect and the lawyer, "even prior to being questioned" by the police (paragraph a) of Article 3.3).[160]

The 2015 procedural reform put an end to this situation in which lawyers were technically prevented from assisting the detainee through a private interview prior to their statement (they were even prevented from communicating in the presence of police officers), by specifying in Article 520.6 the content and scope of legal assistance in the following terms:

"a) To request, where appropriate, that the detainee or prisoner be informed of the rights established in paragraph 2 and that, if necessary, the medical examination referred to in letter i) be carried out.

To intervene in the proceedings of the detainee's statement, in the recognition procedures in which they may be involved, and in the reconstruction of the facts in which the detainee participates. The lawyer may request the judge or officer who carried out the procedure in which they were involved, once it has concluded, to make a statement or expansion of the aspects they deem

160 A critical analysis of this Directive can be found in ARANGÜENA FANEGO, C., "El derecho a la asistencia letrada en la Directiva 2013/48/UE", *Revista General de Derecho Europeo*, No. 32, January 2014, Iustel (RI §414328). See also JIMENO BULNES, M., "La Directiva 2013/48/UE del Parlamento Europeo y del Consejo de 22 de octubre de 2013 sobre los derechos de asistencia letrada y comunicación en el proceso penal: ¿realidad al fin?", *Revista de Derecho Comunitario Europeo*, No. 48, May/August 2014, pp. 443–489; and GLERUM, V., "Directive 2013/48/EU and the requested person's right …", op. cit.

appropriate, as well as the recording in the report of any incident that may have occurred during the practice.

To inform the detainee of the consequences of granting or denying consent to the conduct of the procedures requested of them.

[…]

To meet privately with the detainee, even before they are questioned by the police, the prosecutor, or the judicial authority, without prejudice to what is provided in Article 527."

Therefore, if the judicial authority does not ensure effective legal assistance in the face of a deficient performance by the defense lawyer, and this leads to a situation of defenselessness, it must be considered an omission of the most essential norms of the procedure and, without a doubt, must lead to the nullity of the proceedings.

Likewise, ineffective legal assistance causing a violation of the right to defense could be comparable (or even worse) than the absence of a lawyer's intervention in cases where the law expressly requires it (case 4 of article 238 LOPJ). Although it is clear that the legislator foresaw this situation for cases where the physical presence of a lawyer is dispensed with, the truth is that in cases where the lawyer's intervention has worsened the situation of the defendant, it would make sense to resort to this ground due to the lack of specific legal provision, without prejudice to what I have stated in relation to case 3, which I consider should be the natural channel to report manifestly ineffective legal assistance.

On isolated occasions, the Second Chamber has protected the appellant by opting for a viable solution,

even if it appeared to lack legal anchoring, that is, without an express provision or procedural channel that would allow the solution to be implemented, which I will elaborate on in the following lines. In its Order of July 7, 2017, the High Court, after verifying the absolute lack of quality in a cassation appeal filed by a court-appointed lawyer against a conviction at first instance, decided to act in favor of the accused without addressing the substance of the appeal. The appeal's errors and emptiness had been severely criticized by the public prosecutor during the challenge process. In this case, the Second Chamber chose, literally, to:

"Annul the designation of the court-appointed lawyer made at the cassation stage for the convicted person, declaring null and void all proceedings carried out thereafter. Consequently, the Clerk of the Administration of Justice shall request the appointment of a new lawyer who may file the appropriate appeal, if the appellant has not already appointed one.

Notify this decision to the Governing Board of the Bar Association for the appropriate administrative purposes."

As I have mentioned, the High Court's decision in the face of blatant defensive failure is viable in the sense that, ultimately, it protects the values of justice and equality (article 1.1 of the Constitution), not because the case enjoys adequate legal grounding, but because its legal and judicial consequences the annulment declared and projected are based on solid legal grounds, without the need for precise procedural anchoring, since this type of legal omission (an irremediable incident in the process is, by nature, incompatible gubernative and

extraprocedural indeed[161]) The Second Chamber does not identify which specific norms of the legal system

161 Certainly, the Constitutional Court has employed a criterion of greater retroaction in the field of mixed amparo appeals, where there is an intersection between procedural and extraprocedural violations. In such cases, what would be procedurally correct –pursuant to the principle of retroaction and the coherence of the claims– would be to declare the nullity of the judicial decision, thereby allowing the ordinary courts to rule again on the merits of the administrative act and, once this is done, to leave open once more the possibility of filing an amparo appeal under Article 43 of Organic Law 2/1979, of 3 October, of the Constitutional Court (hereinafter LOTC). However, so as not to produce a counterproductive outcome and in order to safeguard the applicant's right to effective judicial protection, as previously noted, the Constitutional Court did the same as the Supreme Court in the case now under consideration: it resolved the violation alleged under Article 44 LOTC with a merely declaratory effect (Article 55.1.b LOTC) and proceeded to examine the substantive violation arising from the administrative act under Article 43 LOTC, granting amparo to the applicant with the corresponding material effects (Article 55.1.a LOTC).

By way of illustration, see STC 151/2021, of 13 September, which stated, with respect to the criterion applied in examining the applicant's claims in an administrative expulsion proceeding: "In the present case, moreover, the two judgments issued at first instance reached contradictory outcomes, one annulling the challenged administrative decisions (the administrativelaw court) and the other upholding their validity (the competent chamber of the High Court of Justice), such that the examination of the applicant's complaint will ultimately entail the confirmation of one of those judicial decisions, which will always carry a direct consequence for the administrative decisions that both courts reviewed."

In this way –and only in this way– one could sustain the lawfulness of the formula employed by the Second Chamber after establishing the deficiency in the exercise of the right of defence: to return to the origin of that violation, administrative in nature, and remedy it. Otherwise, the paradox could arise that the very defence counsel who contributed to the violation

may have been overlooked or violated due to the conduct of the appellant's counsel, nor does it channel such legal infraction into any of the legal grounds that could, in its case, crystallize into a nullity of proceedings such as the one it ultimately declares. More narrowly, the court of cassation conducts a valuable review of the regulatory framework of our legal system "to guarantee the accused the existence of an effective defense," although, in my opinion, it limits itself to the provision of court-appointed counsel. And indeed, in essence, the high court cites Law 1/1996, of January 10, on legal aid, whose Article 25, under the heading "training and specialization," states that the Ministry of Justice shall lead the establishment of "the general minimum requirements for training and specialization necessary to provide the mandatory legal aid services," with the aim of ensuring a level of quality and professional competence that guarantees the right to constitutional defense";[162] and Royal Decree 658/2001, of June 22, which approves the General Statute of the Spanish Bar Association, whose place was subsequently taken by the resolution under commentary, Royal Decree 135/2021, of March 2, which approves the General Statute of the Spanish Bar Association, which, ultimately, entrusts the Bar Associations with the function of "organizing and managing the services of free legal assistance and any

of the fundamental right would now be the one called upon to guarantee it.

For a more detailed analysis of mixed amparo appeals, see TORRENT i SANTAMARIA, J.M., "Entre lo trascendente y lo aparente: el papel del incidente de nulidad de actuaciones en los recursos de amparo de naturaleza mixta", in El proceso, la prueba y el tiempo de cambio, Dykinson, Madrid, 2024, pp. 119–120..

162 No emphasis in the original.

other assistance and legal guidance services that may be created statutorily."[163]

Lastly, more generically, "as a third instrument of guarantee," the Second Chamber mentions that "although the mission to ensure the presence of the right to defense in criminal proceedings (art. 24 SC) ultimately corresponds to the Constitutional Court, this does not exclude the obligation of its general protection by the Courts of Justice (art. 41.1 LOTC), being these the ones who are in a position to examine whether the defense was intrinsically adequate or suitable (ATC 111/1982 of March 10)."

At the outset, there is a clear inconsistency between the ATS under commentary and the ATC it cites, perhaps in apparent support of its thesis. Indeed, ATC 111/1982 contains a reasoning openly incompatible with the premise of the mission of oversight of the right to defense (in its dimension of the right to effective legal assistance) by the jurisdictional bodies:

"[...] the scope and development of the right to defense can only reside in provision, legal act, or simple de facto path of some public authority, as required by art. 41 of the LOTC, in order for it to be reviewable in amparo, due to a potential violation of a fundamental right, which does not occur in this case, and the absence of recusal would result from the breach of a private relationship of services between the Lawyer and the client with a possible derivation of responsibilities in civil or other types of proceedings; to which must be

163 Article 4.1(d) of the now repealed Royal Decree 658/2001 of 22 June, cited in the ATS of 17 July 2017, and Article 68(d) of Royal Decree 135/2021 of 2 March.

added that the right to defense guaranteed in art. 24 of the Constitution imposes on this Court the mission of ensuring its presence in criminal proceedings, but not of guaranteeing or examining its intrinsic adequacy or suitability, to determine whether it was effective and well carried out, or whether it was not for reasons that go beyond the content of the constitutional right to defense."

Undoubtedly, the intention of the Supreme Court was commendable in terms of guaranteeing the essential core of the right to defense, but departing from constitutional doctrine, however well-intentioned it may be, required at least a minimal explanation.

Without a doubt, the Second Chamber was right in concluding that these regulatory instruments "allow for compliance in our legal system with the content of Article 3.1 of Directive 2013/48/EU of the European Parliament and of the Council, of 22 October 2013, on the right of access to a lawyer in criminal proceedings," which expressly states that "Member States shall ensure that suspects and accused persons have the right to access to a lawyer in such time and manner so that they are able to exercise their rights of defense practically and effectively." (underlined in the original)

Nevertheless, this judicial ruling is practically isolated and responds, without a doubt, to the glaringly inexcusable conduct of the appealing counsel, as reflected in Ground 6 of the ATS:

"Notwithstanding certain syntactic inconsistencies that hinder the logic and comprehension of some parts of the appeal, whose motives intertwine infringements of different nature and scope, closing off without clearly expressing the specific transgression alleged,

the pleadings developed by the appellant form a collage of legal considerations previously maintained by this Chamber, yet lacking discursive connection and at times unlinked from any corresponding objection that might justify them. Nor is the efficacy of the legal considerations detailed in relation to the sentence being challenged effectively expressed. And the appeal, on occasion, argues one thing and its contrary, thereby giving rise only to – without factual or legal analysis – a review of a criminal precept (...) to which the sentence does not apply, with no reference to the penal precept that would support the decision apparently being contested (...). And even though the intent to appeal might allow this Court to grasp the claim more easily, it is evident that what is literally stated in the plea (which is no more than the annulment of the special disqualification penalty for exercising the profession imposed for a term of six years), the appeal would continue to revolve around a matter already settled, since, despite acknowledging the facts in the oral trial, the appellant demands a lawyer to appeal in his name the conviction pronouncement, specifically, whether or not the sentence declared a double criminal liability from a single criminal conduct."

This set of circumstances is what clearly reveals that the appellant's will was not aimed at obtaining an effective judicial defense. The matter was settled with a merely formal or apparent submission of an appeal; that is, the specific professional performance deployed, by failing to address the factual and legal reality expressed in the sentence, does not allow for a review of the conviction under the terms inherent to the disagreement expressed by the accused.

There is no need to exceed, in an exaggerated manner, the incompetence threshold for a court to verify the

ineffectiveness of legal assistance and take measures to protect and uphold the fundamental right.

More recently, Supreme Court Ruling 649/2023, of September 5, after reiterating the doctrine contained in the aforementioned STS 383/2021, stated that:

"[I]ndeed, the requirements derived from the right to legal defense compel the establishment of conditions that ensure its effectiveness, which bind both public authorities and professionals entrusted with its provision. As highlighted by the European Court of Human Rights, "the State must exercise due diligence to ensure [that persons who require legal assistance] effectively enjoy the rights guaranteed by Article 6 of the ECHR. An adequate institutional framework must exist to guarantee effective legal representation for individuals who have a right to it and a sufficient level of protection of their interests" – see ECtHR, case of Staroszczyk v. Poland, March 22, 2007; also Bakowska v. Poland, January 12, 2010."

For its part, the Constitutional Court has repeatedly stated that in order for the content of defenselessness to attain constitutional relevance, it must be imputable to actions or omissions; that is, it must be caused by incorrect actions of the judicial body, with errors or shortcomings attributable to the defense professional—whether due to passivity, neglect, lack of diligence, technical error, or incompetence—being excluded from the protective scope of Article 24 CE (among many others, see STC 101/1989, June 4; 237/2001, December 18; 109/2002, May 6; 87/2003, May 19; 5/2004, January 16; 160/2009, June 29; or 179/2014, November 3).

It was precisely on this doctrine that the trial court based its decision to deny the suspension of the trial

requested by the appellant, understanding that the alleged defenselessness due to a lack of communication with the court-appointed defense attorney could only be attributable to the party alleging it.

However, the Constitutional Court has also ruled, among other decisions, in STC 179/2014, of November 3:

"The duty of judicial bodies to ensure the justiciable party is not left defenseless is especially relevant in criminal proceedings, in cases where legal guidance and representation are provided through court-appointed counsel. It is not sufficient to merely designate legal professionals to protect the right to defense; rather, the effective realization of that right is required, as has been established by the European Court of Human Rights in its Judgments of October 9, 1979 (ECHR 1979, 3) (Airey case), May 13, 1990 (Arctic case), and April 25, 1983 (ECHR 1983, 6) (Pakelli case), which require real and effective legal assistance. These rulings state that assistance must be guaranteed to the claimant as true 'assistance' and not just the simple 'appointment' of a lawyer. This guarantee includes the right to access legal remedies [ECtHR Judgment of July 17, 2007 (ECHR 2007, 198857) (Bobek case) and July 5, 2012 (JUR 2012, 236397) (Szubert case), among others].

