Volume 10
Number 3 *Symposium on The Attorney-Client Relationship: Rights and Duties*
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Symposium on The Attorney-Client Relationship: Rights and Duties

Effective Assistance of Counsel: A Constitutional Right in Transition

NOTE

EFFECTIVE ASSISTANCE OF COUNSEL: A CONSTITUTIONAL RIGHT IN TRANSITION

INTRODUCTION

The assurance of the sixth amendment must have always sounded well to indigent criminal defendants: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[1] Prior to *Gideon v. Wainwright*,[2] however, this right applied only to prosecutions in federal courts;[3] the indigent defendant in a state court could assert a right to counsel solely by means of the broader due process provision of the fourteenth amendment.[4] When a convicted defendant further wished to test the strength of that right by claiming that his court-appointed counsel inadequately represented him, the standard employed by the courts to test his claim was generally the same as that applied to any alleged violation of due process: representation was ineffective only when defense counsel's efforts were so perfunctory, or so outrageous as to render the entire trial a mockery of justice.[5] This note explores the present judicial trend towards viewing the right to the effective assistance of counsel as derived not only from the due process clause, but more

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

2. 372 U.S. 335 (1963). In *Gideon*, the Supreme Court held that the sixth amendment right to counsel applied to the states through the fourteenth amendment in all felony prosecutions. Nine years later, the right to counsel was held to extend to all criminal prosecutions, including misdemeanors, where there exists the possibility of imprisonment. *See* Argersinger v. Hamlin, 407 U.S. 25, 37, 40 (1972).

3. Betts v. Brady, 316 U.S. 455 (1942). In Johnson v. Zerbst, 304 U.S. 458 (1938), the Supreme Court explained that the assistance of counsel is an "essential jurisdictional prerequisite" to a federal court's authority to try an accused. If that right is not properly waived, the court's jurisdiction is lost by its failure to appoint counsel as required by the sixth amendment. Since the court has no jurisdiction, the judgment is void and is therefore open to collateral attack. *Id.* at 467-68.

4. "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

5. United States *ex rel.* Marcelin v. Mancusi, 462 F.2d 36, 42 (2d Cir. 1972); O'Malley v. United States, 285 F.2d 733, 734 (6th Cir. 1961); Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

importantly, from the assistance of counsel clause of the sixth amendment.

Gideon v. Wainwright marked the necessary first step by the Supreme Court towards a stricter demand that appointed counsel render effective representation. *Gideon* highlights the right to counsel as an essential feature of the adversary system. The *Gideon* Court determined that, because of the very nature of the adversary system, it is inherently and fundamentally unfair to try a defendant who is without benefit of counsel. Recognizing that a defendant-layman could not be expected to mount an adequate defense without the special skill and training of a lawyer, the Court perceived the assistance of counsel in criminal cases as a necessity rather than a luxury.[6]

This accent on the adversary system holds obvious implications for ineffectiveness of counsel cases. A trial is just as easily tainted by ineffective counsel as it is by the absence of counsel. In either case, the lack of adequate representation for the defendant effectively undermines the adversary process. As depicted by the metaphor of the three-legged stool of criminal justice,[7] the adversary system consists of the trial judge, the prosecution and the defense attorney. Any inequality among the three will result in an imbalance depriving the defendant of his "day in court."[8] As the Supreme Court asserted in *McMann v. Richardson*,[9] "if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel."[10]

Although *Gideon* emphasized the importance of the right to counsel as a sixth amendment right, it did not have an immediate impact upon cases alleging ineffective assistance of appointed counsel.[11] Instead, courts simply continued to apply general due

6. 372 U.S. at 344.

7. A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICE (app. draft 1971).

8. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 26-27 (1973) [hereinafter cited as Bazelon]. *See also* MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1961); Smotherman v. Beto, 276 F. Supp. 579 (N.D. Texas 1967).

9. 397 U.S. 759 (1970).

10. *Id.* at 771. *See also* Tollet v. Henderson, 411 U.S. 258 (1973).

11. This note addresses mainly alleged deficiencies of counsel appointed to indigent defendants, as opposed to privately retained counsel. Although most courts today make no distinction between appointed and retained

counsel for the purposes of the ineffectiveness issue, *see, e.g.*, Crismon v. United States, 510 F.2d 356 (8th Cir. 1975); United States v. McCord, 509 F.2d 334 (D.C. Cir.), *cert. denied*, —— U.S. —— (1974); United States v. Marshall, 488 F.2d 1169 (9th Cir. 1973); Moore v. United States, 432 F.2d 730 (3d Cir. 1970); Ellis v. Oklahoma, 430 F.2d 1352 (10th Cir.), *cert. denied*, 401 U.S. 1010 (1970); Porter v. United States, 298 F.2d 461 (5th Cir. 1962); Craig v. United States, 217 F.2d 355 (6th Cir. 1954), the two situations have been distinguished in the past. Several courts have held that a defendant may never raise the ineffectiveness of his privately retained counsel. *See, e.g.*, O'Malley v. United States, 285 F.2d 733, 734 (6th Cir. 1961); United States *ex rel.* Darcy v. Handy, 203 F.2d 407, 426 (3d Cir. 1953), *aff'd*, 351 U.S. 454 (1956); Weatherman v. Peyton, 287 F. Supp. 818 (W.D. Va. 1968). Two theories were advanced to justify this holding. First, proceeding under an agency theory, one line of cases indicates that the action of retained counsel is the action of the client; the lack of skill of the retained counsel must be "imputed to the defendant who employs him rather than to the state." United States *ex rel.* Darcy v. Handy, 203 F.2d 407, 426 (3d Cir. 1953), *aff'd*, 351 U.S. 454 (1956). Therefore, the defendant is precluded from raising the ineffectiveness of the attorney he has chosen and employed.

More recently, however, courts are recognizing that the agency rationale is not always appropriate to criminal defendants and their attorneys. Unlike the law of agency in its proper commercial context, a criminally accused person is not always in a realistic position to guide and control the conduct of his retained lawyer. *See* Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289, 297 (1964) [hereinafter cited as Waltz]. Most criminal defendants are simply in no position to judge the competence of the lawyer whom they choose; they have to hire him on faith, relying on the fact that he has been admitted to the bar. Certainly, as one court observed, that fact alone is no guarantee that the attorney is competent to defend a criminal case. Ellis v. Oklahoma, 430 F.2d 1352 (10th Cir.), *cert. denied*, 401 U.S. 1010 (1970). Generally, the layman who has little expertise in choosing a lawyer ought not to be held totally responsible for his retained lawyer's competency. Garton v. Swenson, 497 F.2d 1137, 1139 n.4 (8th Cir. 1974). Thus, it would clearly be unfair to bind a defendant to the ineptitudes of his privately retained counsel.

Another theory which courts have used to restrict ineffectiveness claims in cases involving retained counsel refers to the "state action" requirement of the fourteenth amendment. Some courts have concluded that counsel's incompetency is constitutionally significant only when there is positive state action, most notably in the form of court appointment of counsel. *See, e.g.*, United States *ex rel.* Darcy v. Handy, 203 F.2d 407, 426-27 (3rd Cir. 1953), *cert. denied*, 346 U.S. 865 (1956); Wilkins v. Banmiller, 205 F. Supp. 123 (E.D. Pa. 1962), *aff'd*, 325 F.2d 514 (3d Cir. 1963). This position overlooks two important considerations. First, all attorneys, whether appointed or retained, are considered to be officers of the court, Thread v. United States, 354 U.S. 278, 281 (1957); therefore, the actions of either retained or appointed counsel should equally constitute state action. *See* Waltz, *supra* at 299. Secondly, it is the action of the state itself, by its judicial machinery and its judges' implicit condoning of ineffective defense counsel which permits the trial to fall below constitutional standards. *Cf.* Moore v. Dempsey, 261 U.S. 86

process concepts either directly through the fifth and fourteenth amendments,[12] or indirectly by reading them into the sixth amendment.[13] While this approach had the effect of ensuring that

(1923). This position is given additional credence by Shelly v. Kramer, 334 U.S. 1 (1948), which held that private activities may be transposed into state action when an arm of the state judiciary is used to support that activity. Under this viewpoint it is the conviction itself, obtained in violation of the defendant's constitutional rights, which constitutes the requisite state action. *See generally* Waltz, *supra* at 296-301; Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434, 1437-38 (1965). Accordingly, most courts now hold that defense counsel's status as retained or appointed is immaterial to the issue of ineffectiveness. *See* cases cited in first paragraph above.

While the distinction between retained and appointed counsel in ineffectiveness cases has thus eroded, some fragments of the distinction nevertheless remain. At least one court, reasoning that the sixth amendment more strictly protects indigent defendants, reserves the due process test of fairness for allegations of retained counsel's ineffectiveness. Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1975). *See* note 130 *infra* and accompanying text. Another court, while acknowledging that the constitutional standards for retained and appointed counsel may be identical, recognizes serious practical difficulties when retained counsel is involved. Garton v. Swenson, 497 F.2d 1137, 1139 n.4 (8th Cir. 1974). For example, while a court might, during trial, choose to question the actions of appointed counsel, (*see* Bazelon, *supra*, note 8, at 16) such a challenge of retained counsel's competency might meet with a claim by the defendant that the judge was unduly interfering with trial strategy. Garton v. Swenson, *supra* at 1139 n.4. Also, there is a recurring sentiment that an allegation of ineffectiveness by retained counsel, possibly guided by "misdirected zeal," is particularly suspect. Cross v. United States, 392 F.2d 360, 367 (8th Cir. 1968) (retained counsel tried on appeal to raise his own ineffectiveness; the court accused him of trying to fabricate a defense in lieu of any other). One such suspicion is that the defendant and his private counsel are apt to sow reversible, constitutional error into the record of an obviously losing cause. Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 541-48 (1969). It should be recognized, however, that the issue in effectiveness cases is not the culpability of the attorney, nor of the defendant in choosing his attorney, but the constitutional right of the defendant to effective assistance. Accordingly, there is an increased tendency on the part of the circuits to disregard such a distinction between retained and appointed counsel.

12. *See, e.g.*, United States v. Carr, 459 F.2d 16, 18 (7th Cir. 1972) (issue identified only as whether counsel is so incompetent that "the essential fairness of the proceedings is impugned," thus rendering defendant's trial "invalid as violative of due process"); Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965) (while not mentioning any specific constitutional provisions, the court automatically invoked the traditional, fourteenth amendment mockery of justice test).

13. *See, e.g.*, United States v. Robinson, 502 F.2d 894, 895-96 (7th Cir. 1974) (the court still applied the mockery of justice test of the whole pro-

the defendant received a "fair trial" in compliance with due process requirements, it did not strictly comport with *Gideon*'s requirement of equal partisan advocacy under the sixth amendment.[14] Proponents of the due process approach rationalized their acceptance of such minimal standards for defense counsel, however, as a reflection of the policy that finality in criminal cases outweighs the consequences of inferior defense work.[15] Practically,

ceeding, yet implicitly recognized the sixth amendment as the applicable constitutional provision); United States v. Stahl, 393 F.2d 101, 103 (7th Cir.), *cert. denied*, 393 U.S. 879 (1968) (the court noted that the sixth amendment right to counsel is "a matter of substance, not form," but then looked only to see if other substantive rights of the defendant had been violated).