In this regard, this Court has repeatedly affirmed in its rulings the positive duty to ensure the effectiveness of the defense of the accused or convicted person in criminal proceedings by professionals appointed ex officio (see, among others, STC 47/2003, of March 3, FJ 2)."

Now then, the recognition of the right does not exempt it from precautionary measures to prevent the defendant, relying on it, from arbitrarily manipulating the

course of the trial. A balancing judgment on potentially conflicting interests is required. The right to defense, like any other right, cannot be considered unlimited, as it is subject, among other things, to the legal obligation of the Court to reject those petitions that involve abuse of rights, fraud, or procedural bad faith under Article 11.2 of the LOPJ.

The claim raised by the appellant requires a certain inquiry to obtain at least a minimal basis that allows the appellate judge to weigh the necessary criteria to determine whether in this case the appellant was effectively defended.

Defended not merely formally, but in an effective way, which requires other layers of analysis linked to the necessary recognition of a meaningful space of freedom and guarantee of the defensive function, rather than whether it was carried out formally. And having analyzed the development of the trial, we must conclude that this was not the case.

We are not here to rule now on whether the court-appointed lawyer or public defender acted with the required professional ethics, nor to determine which of these professionals bore the burden of trying to contact their defendant and client. What is true is that we have no basis to affirm that Mr. Juan Luis acted negligently or with abandonment, when he stated, and the data he provided seems highly credible, that after the hearing held on April 1, 2019, he was asked by the presiding judge at the conclusion of the session to contact the Audiencia's offices to obtain further information, which he did twice. He was told that they would be in contact with the assigned professionals. In this logic responds the scheduling order of May 6, 2019. Or when he himself claims that he was not even informed of the suspension

that had been agreed upon regarding the initial setting of September 20, presenting himself at the Tribunal's headquarters.

On the other hand, the intervention of the legal counsel during the trial hearing supports this lack of contact and at the same time reveals that there was no defense: any contradictory questioning was waived, as well as evidentiary evaluation and even legal argumentation. The counsel explained that he had no knowledge of the actions or his client's behavior throughout the hearing, and his conduct during the session revealed as much. Even the video recording of the hearing has not captured any detail that, while lacking legal significance, is revealing of the absence of contact between the appellant and the person who attended the hearing as court-appointed counsel.

As the hearing progressed, Juan Luis interrupted the session by requesting permission to momentarily leave the courtroom, stating that he was affected by a medical condition that compelled him to use the restroom, and he offered the medical documentation certifying this condition. It is he himself who delivers it, and not his counsel, who logically should have been the vehicle for his statement.

It is true that in this case, the lack of defense did not result from any action or omission attributable to the judicial body; nor, however, to the accused. When at the trial hearing, the Tribunal reminded him that the possible lack of defense was attributable to him for having waited until the moment of the trial to bring to light that the appointed lawyer had not been in contact with him, he rhetorically asked what else he could have done if he was told that he would be informed. Since he did not receive any communication from his lawyer or from the

Public Prosecutor's Office, he persistently requested that the Court provide him with the information that would enable such contact, but this extra diligence goes beyond what can be expected of an ordinary citizen facing the judicial machinery. A machinery that relies on the designated professionals to activate the contact mechanisms necessary to fulfill their assigned task, and to which the positive duty corresponds to ensure the effectiveness of the defense—especially in cases in which such defense is provided ex officio.

Therefore, the motive is considered well-founded, given that the appellant lacked effective defense, which he necessarily did not have to provoke, due to the violation of constitutional article 24.2 CE. The declaration, which empowers article 240 LOPJ on nullity of the appealed sentence in its condemnatory pronouncements, and retroactive effects of the actions preceding the trial in the first instance, for its preparation by a different tribunal than the one that handed down the sentence now declared null. A pronouncement that affects both the appellant and the other convicted individuals, given that the relationship between the conduct of all of them was central to the appealed sentence, and requires a careful analysis of the performance of each of them.

Certainly, this ruling may conflict with the right to a trial without undue delays, but due to the essential nature of the right to defense, it is determined that, in this case, the safeguarding of the latter takes on overriding importance [sic.]."

In short, once a manifestly ineffective performance by court-appointed counsel has been verified by the judicial body, one that does not meet a minimum standard of effectiveness, the only possible procedural consequence is the nullity of the proceedings with retroactive effect

to the moment immediately prior to the intervention of the counsel, in order to restore the violated legal order and thus remedy a lack of defense that should never have occurred within a proceeding with full guarantees, where equality and adversarial defense must be indisputable protagonists.

The other isolated judicial decision which, together with the ATS of July 7, 2017, confirms a situation of absolute lack of defense resulting from ineffective legal assistance and opts for the nullity of the proceedings, is STS 1117/2009, of November 11, in a case in which the accused had not been able to contact his lawyer, who, moreover, did not propose any evidence in the accused's favor, despite which the judicial body did not seek the appointment of a new lawyer. The high court agrees with the Provincial Court that even during the investigation phase the accused found himself helpless: "during the investigation, there is no record that the legal counsel for the accused urged the performance of any action, and it can be said that all actions carried out were either routine or offered no defense, and this legal representation did not even request any evidence in the brief of provisional conclusions, made final, nor did they propose any trial evidence [...]".

The matter presents embarrassing details not only regarding the counsel and the participating judicial bodies,[164] but also for the Bar Association, which is worth reproducing here:

164 The high court does not overlook that "both the Investigating Judge throughout that phase, as well as the Court from the moment it received the proceedings and subsequently, were aware of the negative characteristics of the way in which the defense corresponding to the accused in the case against him was being carried out, without ultimately proceeding to

"The Provincial Court further states that 'this situation of lack of defense…' had already been brought to light by the procedural representative of the accused when, upon being notified of the order opening the oral trial, she was compelled to inform the Court of the impossibility of contacting counsel, which resulted in her being granted a period of three days to appoint new counsel or to request court-appointed counsel, 'the latter option which she exercised'; however, surprisingly in the view of this Chamber, the Bar Association, 'invoking administrative reasons, requested the Court to refrain from seeking court-appointed counsel in those matters in which counsel had already been designated,' which led to the fact that no substitution of the counsel then entrusted with the defense took place. The Provincial Court itself acknowledges that it encountered serious difficulties in contacting the appellant's counsel, since 'he did not answer the telephone and it was also not possible to communicate with him by fax,' in order to summon him to the oral trial. It is even recorded in the judgment that the accused himself appeared before the Provincial Court on 3 November 2008 to state that he had been unable to contact counsel to prepare the defense, whereupon the Court once again undertook steps without obtaining a response, until his location on 11 November. It is likewise noted that the Procurator had returned on 7 November the notification of the order scheduling the trial and admitting evidence due to the impossibility of contacting counsel."

Another nuance to consider, which helps to understand the solution adopted by the Second Chamber, even though

replace him with another attorney who would fulfill his legal obligations in a minimally adequate manner."

the conduct of the lawyer (defender?) described so far would have been more than sufficient, has to do with the failed attempt by the lawyer to suspend the oral trial "due to the accumulation of all proceedings against the accused," a request rejected by the court as it "was submitted on the eve of the hearing and reiterated at the start of the oral trial, without providing any information regarding the status of those other proceedings referred to." Despite all of this, the court held the oral trial with the appellant being "assisted" by the aforementioned lawyer.

What has been set out up to this point makes it possible to relativize the classic requirement of constitutional doctrine, adopted by the Second Chamber of the Supreme Court, consisting in conditioning the nullity of proceedings on the fact that the resulting lack of defense be attributable to the judicial body.[165] It

165 *Once again, Judgment No. 370/2021 of the Supreme Court, of 4 May, is the decision that provides a compendium of the relevant constitutional doctrine:*

"B) *Moreover, and secondly, the deprivation or limitation of the right of defence must be directly attributable to the judicial body. Neither the law nor the doctrine of the Constitutional Court protect voluntary omission, passivity, nor, where it exists, negligence, lack of skill, or error. The absence of adversarial proceedings and defence on the part of one of the parties in the process resulting from its negligent conduct cannot find protection in Article 24.1 of the Spanish Constitution; this is the case when the party who was able to defend his rights and legitimate interests through the means offered by the legal system failed to use them with sufficient technical skill, or when the party invoking lack of defence cooperates through his conduct in bringing it about, since lack of defence deriving from inactivity or from the absence of the diligence required of the injured party, or caused by the voluntary but misguided, mistaken [sic.], or erroneous conduct of that party, is entirely irrelevant for constitutional purposes, because the right to effective judicial protection does not impose on judicial bodies the obligation to remedy the deficiency that may have arisen*

might be argued that, in reality, the ineffectiveness of counsel is attributable only to the latter; however, in the preceding paragraphs the duty of supervision incumbent upon judges and courts has been set out and justified.[166]

The procedural treatment of the nullity of proceedings, which I have advocated in previous paragraphs as a channel through which to seek potential redress for the legal order violated due to ineffective legal assistance, is governed by Articles 240 and 241 of the Organic Law on the Judiciary (LOPJ).

The first provision –commonly disregarded in practice– is that the nullity of proceedings must be asserted "by means of the remedies legally established against the decision in question, or by other means established by procedural laws" (Article 240.1 LOPJ). However, "the court or tribunal may, ex officio or at the request of a party, prior to a decision that puts an end to the proceedings and provided that correction is not possible, declare, after hearing the parties, the nullity of all or part of the proceedings" (Article 240.2 LOPJ).

Therefore, in principle, the nullity of proceedings must be raised on the appropriate occasion and through the remedy applicable against the corresponding judicial decision. Consider, for example, situations in which a change of legal representation occurs and the incoming

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in the party's defensive approach (Constitutional Court Judgments 167/88, 101/89, 50/91, 64/92, 91/94, 280/94, 11/95)."

166 *It is worth recalling here the words of Supreme Court Judgment No. 649/2023, of 5 September:*

***"5.** It is true that in this case the lack of defence did not derive from any act or omission attributable to the judicial body; however, neither did it derive from the accused."*

lawyer verifies that their predecessor failed to act with the minimum standards of effectiveness. In such cases, what will proceed is that one of the grounds for appeal –sometimes the only one– against the resolution (which may be a judgment terminating the process at first instance or any other judicial decision affecting the party, such as a pre-trial detention order or an order converting preliminary proceedings into a simplified procedure) will be the violation of the fundamental right to legal assistance enshrined in Article 24.2 of the Spanish Constitution. This will justify the claim of a violation of the right to defense due to the (in)action of the previous counsel and will seek explicitly declare the nullity of the ruling,[167] with retroactive effect of the proceedings to the moment immediately prior to the violation of the aforementioned right, which will normally entail the repetition of the oral trial in cases where the sentence is appealed and retroaction to that moment prior to the ineffective legal assistance is ordered when interlocutory decisions are appealed. In the case of precautionary measures, this should entail the repetition of the hearing in which the prosecution and the defense present their arguments in favor of their respective theses (in the case of pre-trial detention, the appearance under Article 505 of the LECrim; and in the case of a protection order, the "short hearing" of paragraph 4 of Article 544 ter of the LECrim). And, in the event of a deficient investigation from the perspective of the right to legal assistance,

167 It should be noted that the second paragraph of Article 240.2 of the Organic Law of the Judiciary (LOPJ) prevents the judge or court, "on the occasion of an appeal, from declaring ex officio the nullity of procedural acts that has not been requested in that appeal, unless it finds a lack of jurisdiction or of objective or functional competence, or unless violence or intimidation affecting that court has occurred."

this should lead to the nullity of the order transforming the preliminary proceedings into summary proceedings under the abbreviated procedure, or the revocation of the order concluding the preliminary investigation under the ordinary procedure, as well as any procedural acts in which the ineffectiveness of legal assistance is verified, so that the accused may enjoy effective defense even during the investigation phase, in such a way that, thanks to the work of the defense, the hypothesis of a procedural crisis becomes part of the catalog of decisions of the judicial authority.

Nevertheless, in the case addressed in STS 1117/2009, of November 11, the high court opted for a more conservative solution and, in my opinion, lacks foundation from the very moment in which the Supreme Court itself, following the lead of the trial court, acknowledges that, as seen, the conduct of the defense attorney during the investigation phase was ineffective ("from the above facts it clearly results the evident absence of an effective defense, given the passivity of the defense attorney responsible during the investigation phase"). The Second Chamber leaves unresolved the following question: why should an investigation in which the accused has been defenceless be "validated"? Consequently, the process must be annulled. Although the appellant requests that the annulment take effect from the moment they were informed of the transfer for the provisional classification stage, the Chamber considers it appropriate to annul the process up to the moment prior to the notification of the Order by which the decision is agreed upon To continue the proceedings under the rules of the Abbreviated Procedure, with the aim of allowing the filing of the relevant appeal if deemed appropriate for the proposal of investigative measures. The oral trial, in that case, must be held before a court composed of magistrates different

from those who issued the sentence that is now annulled." It is soon noted that the court of cassation took one step further than what was requested by the appellant.