14. Gideon v. Wainwright, 372 U.S. 335, 344 (1963). *See* pp. 528-31 *infra*.

15. The concept of finality applies chiefly to convictions collaterally attacked rather than to challenges on direct appeals. This note will address the problem of ineffectiveness generally. It should be recognized, however, that the bulk of ineffectiveness claims are traditionally raised in such collateral attack as habeas corpus. *See* 28 U.S.C. §§ 2241, 2254, 2255 (1971). It has even been said that the issue of ineffectiveness is primarily a habeas corpus problem. *See* 5 AM. JUR. P.O.F.2d, *Ineffective Assistance of Counsel*, § 11 (1975); Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927, 939 (1973) [hereinafter cited as Bines]; Waltz, *supra* note 11, at 290.

However, the issue of ineffectiveness of counsel may also be raised on direct appeal of a conviction or sentence, or in a motion for a new trial. *See* FED. R. CRIM. P. 33 (1976). Some courts even indicate a greater willingness to reverse on grounds of defense counsel's ineffectiveness when the case is before them on direct appeal. The reason for this willingness is that the concept of finality has not yet attached to these convictions. In contrast, habeas corpus claims involving ineffectiveness often arise years after the actual trial, *see, e.g.*, United States *ex rel.* Feeley v. Ragen, 166 F.2d 976 (7th Cir. 1948) (eight year lapse between the trial and the date of the habeas corpus petition), when witnesses may no longer be available by reason of death or otherwise, and memories are dulled by the intervening passage of time. Garton v. Swenson, 497 F.2d 1137, 1140 n.4 (8th Cir. 1974); Mitchell v. United States, 259 F.2d 787, 791 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958). Because of the difference in time between ineffectiveness claims arising on direct appeal and those arising on collateral attack, there is often a consequent difference in the quantum of proof necessary to sustain the claim. Some courts have held that "it requires a less powerful showing of inadequacy to sustain appellant's burden on direct appeal than is required on collateral attack." United States v. Hammonds, 425 F.2d 597, 600 (D.C. Cir. 1970). *See also* Garton v. Swenson, *supra;* Matthews v. United States, 449 F.2d 985 (D.C. Cir. 1971). The wording of Rule 33 seems to be supportive of this position, indicating that a new trial may be granted if only "in the interest of justice." FED. R. CRIM. P. 33 (1976).

The fact that finality attaches to convictions after final judgment may be one reason why the courts, even after *Gideon*, have been reluctant to depart from the due process-mockery of justice approach to ineffectiveness

this meant that only the most serious mistakes by counsel should constitute the deprivation of a fair trial.[16]

Since *Gideon*, the Supreme Court has been hesitant to address the problem of ineffective assistance of counsel.[17] But necessitated by the reasoning of *Gideon* itself and also by the broader dicta of the Court,[18] the federal circuits are gradually awakening to the

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claims. To adopt a stricter sixth amendment standard of competency, it is argued, would have the concurrent effect of broadening a prisoner's opportunity to claim successfully that his counsel was ineffective, a result that would be contrary to the traditionally "extraordinary remedy" of habeas corpus. Mitchell v. United States, 259 F.2d 787, 791 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958). However, inasmuch as the issue of ineffectiveness involves the possible deprivation of a constitutional right, any existing distinction between direct appeal and collateral attack is strongly questionable. As Mr. Justice Brennan has pointed out, "conventional notions of finality have no place where life or liberty is at stake and infringement of constitutional rights is alleged." Sanders v. United States, 373 U.S. 1, 8 (1963). Whether the issue arises on direct appeal or on collateral attack, the defendant should not have to serve a sentence obtained in violation of the adversary process. One court thus notes that the distinction arose at a time when ineffectiveness was only a due process issue, and implies that the distinction has been erased by the Supreme Court's imposition of the sixth amendment's more stringent requirements. United States v. DeCoster, 487 F.2d 1197, 1201-02 (D.C. Cir. 1973).

The Court of Appeals for the District of Columbia has suggested a longer-ranged answer to the lingering finality argument. Recognizing that a lawyer on appeal will rarely attack his own competency, the circuit now requires that new counsel be automatically appointed on appeal. This ensures that the record will be carefully reviewed for appeal, and the new lawyer is more apt to identify the inadequate representation which trial counsel would not have raised. By giving the defendant the opportunity to raise the ineffectiveness issue on direct appeal, the court thus obviates the need for the issue to be heard later on collateral attack. Bazelon, *supra* note 8, at 24-25. More generally, it may be that as the issue of ineffective assistance becomes less closely identified with habeas corpus, courts will become more amenable to listening to a defendant's sixth amendment argument. *See, e.g.*, United States *ex rel.* Williams v. Twoney, 510 F.2d 634 (7th Cir.), *cert. denied*, —— U.S. —— (1975) (motion for a new trial); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974) (motion to vacate sentence and judgment); United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973) (direct appeal of conviction).

16. Bines, *supra* note 15, at 929.

17. *See* Chambers v. Maroney, 399 U.S. 42, 54 (1970). *See* note 198 *infra*.

18. In the context of the guilty plea, the Court in McMann v. Richardson, 397 U.S. 759 (1970), stated:

> In our view a defendant's plea of guilty based on *reasonably competent advice* is an intelligent plea not open to attack on the ground

realization that allegation of a recognized sixth amendment violation deserves examination by a sixth amendment test. In light of *Gideon*, courts are increasingly questioning the propriety of the less demanding due process approach. If the sixth amendment requires closer examination of the alleged conduct which is endangering the equal balance of the adversary process, then perhaps the due process focus on the overall fairness of the trial is inappropriate to ineffectiveness claims. With this reasoning, several circuits have moved away from the due process-mockery of justice test of the whole proceedings, and have adopted more objective standards, which, under the direct authority of the sixth amendment, focus solely on the adequacy of counsel.[19]

> that counsel may have misjudged the admissibility of the defendant's confession [footnote omitted]. Whether a plea of guilty is unintelligent and therefore vulnerable . . . depends . . . on whether that advice is *within the range of competence demanded of attorneys in criminal cases.* . . . [D]efendants facing felony charges are entitled to the effective assistance of competent counsel [citation omitted]. . . . [I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel.

Id. at 771 (emphasis added). Three years later, the Court re-emphasized that the effectiveness of the attorney must be "within the range of competence demanded of attorneys in criminal cases." Tollet v. Henderson, 411 U.S. 258, 267-68 (1973).

19. The Third, Fourth, Fifth, Sixth, Seventh and District of Columbia Circuits have moved toward more objective standards. *See* United States *ex rel.* Williams v. Twomey, 510 F.2d 634 (7th Cir.), *cert. denied*, —— U.S. —— (1975); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973); Moore v. United States, 432 F.2d 730 (3d Cir. 1970); Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968). The First, Second, Eighth, Ninth and Tenth Circuits retain the mockery of justice test. *See* United States v. Jones, 512 F.2d 347 (9th Cir. 1975); United States v. Yanishefsky, 500 F.2d 1327 (2d Cir. 1974); Dunker v. Vinzant, 505 F.2d 503 (1st Cir. 1974); McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974); Lorraine v. United States, 444 F.2d 1 (10th Cir. 1971).

This note will deal mainly with the ineffectiveness issue as it has developed in the federal courts. Generally, the state courts lag far behind the federal courts in recognizing the impact of the sixth amendment's post-*Gideon* application to ineffectiveness claims. *See, e.g.*, Abbott v. State, —— Ark. ——, 508 S.W.2d 733 (1974); People v. Turner, 31 Ill. App. 3d 319, 333 N.E.2d 598 (1975); Baldwin v. State, 297 So. 2d 157 (Miss. 1974); Sullivan v. Warden, —— Nev. ——, 540 P.2d 112 (1975). *See also* Note, *Effectiveness of Counsel in Indiana: An Examination of Appellate Standards*, 7 IND. L. REV. 674 (1974).

The federal circuits are still remarkably disparate in their approaches to ineffectiveness of counsel claims. While the dialogue often sounds like a healthy dispute over the standard of competency, the actual conflict centers around the more basic issue of whether due process considerations or sixth amendment considerations should be controlling in effectiveness of counsel cases. That determination itself, in turn, dictates a standard consistent with those requirements. Further differences arise not only over the standard to be applied in measuring the adequacy of counsel, but also on the allocation of the burden of proof, and the quantum of prejudice, if any, necessary to substantiate the claim of ineffectiveness. This note examines these intercircuit differences, with an eye toward balancing the competing pragmatic and ideal interests—a resolution which the United States Supreme Court has not yet achieved.

THE DUE PROCESS RIGHT TO COUNSEL: THE MOCKERY OF JUSTICE STANDARD

The right to the effective assistance of counsel originated as a corollary of the due process right to counsel, and expanded slowly. Initially, the right to counsel was limited to criminal cases that arose in federal courts under the mandate of the sixth amendment.[20] But in *Powell v. Alabama*,[21] the Supreme Court indicated that the right to counsel was a fundamental right, protected also in the state courts by virtue of the fourteenth amendment due process clause. The federal courts of appeals, however, were in no hurry to acknowledge the impact of *Powell* upon cases alleging, not the absence of counsel, but the ineffective assistance of counsel. Fearing the practical effects that might ensue from a more liberal interpretation of the right to effective assistance, the federal circuits steadfastly reiterated that the right to effective assistance was a due process right whose violation merited only a strict scrutiny of the trial's overall fairness.[22]

The Supreme Court Mandate

Powell v. Alabama[23] was the vehicle which the Supreme Court in 1932 used to expand both the right to counsel and the require-

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

21. 287 U.S. 45 (1932).

22. *See, e.g.*, United States *ex rel.* Feeley v. Ragen, 166 F.2d 976 (7th Cir. 1948); Jones v. Huff, 152 F.2d 14 (D.C. Cir. 1945); Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

23. 287 U.S. 45 (1932).

ment that appointed counsel render effective assistance. In the famous case involving the "Scotsboro boys," the defendants were a group of itinerate black youths accused of the rape of a white girl. Indicted in the hostile white community of Scotsboro, Alabama, they were unable to contact friends or families. The defendants pleaded not guilty, whereupon the court appointed "all the members of the bar" of Scotsboro to represent them at trial.[24] The Supreme Court reversed the conviction, noting that the appointment of responsible counsel was required in the special circumstances of the case. Consistent with the expanding notion of rights protected by due process, the Court ruled that the right to counsel is one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[25] The right was seen as a necessary element of the overall "fair trial" requirements of the due process clause. Significantly, the Court further decided that, when the circumstances of the case required the appointment of counsel, the right to counsel meant the right to the "effective aid" of counsel.[26]

Subsequent decisions revealed a reluctance to extend the right to counsel beyond the circumstances of *Powell* or to liberalize the due process fairness test applied to claims of ineffective assistance. Most notably, the Court in *Betts v. Brady*[27] refused the invitation to incorporate the express guarantee of the sixth amendment through the due process clause to state prosecutions. The majority in *Betts* instead preferred the "less rigid and more fluid" right to counsel implicitly provided by due process.[28] When considering alleged violations of the right to counsel in state prosecutions, the courts were to address the totality of facts in a given case. The Court noted that what may on one occasion be shocking to a sense of justice and constitute a denial of fundamental fairness, might in other circumstances fall short of such a denial.[29]

The *Betts* opinion sharply disagreed with *Powell* on the fundamental nature of the right to counsel. Examining almost the identical historical material as *Powell*, the *Betts* Court arrived at the opposite conclusion: "[A]ppointment of counsel is not a funda-

24. *Id.* at 56.
25. *Id.* at 71-72.
26. *Id.*
27. 316 U.S. 455 (1942).
28. *Id.* at 462.
29. *Id.*

mental right, essential to a fair trial."[30] Consequently, *Betts* refused to require the appointment of counsel beyond "special circumstances" such as in *Powell*.[31]

Considering whether the circumstances warranted appointment of counsel, *Powell* necessitated an examination of each case to determine if the proceedings were consistent with the more general concept of fundamental fairness.[32] This approach was succinctly stated by Mr. Justice Frankfurter in *Malinski v. New York*:[33]

> Judicial review of that [due process] guaranty of the fourteenth amendment inescapably imposes upon this court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples.[34]

Thus, a finding of unfairness in the conduct of the trial due to a low level of defense representation would require a reversal on the ground that the defendant was deprived of his due process right to counsel. This approach, however, created serious problems of interpretation and application of the constitutional right to the assistance of counsel. The "exercise of judgment" was completely subjective; there was no objective standard by which to measure the level of the defendant's representation, nor was a close examination of his representation even required. The defense representation might be shockingly minimal, but if the result was considered otherwise fair to the defendant, the conviction would still be upheld. Hence, the decisions applying the concept of fundamental fairness in the years after *Betts* were neither consistent nor conclusively reasoned.[35] In no areas were the incon-

30. *Id.* at 471.

31. *Id.* at 473.

32. Powell v. Alabama, 287 U.S. 45, 71 (1932).

33. 324 U.S. 401 (1945).

34. *Id.* at 416.

35. Although objectivity never became a byword of the special circumstances test left in effect by *Betts*, several clear trends did emerge. It soon became apparent that counsel was required in the trial of any capital offense. *See, e.g.*, Bute v. Illinois, 333 U.S. 640 (1948); Williams v. Kaiser, 323 U.S. 471 (1945). And in non-capital cases, the trend was toward a more liberal interpretation of the test. Youth, lack of normal mental competence of the defendant, and the existence of technical or complicated legal issues were all grounds commonly held sufficient to warrant appointment of counsel. Craig, *The Right to Adequate Representation in Criminal Process:*

sistencies more obvious than in the cases alleging not merely the absence of counsel, but the ineffective assistance of counsel.

The *Powell* Court had further determined that, when the due process clause mandated the right to the assistance of counsel, mere formal compliance would not suffice. In the context of *Powell,* this proscription meant that the trial court's cavalier appointment of "all the members of the bar" was a mere "expansive gesture," constituting a denial of due process.[36] Although the Court refused to particularize beyond the circumstances of *Powell,* it emphasized that the right to counsel meant the right to the "effective aid" of counsel.[37]

Subsequent decisions rendered axiomatic the requirement that appointed counsel be effective. Only eight years after *Powell,* the Supreme Court in *Avery v. Alabama*[38] reiterated its position. Noting that each case had to be subjectively examined on its own merits, the Court determined that a denial of opportunity to confer with the defendant and to prepare the case could convert the appointment of counsel into a mere sham.[39] In *Von Moltke v. Gillies,*[40] for example, the Court reversed the petitioner's conviction under the Espionage Act of 1917 when she was able to confer only minimally with legal counsel concerning her plea. Mr. Justice Black, speaking for the majority, noted that the Court would not accept such assignment of counsel as anything more than "token obedience" to the trial court's duty to appoint counsel.[41] Such hollow compliance with the right to counsel was deemed wholly inadequate.

A more divisive issue among the judiciary, however, was the question of what objectively constitutes effective assistance under the due process clause. Thirty-two years after *Powell,* a leading commentator's case by case analysis still groped to identify "that level of laxity or ineptitude which moved courts in the past to brand a criminal trial unfair to the accused."[42] The difficulty

Some Observations, 22 SW. L.J. 260, 264-65 (1968). *See generally* Waltz, *supra* note 11; Finer, *Ineffective Assistance of Counsel,* 58 CORNELL L. REV. 1077 (1973).

36. Powell v. Alabama, 287 U.S. 45, 56 (1932).
37. *Id.* at 71.
38. 308 U.S. 444 (1940).
39. *Id.* at 446.
40. 332 U.S. 708 (1948). *See also* Reese v. Georgia, 350 U.S. 889 (1945).
41. 332 U.S. at 723.
42. Waltz, *supra* note 11, at 304.

of achieving consistent results without an objective standard became more pronounced as the federal circuits began to define their respective positions.

Genesis of the Mockery of Justice Standard: DIGGS V. WELCH

The Court of Appeals for the District of Columbia was the first court to devise a specific due process test applicable to cases involving ineffective counsel. In 1945, the court in *Diggs v. Welch*[43] outlined a mockery of justice test that was to become the standard to which federal courts consistently adhered until 1970.[44] In effect, the court said that in order for a prisoner to succeed in a claim of ineffectiveness, it must be shown that the entire proceedings were a "farce and a mockery of justice."[45]

The court's reasoning in *Diggs* was largely based on older, due process-fair trial concepts. The facts of the case showed Diggs to be a prisoner, appealing a district court dismissal of his habeas corpus petition. The ground for the appeal and the petition was the alleged ineffectiveness of his appointed counsel. At the outset, the court identified the ineffectiveness issue solely as a fifth amendment problem, ruling that once a qualified lawyer is appointed, the subsequent negligence of counsel does not deprive the accused of any right under the sixth amendment.[46] The court decided that since the due process clause of the fifth amendment guarantees a defendant only the broader right to a fair trial, Diggs could base his petition for habeas corpus solely on that broader due process violation. Although the careless representation of the defendant by his lawyer might have contributed to the lack of due process of the trial as a whole, the court reasoned, it was only one of the contributing evidentiary factors. Only by coupling the ineffective assistance with a breach of duty of the court and prosecuting attorney to comply with "the orderly administration of justice" could the petitioner show a violation of the fifth amendment.[47] The *Diggs* court thus decided that the claim of ineffective assistance did not call for an examination into the quality of defense counsel's work alone, but rather for an

43. 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

44. The Supreme Court's dicta in McMann v. Richardson, 397 U.S. 759 (1970), marked the point at which several circuits began to depart from the mockery of justice test. *See* pp. 531-36 *infra*.

45. 148 F.2d at 669.

46. *Id.* at 668.

47. *Id.* at 668-69.

examination of the whole conduct of the trial for its overall fairness.[48]

The very cases cited by *Diggs* for justification of its reasoning, however, illustrate the inappropriateness of transposing the fair trial concept onto ineffectiveness of counsel claims. *Diggs* relied on the "mob influence" cases,[49] in which the defendants were convicted in an atmosphere of haste, racial prejudice and threat of mob violence. For example, in *Moore v. Dempsey*[50] the black defendants had been arrested for the killing of a white man during interracial rioting. Spurred by inflammatory newspaper articles and by threats of lynch mobs, an all-white grand jury indicted the defendants. The jury included persons in the arresting posse. Thereafter, a lawyer was appointed to represent the blacks at the trial, and the proceedings commenced before an all-white jury, blacks having been systematically excluded. The courthouse and surrounding area were filled with a crowd that threatened violence against anyone who hindered the desired conviction. Thus, counsel did not dare to press for a change of venue or a delay, or to challenge a juryman, or to ask for separate trials. In a trial lasting less than an hour, followed by a five-minute consideration by the jury, the defendants were convicted of murder and were sentenced to death. When the case was appealed, reprisals were threatened against other blacks in the event the sentence was reduced.[51] The United States Supreme Court found that the trial judge, prosecutor and defense counsel had all been swept along by public passion in their conduct of the trial, and furthermore, that the state appellate system had similarly been remiss in failing to correct this "mask" of a proceeding. Finding in the overall judicial misconduct the requisite "state action" required by the fourteenth amendment, the Court ruled that the prisoner had been deprived of a fair trial under the due process clause.[52] *Diggs* extrapolated from *Dempsey* the requirement that the inadequacy of the defense counsel had to be so perfunctory or so outrageous that somehow it became the duty of the trial court and prosecution to intervene and correct the error. Short of such obvious "unfairness," due process would not be violated.

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48. *Id.* at 670.

49. *See* Brown v. Mississippi, 297 U.S. 278 (1936); Mooney v. Holohan, 294 U.S. 103 (1935); Moore v. Dempsey, 261 U.S. 86 (1923).

50. 261 U.S. 86 (1923).

51. *Id.* at 88-90.

52. *Id.* at 91.

In *Dempsey*, just as in the other "mob influences" cases cited by *Diggs*, the ineffectiveness by appointed counsel actually played a diminutive role in comparison with the greater, independent culpability of the trial judge and prosecutor. At least in its inception, it was clear that the mockery of justice test was not so much a standard for effective assistance of counsel as it was a standard for broader due process violations based on the general conduct of the trial. The result was incongruous; the defendant alleged the ineffective assistance of counsel, but the court looked past the conduct of the defense counsel to the overall "fairness" of the trial.

Growth of the Mockery of Justice Standard

Notwithstanding the fact that the mockery of justice standard for claims involving ineffective assistance of counsel was little more than another name for the broader test of overall due process, other circuits consistently followed the lead of the District of Columbia Circuit.[53] The approach of the Seventh Circuit is typical. In *United States ex rel. Feeley v. Ragen*,[54] the court held that the sixth amendment requirement of assistance of counsel had been met by the trial court's acceptance of the appearance of a member of the bar in good standing. Citing *Diggs*, the court concluded that if the actions of defense counsel reduce the trial to a "travesty of justice," then the court might consider the trial to be violative of due process.[55] Underlying the court's position was its reiteration of the view that the trial should be examined in its entirety. The defense lawyer was seen as only one of the court's officers, all of whom had the duty to ensure that the defendant received a fair trial.[56] As summarized by the Tenth Circuit in yet another decision traceable to *Diggs*:[57]

> The constitutional right to the effective assistance of counsel does not vest in the accused the right to the services of an attorney who meets any specific aptitude test in point of professional skill . . . . It is instances in

53. *See* Williams v. Beto, 354 F.2d 698 (5th Cir. 1965); Fraund v. United States, 301 F.2d 101 (10th Cir. 1962); O'Malley v. United States, 285 F.2d 733 (6th Cir. 1961); Cofield v. United States, 263 F.2d 686 (9th Cir. 1959); United States v. Wright, 176 F.2d 376 (2d Cir. 1949); United States *ex rel.* Feeley v. Ragen, 166 F.2d 976 (7th Cir. 1948).

54. 166 F.2d 976 (7th Cir. 1948).

55. *Id.* at 980-81.