It should be noted that this solution, besides unjustifiably limiting the scope of the nullity of proceedings, and thus, the reparation of the fundamental right, brings to light a major issue stemming from the existence of procedural deadlines that, with more or less legislative changes, have been in place for nearly a decade.[168] Indeed, if Article 324 of the Criminal Procedure Act (LECrim) sets maximum time limits for the investigation phase, and the natural consequence of the nullity of procedural acts carried out in a scenario of clear defenselessness due to ineffective legal assistance is their repetition under conditions of defensive balance, the situation may arise that, due to the (most frequent) expiration of procedural deadlines, such a solution is no longer possible if the judicial ruling seeking to restore the violated legal order merely declares the nullity of the order transforming the proceedings or concluding the investigation. Indeed, since 2015, the solution of the High Court in the already cited STS 1117/2009, which chose to declare the nullity of all proceedings up to the notification of the order transforming the investigative proceedings into the abbreviated procedure "for the purpose of allowing the filing of the relevant appeal if deemed appropriate for the proposal of investigative measures," would be sterile to that end to the extent

168 Law 41/2015 of 5 October, amending the Criminal Procedure Act to streamline criminal justice and strengthen procedural safeguards, introduced a system of procedural time limits for the investigation phase, which was subsequently amended by Law 2/2020 of 27 July, amending Article 324 of the Criminal Procedure Act.

that the potential expiration of the investigation period would determine the untimeliness of the proposed investigative measures and those carried out in a clear situation of defenselessness could not be repeated and would have been (unduly) validated. This is because measures ordered once the maximum investigation periods have been exceeded become invalid under Article 779 of the Criminal Procedure Act (STC 128/2024, of February 8). Thus, the upholding of an appeal for violation of the right to legal assistance, with a clear intention to restore the appellant's rights would lack practical effect and would lead to a true dead-end in procedural terms; a paradox, insofar as a nullity would be declared due to proven lack of defense, and yet there would be no possibility of defense once the appellant's rights are (theoretically) restored. Certainly, it is not always possible to determine clearly when the lack of defense due to ineffective legal assistance occurred during the investigation phase, and in many cases it would be practically impossible to determine whether the lawyer's actions during an investigative procedure caused actual defenselessness; in other, more frequent cases, it will be the absence of proposed exculpatory evidence that will result in the confirmation of defenselessness. Precisely for these cases, in which the consequence should indeed be the nullity of the order for transformation into the abbreviated procedure or the closing of the investigation phase in ordinary proceedings, it would be necessary de lege ferenda to correct the potential expiration of the maximum time limit for investigation (which would make it impossible to propose and carry out investigative procedures to balance a biased, one-sided investigation) and to automatically grant, ex lege, a reasonable additional period so that the accused can exercise the defense from which he was wrongfully deprived, regardless of the expiration of the procedural

time limits established in Article 324 of the Spanish Criminal Procedure Act (LECrim).[169]

Nevertheless, it must not be overlooked that the critical moment of the criminal process when evidence is truly presented[170] takes place under the umbrella of the principles of orality, publicity, concentration, and contradiction, which is the oral trial, and it is here where the presumption of innocence is genuinely at stake, when the judge or court must be especially vigilant insofar as the procedural imbalance resulting from an ineffective defense may have fatal and irreversible consequences. And indeed, the investigation phase is not –sit venia verbo, dangerously speaking– harmless in terms of harm to the accused due to ineffective legal assistance, but it cannot be overlooked that its purpose. Its purpose is to "prepare the trial" and "ascertain and record the perpetration of the crimes with all the circumstances that may influence their classification and the culpability of the offenders, ensuring their persons and the pecuniary responsibilities of the same" (Article 299 LECrim), or, in other words, "determine the nature and circumstances of the act, the persons who may have participated in it,

169 However, the very recent STS 728/2024 of 11 July has trivialised these time limits in order to accommodate the investigative measure of declaring the investigation secret, even though it was agreed outside the investigation period, derived "necessarily and sequentially" from the pre-trial detention orders, search and arrest warrants and the issuance of international and European arrest and surrender warrants, on the one hand, and from the proposal to the Government of Spain for the request for extradition to the competent judicial authority of Colombia, both issued within the investigation period.

170 This is a settled, consistent and unbroken matter since the long-standing STC 31/1981 of 28 July.

and the competent body for prosecution" (Article 777.1 LECrim, in the context of the Abbreviated Procedure).

As stated in previous paragraphs, when the initiative comes from a party, the nullity of proceedings must be raised on the occasion of and through the appeal proceeding against the corresponding judicial resolution (Article 240.1 LOPJ). However, the party harmed by the failure to observe essential procedural rules that resulted in their defenselessness within a final judicial resolution also has at their disposal the exceptional mechanism established in Article 241.1 LOPJ, which, although it begins with the categorical statement that "[n]o general incidents of nullity of proceedings shall be admitted," exceptionally allows that, within a relative time limit of twenty days and an absolute one of five years,[171] the harmed party may request "in writing that the nullity of proceedings be declared, based on the violation of any fundamental right referred to in Article 53.2 of the Constitution, provided that such violation has not been previously reported before a resolution bringing the proceedings to an end was issued and as long as such resolution is not subject to ordinary or extraordinary appeal."[172]

171 "The time limit for requesting nullity shall be twenty days from notification of the decision or, in any event, from the time the defect causing indefensión became known, and in no case may nullity of proceedings be sought after five years have elapsed from notification of the decision" (second paragraph of Article 241.1 of the Organic Law on the Judiciary).

172 The processing of this incident, within the jurisdiction of the court or tribunal that issued the final decision, is regulated in paragraph 2 of Article 241 of the LOPJ:

"2. Once the application requesting nullity based on the defects referred to in the preceding paragraph of this Article has been admitted for consideration, the enforcement and effectiveness

The major issue posed by this nullity incident against judicial decisions that have become final is that the judicial body functionally competent to resolve it is the same one that issued the decision (first paragraph of the second subparagraph of Article 241.1 LOPJ), which, rightly so, has been the subject of criticism by scholars. In this regard, the reflections of DÍEZ-PICAZO GIMÉNEZ[173] stand out, who considers that the incident of nullity of proceedings is entirely senseless and explains in a decidedly didactic manner that it only made sense

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of the final and unappealable judgment or decision shall not be suspended, unless suspension is expressly ordered to prevent the incident from losing its purpose, and the application shall be served, together with copies of the documents attached, where appropriate, to substantiate the defect on which the request is based, on the other parties, who, within a common period of five days, may submit their written observations, attaching such documents as they deem appropriate.

If the nullity is upheld, the proceedings shall be restored to the stage immediately prior to the defect that gave rise to it and the procedure legally established shall continue. If the request for nullity is dismissed, the applicant shall be ordered, by means of an order, to pay all the costs of the incident and, if the court or tribunal considers that it was brought recklessly, a fine of 90 to 600 euros shall also be imposed.

No appeal shall lie against the decision resolving the incident."

173 DÍEZ-PICAZO GIMÉNEZ, I., "A small big problem: indefensión and final judgment", *Tribunales de Justicia*, No. 5, May 1997, pp. 513-520; "The reform of Article 240 of the Organic Law of the Judiciary: lights and shadows", *Tribunales de Justicia*, No. 2, February 1998, pp. 129-143; "On the incident of nullity of proceedings", *Tribunales de Justicia*, No. 7, July 1999, pp. 615-620; and "Does the incident of nullity of proceedings make sense?", in AAVV, *A new perspective on the procedural protection of fundamental rights: XXII Conference of the Association of Clerks of the Constitutional Court*, Centre for Political and Constitutional Studies; Presidency of the Government and Constitutional Court, Madrid, 2018, pp. 99-122.

when the legislature approved Organic Law 5/1997, of December 4, amending Organic Law 6/1985, of July 1, of the Judiciary, which opted for the nullity incident as a preliminary step before filing for constitutional protection, as there was unanimous agreement on the convenience of empowering ordinary courts to remedy, at least, cases of *defenselessness* after a final judgment. Let us also note that with the reform introduced by the still-current Organic Law 6/2007, of May 24, which amended Organic Law 2/1979, of October 3, of the Constitutional Court, the scope of the nullity incident was expanded to cover "any violation of a fundamental right among those listed in Article 53.2 of the Constitution,"[174] and thus, as the same author critically points out, "no court is going to grant an incident based on the fact that its decision is arbitrary or unreasonable," nor –he adds– is the defense counsel who acted in its presence in such an ineffective way that it rendered the fundamental right to legal assistance unrecognizable. As this frequently referenced author concludes, the rule made much more sense under the previous regulation, in the realm of defenselessness and incongruity, as the jurisdictional rule was based "on the maxim derived from experience that, in a mere dysfunction (typically a faulty communication or the loss of a written notice of appearance), the court itself would be the most interested in remedying the issue quickly and easily.[175]

In this regard, AGUILERA MORALES has argued with tact and common sense that "in order for this [the incident of nullity of proceedings] to truly be an effective

174 DÍEZ-PICAZO GIMÉNEZ, I., "Does the incident of nullity of proceedings make sense?". Op. cit., pp. 99-122.

175 *Ibidem.*

instrument for the protection of fundamental rights, it is advisable, if not necessary, for the authority responsible for assessing the violation of these rights to act without any bias or predisposition. And this –we interpolate– is not something that can generally be said of the same court to which the alleged injurious action is attributed".[176] This is a doctrinal claim that is now practically historical[177] but continues to appear in more recent publications. For example, RODRÍGUEZ-ZAPATA PÉREZ maintains that "de lege ferenda, we must continue to insist on the convenience of having the incident resolved by a judicial body composed differently from the one to which the constitutional violation is attributed".[178]

176 AGUILERA MORALES, M., "The incident of nullity of proceedings under Article 241 LOPJ: a poor solution to a major problem", *Revista Ítalo-Española de Derecho Procesal*, Vol. 1, 2018, p. 124.

177 BACHMAIER WINTER, L., "The reform of the LOTC and the expansion of the incident of nullity of proceedings", *Revista Derecho Procesal*, 2007, p. 61; RICHARD GONZÁLEZ, M., *Procedural treatment of the nullity of proceedings*, Cizur Menor, 2008, p. 224; CHOZAS ALONSO, J. M., "The expansion of the incident of nullity of proceedings on procedural grounds. Regarding STC 43/2010 of 26 July", *Derecho Privado y Constitución*, No. 25, January-December 2011, pp. 329-330; or MORENILLA ALLARD, P., and CASTRO MARTÍN, J. L., "On the unconstitutionality of Article 241.1, second paragraph, LOPJ, insofar as it attributes jurisdiction for the hearing and resolution of the exceptional incident of nullity of proceedings to the same court that issued the final judicial decision whose rescission is sought", *Diario La Ley*, No. 7784, 26 January 2012.

178 RODRÍGUEZ-ZAPATA PÉREZ, J., "The incident of nullity of proceedings", *Anuario Iberoamericano de Justicia Constitucional*, 25(1) (2021), pp. 137-138.

IV. Conformity as the Main Setting for Ineffective Legal Assistance

Currently, a very high percentage of criminal proceedings end with a plea agreement. This is evident from the data provided in the latest report of the Attorney General's Office (2022 fiscal year):[179] of the total number of convictions issued by the Criminal Courts (116,034) and the Provincial Courts (8,741), 63% and 57%, respectively, were plea agreements. This official percentage must be interpreted with caution due to the so-called "partial agreements," which are not formalized during the hearing. Oral hearings such as strictu sensu plea bargains, but *de facto*, they crystallize into an absolute consensus between the prosecution and some defense counsels.[180] This procedural anomaly has been addressed fluently in the recent STS 930/2023, of December 18. In a succinct summary, the high court reminds that "even though it is authorized by a more or less widespread practice, it does not strictly conform to legality," although it does not find a violation of ordinary or constitutional legality when the court of first instance imposes a lesser penalty on the "pleading" defendants, even if the agreement is not officially formalized.

If this is the case and more than half of criminal litigation in Spain ends through strict plea bargains –and adding the so-called "partial plea bargains," it is more than likely that they account for three-quarters of all cases– then there is a clearly identified risk of convicting

179 Available at: Annual Report of the State Attorney General's Office 2023 (last consulted: 20 September 2024).

180 On these and other issues relating to conformity, see AGUILERA MORALES, M., "La deriva del 'principio' del consenso", Revista Ítalo-Española de Derecho Procesal, Vol. 2 | 2019.

innocent defendants due to ineffective legal assistance. As will be seen, the Spanish criminal procedural system does not provide any mechanism to control the existence of incriminating evidence when it regulates plea bargains.

Indeed, when the Spanish Code of Criminal Procedure (LECrim), in the context of the Abbreviated Procedure,[181] regulates plea bargains, it does not assign to the judge or court any mechanism for controlling the existence of evidence, whether lawful or unlawful (*see* paragraphs 2

181 Without disregarding the fact that in the Ordinary Procedure for serious offences the defendant's conformity is also regulated, already since the original wording of the Criminal Procedure Act, at two procedural stages, namely in the defence's statement of provisional classification (Art. 655) and at the oral trial, at the beginning of the hearings (Arts. 688.II to 700), I have chosen to start from the regulation of the Abbreviated Procedure, since, on the one hand, it is the most frequent in practice, with conformities in the context of the Ordinary Procedure becoming anecdotal (it should be noted that, for them to be viable, the custodial sentence may not exceed six years in duration when this type of procedure deals with offences punishable by more than nine years), and, on the other hand, because, as CHOZAS ALONSO, J.M. states ("La conformidad penal española y el patteggiamento italiano. Breve estudio de derecho comparado", La Ley Penal: revista de Derecho Procesal, Penal y Penitenciario, No. 104, September-October 2013, p. 104), the regulation of the Ordinary Procedure does not fit very well with the nature and purpose of modern conformity, incorporated into Spanish law through Law 7/1988 (Abbreviated Procedure) and subsequently expanded by Law 38/2002 (Fast-Track Trials), inasmuch as the element of "negotiation" appears to be absent and, in our view, the idea of "adhesion" gains prominence. On the exceptional nature of conformity in the Ordinary Procedure, see also TOMÉ GARCÍA, J.A. (with DE LA OLIVA SANTOS, A., ARAGONESES MARTÍNEZ, S., HINOJOSA SEGOVIA, R. and MUERZA ESPARZA, J.), Derecho Procesal Penal, Ed. Universitaria Ramón Areces, Madrid, 2004, p. 458 (cited by CHOZAS ALONSO).

and 3 of Article 787181),[182] and, in any case, its detection would not entitle the accused to appeal the sentence (Article 787.7 LECrim). However, although they do not refer exactly to the topic at hand, there are authors such as MORENO VERDEJO[183] who argue that, despite the wording of paragraph 1 of Article 787 LECrim, which states: *"…based on the description of the facts accepted by all parties…"*, which might, at first glance, seem like a ban on the judge questioning the agreed facts, this would merely reflect *"the prohibition imposed on the judge by Article 789.3 from altering the facts, that is, from convicting for facts other than those in the indictment."* Hence, following VARELA CASTRO,[184] the cited author points out that the mandate to *"start from the accepted facts"* does not equal having the facts proven, which is a very different matter.

The ideal scenario, and certainly the most respectful one of the fundamental rights of any accused person, would be, *de lege ferenda*, that the judicial authority before whom the plea agreement is submitted could verify the

182 In any event, prior to this procedural stage, the Criminal Procedure Act provides for the possibility that the accused may enter a plea of conformity. In this regard, see Articles 779.5, 784.3 and 801, as well as the Protocol of Action for Conformity Proceedings signed between the Office of the State Attorney General and the General Council of the Legal Profession on 1 April 2009, and Instruction No. 2/2009 of the Office of the State Attorney General concerning its application.

183 MORENO VERDEJO, J., "La conformidad", in VV.AA., El juicio oral en el proceso penal (especial referencia al procedimiento abreviado), Colección de Estudios de Derecho Procesal Penal No. 26, Comares, Granada, 2010, pp. 47-48.

184 VARELA CASTRO, L., "For a reflection on the regime of conformity in the abbreviated procedure", in VV.AA., El procedimiento abreviado, Cuadernos de Derecho Judicial IX, CGPJ, Madrid, 1992, p. 219.

existence of incriminating evidence[185] and, from there, the potential existence of unconstitutionally obtained evidence and, in such case, extend its consequential effects, being authorized –and obliged– to reject the plea[186] and issue an acquittal[187] in those cases where there is no *prima facie* incriminating evidence sufficient to rebut the presumption of innocence of the accused, either because such evidence never existed,[188] or because it was excluded that obtained directly or indirectly in violation of fundamental rights.

I am not unaware that, in a certain sense, I incur in an argumentative acrobatics by advocating verification of the non-existence or insufficiency of incriminating "evidence" when, strictly speaking, such evidence has not even been produced, given that the trial hearing is the

185 The prosecution, especially the Public Prosecutor's Office, and the defence could offer the judicial body that must approve the conformity a summary of the incriminating elements against the accused for the sole purpose of facilitating the judge's task. This would not entail any additional effort for the parties and, moreover, would be useful to ensure that the conformity is the result of genuine negotiation and not a mere formality.

186 Without prejudice to the foregoing, Article 50.2 of the LOTJ allows the Presiding Magistrate to refuse the conformity and order the continuation of the trial instead of dissolving the Jury if it is understood that there are sufficient grounds to conclude the objective or subjective non-existence of the act.

187 Similarly, with regard to the power of early dissolution of the Jury Court conferred by Article 49 of the LOTJ on the Presiding Magistrate.

188 Recently, BAUTISTA SAMANIEGO, C., "Conformidad material y juicio equitativo", *La Ley Penal*, No. 164, September 2023, Editorial La Ley, has advocated overcoming the limits established by the current Article 787.2 of the Criminal Procedure Act, arguing in favour of judicial review of the sufficiency of evidence as a prerequisite for conformity.

proper[189] procedural moment for its taking. However,

189 However, there are systems, such as the German one, in which the defendant's conformity does not affect the judicial commitment to verify that there is sufficiently charged evidence capable of rebutting the presumption of innocence. Specifically, paragraph 1 of Article 257c of the German Code of Criminal Procedure (Strafprozessordnung) provides for the judge's obligation to broaden the taking of evidence in order to ascertain the truth, as provided in Article 244 StPO, which is not affected by any agreement reached between the court and the parties regarding the conduct and outcome of the proceedings. SACHER, M., in "Die Hauptverhandlung als Forum der Wahrheit. Eine Analyse mit Blick auf die Strafprozessreformen von Argentinien und Mexiko", Duncker & Humblot, Berlin, 2022, notes that, with this reservation, the legislator intended to avoid contradicting the settled case law of the Federal Constitutional Court (Bundesverfassungsgericht) on the limits of ius puniendi of the State.

As VELEDA, D., points out in "La decisión sobre la quaestio facti en los acuerdos de culpabilidad", Quaestio facti. Revista Internacional sobre Razonamiento Probatorio, No. 2, 2021, in the case law of the German Federal Constitutional Court "the confession of the accused in a plea agreement is not a thing but a source of knowledge about the facts or, more precisely, a means of proof of his or her guilt which, if not corroborated by other elements supporting its truthfulness, may be insufficient for the delivery of a conviction. Accordingly, an accused cannot, by means of a plea, put an end to the determination of guilt by admitting responsibility before the court. While an admission of guilt may be of great utility for the judge in the search for the truth, the fact remains that the judge must take it to the test in respect of its probative value and consequences: 'I believe, but I verify; a confession alone is not sufficient proof beyond a reasonable doubt that you did it'" (Langer, 2018: 40-41) (p. 162).

In the same vein, DIAS, L., in "Los acuerdos en Derecho penal en Karlsruhe y Estrasburgo: análisis de las recientes sentencias del Tribunal Constitucional Federal Alemán y del Tribunal Europeo de Derechos Humanos", Pensar en Derecho, No. 6, pp. 195-243, citing the Judgment of the Federal Constitutional Court (BVerfG) of 2 BvR 2628/10, affirms that "the obligation

there may be situations in which even the *corpus delicti* does not exist (again, either because it was never incorporated into the investigative record, or because it was excluded pursuant to the exclusionary rule laid down in Article 11.1 of the LOPJ). In such a scenario, the judge or court must be aware that a conviction can never be substantiated.[190] With all due regard to the differences,

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of the judge to conduct an exhaustive investigation remains in force despite the consensual decision. In other words, the agreement can in no case be sufficient to permit a conviction, but must be sufficiently grounded in facts and circumstances independently established. This ultimately leads to the plea agreement implying a waiver of the accused's right to present evidence, but without prejudice to the fact that the facts must remain sufficiently established, the judge retaining the duty to seek the truth" (p. 219).

Indeed, I have had occasion to attend plea agreement hearings in the city of Hamburg and these hearings may last several hours to the extent that the prosecutor questions the accused on each fact and introduces incriminating evidence during the examination, which the accused must acknowledge, for example, the authorship and content of emails that are read by the prosecution. Given the high volume of criminal litigation and the generalised collapse of the judicial system in Spain, it seems impossible, in addition to unnecessary, to establish a similar system. The advantages inherent in conformity can be obtained with minimal judicial oversight of the existence of *fumus boni iuris* of the commission of the offence and of the accused's participation therein.

190 Not in vain, as GASCÓN INCHAUSTI, F., explains in "Justicia penal negociada y nueva Ley de Enjuiciamiento Criminal. Algunas reflexiones críticas a la luz de la experiencia jurídica estadounidense", unpublished text (provided by the author), in the United States, at least in theory, the court must ensure that there is a factual basis for the declaration of guilt, not only through the defendant's confession, but also by asking the prosecutor what evidence would support the accusation at trial. Nevertheless, it seems that these jurisprudential requirements of the Supreme Court have been relaxed to

Article 108(4) of the ill-fated Draft Code of Criminal Procedure 2013 (BACPP 2013) allowed the court to reject the plea agreement and order the continuation of the trial where the existence of the *corpus delicti* was not established and such existence ought to have been proven had the offence been committed.[191] By contrast, the Draft Criminal Procedure Act 2020 (ALECrim 2020)

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the point of becoming unrecognisable. This is explained by FERRÉ OLIVÉ, J.C., in "El Plea Bargaining, o cómo pervertir la justicia penal a través de un sistema de conformidades low cost", *Revista Electrónica de Ciencia Penal y Criminología*, 20-06 (2018), according to whom the Supreme Court of the United States in Brady v. United States (1970) held that plea bargaining was a tool that could only be used when the evidence of guilt was overwhelming, and the accused could not benefit from negotiating (p. 18).

191 CHOZAS ALONSO, J.M., "La conformidad…", op. cit., pp. 110–111, points out that, in his view, the proposed Article 108 has taken careful account of the design of judicial review established in Italy for "patteggiamento." This author, perhaps going beyond the literal wording of the provision and influenced by the aforementioned institution of Italian law, argues that the Court may also reach the conclusion that there are no elements to sustain the accusation, in which case the proceedings should be terminated at an early stage by means of an acquittal, for example not only where the criminal act never occurred, but also "if the accused is not responsible for it (there are elements that demonstrate his innocence)."

However, CHOZAS acknowledges that, in essence, the judge does not verify the existence of guilt, but merely limits himself to verifying the absence of grounds for non-punishability (note 27, ibid.). In this regard, see FERRUA, P., Il "giusto processo", Zanichelli, Bologna, 2012, pp. 75 ff. (cited by CHOZAS ALONSO).

On "patteggiamento," see MARCOLINI, S., Il patteggiamento nel sistema della giustizia penale negoziata. L'accertamento della responsabilità nell'applicazione della pena su richiesta delle parti tra ricerca di efficienza ed esigenze di garanzia, Giuffrè Editore, Milan, 2005.

projected a form of judicial review limited to verifying the effective existence of rational indicia of criminality additional to the confession only in cases where the accused seeks to enter into a plea agreement involving a sentence exceeding five years' imprisonment (Article 107(3) in fine and (4)).

As MORENO VERDEJO points out when referring to evidence of facts in the context of plea agreements,[192] the judge must verify the existence of such facts, that is, "the coincidence between the agreed-upon facts and material truth," citing in support his thesis and the old STSs of March 1, 1988, and July 19, 1989, and concluding that, indeed, it is rare for the judge to question the reality of the facts underlying the defendant's plea agreement,[193] which does not prevent –and indeed obliges– the judge to question the motivation behind the expressed plea "in light of the evidence gathered during the investigation or other circumstances." All this becomes paradoxical when

192 MORENO VERDEJO, J., "La conformidad", op. cit., p. 47.

193 The Criminal Chamber of the Supreme Court itself has been critical of this issue in some relatively recent judgments. Due to its clarity, it is worth transcribing the words of STS 592/2009, of June 5, later adopted by STS 1077/2011, of October 10: "profoundly distorts the nature of the jurisdictional moment: by making the punitive claim available; and by opening the door to merely adhesive consents based on pragmatic reasons of pure convenience, to poorly rigorous exercises of the right of defense, at the expense, above all, of defendants with limited financial capacity, the main beneficiaries of the system. Furthermore, it favors routine applications of this option, driven by a simple procedural efficiency; and it may actively contribute to the degradation of the role of the judge, who, from being an autonomous decision-maker based on evidence, becomes merely a notary responsible for certifying a negotiated agreement with antecedents exclusively summary in nature as a premise."

we realize that this constitutes consolidated doctrine in both the Constitutional Court (*vid*., *ad exemplum*, the ruling of October 4, 1989) and the Supreme Court (most notably, Judgment 1652/2001 of September 17), which considers that the granting of a plea agreement implies, *per se*, the destruction of the presumption of innocence. This doctrine finds its rationale in appeals filed by those who had previously agreed to a plea deal, and whose appeals were later denied. As noted in STS 1652/2001, "the taking of incriminating evidence in open court" after prior admission of the facts by the defendant, properly advised by counsel, is inadmissible. (See also AATS 595/2004 of April 15 and 1408/2005 of July 7, or SAP Madrid, Sec. 30ª, 39/2012 of January 30.)

To complete the proposed system, and, certainly, for as long as judges and courts continue to refrain from verifying the actual existence of incriminating elements against the defendant who has entered into a plea agreement, it should be permissible to lodge an appeal against plea-based judgments in those cases in which it is duly invoked: i) the violation of the principle of the presumption of innocence in connection with the right to effective legal assistance; or ii) the infringement of the fundamental right to a trial with all guarantees, in connection with effective legal assistance, arising from the failure to exclude unlawfully obtained evidence prior to the plea agreement being reached.[194] And this insofar

194 However, in order to avoid dysfunctions and procedural abuses, it would be desirable for the proposed avenue not to be available in cases where the violation of fundamental rights had not been raised prior to the conclusion of the conformity agreement, inter alia because this would entail an issue being brought per saltum before the appellate court or in cassation, as the case may be.

as fundamental rights are res extra commercium and the State must prevent the conviction of innocent persons, especially where such conviction may result from the potential passivity or ineffectiveness of their counsel.