56. *Id.*

57. Fraund v. United States, 301 F.2d 101 (10th Cir. 1962).

> which resulting from the substandard level of the services of the attorney the trial becomes mockery and farcical that the judgment is open to collateral attack on the ground that the accused was deprived of his constitutional right to the effective assistance of counsel.[58]

By approving of the *Diggs'* mockery of justice "fairness" approach, the circuits accepted not only its weaker legal underpinning, but also its persuasive practical rationale. Raising the spector of a swamped judicial system, *Diggs* argued that to construe the right to counsel any more broadly and to thereby permit a prisoner to try the issue of the effectiveness of his counsel would be to "give every convict the privilege of opening a Pandora's box of accusations which trial courts near large penal institutions would be compelled to hear."[59] Additionally, the District of Columbia Circuit observed that in many penal institutions the drafting of habeas corpus petitions has become a "game" to relieve the enforced monotony of prison life.[60] Generally, the claim of ineffective assistance of counsel is one of the most frequent allegations of a convict in his last-ditch attempt at post-conviction relief. A great number of these claims have been shown to be either frivolous or too intangible for review.[61] Thus, the general attitude of the courts is to hold such claims naturally suspect.[62]

Several other practical considerations buttress the circuits' acceptance of the mockery of justice approach. First, adoption of a more liberal standard than the mockery of justice test would give the disappointed defendant an opportunity to use the benefit of hindsight to endanger the professional and personal reputation of his appointed counsel.[63] Such harassment, it was feared, could lead

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58. *Id.* at 103.

59. Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), *cert denied*, 325 U.S. 889 (1945). See also the comments of Mr. Justice Frankfurter in Uvetes v. Pennsylvania, 335 U.S. 437, 450 (1948) (Frankfurter, J., dissenting); Foster v. Illinois, 332 U.S. 134, 139 (1947). *See generally* Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

60. Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

61. Johns v. Smythe, 176 F. Supp. 949, 951 (E.D. Va. 1959). *See, e.g.*, Setzer v. Welch, 159 F.2d 703 (4th Cir. 1947).

62. Waltz, *supra* note 11, at 302. *See also* Gray v. United States, 299 F.2d 467, 468 (D.C. Cir. 1962).

63. *See* Mitchell v. United States, 259 F.2d 787, 790-91 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958):

> It has been repeated so many times as to become axiomatic that convicted felons almost unanimously relish the prospect of putting

to an increasing unwillingness to represent indigent defendants.[64] Second, the price to be paid in terms of lost convictions might be high. Although a prisoner who wins reversal can be retried, crucial prosecution evidence may have disappeared during the intervening years. Thus, the reversal may be tantamount to an acquittal.[65]

The Fifth Circuit, however, evinced a reluctance to adopt a mockery of justice test. In *MacKenna v. Ellis*,[66] the court instead read the fourteenth amendment right to counsel itself as the right to effective counsel. Counsel was not interpreted to mean errorless counsel, nor counsel judged ineffective by hindsight, but counsel "reasonably likely to render *and rendering* reasonably effective assistance."[67] The Fifth Circuit in applying this standard found the defense attorney in *MacKenna* to have inadequately represented the defendant when it was questionable that the mockery of justice test would have led to the same result.[68] How-

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to public judicial test the competence of their erstwhile defenders; that almost any judge or lawyer can point to potential mistakes in reviewing the record of a lost cause; and that even trial counsel, having lost, can almost invariably enumerate what in the hindsight of disaster appear to have been errors.

See also Moran v. Hogan, 494 F.2d 1220, 1223 (1st Cir. 1974) (post-conviction quarrels over losing trial tactics, considered in retrospect, are not entertainable by a court); Bottiglio v. United States, 431 F.2d 930, 931 (1st Cir. 1970) (the court will not recognize hindsight criticism of specific errors of counsel as an "easy way" of avoiding all rules of criminal procedure).

64. Mitchell v. United States, 259 F.2d 787, 793 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958). *See* Bines, *supra* note 15, at 932-33.

65. Bines, *supra* note 15, at 932 n.29. *See also* Waltz, *supra* note 11, at 291. Because of these practical considerations, the courts' hesitancy to permit a closer scutiny of long-standing judgments continued even after *Gideon*. Thus, Professor Waltz expressed both the tenor and misgivings of the courts when he predicted shortly after the *Gideon* decision: "Long abhored in many jurisdictions . . . , claims of this nature can be expected to proliferate in the in the wake of the Court's announcement that the Sixth Amendment is directly applicable." *Id. See also* Bazelon, *supra* note 8, at 22-23 (noting that many judges still would rather preserve the illusion that "nothing is wrong" than try to remedy the problem).

66. 280 F. 2d 592 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961).

67. *Id.* at 599 (emphasis in original).

68. In *MacKenna*, the trial court had appointed two totally inexperienced lawyers to the defense of a criminal case, over the protest of the defendant. The Fifth Circuit reversed the resulting conviction and criticized the trial judge for his "insensitivity to the need for protecting the defendant . . . from the obvious mistakes of inexperienced counsel." *Id.* at 604. In contrast, most courts were not so active in affirmatively protecting a defendant from representation by fledgling attorneys. *See* Achtien v. Dowd, 117 F.2d

ever, the equation of the right to counsel with the right to effective assistance of counsel was meaningless as a fourteenth amendment due process requirement; the test for ineffectiveness was still unclear. When *Williams v. Beto*[69] finally and explicitly invoked the mockery of justice test in the Fifth Circuit, it cited *MacKenna* itself for authority that the defendant was entitled only to representation by a lawyer of sufficient competence to be admitted to the bar, "no more and no less."[70]

Generally, the courts preferred the safer position of the *Diggs* resolution: since few criminal trials are free from error by defense counsel and since no test can effectively indicate when such errors rendered the assistance ineffective, the only practical standard should be whether "judicial character" is present in the proceedings taken as a whole.[71] In focusing concern on the fairness of the whole proceeding rather than on the obligations of counsel, the courts in effect dictated that only the most egregious errors by defense counsel would be held to deprive the accused of a fair trial. Not surprisingly, only few cases have actually found incompetence sufficient to have reduced the trial to a mockery of justice.[72]

THE SIXTH AMENDMENT RIGHT TO COUNSEL: THE OBJECTIVE APPROACH

In the opinions of the United States Supreme Court, the sixth amendment right to counsel has always been a substantive right. The appointment of counsel is not just a formal requirement; but rather requires that effective and conscientious counsel be furnished to indigent defendants.[73] When *Gideon v. Wainwright* made the sixth amendment directly applicable to state criminal prosecutions, the circuits were forced to reevaluate their due process fairness concepts in ineffectiveness claims in the light

989, 992 (7th Cir. 1941); Johnson v. United States, 110 F.2d 562, 563 (D.C. Cir. 1940).

69. 354 F.2d 698 (5th Cir. 1965).

70. *Id.* at 705.

71. Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

72. *See* Comment, *Incompetency and Inadequacy of Counsel as a Basis for Relief in Federal Habeas Corpus Proceedings*, 20 SW. L.J. 136, 139-40 (1966).

73. *See* Von Moltke v. Gillies, 332 U.S. 708, 723 (1948); Glasser v. United States, 315 U.S. 60, 76 (1942); Avery v. Alabama, 308 U.S. 444, 446 (1940); Powell v. Alabama, 287 U.S. 45, 71 (1932).

of the stricter and more directly applicable sixth amendment requirements. Just as the due process approach was of dubious validity in federal cases prior to *Gideon* such a rationale was now even less defensible. The Supreme Court's caveat to the circuits was to give greater support to the necessary elements of the American adversary system. Accordingly, the majority of circuits have begun to adopt varying objective standards of defense counsel competency.[74] Although these tests differ slightly, they are all consistent in their determination to focus attention on the specific actions of the defense attorney rather than on the overall conduct of the trial.

The Direct Right to Counsel: Before GIDEON

Johnson v. Zerbst[75] held that any infringement of the sixth amendment right to assistance of counsel automatically deprived the federal courts of jurisdiction to continue in any judicial proceeding and justified issuance of a writ of habeas corpus.[76] The circuit courts, however, continued to apply the less stringent due process rationale to all claims of ineffective assistance, even to those arising in federal courts. This was in direct conflict with Supreme Court decisions both prior and subsequent to *Zerbst*, which unequivocally stated that the sixth amendment right was more than just a procedural requirement in the federal courts. In *Powell*, for example, the evil condemned was the denial of "effective and substantial aid."[77] In *Avery v. Alabama*,[78] Mr. Justice Black referred to the constitutional requirement of the "due appointment of counsel which cannot be satisfied by mere formal appointment."[79] In *Von Moltke v. Gillies*,[80] Mr. Justice Black again commented that the duty to appoint counsel is not a mere "procedural formality."[81] In *Glasser v. United States*,[82] the Court

74. *See* United States *ex rel.* Williams v. Twoney, 510 F.2d 634 (7th Cir.), *cert. denied*, —— U.S. —— (1975); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973); Moore v. United States, 432 F.2d 730 (3d Cir. 1970); Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968).

75. 304 U.S. 458 (1938).

76. *Id.* at 468.

77. Powell v. Alabama, 287 U.S. 45, 71 (1932).

78. 308 U.S. 444 (1940).

79. *Id.* at 446.

80. 332 U.S. 708 (1948).

81. *Id.* at 723.

82. 315 U.S. 60 (1942).

said that the appointment of a lawyer to defend two codefendants with potentially inconsistent defenses denied the defendant-petitioner the "right to have the effective assistance of counsel guaranteed by the Sixth Amendment."[83] As one circuit judge aptly analogized, just as "due process of law includes both procedural and substantive due process," so too does the sixth amendment right to the effective assistance of counsel extend through form to substance in federal courts. "To dilute the right so as to eliminate consideration of competence . . . would . . . leave only the shadow of one of our fundamental aids in the administration of justice."[84]

The rationale of *Diggs* and other cases unabashedly flew in the face of both the clear words and the logical import of the Supreme Court opinions. *Diggs* expressly held that the sixth amendment guaranteed only the formal appointment of counsel.[85] Coming subsequent to *Powell, Avery,* and *Glasser,* the *Diggs* holding was questionable even at the time it was decided. Instead of examining the conduct of the attorney for the level of effectiveness required by the sixth amendment, the circuits applied due process considerations to all claims of ineffective assistance, both state and federal. The approach of Judge Prettyman in *Mitchell v. United States*[86] is typical. Preoccupied with the possible consequences of a literal reading of *Powell* and its allied cases, the judge interpreted *Powell* as laying down a "procedural requirement, as contrasted with a standard of skill."[87] In reviewing federal convictions attacked on the basis of the sixth amendment, the circuits thus circumvented the caveat of the Supreme Court that mere formal compliance with the right to counsel would not suffice.

The Impact of GIDEON v. WAINWRIGHT

The explicit holding of *Gideon v. Wainwright* was that the fourteenth amendment incorporated the words of the sixth amendment and made them directly applicable to the states.[88] In doing

83. *Id.* at 76.

84. Mitchell v. United States, 259 F.2d 787, 795 (D.C. Cir.), *cert. denied,* 358 U.S. 850 (1958) (Fahy, J., dissenting).

85. Diggs v. Welch, 148 F.2d 667, 668 (D.C. Cir.), *cert. denied,* 325 U.S. 889 (1945) ("It is clear that once competent counsel is appointed his subsequent negligence does not deprive the accused of any right under the Sixth Amendment.").

86. 259 F.2d 787 (D.C. Cir.), *cert. denied,* 358 U.S. 850 (1958).

87. *Id.* at 790.