It can more easily be inferred that the proposed solution stems from *de lege ferenda*, which, at present, constitutes consolidated, constant jurisprudence without fissures, establishing the non-appealability of plea agreement judgments once the agreement has been reached (among the most recent decisions, *vid.* ATS 20418/2023, of June 27). In a concise synthesis, this jurisprudential doctrine pivots on three arguments: 1. The principle that no one may act against their own actions, challenging what they have freely and voluntarily accepted with the endorsement of their defense attorney; 2. The principle of legal certainty, grounded in the rule of *pacta sunt servanda;*[195] 3. The possibilities of fraud, in the sense that the defense may conduct a negotiation

195 Underlying this point is clearly a *iusprivatist* conception of plea agreement, which once again would constitute a North Americanization of Spanish criminal proceedings. Thus, as GASCÓN INCHAUSTI points out, F., *Negotiated Criminal Justice*, op. cit., 'U.S. jurists conceive plea bargaining from a much more *iusprivatist* perspective than what seems acceptable from continental legal frameworks when approaching criminal law and its judicial application. This translates into two basic approaches. On the one hand, plea bargaining constitutes a form of contracting, which leads all its aspects to be interpreted and given meaning through basic contractual principles. On the other hand, this institution is a structured framework of waivers of rights, many of them fundamental. Indeed, the accused must also waive evidentiary claims or maintain such waiver if it has already been articulated previously in the extrajudicial negotiation and/or in the formalization of the plea agreement, as, in our view, happens, so to speak, in Spain, which would constitute the mere North Americanization of criminal proceedings.

aimed at achieving a more favorable qualification or sentence, only to later challenge it, having secured a lower "ceiling" than what might have been imposed had the trial taken place (*vid.* among many other rulings of the High Court, STS 768/2022, of September 15, or ATS 85/2023, of January 12).[196]

In England and Wales, appellate courts within the criminal jurisdiction have held that a plea agreement

196 Evidently, as a general rule, the doctrine of the non-appealability of conformity judgments that embody the agreement reached is not without exceptions. These, based on the doctrinal and jurisprudential foundations set out, could be summarized as follows: 1) Where the agreement is not permitted by law, for example, when the penalty exceeds the legally established limit (see Arts. 655 and 688 of the Criminal Procedure Act); 2) Where procedural requirements have not been respected (e.g., the dual guarantee of the accused and counsel's consent); 3) Where there has been a defect in consent, such as error, violence, intimidation or deceit; and 4) Where the principle of legality is infringed, for example, as a consequence of imposing an improper penalty in accordance with the legal classification of the facts.

It should finally be specified that nothing prevents a pleabargained judgment (*sentencia de conformidad*) from being reviewed through the mechanism provided in Article 954 of the Spanish Criminal Procedure Act (*LECrim*), provided that any of its statutory grounds are met. In this regard, Supreme Court Judgment 803/2013, of 31 October, is noteworthy. It does not consider reproachable the procedural conduct of the defendant, who agreed to a reduced sentence as the perpetrator of a trafficsafety offence –driving without administrative authorization due to the loss of licence points– and subsequently, after his arguments were upheld in administrativecontentious proceedings and, ultimately, after the annulment of a traffic sanction and, as a consequence, the annulment of the declaration of loss of his driving licence, filed an extraordinary appeal for review under Article 954.4 LECrim. The more recent Supreme Court judgments 14/2023, of 19 January, 821/2023, of 10 November, and 574/2024, of 7 June,

does not deprive the court *ad quem* of its jurisdiction to hear the appeal against the conviction (*Lee* [1984] 1 W.L.R. 578).

If the accused can articulate their appeal through the channel of section 2.1 of the Criminal Appeal Act,[197] the appellate court is authorized to quash the conviction (*Boal* [1992] Q.B. 591).

However, these courts have warned that in the case of a guilty plea, the appellate court's approach does not resemble that taken when reviewing a conviction based on a jury verdict following a fully contested trial (*Tredget* [2022] EWCA Crim 108). In *Lee* (*supra*), the appellate court emphasized the relevance of whether the appellant had been in a position to plead, knew what he was doing, had the intention to plead guilty, and did so unequivocally and after receiving expert legal advice. This judicial doctrine has been reaffirmed more recently in *Asiedu* ([2015] EWCA Crim 714), where the court held that a defendant who admitted to facts constituting a crime through an unequivocal and deliberate guilty

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also recognize this extraordinary possibility of challenging pleabargained judgments.

For its part, the 2020 Draft Criminal Procedure Act (*Anteproyecto de LECrim 2020*) included a provision which, although somewhat indeterminate, allowed appeals against pleabargained judgments "when the requirements or terms thereof have not been respected" (Article 173.2).

197 This provision of the Criminal Appeal Act of 1968 establishes the unsafe conviction as a ground for appeal. It is somewhat paradoxical that, from the very moment in which first instance trials, held before the Crown Court, are decided by a jury that has no obligation to give reasons for its verdict and is limited to determining the guilt or innocence of the accused, ten votes of its twelve members are required (see the Juries Act of 1976).

plea is normally not permitted to appeal the conviction, as there is no significant danger in a conviction based solely on a voluntary and public admission.

Now then, the courts in England and Wales have concluded that, in certain cases, despite the admission of guilt, the appellant may still appeal their conviction if their plea was not valid. This aligns with jurisprudence that recognizes Three major categories of causes can be identified that allow a convicted defendant who entered a guilty plea ("conformado") to appeal the conviction: i) defects in the defendant's consent; ii) procedural fraud (abuse of process) due to the existence of an obstacle preventing prosecution; iii) lack of commission of the offense by the defendant (*Tredget* [2022] EWCA Crim 108[198]).

i) Case law from the appellate courts in England and Wales on defects in the consent of defendants who pleaded guilty is longstanding, abundant, and surprisingly rich. For example, in *Swain* ([1986] Crim L.R. 480), the conviction was quashed on the basis of evidence that established a "very real" risk that the defendant had been under the influence of LSD-induced delusions at the time of the plea, with the episode extending briefly thereafter. In *Inss* ([1974] 60 Cr. App. R. 231), the Court of Appeal held that "when the defendant pleads guilty under pressure or threats, he is not acting freely, and the trial begins without any valid plea." Everything that follows, it ruled, "is void." (free translation)

198 In this particular case, the Court of Appeal of England and Wales quashed the conviction of a person who had previously pleaded guilty, having regard to his vulnerable psychological condition, which undermined the reliability of his confession, as well as to the admission of new evidence on appeal, (which called into question the origin of the fires attributed to the accused).

This pressure may even come from the judge (though it must be emphasized that it is the defense counsel's duty to prevent this). A recent example is the *Nightingale* case ([2013] EWCA Crim 405), where the court ruled that the plea agreement was invalid:

"The issue is whether the judge's intervention, and its resulting impact on the defendant after considering the advice given by his legal team, based on their professional judgment about the judge's potential sentence, created improper additional pressure on the accused and took the decision out of the area reserved for the defendant's own free choice."

In *AB* ([2021] EWCA Crim 2003), the appeal court also annulled a guilty plea because the defendant had not been properly informed about the seriousness of one of the charges against him, related to violating a restraining order. He had also not been made aware of the possibility of a custodial sentence.

An appeal may succeed if the guilty plea was entered under incorrect legal advice. In this regard, the judgment in *Saik* ([2004] EWCA Crim 2936) states:

"For an appeal against conviction to succeed on the grounds that the guilty plea followed erroneous legal advice, the facts must be sufficiently solid to demonstrate that the plea was not a genuine acknowledgment of guilt. The legal advice must go to the heart of the agreement, so that [...] if the agreement was not freely made, it would be rendered null."

The Criminal Court of Appeal of England and Wales has established that an appeal may prosper if the guilty plea was tainted by erroneous legal advice or by the absence of advice on a viable defense. This

would imply depriving the defendant of their right to an effective defense, which –if potentially successful– would constitute "a clear injustice" (see again, *Boal*, as cited; *Kakaei* ([2021] EWCA Crim 503)). This view has remained consistent in the Court of Appeal. For instance, in *McCarthy* ([2015] EWCA Crim 1185), the court stated it was "far from convinced that when the appellant pleaded guilty to the offense of actual bodily harm, he fully understood the elements of the criminal offense. In this sense, his freedom of choice was limited."

In *Whatmore* ([1999] Crim. L.R. 87), the court quashed the convictions based on the fact that the appellant had received incorrect legal advice from his trusted lawyer, which compromised the safety of the convictions. In that case, the appellant had pleaded guilty to sexual offenses against his daughter, having been mistakenly led to believe that those allegations would otherwise form part of the evidentiary framework in a separate trial –when in reality, that was not the case. As the judgment put it:

"[...] the appellant did not admit his guilt and only pleaded guilty based on the belief that, if he did so, the accusations involving his daughter would be removed from the case and he would, in effect, be accepting a lesser penalty than he would otherwise face."

There have also been cases in which the Court of Appeal has quashed the conviction because a judge's comment was deemed decisive in leading the defendant to plead guilty, even though it was clear that they had, *a priori*, a strong defens9e–specifically, one protected under domestic legislation regarding victims of trafficking[199]

199 Article 45 of the Modern Slavery Act 2015 provides a specific defence for victims of slavery or trafficking who commit certain

(see, *e.g.*, the judgment in *BWM* [2022] EWCA Crim 924).

In the case of *BYA* ([2022] EWCA Crim 1326), the Court of Appeal also overturned the conviction previously accepted by the defendant based on a dual rationale, both rooted in the (at trial) unexplored fact that she was a victim of human trafficking. In this case, the appellant claimed during the appeal hearing that she could not recall being advised about "anything that might relate to human trafficking or the Modern Slavery Act," and that she was unaware of her right to appeal until she was referred to a specialist lawyer. Her new defense argued that she was indeed a victim of trafficking, but that this status had either been ignored or gone unnoticed by the prosecution and police; and that no steps (or at least, insufficient ones) had been taken to investigate apparent trafficking indicators raised in the appeal process. Consequently, the defendant pleaded guilty without any exploration of the possibility of granting her victim status. In the court's opinion, the prosecution had failed to consider her full story and the context of the offense[200] when asserting she had committed the crime. The Court of Appeal recognized that the speed at which the case against the defendant was processed reasonably led to the inference that no genuine opportunity to assess her potential status as a trafficking victim had existed. In the opinion of the appellate body, had these circumstances been known, public interest in prosecuting the offense would have been a far more sensitive question

offences under compulsion attributable to slavery or "relevant" exploitation.

200 In this respect, as can readily be inferred, the principle of opportunity applies.

—one likely to have been addressed with greater care. Finally, the court noted that the emphasis appeared to have been placed disproportionately on the accused's conduct, ignoring the other side of the equation: the broader context of her victimization.

ii) For its part, cases of procedural fraud (*abuse of process*) do not depend on the circumstances under which the plea agreement was reached or whether the accused is guilty or not, but rather arise when there is some kind of obstacle to prosecuting the accused.

These are, for the most part, highly specific cases of the Anglo-Saxon system that lack interest for the comparative effects I intend to explore, except in those cases where a violation of the right to a fair trial is verified (Article 6.1 of the European Convention on Human Rights), in any of its dimensions (right to an impartial judge, etc.). In such cases, the accused does not need to prove specific harm (*vid.* the judgments in the cases *Ilyas Hanif* ([2014] EWCA Crim 1678); and *Abdroikov* ([2007] UKHL 37).

iii) Lastly, in England and Wales it is possible to appeal plea bargain sentences when it is determined that the accused, in reality, did not commit the crime.

In these cases, it is required to prove that the appellant is not guilty, which, logically, sets a very demanding standard. It is not a matter of doubts, but of certainties. Thus, in the case *Verney* ([1909] 2 Cr. App. R. 107) it was established that the appellant was in prison on the day of the events for which he had been convicted as the mastermind; and in the case *Jones* ([2019] EWCA Crim 1059), DNA evidence completely exonerated the appellant who had originally been convicted under a plea agreement.

In Spain, an intermediate solution –*rectius*, of compromise– though theoretically inapplicable in practice, would entail drawing inspiration from the U.S. Federal Rules of Criminal Procedure[201] and allowing for the possibility that the accused admits guilt conditionally (*conditional guilty plea*),[202] reserving...written right to appeal the improper denial of any motion such as, in what matters here, the motion to suppress. However, insofar as such a conditional admission must be made with the consent of the court and the prosecutor, this legal possibility would lack, at least in Spain, any real path of appeal. No representative of the Public Prosecutor's Office would accept such a condition.

The Kingdom of Spain is called to avoid the striking paradox observed by DEL MORAL GARCÍA[203] in the USA:[204] "first, a procedural system is built that is complex, slow, burdened by the utmost scrupulousness towards guarantees, and a genuine and well-developed

201 Specifically, Rule 11(a)(2) of the Federal Rules of Criminal Procedure.

202 On this issue, see FIDALGO GALLARDO, C., *Las "pruebas ilegales": de la exclusionary rule estadounidense al artículo 11.1 LOPJ*, Centro de Estudios Políticos y Constitucionales, Madrid, 2003, pp. 426–428.

203 DEL MORAL GARCÍA, A., "Verdad y Justicia Penal", *Ética de las profesiones jurídicas. Estudios sobre deontología*, Vol. I, Universidad Católica de San Antonio, Murcia, 2003, pp. 544–545.

204 On the influence or intrusion of negotiated criminal justice in the countries of the European Union, see SCHÜNEMANN, B., "Crisis del procedimiento penal (¿Marcha triunfal del procedimiento penal americano en el mundo?)", *Jornadas sobre la Reforma del Derecho Penal en Alemania*, Cuadernos de Derecho Judicial, Consejo General del Poder Judicial, Madrid, 1991, pp. 49 and following.

right to a fair trial is configured. And then, it is socially verified that it would be unbearable for all citizens accused of a crime to demand these rights so emphatically proclaimed and carefully safeguarded, and so techniques and strategies are invented to ensure that the majority of accused persons *freely* renounce those rights. To that end, they must be offered something: the State offers them reduced sentences."

Likewise, PIZZI[205] refers to the systematic avoidance of trial in the USA, considering it a sign of weakness of a procedural system that rests on plea negotiation outside the scope of sentencing, occasionally bringing someone to trial. Later, the aforementioned author, with the descriptive realism that characterizes him, concludes that "the U.S. criminal process has been reduced to a Solomon-like path of 'splitting the baby,' and so time and again it will do so to avoid going to trial, even though the sentences handed down end up bearing only a distant relation to the crime or crimes committed, and even though the sentence is entirely unrelated to what actually happened."

So widespread is the inclination in the U.S. to negotiate plea agreements, with a preference for establishing the truth that led to the so-called *Alford* pleas, a name that comes from the case in which the Supreme Court The Supreme Court of the United States in the *Alford* case[206] and lack of comparison in other procedural systems, inasmuch as they allow the negotiated admission of

205 PIZZI, W.T., *Juicios y mentiras. Crónica de la crisis del sistema procesal penal estadounidense*, Tecnos, Madrid, 2004 (Introductory study, translation and notes to the Spanish edition by FIDALGO GALLARDO), pp. 102–104.

206 United States v. Alford, 400 U.S. 25 (1970).

guilt by defendants, while maintaining the defendants' assertion of innocence.

It is worth clarifying, in any case, following GASCÓN INCHAUSTI,[207] that, with few exceptions, and unlike what happens in the Spanish legal system, a *guilty plea* is a declaration of guilt, but not a recognition of the sentence requested: it is merely a statement of guilt that does not include the penalty, since at that procedural stage no one would yet have requested a specific sentence for the accused.[208]

It is true that plea bargains are necessary, and even, on many occasions, beneficial to the State, which finds them effective in the prosecution of crimes, and for those subject to trial (victims and accused), who avoid secondary victimization or obtain favorable treatment without taking risks. However, it is no less true that there is a considerable number of innocent individuals convicted via plea bargains for many and varied reasons. I do not intend –*sit venia verbo*– to lock the stable door after the horse has bolted, but rather, more moderately, to prevent plea bargains encouraged by defense lawyers who recommend this path to seek their own convenience, without needing to study the matter, *sic et simpliciter*, because their lack of training prevents them from analyzing the existence of evidence of guilt and conducting a risk assessment, thus opting

207 GASCÓN INCHAUSTI, F., "Justicia penal negociada…", op. cit.

208 On the very high figures of conformity before North American courts, see JIMENO BULNES, M., "El proceso penal en los sistemas del common law y civil law: los modelos acusatorio e inquisitivo en pleno siglo XXI", *Justicia*, 2013, No. 2, pp. 302–304 (especially note 238).

definitively for the easiest solution (the plea bargain), which, in many cases, will be seen by the accused as a way to obtain a reduced sentence, even if they are innocent. This is even more so for institutional actors in the criminal process (judges and prosecutors), whose workload frequently leads to scenarios –albeit honorable and honest exceptions exist– that especially regard – and even encourage– plea bargains. Hence, *de lege lata* the problematic situation could partially be resolved by urging Bar Associations to remind lawyers of the need to observe their ethical duties from simple and rudimentary actions taken prior to reaching a plea agreement which, without any intention of being exhaustive, may include obtaining a complete copy of the proceedings,[209] their review; conducting a written risk[210] assessment that includes the potential nullity of incriminating elements obtained unconstitutionally (Article 11.1 of the Organic Law of the Judiciary),[211] negotiations with the

209 The implementation of the electronic court file reveals that there are lawyers who either obtain access to the case only a few days before the commencement of the oral trial, or do so during the hearing itself. In other cases, there is no record that such access ever took place.

210 This action would also prevent a shadow of doubt from hanging over the lawyer who advises acceptance of a plea, suggesting that he did so merely out of convenience. It is very common for defendants who have agreed to a plea to turn to another lawyer to file an (unviable) appeal against the plea, under the pretext that their lawyer did not know the case or did not inform them of the reasons why he advised accepting the plea.

211 Bar Associations should insist on the necessity and advisability of lawyers demanding the exclusion of sources of evidence obtained directly or indirectly in violation of fundamental rights. To this end, against the widespread (and inexplicable) belief that the appropriate procedural moment is that of Article 786.2 of the Criminal Procedure Act –that is, at the beginning

prosecuting parties at least a few days before the trial date in order to increase the chances of scrutinizing the case and, thereby, of the extraprocedural debate, as well as the necessary reflection by both lawyers and defendants, who all too often are forced to decide about their life and assets within seconds or minutes in the immediate surroundings of the courtroom. Ultimately, it is a matter of exercising self-responsibility.

One could argue that, in reality, an innocent person never agrees to a plea, but for many different reasons, such a statement is far from reality.

As a case in point, consider what occurred in the case resolved by the judgment issued by the Criminal Division of the National Court (3rd Section) 36/2018, on October 18. In a scheme involving alleged offenders of Russian nationality purportedly linked to money laundering activities, several of the accused acknowledged their criminal responsibility and accepted reduced sentences, while a few defendants maintained their innocence during

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of the oral trial hearings, as a preliminary issue– lawyers must internalise that the exclusionary rule of Article 11.1 of the Organic Law on the Judiciary prohibits unlawful evidence from producing effects. In other words, it is not merely a prohibition on the evaluation of evidence at trial, but on the deployment of any procedural effect. The obtaining of the status of suspect is one such effect, the imposition of precautionary measures is another, and so too is being subjected to prosecution (in the broad sense, that is, including the order continuing preliminary proceedings under the abbreviated procedure). Article 11.1 of the Organic Law on the Judiciary is self-sufficient and directly applicable in any proceeding; moreover, if one prefers, Article 287.1 of the Civil Procedure Act, of supplementary application, supports this thesis. On this issue, see in detail CAMPANER MUÑOZ, J., *La confesión precedida de la obtención inconstitucional de fuentes de prueba*, Thomson-Reuters Aranzadi, Cizur Menor, 2nd edition, 2021, pp. 224–228.

the oral trial. The court made an unusual but bold and rigorous decision: it acquitted each and every one of the defendants (including those who had entered guilty pleas) considering that merely exhibiting Russian nationality and engaging in somewhat unorthodox economic operations could not be deemed to constitute the alleged offense. Unfortunately, however, this ruling represents an exception in the daily practice of criminal courts, and additionally, the refusal of several defendants to admit guilt decisively contributed to the court analyzing the evidence and the legal classification of the facts, despite the admission of guilt by many others.

In an even more recent case, addressed in Supreme Court Judgment 821/2023, of November 10, the high court openly accepted an application for review under Article 954 of the Spanish Criminal Procedure Act, where the accused had pled guilty to a charge of endangering public safety (driving without a license), but due to his dire economic situation, the conviction was annulled. It had been proven that, in fact, he did have a license and his conduct fell within the realm of a mere administrative infraction.

CARNELUTTI already warned that "it would be unfortunate if the judge were to reason as follows: the accused has confessed to having killed; therefore, he has killed."[212] He issued this warning because experience had shown –and continues to show– that there are cases in which a person confesses to a crime he did not commit. For his part, ROXIN rightly emphasized that the judicial authority may give credence to the defendant's

212 CARNELUTTI, F., *Las miserias del proceso penal*, Librería El Foro (Clásicos del Derecho Collection), Buenos Aires, 2006 (trans. by N. VÁZQUEZ), p. 50.

confession instead of to the statements of potential prosecution witnesses; however, since a confession does not necessarily yield certain results, it may in fact be false for a variety of reasons, such as the desire to enter prison, to obtain an alibi in relation to a more serious charge, or to shield the true perpetrator.[213] More recently, GASCÓN and LASCURAÍN[214] have identified as the principal reasons why an innocent person may agree to a plea the avoidance of the risk of a harsher sentence; the costs of the proceedings (including reputational costs); and the costs imposed on third parties.[215]

If to the above we add that the confession of the defendant was the *regina probationum* of the inquisitorial procedure of the Ancien Régime –which, moreover,

213 ROXIN, C., *Strafverfahrensrecht*, C.H. Beck, Munich, 1995, pp. 92–93.

214 GASCÓN INCHAUSTI, F., and JASCURAÍN SÁNCHEZ, J.A., "¿Por qué se conforman los inocentes?", *Indret: Revista para el análisis del Derecho*, No. 3/2018.

215 In the words of these authors, which I fully endorse, the benefit may be 'for the reputation and proper functioning of the company managed by the person who pleads guilty and who, in public opinion, is identified with it, and whose reputation may be damaged as a result of being accused. Faced with the reputational and business cost that may arise from having a criminal case prolonged over time and fueled by public debate, entering into a plea agreement may be sensible in order to put an end to the negative media impact that harms the company's operations or its stock market valuation.' (p. 19).

In practice, especially in proceedings for corruption offenses or offenses against public health, it is not uncommon for the Public Prosecutor to bring charges against the wife of the principal accused in order to obtain the latter's plea agreement in exchange for her acquittal.

generally operated in association with torture,[216] it is not surprising that the original wording of the first paragraph of Article 406 of the Spanish Criminal Procedure Act (LECrim) clearly established that "the confession of the accused shall not exempt the Investigating Judge from carrying out all necessary procedures in order to be convinced of the truth of the confession and the existence of the offense."[217]

216 On this issue, see DE CASTRO, P., *Defense of Torture and National Laws that Established It: and Refutation [sic] of the Treatise Written Against It by Doctor Alfonso María de Acevedo*, Miguel Escribano, Madrid, 1778, reprinted by Maxtor, Valladolid, 2009.

217 Hundreds of years later, our frustrated prelegislator keeps alive the aforementioned conception of the confession of the accused from the moment when paragraph 3 of Article 322 of ALECrim 2020 proposed that such confession, unless a request is made for a judgment of conformity to be issued in accordance with the provisions of this law, does not dispense with the need to carry out all the investigative actions necessary to verify the existence of the offense and the participation in it of the person under investigation.

A similar wording was contained in paragraph 2 of Article 269 of BACPP 2013, when it declared that the confession does not dispense the Public Prosecutor from carrying out all the necessary investigative actions to verify the existence of the offense and the participation in it of the person concerned, without prejudice to the fact that, when during the investigative actions the prosecutor considers that, with the confession and the immediate conformity of the accused, with the consequent reduction of one third of the penalty pursuant to Article 270.3.3, the offense is sufficiently clarified in the interest of justice.

With regard to the current Article 406 of the Criminal Procedure Act, Supreme Court Judgmnt 651/2014 of October 7 has declared that it is, as is well known, a provision intended to prevent a person from suffering a penalty for an offense whose reality has not been proven. Thus, it has also been interpreted by different Provincial Courts. See, for example, SAP Málaga

Similarly, Article 820, referring to special proceedings for crimes committed through the press, provides that "the confession of a presumed author shall not suffice for him to be treated as such, and for the proceedings not to be directed against other persons, if from the circumstances of the individual or the offense there arise sufficient indications to believe that the confessor was not the actual author of the written or printed material published."

Our doctrine has understood that the purpose of these provisions is none other than to avoid the overvaluation of confessions in criminal proceedings, which is why they urge the investigating judge to go beyond merely obtaining a confession in his investigative activity.[218] However, in reality, practice often takes very different paths, as the investigating authority – and also the Public

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Section 1 491/2021 of November 11 or SAP Valencia Section 4 363/2021 of June 7

218 "Although they refer to the oral trial phase, it is worth recalling here the words of VÁZQUEZ SOTELO, J.L., *Presumption of Innocence of the Accused and the Tribunal's Inner Conviction*, Bosch Casa Editorial, Barcelona, 1984, p. 11: 'Never does a Judge's conscience rest so much as when he delivers his judgment on the reality of facts subject to trial, recognized and admitted by the very recipient of criminal punishment.'

Regarding Article 820 of the Criminal Procedure Act, see SÁNCHEZ MELGAR, J., 'Title V. On Proceedings for Crimes Committed through the Press, Engraving or Other Mechanical Means of Publication,' *Criminal Procedure. Commentary and Case Law* (Coord. SÁNCHEZ MELGAR, J.), Volume II, Sepín, Madrid, 2010, pp. 2960–2961, who states that this provision, in line with Article 406 of the Criminal Procedure Act, guides judges and courts in their evidentiary assessment, so that a mere confession does not by itself authorize conviction 'if the other elements indicate otherwise.'"

Prosecutor's Office – often settle for the mere confession of the suspect.[219]

In this regard, and in some way, the dissenting opinion of Judge CASAS BAAMONDE in STC 56/2009, of March 9, states: "Nor is it alien to our doctrine on the fundamental right to the presumption of innocence that the investigation of potentially criminal facts should not come to a halt due to the convenient statement of the potentially interested testimony of those involved, but should persist toward the rigorous finding of objective data that serve to determine [responsibility]."