88. 372 U.S. 335, 343 (1963).

so, *Gideon* revived and clarified the principles in *Powell.* The sixth amendment right to counsel was deemed a fundamental right in its own strength and not just a necessary aspect of due process.[89] Yet *Gideon* had no immediate effect on the cases involving the alleged ineffectiveness of counsel. By this time, the circuit courts had completely absorbed the view that the right to the effective assistance of counsel was adequately and uniformly protected in both state and federal courts by due process fairness safeguards. Their continued usage of due process language in incompetency of counsel cases subsequent to *Gideon* evidenced that the circuits were in no mood to entertain more disruptive sixth amendment arguments. In *United States v. Stahl,*[90] the Seventh Circuit denied a habeas corpus petition based on the sixth amendment claim. Noting cryptically that "[t]he Sixth Amendment right to counsel is a matter of substance, not form," the court looked only to see if any other substantive right or defense of the defendant had been thereby abridged. The court concluded that even the sixth amendment guarantee is satisfied as long as the essential integrity of the proceedings as a trial is preserved.[91] The deficiency perpetuated by this approach was that it failed to reflect an adequate level of performance owed by appointed counsel to his client. Yet the circuits in the sixties consistently adhered to the mockery of justice test. The courts' concern that a more liberalized standard would have adverse consequences inhibited greater consideration of the constitutional ideal of effective assistance.

As the Supreme Court recently noted,[92] the very premise of our adversary system is that effective partisan advocacy best promotes the ultimate objective that the guilty be punished and the innocent go free.[93] That ideal is defeated, however, if one side of a case is inadequately represented. The American adversary system places on the respective parties the burden of protecting their own interests. In criminal justice, this means that the prosecution has the burden of proving beyond a reasonable doubt every element necessary to constitute the crime alleged.[94] The constitutional requirement that the indigent defendant be given the assistance of counsel recognizes that diligent

89. *Id.* at 344.
90. 393 F.2d 101 (7th Cir.), *cert. denied,* 393 U.S. 879 (1968).
91. *Id.* at 103.
92. Herring v. New York, —— U.S. ——, 95 S. Ct. 2550 (1975).
93. *Id.* at 2555.
94. *In re* Winship, 397 U.S. 358, 364 (1970).

and skilled representation of the defense is necessary to rebut evidence presented by the prosecution and to present vindicating evidence in the most persuasive manner. Effective defense counsel is necessary to ensure that the prosecution properly meets its burden of proof. Thus, counsel is required to act "in the role of an active advocate in behalf of his client."[95]

The same sixth amendment principles which in *Gideon* require the appointment of counsel apply equally to the requirement that counsel be effective. Equating the right to counsel with the right to effective assistance of counsel is essential under the sixth amendment; the right to counsel, deemed fundamental, is meaningless if that counsel is not effective. When counsel fails to secure a defense, is ignorant of a defense because of inadequate legal or factual investigation, or ineptly presents a defense, the adversarial system of justice is thereby handicapped. Under the sixth amendment, the defendant has been deprived of his "day in court."[96] Irrespective of his guilt or innocence, he has not been tried by constitutional standards and should not be punished until he has been.[97]

The Supreme Court's continuing emphasis on the adversary system highlights the importance of each necessary element of that system. Mr. Justice Rehnquist recently explained:

> In making the decision whether or not a particular provision of the [Bill of Rights] relating to the conduct of a trial should be incorporated [into the fourteenth amendment], we have been guided by whether the right in question may be deemed essential to fundamental fairness—an analytical approach which is compelled if we are to remain true to the basic orientation of the Due Process Clause. . . . But once we have determined that a particular right should be incorporated against the States, we have abandoned case-by-case considerations of fairness. . . . It is a judgment on the part of this Court that the probability of unfairness in the absence of a particular right is so great that denigration of the right

95. Anders v. California, 386 U.S. 738, 744 (1967). *See also* United States v. Ash, 413 U.S. 300, 314 (1973) (the purpose of counsel is to "preserve the adversary process").

96. Bazelon, *supra* note 8, at 27.

97. *Cf.* Riser v. Teets, 253 F.2d 844, 847-48 (9th Cir. 1958) (dissenting opinion).

> will not be countenanced under any circumstances. These judgments by this Court reflect similar judgments made by the Constitution's Framers with respect to the federal government.[98]

The Supreme Court undertook this judgmentary process regarding the assistance of counsel in *Gideon v. Wainwright*.[99] Taking its third look at the historic importance of the right to counsel, the Court in *Gideon* overruled *Betts* and reaffirmed its original analysis in *Powell* concerning the fundamental nature of the right to counsel.[100] *Powell* and *Gideon* agreed that, because of the very nature of the adversary system, it is inherently unfair to try a defendant who is without adequate benefit of counsel.[101] *Argersinger v. Hamlin*,[102] a post-*Gideon* case, noted explicitly that "[t]he assistance of counsel is often a requisite to the very existence of a fair trial."[103] In other cases the Court further emphasized the fundamentality of the right to counsel by extending its scope to require representation at interrogation,[104] at line-ups,[105] at

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98. Herring v. New York, —— U.S. ——, 95 S. Ct. 2550, 2558 (1975).

99. 372 U.S. 335 (1963).

100. *Id.* at 345.

101. In both *Powell* and *Gideon*, the Supreme Court emphasized the practical need for counsel representing an accused. The oft-quoted opinion of *Powell* is thus:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Powell v. Alabama, 287 U.S. 45, 69 (1932). *Gideon* employed similar reasoning:

> That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.

Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

102. 407 U.S. 25 (1972).

103. *Id.* at 31.

104. Escobedo v. Illinois, 378 U.S. 488 (1967).

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

preliminary hearings,[106] at arraignment,[107] and on appeal.[108] It did so not on due process grounds but on the specific assurance of the sixth amendment. With these cases, the Supreme Court further underscored its increasingly jealous protection of the right to counsel as a sixth amendment right, essential to the preservation of an adversary system.

In 1970, the Court again pushed the courts towards greater consideration of the quality of defense representation, and furthermore, gave some indication of what would satisfy a sixth amendment test of the competency of defense counsel. The Court in *McMann v. Richardson*[109] commented in dicta that the advice given by appointed counsel concerning a guilty plea should be "reasonably competent." The Court emphasized that if the right to counsel guaranteed by the sixth amendment is to serve its purpose, the representation should be "within the range of competence" that is demanded of lawyers in criminal cases.[110]

The Circuits' Response

Taking their cue from the Supreme Court, the circuit courts have begun drifting away from the subjective mockery of justice test toward a more objective standard. The District of Columbia Circuit, which first enunciated the mockery of justice test,[111] best exemplifies this trend. In *Bruce v. United States*,[112] the circuit amended its mockery of justice test to the extent that if gross incompetence has in effect "blotted out the substance of a defense," relief should be awarded.[113] Reflecting the Supreme Court's changed position, an affirming opinion declared:

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106. Coleman v. Alabama, 399 U.S. 1 (1970).

107. Hamilton v. Alabama, 368 U.S. 52 (1961).

108. Douglas v. California, 372 U.S. 353 (1963). *See also* Miranda v. Arizona, 384 U.S. 436 (1966) (the right to counsel exists at every "critical stage" of a criminal prosecution); *In re* Gault, 387 U.S. 1 (1967) (right to counsel applies at juvenile proceedings).

109. 397 U.S. 759 (1970).

110. *Id.* at 770.

111. *See* Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

112. 379 F.2d 113 (D.C. Cir. 1967).

113. *Id.* at 117. *See also* Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970). Judge Bazelon, Chief Judge of the Court of Appeals for the District of Columbia, expressed dissatisfaction with even this test, noting that it is equally subjective. Bazelon, *supra* note 8, at 29.

> That [mockery of justice] standard is no longer valid as such but exists in the law only as a metaphor . . . [citation omitted]. The "farce and mockery" standard derives from some older doctrine in the context of the due process clause of the Fifth Amendment. What is involved here is the Sixth Amendment. The Sixth Amendment has overlapping but more stringent standards than the Fifth Amendment as is clear from other contexts. Compare, for example, *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967), with *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1119 (1967).[114]

In 1968 the Fourth Circuit set a stricter standard of counsel's performance which closely resembled the reasonable competency test of subsequent cases.[115] The court said that counsel had to be promptly appointed and must be given adequate opportunity to prepare the defense. He must confer sufficiently with the defendant, investigate all possible defenses, and have an adequate period of reflection and deliberation prior to the trial. A deficiency in any of these areas would result in the presumption of a failure to meet the constitutional requirements of assistance of counsel.[116]

Moore v. United States,[117] a Third Circuit case, was the first of the series of cases in which the circuits began to move away from the due process approach, toward the more objective standard of reasonable competency indicated in *McMann v. Richardson*.[118]

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114. 427 F.2d at 610. A comparison of the two cases cited supports the District of Columbia Circuit's conclusion that the sixth amendment demands a stricter test. In *Wade*, the Supreme Court extended the sixth amendment right to counsel to include representation at post-indictment lineups. Absent a valid waiver, the test for violations of the counsel requirements was to be whether the defense attorney had a reasonable opportunity to be present. United States v. Wade, 388 U.S. 218, 237 (1967). In contrast, the Court in *Stovall* held that the rule in *Wade* was not retroactive and that such identifications prior to *Wade* need only be examined under the fifth amendment due process test of fairness, balancing the suggestiveness of the circumstances against the need for speedy identification of the suspect. Stovall v. Denno, 388 U.S. 293, 302 (1967). The Supreme Court clearly meant *Wade*'s sixth amendment test to be more stringent than the due process test of *Stovall*.

115. *See* Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968).

116. *Id.* at 226.

117. 432 F.2d 730 (3d Cir. 1970).

118. 397 U.S. 759 (1970). See note 18 *supra*.

In *Moore,* the petitioner claimed that the belated appointment of his counsel deprived him of adequate representation. The Third Circuit used this opportunity to delineate a standard of "normal competency."[119] The criterion for judging the effectiveness of counsel, the court decided, should be solely counsel's overall conduct, not only during the trial but also during the preparation and investigation of the case. The test measured the performance of counsel against an acceptable community standard of attorney competence, a test similar to the familiar standard employed by *the Restatement (Second) of Torts* to test malpractice claims.[120] The court concluded that:

> Whether an indigent is represented by an individual or by an institution, he is entitled to legal services of the same level of competency as that generally afforded at the bar to feepaying clients. In both cases, therefore, the standard is adequacy of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place.[121]

Three years after *Moore,* the District of Columbia Court of Appeals placed more distance between itself and the mockery of justice-fair trial standard by adopting a similar standard;[122] in that jurisdiction a defendant is entitled to "the reasonable competent assistance of an attorney acting as his diligent conscientious advocate."[123] The court listed specific guidelines similar to those of the Fourth Circuit, defining the duties owed by appointed counsel to his client. The court determined that counsel should generally be guided by the American Bar Association Standards for the Defense Function,[124] and divided the duties owed by counsel to his client into three specific categories: first, conferring with the defendant concerning all matter of defense, trial strategies and tactical choices; second, providing prompt and adequate legal advice at all stages of the prosecution; and third, investigating all possible legal and factual issues.[125]

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119. 432 F.2d at 737.

120. RESTATEMENT (SECOND) OF TORTS § 229A (1965).

121. 432 F.2d at 736.

122. *See* United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973).

123. *Id.*

124. ABA STANDARDS, THE DEFENSE FUNCTION (1974).

125. 487 F.2d at 1203-04.