Very instructive is STS 193/2008, of April 30, which states:

"(...) the confession was, indeed, regina probationum, but only in the criminal process of the ancien régime, that is, in the inquisitorial system, and generally in the inquisitorial one, as is well known, this probatory instrument usually operated in association with torture. That is why, rightly, it is considered the true foundation of all the abuses of that dark era. So much so that we may truly speak of 'horrors and errors' committed under the weight of confession as evidence. And it is well known that the very existence of this outcome – painstakingly and thanks to the effort of enlightened thought – shocked consciences, changed sensibilities and generated the modern rule of law which, ultimately, led to the overcoming of such barbarity by abolishing the value of confession unless it is corroborated by evidence obtained with full procedural guarantees." This was a

219 See, for example, ASENCIO MELLADO, J.M., *Prohibited Evidence and Preconstituted Evidence*, Trivium, Madrid, 1989, p. 133.

prerogative rule, and the consecration of the *nemo tenetur se detegere* principle, that is, the right of the accused not to testify or to remain silent, especially against themselves. Thus, their statement was to be treated more as an (optional) means of defense. And if their confession was indeed voluntary, it should not be privileged, but rather rigorously viewed with suspicion. This is supported by the provision in Article 406 LECrim, which states that, when an accused person makes a self-incriminating statement, the judge is obligated to conduct the necessary investigative proceedings to ascertain the truth, because the confession alone, by itself, is not reliable.

However, a certain doctrinal sector argues that when it becomes impossible to obtain data that corroborates the accused's account and the judge or court believes the version is credible, nothing prevents it, in fact, from being accepted as probative evidence and, in addition, from treating the self-incriminating confession as sufficient evidence to override the presumption of innocence.[220] In line with this idea, DE LA OLIVA SANTOS[221] holds that

220 See, for example, ASENCIO MELLADO, J.M., *ibid*., p. 134; conversely, see GARCÍA MUÑOZ, P.L., 'Statements of Those Subject to Criminal Proceedings as Suspects, Defendants or Accused,' in *Studies on Criminal Evidence* (Dir. ABEL LLUCH, X., and RICHARD GONZÁLEZ, M.), Volume II, La Ley, Madrid, 2011, p. 182, who categorically argues that mere self-incrimination without further data cannot determine the participation of a defendant in the criminal judgment 'not so much due to a deficit of credibility in the person of the accused, but because of a logical and insurmountable lack of credibility in the statement itself.'

221 DE LA OLIVA SANTOS, A., 'Presumption of Innocence, Incriminating Evidence and Plea Agreements,' in GÓMEZ COLOMER, J.L. (Coord.), *Evidence and Criminal Procedure. Special Analysis of Prohibited Evidence in the Spanish System and*

in cases of minor offenses ("petty crime") the confession at trial should be rationally and empirically justified as a legally decisive element of conviction.[222] According to this author, based on "maximums of experience," in cases involving serious criminal acts the confession alone is not reliable, while when it comes to "less relevant, not extremely serious nor grave acts," the opposite may be upheld.[223]

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in Comparative Law, Tirant lo Blanch Treatises, Valencia, 2008, p. 73.

222 In this way, on the one hand, the conviction judgment is legitimised with genuine evidence (the confession), which complements that 'juridical-procedural transaction' that is conformity (which, by itself, as Professor DE LA OLIVA rightly maintains, is incapable of undermining the presumption of innocence), and, on the other hand, it contributes to the streamlining of criminal justice. In short, it would be a matter of introducing a North American component into our conformity regime, requiring the judge or court, among other things, to ensure –just as in the guilty plea– that there is a factual basis for the declaration of guilt, as explained by GASCÓN INCHAUSTI, F., 'Negotiated Criminal Justice …,' *op. cit.*, by asking the defendant to recount the facts (in the American model, such a statement is made under oath).

223 The same may have been in the mind of the legislator in 2002 when, in contrast to the already mentioned Article 406 of the Criminal Procedure Act (LECrim) (which remained and still remains in force), Article 779.1.5 of the LECrim was given the following wording:

"If, at any time prior [to the continuation of the preliminary proceedings through the stages of the Abbreviated Procedure], the accused, assisted by his lawyer, has acknowledged the facts in the presence of the court, and these constitute an offence punishable by a penalty within the limits provided for in Article 801 [which correspond to what is commonly referred to as 'petty criminality'], the judge shall immediately order that the Public Prosecutor and the parties who have entered an appearance be summoned so that they may state whether

In any case, the confession must be assessed in light of the criterion of free assessment of evidence from article 741 of the LECrim, together with the entire body of evidence available, the Second Chamber of the Supreme Court[224] having been entrusted with distinguishing, in this regard, between evidence of the

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they file an indictment with the consent of the accused. If so, urgent proceedings shall be initiated and the continuation of the proceedings shall be ordered in accordance with the procedures provided for in Articles 800 and 801."

Along the same lines, it should be noted that Law 41/2015 of 5 October brought about the theoretical introduction in Spain of the so-called criminal *"payment order"* procedure, or procedure *"by acceptance of a decree"*, which essentially allows the sanction proposed by the Public Prosecutor to be converted into a final conviction in cases involving minor offences, even where the accused has not been summoned to give a statement, it being sufficient that he merely appear and accept the proposal while assisted by counsel (Articles 803 bis a) et seq. LECrim).

On this procedure, see ASENCIO MELLADO, J.M., *El proceso por aceptación de decreto*, Tirant Lo Blanch, Valencia, 2016; as well as LÓPEZ SIMÓ, F. and CAMPANER MUÑOZ, J., *El proceso por aceptación de decreto o monitorio penal*, Reus, Madrid, 2017.

224 Since the old Supreme Court Judgment of 18 January 1989. See also the more recent Supreme Court Judgments 290/2010, of 31 March; 512/2017, of 5 July; 145/2019, of 14 March; and 357/2023, of 16 May. In the words of the latter decision:

"This would be the case, for example, with those relating to the concealment of the woman's body and of the instruments (knife and saw) used for that purpose, whose disaggregation into several indicia would be artificial; therefore, they should only be considered as a single basic fact. Likewise, the traces of blood in the freezer chest, although they constitute a fundamental element for conferring credibility on the accused's confession regarding the act, the authorship and the circumstances of the dismemberment (Article 406 LECRim evidences the limited scope of a confession if the existence of the offence is not proven by other means), contribute nothing to establishing

existence of the crime (*corpus delicti*) and evidence of authorship, concluding that only the former cannot be proven exclusively by confession. "hus, on the one hand, Article 699 of the Criminal Procedure Act, already at the plenary stage, prevents the defendant's conformity (or, rather, deprives of effect the confession made at trial), even when ratified by his counsel, in cases where there is no evidence of the corpus delicti.[225]

V.- Conclusions

The right to legal counsel is an essential corollary of the more general right to defense (a right in direct opposition to the right of accusation) and constitutes one of the two modalities (undoubtedly, the most important one) through which that right is exercised. Indeed, every person has the right to self-defense within the terms established by the legislator, that is, to intervene directly and personally in the criminal process conducted against them, but technical defense –through a lawyer freely chosen by the individual (heterodefense)– is the only one that can guarantee procedural fairness and, ultimately, the effective equality of procedural arms. The lawyer acts as the alter ego of the investigated or accused person, equipped with the technical knowledge and proce-

authorship of the death once this has been denied by the accused."–

225 In a similar sense, see the wording of Article 108(4) of the BACPP 2013.

Likewise, the wording proposed in the final clause of Article 172(3) of the ALECrim 2020 is also noteworthy:

"If the accepted penalty exceeds five years' imprisonment, the judge shall hear all the parties regarding the existence of reasonable indicia of criminality additional to the acknowledgment of the facts."

dural tools necessary to protect their fundamental rights in general and their liberty in particular. Legal counsel, then, constitutes the quintessence of the right to defense and is embodied in a professional trained to engage with the accusation both procedurally and dialectically.

In Spain, there is no regulation ensuring the effectiveness of legal assistance, nor are there (explicitly) any procedural consequences for a harsh reality: the ineffectiveness of certain legal defenses in the criminal jurisdiction, stemming from a lack of training, responsibility, and skill on the part of the attorney, which crystallizes into the defendant's helplessness.

This is not a retrospective scrutiny or an evaluation of whether legal counsel was effective or not. However, there are minimum standards of professional competence and courtroom performance that defense counsel must meet. If those standards are not upheld, to the extent that they fall below the minimum threshold, the result may leave the defendant defenseless –or worse, may harm them in a "comfortable" procedural scenario where the aim is simply to maintain the status quo and avoid worsening the situation (by asking questions, submitting evidence, etc.) –but which results in blatantly unfortunate actions. In such a scenario, the very core of the right to defense is undermined by causes attributable to those meant to uphold it– paradoxically turning the defender into a threat to the accused. In form and appearance, the right to legal counsel may seem fulfilled, but in truth, it may have been nullified by the very lawyer, to the point of disappearing materially and becoming unrecognizable.

In my opinion, we must avoid swinging to the extremes of the pendulum and instead seek balance. It is unreasonable not to meet the minimum core of the right to defense in general –and the right to legal counsel in

particular– when, in Spanish courts, this issue remains a taboo subject. While there is no need to reach the level of scrutiny of North American puritanism –*sit venia verbo*–, ex ante reasonableness of minimally competent legal assistance is essential.

There exists a structural training issue that explains the lack of skill in certain legal defenses within the criminal jurisdiction, a problem that should be addressed primarily by universities and bar associations. This issue affects both private lawyers and public defenders equally, despite the bar associations' efforts to ensure a minimum level of experience and training for attorneys assigned to especially sensitive public defense cases.

These situations would not arise (or at least would be reduced) if measures were adopted to address the root of the problem, starting from the ground up –that is, through proper training– and by requiring a minimum level of experience before an attorney is qualified to submit extraordinary appeals such as cassation appeals. Italy provides a good example, where cassazionistas (cassation lawyers) enjoy considerable prestige because they must demonstrate a series of competencies to be licensed. This contrasts sharply with the situation in Spain, where practically any lawyer, even a newly licensed one with no experience in the criminal jurisdiction, may file cassation appeals before the Second Chamber of the Supreme Court.

It could also have a palliative effect on the current dramatic situation if Spain moved toward a system of mandatory continuing legal education, similar to Denmark's. There, every three years, lawyers and legal assistants must regularly participate in 54 hours of "mandatory continuing legal education for the legal profession" if they wish to continue practicing law.

Neither Spanish legal doctrine nor jurisprudence has paid attention to this structural problem of the criminal process, which lies in the provision of ineffective legal assistance. Nor have universities or bar associations.

The Constitutional Court openly acknowledges the (alleged) lack of legal provisions for supervising the effectiveness of legal assistance, but it does not explain why such oversight should be limited only to defendants with court-appointed counsel, considering that those represented by privately hired lawyers hold the same fundamental rights and that the principle of equality among defendants must prevail.

What matters is what (effectiveness or ineffectiveness), not who (court-appointed or private). Moreover, when the constitutional court identifies public defenders as those who provide free legal aid, it incurs in a false dichotomy that does not align with how this matter is regulated. Court appointment and gratuity are not synonymous and should not be equated; one refers to the mandatory designation in the process, the other to who bears the cost. Free legal aid necessarily involves the designation of a public defender and solicitor. However, a court-appointed lawyer is not automatically free of charge, unless the defendant's lack of means to litigate is proven.

Thus, ensuring the effectiveness of legal assistance is part of the judiciary's responsibilities, and no distinctions should be made based on how the lawyer was designated or who pays their fees. Nor does the origin of the trust placed in the lawyer justify any differentiation. That trust operates intra –between client and lawyer– and lacks, *per se*, procedural relevance. By contrast, the fulfillment of the core of the right to legal assistance is projected *ad extra*, toward the judiciary, and therefore, it holds

procedural significance in a regulated system where, as shown, the judge or court has a duty of oversight.

We must not confuse this structural, historical, and perhaps age-old inequality of arms between defense attorneys and prosecutors with an excuse for the judiciary to avoid responsibility when a lack of skill or inferiority arises on the part of the defense.

The problem analyzed in this research becomes more pronounced in light of what could be called legislative anemia: our legal framework does not contemplate the existence of ineffective legal assistance, nor how the judicial body should act if it detects it, and even less so what procedural consequence should be attached to such a procedural tragedy. The recently enacted Organic Law on the Right to Defense represents yet another missed opportunity.

Recently, the Second Chamber of the Spanish Supreme Court has attempted to overcome this normative void by resorting to the so-called Strickland standard, drawn from the jurisprudence of the United States Supreme Court. However, as highlighted by the best North American legal doctrine, the Strickland test would only be useful to address one of the four modalities of ineffective legal assistance. Therefore, reducing this complex and multifaceted issue to the lens of Strickland reflects a narrow and wholly unsatisfactory approach.

While in Spain and in the rest of the European Union member states the floodgates have not been opened, in the United States of America it is quite common to request the review of convictions (broadly speaking, not only through extraordinary appeals) based on claims of ineffective assistance of counsel (IAC). This is so widespread that even prison law textbooks include a

chapter dedicated to conviction review based on the well-known doctrine of ineffective assistance of counsel. Moreover, while in our legal culture it may be frowned upon –even punished on ethical grounds– for a lawyer to criticize the work of a prior lawyer, to the extent that a procedural document is based specifically on that lawyer's ineffectiveness, in the United States, the Criminal Justice Standards published by the American Bar Association serve as a powerful tool: they are clear and precise in encouraging the new attorney to explicitly point out the potential ineffectiveness of the former lawyer.

A scenario of ineffective legal assistance results in helplessness for the defendant. The core issue is how to articulate and ground a claim in our legal system for such a serious situation. In order to provide the judicial authority with remedial tools, it is necessary to frame this problem within the grounds for nullity of proceedings provided in Article 238 of the Spanish Judiciary Act (LOPJ)—specifically in section 3, which contemplates helplessness as a conditio sine qua non. However, a difficulty arises: what would be the essential procedural rule that has allegedly been violated? A reading of Article 546.1 LOPJ, in relation to Article 7 of the same legal body, through the lens of the fundamental right to effective legal assistance, allows one to conclude that in cases where the judicial authority fails to guarantee assistance (in the broad sense) of legal counsel "under the terms established in the Constitution," i.e., a minimally competent and effective assistance, then the judge or court has neglected its duty of oversight and, in doing so, has bypassed the most essential procedural guarantees. In such cases –without the need to overextend the argument or distort the meaning of Article 546.1 LOPJ– the core procedural rules that have been violated can be reduced to an infringement of the fundamental right to

effective legal defense from two angles: first, due to the inadequate performance of the lawyer, and second, due to the abdication of judicial oversight duties. Therefore, this violation of a fundamental right may be invoked as a "super cause" (supracausa) of nullity, which fits perfectly within Article 238.3º LOPJ.

In principle, the nullity of proceedings should be raised on occasion and through the proper appeal against the corresponding judicial decision (Article 240.1 LOPJ). Exceptionally, it may be brought against final judgments (Article 241.1 LOPJ). The problem lies in the fact that, due to the rule of functional competence for resolving this incident, the law assigns the resolution to the same judge or court that issued the ruling, even when it has become final (second paragraph of Article 241.1 LOPJ), which renders this mechanism practically illusory.

Once the judicial authority verifies manifestly ineffective legal assistance, which fails to meet a minimum standard of competence, the procedural consequence ...the procedural consequence can be none other than the nullity of the proceedings, with retroactive effect to the moment immediately prior to the lawyer's intervention, in order to restore the violated legal order and thus repair the helplessness that should never have occurred in the context of a trial with all guarantees, where equality and adversarial defense must be undisputed protagonists.

More than half of criminal proceedings in Spain end through strict plea agreements, and –adding partial plea agreements– it is highly likely that they account for three-quarters of all criminal trials. This exposes a critical risk: the possibility of convicting innocent defendants due to ineffective legal counsel during plea procedures. This occurs because the Spanish criminal process does not

provide any control mechanism to verify the existence of incriminating evidence when regulating plea agreements.

The ideal scenario –and certainly the one most respectful of fundamental rights– would be, de lege ferenda, for the court, when presented with a plea agreement, to be able to verify the existence of incriminating evidence, and –if such evidence was unconstitutionally obtained– to be obliged to assess its inadmissibility and refuse the plea, issuing an acquittal in cases where no prima facie incriminating evidence exists to rebut the presumption of innocence. This applies either because the evidence never existed or was excluded due to violations of fundamental rights.

To complete the proposed system –and overcome the current legal doctrine of non-appealability of plea agreements– appeals should be allowed in those cases where the defendant alleges, in a well-founded manner: 1. A violation of the presumption of innocence due to ineffective legal counsel, or 2. A breach of the right to a fair trial with full guarantees due to that same ineffective assistance, especially when the plea agreement was reached without prior exclusion of unconstitutionally obtained evidence.

This research has demonstrated that in England and Wales, appeal is fully possible against plea-based judgments when grounded on ineffective assistance of counsel.

An intermediate solution –*rectius*, a compromise– in theory, but impractical in reality, would involve drawing inspiration from the Federal Rules of Criminal Procedure in the United States and allowing the defendant to conditionally plead guilty (*conditional guilty plea*), while reserving in writing the right to appeal an unjust denial

of a motion, such as a motion to suppress. However, since this conditional admission of guilt must be expressed with the consent of both the court and the prosecutor, this legal avenue would, at least in Spain, lack any real practical path.

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7.2.- Constitutional Court

STC (First Chamber) 31/1981, of July 28.

ATC (Second Section) 111/1982, of March 10.

STC (Second Chamber) 42/1982, of July 5.

STC (First Chamber) 47/1987, of April 22.

STC (Plenary) 37/1988, of March 3.

STC (Second Chamber) 90/1988, of May 13.

STC (Second Chamber) 167/1988, of September 27.

STC (Second Chamber) 101/1989, of June 4.

STC (Second Chamber) 112/1989, of June 19.

STC (Second Chamber) 50/1991, of March 11.

STC (First Chamber) 178/1991, of September 19.

STC (First Chamber) 64/1992, of April 29.

STC (Second Chamber) 162/1993, of May 18.

STC (Second Chamber) 91/1994, of March 21.

STC (First Chamber) 181/1994, of June 20.

STC (First Chamber) 280/1994, of October 17.

STC (First Chamber) 316/1994, of November 28.

STC (Second Chamber) 11/1995, of January 16.

STC (First Chamber) 18/1995, of January 24.

STC (First Chamber) 29/1995, of February 6.

STC (First Chamber) 169/1996, of October 29.

STC (First Chamber) 184/1997, of October 28.

STC (Second Chamber) 233/1998, of December 1.

STC (Second Chamber) 105/1999, of June 14.

STC (Second Chamber) 162/1999, of September 27.

STC (Second Chamber) 202/2000, of July 24.

STC (First Chamber) 237/2001, of December 18.

STC (Second Chamber) 109/2002, of May 6.

STC (Second Chamber) 47/2003, of March 3.

STC (Second Chamber) 60/2003, of March 24.

STC (First Chamber) 87/2003, of May 19.

STC (Second Chamber) 5/2004, of January 16.

STC (First Chamber) 141/2005, of June 6.

STC (First Chamber) 56/2009, of March 9.

STC (Second Chamber) 160/2009, of June 29.

STC (Second Chamber) 26/2010, of April 27.

STC (Second Chamber) 80/2011, of June 6.

STC (Second Chamber) 179/2014, of November 3.

STC (Second Chamber) 180/2020, of December 14.

STC (Full Court) 35/2021, of February 18.

STC (Second Chamber) 151/2021, of September 13.

Decision of September 9, 2024, by the First Chamber, by which the disciplinary proceedings opened aga-

inst the attorney who signed the petition for constitutional protection appeal 1739-2024 are resolved.

7.3.- Supreme Court (Second Chamber)

STS 1417/1988, of March 1.

STS 2373/1990, of January 18.

STS 722/1989, of July 19.

STS 7273/1990, of October 15.

STS 758/1997, of May 30.

STS 1304/2000, of July 14.

STS 114/2001, of May 31.

STS 1652/2001, of September 17.

ATS 595/2004, of April 15.

ATS 1408/2005, of July 7.

STS 193/2008, of April 30.

STS 592/2009, of June 5.

STS 1117/2009, of November 11.

STS 125/2010, of February 16.

STS 256/2010, of March 8.

STS 290/2010, of March 31.

STS 1022/2010, of November 17.

STS 1077/2011, of October 10.

STS 892/2012, of November 15.

STS 137/2013, of February 21.

STS 208/2013, of March 15.

STS 679/2013, of July 25.

STS 803/2013, of October 31.

STS 72/2014, of January 29.

STS 487/2014, of June 9.

STS 651/2014, of October 7.

STS 327/2016, of April 20.

STS 821/2016, of November 2.

STS 512/2017, of July 5.

ATS of July 7, 2017.

STS 60/2018, of February 2.

STS 158/2018, of April 5.

STS 145/2019, of March 14.

STS 447/2019, of October 3.

STS 298/2020, of June 11.

STS 407/2020, of July 20.

STS 636/2020, of November 26.

STS 655/2020, of December 3.

STS 686/2020, of December 14.

STS 47/2021, of January 21.

STS 370/2021, of May 4.

STS 229/2021, of March 11.

STS 383/2021, of May 5.

STS 651/2021, of July 20.

STS 728/2022, of July 14.

STS 768/2022, of September 15.

STS 906/2022, of November 17.

ATS 85/2023, of January 12.

STS 14/2023, of January 19.

STS 357/2023, of May 16.

STS 380/2023, of May 19.

ATS 20418/2023, of June 27.

STS 522/2023, of June 29.

STS 649/2023, of September 5.

STS 651/2023, of September 20.

STS 714/2023, of September 28.

STS 821/2023, of November 10.

STS 930/2023, of December 18.

STS 202/2024, of March 5.

STS 342/2024, of April 25.

STS 403/2024, of May 16.

STS 574/2024, of June 7.

STS 728/2024, of July 11.

STS 782/2024, of September 19.

7.4.- Provincial Courts

SAP Madrid (Section 30ª) 39/2012, of January 30.

SAP Balearic Islands (Section 2ª) 28/2018, of January 18.

SAP Barcelona (Section 6ª) 84/2020, of February 4.

SAP Valencia (Section 4ª) 363/2021, of June 7.

SAP Málaga (Section 1ª) 491/2021, of November 11.

SAP Asturias (Section 2ª) 175/2022, of May 25.

SAP Madrid (Section 23ª) 2/2024, of January 8.

SAP Palma (Section 1ª) 21/2024, of January 9.

AAP Palma (Section 1ª) of May 2, 2024.

AAP Madrid (Section 17ª) of July 16, 2024.

7.5.- HIGH COURTS OF JUSTICE (CIVIL AND CRIMINAL DIVISION)

STSJ Madrid 87/2018 (Section 1ª), of June 26.

STSJ Catalonia 247/2023 (Criminal Appeals Section), of July 17.

7.6.- NATIONAL COURT (CRIMINAL DIVISION)

SAN (Section 3ª) 36/2018, of October 18.

AAN (Section 4ª) 544/2021, of September 24.

AAN (Section 1ª) 716/2022, of November 22.

7.7.- UNITED STATES SUPREME COURT (SUPREME COURT OF THE UNITED STATES)

Judgment in the case Anders v. California, 386 U.S. 738, 743 (1967).

Judgment in the case Engle v. Isaac, 456 U.S. 107 (1982).

Judgment in the case Strickland v. Washington, 466 U.S. 668 (1984).

Judgment in the case United States v. Cronic, 466 U.S. 648 (1984).

7.8.- Court of Appeals of the United States of America, Seventh Circuit (U.S. Court of Appeals, Seventh Circuit)

Judgment in the case *Williams* v. *Twomey*, 510 F.2d 634, of March 24, 1975.

7.9.- Supreme Court of Austria (*Oberster Gerichtshof*)

Judgment of June 30, 2011, 11 Os 67/11d.

7.10.- Federal Supreme Court of Switzerland (*Bundesgericht*)

Judgment of July 14, 2009, 1B_67/2009.

Judgment of July 22, 2013, 1B_110/2013.

Judgment of January 22, 2014, 1B_398/2013.

Judgment of February 9, 2016, 6B_1078/2014.

Judgment of June 17, 2016, 6B_307/2016.

Judgment of March 21, 2023, 1B_479/2022.

7.11.- Criminal Division of the Court of Appeal of England and Wales

Judgment in the case *Inss* [1974] 60 Cr. App. R. 231.

Judgment in the case *Swain* [1986] Crim. L.R. 480.

Judgment in the case *Ensor* [1989] 2 All ER 586.

Judgment in the case *Verney* [1909] 2 Cr. App. R. 107.

Judgment in the case *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223.

Judgment in the case *Clinton* [1993] 2 All ER 998.

Judgment in the case *Donnelly* [1998] Crim. L.R. 131.

Judgment in the case *Whatmore* [1999] Crim. L.R. 87.

Judgment in the case *Richards* [2000] All ER (D) 900.

Judgment in the case *Ullah* [2000] 1 Cr. App. R. 351.

Judgment in the case *Nangle* [2001] Crim L.R. 506.

Judgment in the case *Boodram* v. Trinidad and Tobago [2001] UKPC 20.

Judgment in the case *Day* [2003] EWCA Crim 1060.

Judgment in the case *Saik* [2004] EWCA Crim 2936.

Judgment in the case *Abdroikov* [2007] UKHL 37.

Judgment in the case *Nightingale* [2013] EWCA Crim 405.

Judgment in the case *Ilyas Hanif* [2014] EWCA Crim 1678.

Judgment in the case *Achogbuo* [2014] EWCA Crim 567.

Judgment in the case *Ekaireb* [2015] EWCA Crim 1936.

Judgment in the case *McCarthy* [2015] EWCA Crim 1185.

Judgment in the case *Jones* [2019] EWCA Crim 1059.

Judgment in the case *Kakaei* [2021] EWCA Crim 503.

Judgment in the case *AB* [2021] EWCA Crim 2003.

Judgment in the case *BWM* [2022] EWCA Crim 924.

Judgment in the case *BYA* [2022] EWCA Crim 1326.

7.12.- ITALIAN SUPREME COURT (*CORTE SUPREMA DI CASSAZIONE*)

Judgment No. 3631, of December 20, 2016.

Judgment No. 2112, of November 16, 2021.

Judgment No. 30262, of May 30, 2023.

Judgment No. 5983, of December 19, 2023.

7.13.- Italian Constitutional Court (*Corte Costituzionale*)

Judgment No. 113, dated April 4–7, 2011.

7.14.- First Section of the Criminal Court of Florence (*Tribunale di Firenze*)

Order No. 100, dated April 5, 2024 (issue of unconstitutionality).

The right to legal assistance constitutes one of the fundamental pillars of criminal justice. However, the mere presence of a lawyer does not always guarantee that the right of defense is truly protected. In this work, *Jaime Campaner Muñoz* examines the problem of ineffective legal assistance through a rigorous analysis of constitutional doctrine, case law, and comparative models, and offers original solutions to prevent the ineffectiveness of legal assistance, as well as novel remedial mechanisms.

The book explores how different legal systems confront this challenge and reflects on the responsibility of legal professionals and judicial authorities to ensure that the right of defense functions as a genuine guarantee and not merely as a formal requirement. By situating this reflection within the framework of the Spanish legal system and engaging with international perspectives, this study offers a valuable contribution to the debate on fairness and responsibility in criminal proceedings.

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