The Fifth Circuit took a somewhat different approach in establishing an objective standard of reasonable competency.[126] Instead of formulating a new test, the circuit simply reread its decision in *Williams v. Beto*[127] to have actually reaffirmed the older standard of "counsel reasonably likely to render *and rendering* reasonably effective assistance."[128] Thus, the court reconciled the standard of reasonable effectiveness with the mockery of justice test:

> One method of determining whether counsel has rendered reasonably effective assistance is to ask whether the proceedings were a farce or mockery. The farce-mockery test is but one criterion for determining if an accused has received the constitutionally required minimum representation (reasonably effective assistance).[129]

A lawyer's conduct might fall short of a due process violation of fundamental fairness but still be violative of the defendant's sixth amendment right to effective assistance.[130] Thus, the court recognized that a stricter test should be applied when a sixth amendment violation is alleged.

The Seventh Circuit was even more equivocal in setting a sixth amendment standard of competency.[131] Recognizing that a criminal defendant has the right to an advocate whose performance meets "a minimum standard of professional representation,"[132]

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126. *See* Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974).

127. 354 F.2d 698 (5th Cir. 1965). *See* pp. 524-25 *supra*.

128. MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960) (emphasis in original).

129. Herring v. Estelle, 491 F.2d 125, 127-28 (5th Cir. 1975).

130. Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1975). The question of when there might be a due process violation but no sixth amendment violation arose in the context of retained counsel. In an earlier case, in which a retained counsel was alleged to have rendered ineffective assistance, the Fifth Circuit had already overturned the mockery of justice test in favor of the objective sixth amendment standard. *See* West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973). In *Fitzgerald*, however, the court rescinded its decision in *West* insofar as it related to retained counsel, saying that due process notions should still control in cases involving retained counsel. Fitzgerald v. Estelle, *supra*, at 1336. *See also* West v. Louisiana, 510 F.2d 363 (5th Cir. 1975). Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974), followed shortly thereafter, clearly stating that when a defendant raises the ineffectiveness of his appointed council, the claim would be examined under an objective sixth amendment standard of competency. *Id.* at 128.

131. *See* United States *ex rel.* Williams v. Towney, 510 F.2d 634 (7th Cir.), *cert. denied*, —— U.S. —— (1975).

132. *Id.* at 641.

the court did not make it clear whether an infringement of that right constituted a sixth or fourteenth amendment violation.[133] Subsequent decisions in the circuit, however, make it apparent that the court based its decision on the sixth amendment.[134]

The Third, Fourth, Fifth, Seventh, District of Columbia, and additionally the Sixth Circuits[135] have thus substituted the "fairness" examination of the trial as a whole with a closer scrutiny of defense counsel for at least minimal standards of competency. Although the standard is articulated somewhat differently by each circuit adopting it, all agree that the objective standard is most consistent with the requirements of the sixth

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133. The Seventh Circuit in *Twoney* did not clearly delineate its movement from the due process rationale toward a six amendment approach. In *Twoney*, the defendant was unable to meet bail, and had already spent 112 of the maximum 120 days in jail permissible in Illinois prior to trial. Called before the state court judge with the counsel appointed to him two days previously, he was confronted with the choice between a continuance which would enable him to better prepare his care but would require him to spend up to 120 additional days in prison awaiting trial, or an immediate commencement of the trial, gambling on the probability that the prosecutor's case was equally unprepared. Forced to choose between these two undesirable alternatives, the defendant elected the latter and was convicted. In view of the greater culpability of the trial court which required him to make such a choice, it is questionable whether this was really a sixth amendment effectiveness-of-counsel case at all, as much as it involved the due process right to a fair trial.

The court revealed some further confusion as to the constitutional authority for its new standard of minimum professional competency. Citing no specific cases, the court said only that the petitioner was denied effective legal assistance as provided for "by the due process clause of the Fourteenth Amendment, or, as is sometimes said, the assistance of counsel clause of the Sixth Amendment." *Id.* at 64. In describing its new objective standard, the court used language traditionally associated with the subjective mockery and farce test: the representation must not go below a level "shockingly inferior to what may be expected," nor should the trial be "a sacrifice of unarmed prisoners to gladiators." *Id.*

In United States v. Merritt, No. 75-1019 (7th Cir. Feb. 5, 1976), the petitioner directly challenged the efficacy of the minimum professional standard. The Seventh Circuit, after finding incompetency under the *Twoney* test, explicitly declined the invitation to supplement its test with a stricter objective standard, similar to those employed by other circuits. *Id.*

134. *See* United States v. Jeffers, Nos. 74-1650, 74-1680 (7th Cir. July 30, 1975), *cert. denied*, —— U.S. —— (1975); Israel v. Odom, No. 74-1519 (7th Cir. July 28, 1975); Matthews v. United States, No. 74-1988 (7th Cir. July 3, 1975).

135. *See* Beasley v. United States, 491 F.2d 687 (6th Cir. 1974).

amendment; all look to defense counsel's performance rather than to the fairness of the proceedings as a whole.

The remaining circuits retain the due process-mockery of justice analysis with varying degrees of obstinacy.[136] In *United States ex rel. Marcelin v. Mancusi*,[137] the Second Circuit was adamant in refusing to modify its due process approach. Instead, the court reiterated its requirement that, in order for the petitioner to prevail in his claim, it must be shown that his representation was so lacking as to make the trial a farce and mockery of justice, or that counsel totally failed to present the cause of the accused in any fundamental respect, or that the defense was so "horribly inept" as to amount to a breach of legal duty.[138] The court did not elaborate on its refusal to reassess its position, but seemed to reflect the oft-repeated argument that when the result of the trial is generally fair to the defendant, it should not be disturbed by hindsight considerations.[139] The First and Ninth Circuits are less obdurate in their defense of the due process approach. There is at least some indication that courts in these circuits would review their position given the appropriate circumstances.[140]

The stance of the Eighth Circuit is the most unique among the mockery of justice circuits. In *McQueen v. Swenson*,[141] the court at the outset of its opinion declined to address the issue of whether the right to the effective assistance of counsel derives solely from the fourteenth amendment or also from the stricter requirements of the sixth amendment. Instead, it ruled that the defense counsel's self-avowed practice of never interviewing prosecution witnesses was clearly a constitutional violation even under the mockery of justice precedent in the circuit.[142] The court tried to make the mockery of justice test more objective, however, and focused its attention on the obligation of defense counsel to investigate adequately all the circumstances of the case. This approach reasoned that the mockery of justice test was never

136. *See* United States v. Jones, 512 F.2d 347 (9th Cir. 1975); United States v. Yanishefsky, 500 F.2d 1327 (2d Cir. 1974); Dunker v. Vinzant, 505 F.2d 503 (1st Cir. 1974); McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974); Lorraine v. United States, 444 F.2d 1 (10th Cir. 1971).

137. 462 F.2d 36 (2d Cir. 1972).

138. *Id.* at 45.

139. *Id.* at 43 n.12, 44 n.13.

140. *See* United States v. Jones, 512 F.2d 347, 349 n.2 (9th Cir. 1975); Moran v. Hogan, 494 F.2d 1220, 1222 n.4 (1st Cir. 1974).

141. 498 F.2d 207 (8th Cir. 1974).

142. *Id.* at 218.

meant to be taken literally, or to be used as a "shibboleth" to avoid a search for constitutional error.[143] Thus, the Eighth Circuit adopted the identical two-staged process which other circuits applying the objective standard have used to evaluate petitions alleging the ineffective assistance of counsel: first, a determination of whether there is a breach of some duty owed by defense counsel to his client; and second, a determination of whether that failure prejudiced the defendant.[144]

RELATING THE STANDARD TO THE ALLOCATION OF THE BURDEN OF PROOF

The federal circuits are remarkably disparate over the burden of proving the incompetency of counsel and the quantum of proof necessary. Each circuit's stance on the burden of proof directly reflects its usage of either the mockery of justice test or its own variant of the objective standard. Among the circuits which retain the mockery of justice standard, the burden of showing the overall unfairness still rests heavily on the petitioner.[145] In the circuits which require that counsel's conduct meet an objective standard of competency, there is considerable disagreement over delegating the burden of persuasion. One approach is that the petitioner need only show incompetency by the objective standard in order to vindicate his claim.[146] Thus, a showing that counsel failed to investigate and assert a substantial defense would result in a reversal.[147]

Another approach using the objective standard identifies a further issue of whether the defendant was prejudiced by the incompetency under the harmless error test for constitutional error.[148] Circuits applying the test again divide on the burden of proof. One view applies the rule of *Chapman v. California*,[149] placing the burden to show the lack of prejudice on the prosecution, the beneficiary of the error.[150] The alternative position is that since

143. *Id.*

144. *See* notes 167-88 *infra* and accompanying text. *See generally* Case Note, *Ineffective Assistance of Counsel*, 43 FORDHAM L. REV. 310 (1974).

145. Garton v. Swenson, 497 F.2d 1137 (8th Cir. 1974); United States *ex rel.* Marcelin v. Mancusi, 462 F.2d 36 (2d Cir. 1972).

146. *See* Beasley v. United States, 491 F.2d 687 (6th Cir. 1974).

147. *Id.* at 696.

148. *See, e.g.*, United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973).

149. 386 U.S. 18 (1967).

150. *Id.* at 24.

the defendant is challenging the regularity of his counsel's conduct, absent any culpability on the part of the prosecution, the petitioner should bear the burden of proving both incompetency and resulting prejudice.[151] Every objective approach, however, stands in marked contrast to the traditional mockery of justice standard. Under the subjective approach the questions of incompetency and prejudice are mixed; the petitioner has the heavy burden to show such deficiencies in the trial which rendered it fundamentally unfair.

The Mockery of Justice Approach

Under the due process rationale, the test itself indicates the burden and quantum of proof. The petitioner must establish such deficiencies in the conduct of counsel that the trial as a whole represents a farce or mockery of the guilt-determination process. The allegations must "shock the conscience of the reviewing court."[152] The degree of incompetency required to reduce the trial to a mockery of justice has been variously described: that which amounts to no representation at all,[153] a complete failure to represent the defendant's cause in any fundamental respect,[154] a gross lack of skill on the part of counsel, or counsel's ignorance of the law pertinent to the case.[155] These are only subjective descriptions; whether the alleged deficiencies actually shock the conscience of the court is totally dependent on the sensibilities of the reviewing judge. Irrespective of any more "objective" guidelines offered by the court or by law review commentators,[156] the precise question is always whether the alleged impropriety, generally defined as a disservice by the court's officers to fundamental concepts of Anglo-American justice, is of such magnitude that it constitutes a due process violation. By whatever measure used to judge competency, however, the requirement under the

151. McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974).

152. *See, e.g.*, Allen v. Van Cantfort, 436 F.2d 625, 630 (1st Cir. 1975); Candarella v. United States, 375 F.2d 222, 230 (8th Cir.), *cert. denied*, 389 U.S. 882 (1967).

153. Lunce v. Overlade, 244 F.2d 108, 110 (7th Cir. 1957); United States *ex rel.* Feeley v. Ragen, 166 F.2d 976, 981 (7th Cir. 1948).

154. United States v. Yanishefsky, 500 F.2d 1327, 1333 (2d Cir. 1974); United States v. Garguilo, 324 F.2d 795, 796 (2d Cir. 1963); Jones v. Huff, 152 F.2d 14, 15 (D.C. Cir. 1945).

155. Schaber v. Maxwell, 348 F.2d 664, 671 (6th Cir. 1965); Mitchell v. United States, 256 F.2d 787, 793-94 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

156. *See generally* Waltz, *supra* note 11.

mockery of justice test is generally taken to mean that the defendant has a heavy burden of proving unfairness.[157]

Meeting that burden is, more often than not, a near-impossible task for the convicted defendant. In most courts the petitioner must rebut a presumption, either implicit or explicit, of counsel's competency, particularly if the attorney is a member in good standing of the bar.[158] There also may exist a strong presumption of regularity in the proceedings even after gross incompetence has been established, particularly when no written transcript of the trial proceedings is available.[159] At least one circuit expressly states that in examining a claim of ineffective assistance, the court should begin by looking to the strength of the prosecutor's case.[160] Furthermore, several commentators agree that a tacit "guilty anyway" outlook pervades the majority of the decisions under the mockery of justice test.[161] As a result of these presumptions and the general attitude of the courts, there are few situations in which the ineffective assistance of counsel can, by itself, reduce the trial to a farce or sham, as did the mob violence and racial prejudice demonstrated in *Moore v. Dempsey*.[162]

The jurisdictions adhering to the mockery of justice test justify placing this heavy burden on the defendant with at least two reasons. First, the test's subjectivity is the means used to reflect these courts' disapproval of the abounding number of prisoners' petitions for habeas corpus.[163] One court has noted that

157. *See* DeBerry v. Wolf, 513 F.2d 1336, 1340 (8th Cir. 1975); Lorraine v. United States, 444 F.2d 1, 2 (10th Cir. 1971).

158. Crowe v. State, 484 F.2d 1359, 1361 (8th Cir. 1973); United States *ex rel.* Feeley v. Ragen, 166 F.2d 976, 980 (7th Cir. 1948); Maye v. Pescor, 162 F.2d 641, 643 (8th Cir. 1947); Achtien v. Dowd, 117 F.2d 989, 992 (7th Cir. 1941). One court has even held the presumption to be unrebuttable. *See* Andrews v. Robertson, 145 F.2d 101, 102 (5th Cir. 1944), *cert. denied*, 324 U.S. 874 (1945).

159. *See* Strong v. Huff, 148 F.2d 692 (D.C. Cir. 1942); Comment, *Incompetency and Inadequacy of Counsel as a basis for Relief in Federal Habeas Corpus Proceedings*, 20 Sw. L.J. 136, 140 (1966).

160. *See* United States *ex rel.* Testamark v. Vincent, 496 F.2d 641, 643 (2d Cir. 1974); United States *ex rel.* Marcelin v. Mancusi, 462 F.2d 36, 43 (2d Cir. 1972). *See also* United States *ex rel.* Johnson v. Vincent, 370 F. Supp. 379, 387-88 (S.D.N.Y. 1974).

161. *See* Bazelon, *supra* note 8, at 26; Bines, *supra* note 15, at 928-29.

162. 261 U.S. 86 (1923). See pp. 519-22 *supra* and accompanying notes.

163. *See* Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945). See also the comments of Mr. Justice Frankfurter in Uvetes v. Pennsylvania, 335 U.S. 437, 450 (1948) (Frankfurter, J., dissent-

convicted defendants "almost unanimously relish the prospect" of putting to judicial test frivolous and intangible claims.[164] In addition, placing the heavy burden on the petitioner to show incompetency is consistent with the focus of due process rationale on the trial's character as a whole. Since the petitioner is attacking the trial's overall fairness, he must therefore overcome all these presumptions of regularity which surround any proceedings in a court of law. As was noted earlier, pervasive unfairness is readily found in such aggravated circumstances as *Powell* or *Dempsey*, yet not so easily found where the lawyer's inadequacy, often not visible on the trial record, is the sole basis of the claim. Therefore, under the due process approach it is apparent that the demand upon the sufficiency of the defendant's proof will vary within the discretion of each judge. Thus, it has been difficult for the defendant to succeed in showing incompetency of counsel which reduced the trial to a mockery of justice.[165] Other circuits have totally rejected this subjective approach and its attendant heavy burden of proof.[166] Their position is that, since the sixth amendment explicitly focuses on "assistance of counsel," effectiveness should be judged solely by an objective examination of counsel's performance.

The Objective Approach: A Two-staged Process

Unlike the due process position, the circuits adopting a sixth amendment standard generally remove the issue of prejudice from

ing), and in Foster v. Illinois, 332 U.S. 134, 139 (1947). *See generally* Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

164. 259 F.2d at 791.

165. To succeed in a claim based on the incompetency of counsel under the farce and mockery test, it is clear that an extreme case must be shown. In some cases, however, even that has not been sufficient. For example, in United States v. Katz, 425 F.2d 928 (2d Cir. 1970), defense counsel was seen to be sound asleep during the examination of prosecution witnesses. The Second Circuit denied the defendant's claim of ineffective assistance, since "the testimony during the periods of counsel's somnolence was not central to [the defendant's] case and . . . , if it had been, the [trial judge] would have awakened him rather than [waiting] for the luncheon recess to warn him. *Id.* at 931. *See also* Javor v. United States, 467 F.2d 481 (9th Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) (counsel similarly asleep at trial); Hudspeth v. McDonald, 120 F.2d 962 (10th Cir. 1941) (attorney inebriated at trial); Bazelon, *supra* note 8, at 35-37.

166. See United States *ex rel.* Williams v. Twoney, 510 F.2d 634 (7th Cir.), *cert. denied*, —— U.S. —— (1975); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973); Moore v. United States, 432 F.2d 730 (3rd Cir. 1970).

the issue of competency. Thus, the initial question is whether there is ineffectiveness or incompetency by the circuit's objective test; the courts are unanimous in placing at least this burden of proof on the defendant.[167] One approach ends its consideration at this point, holding that a mere demonstration of incompetence is enough to warrant relief.[168] Most courts, however, address a further question of whether the mistakes or misconduct of counsel were of sufficient magnitude that the defendant was so prejudiced as to justify a reversal or remand.[169] The courts adopting this rationale again disagree on whether the defendant should also bear the burden of showing that the ineffectiveness prejudiced his defense, or whether, consonant with the harmless error test, the prosecution should have the burden of showing the absence of prejudice.

The dispute between these two positions is highlighted by the dialogue in the Supreme Court on whether or not a harmless error test should be applied to constitutional errors, and, if so, then which constitutional rights should be held sacrosanct and aloof from such a test. In *Fahy v. Connecticut*,[170] the Supreme Court said that in order to deem a constitutional error harmless, it must be found to be harmless by a test of reasonableness: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[171] *Chapman v. California*,[172] the Court's leading case, interpreted *Fahy* to mean that not all trial errors concerning federal constitutional rights are harmful errors. Noting that there are valid practical consideration for limiting reversal, the Court concluded:

167. The defendant always bears the burden of proving the allegations of his habeas corpus or other collateral petition for post-conviction relief. *See* 28 U.S.C. §§ 2241, 2244, 2255 (1971). The same burden is put on the defendant in claims made on direct appeal, for example, in a motion for a new trial based on newly discovered evidence. *See* FED. R. CRIM. P 33; United States v. Lucas, 513 F.2d 509 (D.C. Cir. 1975); United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973).

168. *See* Beasley v. United States, 491 F.2d 687 (6th Cir. 1974), relying on Chapman v. California, 386 U.S. 18 (1967) (Stewart, J., concurring).

169. Courts expressly requiring this second stage are the Third, Fourth, Eighth and District of Columbia Circuits. *See* McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974); United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973); United States *ex rel.* Green v. Rundle, 434 F.2d 1112 (3d Cir. 1970); Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968).

170. 375 U.S. 85 (1963).

171. *Id.* at 86-87.

172. 386 U.S. 18 (1967).

> All of these harmless error rules . . . serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any likelihood of having changed the result of the trial.[173]

Accordingly, *Chapman* held that there may be some constitutional errors which are so insignificant that they simply do not warrant reversal.[174] However, pointing to the right to counsel issue in *Gideon*,[175] *Chapman* indicated that there are some constitutional rights so basic to a fair trial that their infraction could never be treated as harmless error.[176] In a concurring opinion, Mr. Justice Stewart went beyond the majority to assert that "this Court has steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were harmless."[177] Mr. Justice Stewart illustrated his point with the right to counsel cases:

> When a defendant has been denied counsel at trial, we have refused to consider claims that this constitutional error might have been harmless. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States*, 315 U.S. 60, 76. That, indeed, was the whole point of *Gideon v. Wainwright*, 372 U.S. 335, overruling *Betts v. Brady*, 316 U.S. 455. . . . "[W]e do not stop to determine whether prejudice resulted." *Hamilton v. Alabama*, 368 U.S. 52, 55; *White v. Maryland*, 373 U.S. 59, 60.[178]

The ensuing problem, then, is whether the right to the effective assistance of counsel is similarly such a basic right that its violation should automatically be considered prejudicial. To do justice to the oft-invoked equation of the sixth amendment right to counsel with the right to have effective assistance, logical analogy compels that a conclusive presumption of prejudice be extended to ineffectiveness of counsel cases. Applying the "fundamental" sixth amendment right to counsel directly to the states

173. *Id.* at 22.
174. *Id.*
175. Gideon v. Wainwright, 372 U.S. 335 (1963).
176. 386 U.S. at 23.
177. *Id.* at 42 (Stewart, J., concurring).
178. *Id.* at 43.

by incorporation into the fourteenth amendment, the Supreme Court established a strict prophylactic rule applicable to every case regardless of its particular circumstances. *Gideon* adjudged the probability of unfairness to be so great that an infraction of the right to counsel should not be countenanced under any circumstances.[179] In effect, the Court has determined that the impact of violations of *Gideon* cannot be intelligently assessed because no appellate court can fairly determine what would have happened at the trial stage had the defendant not been denied his constitutional right to counsel. As stated by Judge Schaefer of the Illinois Supreme Court, "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."[180] Thus, an infraction of the right to counsel is reversible error because it goes to the very reliability of the process of guilt determination. There is simply too great a risk that an innocent man might thereby be found guilty.[181]

Precisely the same argument applies to violations of the right to effective assistance of counsel. The ineffective representation of the defendant upsets the equal balance that is an essential feature of the adversary system. When counsel fails to adequately investigate, prepare and advocate the cause of the defendant, again there exists the danger of reaching the wrong result. Just as in the absence of counsel cases, the prejudice resulting from the sometimes subtle ineffectiveness would be difficult to pinpoint by applying a harmless error test. Concurring with Mr. Justice Stewart's analysis, the Sixth Circuit has concluded that "[h]armless error tests do not apply in regard to the deprivation of a procedural right so fundamental as the effective assistance of counsel."[182]

The opposite position among those circuits which objectively judge ineffectiveness of counsel claims is that denial of effective assistance does not warrant a conclusive presumption of prejudice.[183] In the terms of *Chapman*, the constitutional right to the effective assistance of counsel is simply not one of those rights

179. Herring v. New York, —— U.S. ——, 95 S. Ct. 2550, 2558 (1975).

180. Schaefer, *Federalism and Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956).

181. Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 541-48 (1969) [hereinafter cited as Mause].

182. Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974).

183. *See* cases cited note 166 *supra*.

"so basic to a fair trial that their infraction can never be treated as harmless error."[184] This position is defensible on two levels. First, in answer to the Sixth Circuit's reasoning, it is arguable that the impact of a violation of the right to the effective assistance of counsel is not so pervasive as a violation of the right to counsel. In the absence of counsel cases, the total lack of legal training on the side of the defense is most obvious throughout the entire proceedings—hence the label, "inherently prejudicial" under the *Chapman* rule. Appellate courts reviewing a claim of ineffective assistance, however, can more readily examine the trial record in order to determine whether defense counsel's mistakes prejudiced the defendant's case.[185]

The second argument for not conclusively presuming prejudice from the ineffectiveness of counsel is based on the policy considerations which underlie the harmless error test. *Chapman* recognizes the efficacy of the harmless error test insofar as it prevents reversals or retrials because of small errors or defects which affect the adversary system only inconsequentially, if at all.[186] If a harmless error test can achieve its purpose of screening irreparably tainted adversary proceedings from only inconsequentially flawed proceedings, it is supportable as serving a desirable function in the law. For that limited purpose, it should be protected whenever possible. Failing to do so would place an unnecessary burden on the judicial system by requiring that a case be retried even when the result on retrial would be the same. Alternatively, so the argument runs, defendants who are guilty in fact might escape further punishment because the strength of the government's evidence has deteriorated in the intervening period.[187] The persuasiveness of both of these arguments has caused several circuits to resolve the issue of considering prejudice in favor of the harmless error test.[188]

Just as there is no agreement on the efficacy of the harmless error test for claims involving ineffective assistance, neither is

184. Chapman v. California, 386 U.S. 18, 23 (1967).

185. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 1018 (1973); Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434, 1436 (1965).

186. 386 U.S. at 22.

187. Waltz, *supra* note 11, at 291.

188. *See, e.g.*, McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974); United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973); United States *ex rel.* Green v. Rundle, 434 F.2d 1112 (3d Cir. 1970); Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968). *See also* Mause, *supra* note 181, at 519-20.

there uniformity with regard to the burden of proving prejudice or its absence. Circuits adopting the harmless error test follow at least three distinct approaches. One approach holds that a showing of ineffectiveness under the objective standard results in a prima facie case for the defendant, unless the prosecution can establish that the defendant was not prejudiced by ineffective counsel.[189] Another position holds that the defendant should carry the burden of proving both incompetency and its consequent prejudice.[190] A third approach incorporates the reasoning of both of these rules and determines the burden of proof in accordance with the exigencies of each case.[191]

Among the courts which place the burden on the prosecution to rebut the presumption of prejudice, *Chapman v. California*[192] is again the touchstone. In *Chapman*, the Supreme Court supplied a general rule that constitutional error "certainly . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless."[193] Thus, *Chapman* indicated that the burden should be placed on the beneficiary of the error to prove beyond a reasonable doubt that the error did not contribute to the verdict.[194]

Proponents of the strict *Chapman* rule offer several arguments in support of requiring the prosecution in ineffectiveness cases to prove the absence of prejudice. One rationale is that it would simply be unfair to require the defendant to prove prejudice.[195] Evidence of prejudice may be absent from the record precisely because counsel has been ineffective. For example, the record often would not indicate which witnesses could have been called or what other defenses could have been raised. The defendant's burden in these circumstances would be difficult to carry, particularly when review is limited to the record of the case.[196]

189. *See, e.g.*, United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973); Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968).

190. *See, e.g.*, Moore v. United States, 432 F.2d 730 (3d Cir. 1970); Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968) (Craven, J., dissenting).

191. *See, e.g.*, McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974).

192. 386 U.S. 18, 23 (1967).

193. *Id.* at 24.

194. *Id.*

195. United States v. DeCoster, 487 F.2d 1197, 1204 (D.C. Cir. 1973).

196. The Court of Appeals for the District of Columbia has recognized the awkwardness of the defendant's having to produce evidence of prejudice when review on direct appeal is limited to the court record, particularly when the errors might have been made in the less visible but no less critical stages

Another argument draws on the requirements of the adversary system of justice and the constitutional presumption of innocence. When a defendant has been denied the effective assistance of counsel, his implicit complaint is that he has been deprived of a full adversary trial; the government has never been effectively put to its proof. To require the petitioner to shoulder the burden of proving prejudice in these circumstances, so the argument runs, would be tantamount to requiring the accused to show "the likelihood of his innocence."[197] This result is untenable in an adversary system that requires the prosecution to prove guilt beyond a reasonable doubt. Thus, in order to satisfy sixth amendment requirements, the burden is put on the prosecution to rebut the presumption of prejudice which always arises upon a showing of ineffectiveness.[198]

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of investigation and preparation. In these circumstances, therefore, the court suggests that one remedy is to permit evidence of ineffectiveness outside the record, submitted by affidavit. *Id.* at 1204-05.

197. *Id.* at 1204.

198. *Id. See also* Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968). In *Coles*, the Fourth Circuit stated that any failure of counsel to abide by the objective standard of competency automatically constitutes a denial of effective assistance, "unless the state, on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby." *Id.* at 226. *Coles* did not immediately justify its position. An examination of the court's analysis, however, discloses its reliance on the reasoning in closely analogous cases in which the late appointment of counsel is the basis of the ineffectiveness claim. *Cf.* Twilford v. Peyton, 375 F.2d 670 (4th Cir. 1970); Martin v. Virginia, 365 F.2d 549 (4th Cir. 1966). In those cases, the issue was whether a showing of an untimely appointment of counsel gives rise to a presumption of ineffective assistance. Several courts have held that evidence of a late appointment results in a prima facie case of ineffective assistance, unless rebutted by the prosecution. *See, e.g.*, Twilford v. Peyton, 375 F.2d 670 (4th Cir. 1970); Mosley v. Dutton, 367 F.2d 913 (5th Cir. 1966), *cert. denied*, 387 U.S. 942 (1967); Turner v. Maryland, 303 F.2d 507 (4th Cir. 1962).

Critics of this analysis reply that the prejudice of a late appointment of counsel is only relative to the circumstances of each case, and will vary with the gravity of the charge, the experience of counsel, and the opportunity for appropriate preparation. Moore v. United States, 432 F.2d 730, 735 (3d Cir. 1970). This position instead finds in the late appointment cases the broader concept that the burden of showing a lack of prejudice should fall on the government only *after* the defendant has demonstrated prejudice to his defense. *Id.* The Supreme Court seems to concur in this view, at least in the context of late-appointed cases. In *Chambers v. Maroney*, 399 U.S. 42 (1972), the Court indicated:

> Unquestionably, the courts should make every effort to effect early appointments of counsel in all cases. But we are not disposed to fashion a *per se* rule requiring reversal of every conviction following

Opponents of the strict *Chapman* approach argue that ineffectiveness of counsel is distinct from the kind of constitutional error contemplated by *Chapman*'s *rule*.[199] In *Chapman*, the Court spoke in terms of placing the burden of proof on the "*beneficiary* of the error,"[200] and assumed that the constitutional error was caused by the state and tolerated by the trial court. However, a violation of the right to effective assistance is inherently different from violations caused by the state, such as an illegal search and seizure or a coerced confession. Unlike the prosecutor's extensive commenting in *Chapman* on the defendant's failure to testify, for example, ineffectiveness of counsel is the consequence of the volitional acts or omissions of the lawyer who is defending the accused. This distinction has caused one court to conclude that the right to effective assistance is sui generis—in a class by itself—and therefore aloof from the rule of *Chapman*.[201] Thus, to thrust on the prosecution the full burden of proving a lack of prejudice would often unduly penalize the prosecution for actions over which it had no control at all.[202]

A second approach to the issue of the burden of proof sidesteps the problems in *Chapman* by always placing the burden on the defendant to show how the proven ineffectiveness was

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tardy appointment of counsel or to hold that, whenever a habeas corpus petition alleges a belated appointment, an evidentiary hearing must be held to determine whether the defendant has been denied his constitutional right to counsel.

Id. at 54. Mr. Justice Harlan strongly dissented. Citing *Powell* and *Avery* as precedents, he emphasized that the late appointment of defense counsel has often been a cause for finding ineffective assistance of counsel, and stressed his belief that the Court should have addressed that issue: "Where counsel has no acquaintance with the facts of the case and no opportunity to plan a defense, the result is that the defendant is effectively denied his constitutional right to assistance of counsel." *Id.* at 59 (Harlan, J., dissenting). Interestingly enough, in anticipation of the *Chambers* decision, it had been widely assumed that this case would be the Court's occasion to deal once and for all with the issue of ineffective assistance. N.Y. Times, Nov. 11, 1969 at 26, col. 1. Apparently, the majority of the Court felt that the larger problem of ineffectiveness was not yet ripe for decision. Thus, *Chambers* was decided on an alternative basis, and became a landmark case in search and seizure law. *See* Bazelon, *supra* note 8, at 21.

199. *See* McQueen v. Swenson, 498 F.2d 207, 218 (1974); Moore v. United States, 432 F.2d 730, 735 (3d Cir. 1970); Coles v. Peyton, 389 F.2d 224, 230 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968) (Craven, J., dissenting).

200. Chapman v. California, 386 U.S. 18, 24 (1967) (emphasis added).

201. 498 F.2d at 218.

202. *Id.* at 219.

prejudicial to his case.[203] Citing the general rule that it is always easier to prove a positive than a negative,[204] proponents of this approach argue that it is only just that the one who is claiming that his counsel inadequately represented him should now bear the burden of proving all that he claims.[205] The problem with this approach is that it is equally absolute; a defendant might be able to show that his counsel inadequately investigated the case, yet he would fail to get relief simply because the evidence tending to exonerate him has long since dissipated.[206]

A third approach to the issue of the burden of proving prejudice or the absence thereof takes a more flexible position than either the advocates of the strict *Chapman* rule or its opponents.[207] Recognizing the problems inherent in placing the burden of proof absolutely on either the prosecution or the defendant, this approach opts instead for a more equitable sharing of the burden of proof.[208] Such a policy of flexibility permits the exigencies of each case to determine who carries the burden of proof. In circumstances in which the ineffectiveness has a pervasive effect on the guilt determination process,[209] or whenever the absence or presence of prejudice would be difficult to show,[210] proof of ineffective assistance is deemed to be sufficient by itself to justify a new trial.[211] When the defendant alleges incompetency reflected by a failure to reasonably discover and present specific trial evidence, however, then the defendant should bear the burden of showing how that evidence would have been helpful to him, since that knowledge would be obviously more within his grasp than the prosecution's.[212] But when the defendant is unable by changed circumstances to produce such evidence, then the prosecution should be compelled to

203. *See, e.g.*, Moore v. United States, 432 F.2d 730, 735 (3d Cir. 1970); Coles v. Peyton, 389 F.2d 224, 230 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968) (Craven, J., dissenting).

204. *Id.*

205. 432 F.2d at 735.

206. *Cf.* United States *ex rel.* Green v. Rundle, 434 F.2d 1112, 1115 (3d Cir. 1970) (while the burden generally rests on the defendant to prove prejudice, a mere finding of ineffectiveness may be enough to justify a new trial if the ineffectiveness had a pervasive effect on the trial or if the defendant cannot produce such evidence due to changed circumstances).

207. *See* McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974).

208. *Id.* at 219.

209. *Id.* at 219-20. *See also* United States *ex rel.* Green v. Rundle, 434 F.2d 1112, 1115 (3d Cir. 1970).

210. 498 F.2d at 220.

211. *Id.*

212. *Id.* at 219-20.

prove, to the satisfaction of *Chapman's* "beyond a reasonable doubt" test,[213] a lack of prejudice to the defendant.[214] Then, acknowledging that the right to effective assistance is a unique constitutional right, a medium is indicated between the extreme positions of either *Chapman* or its opponents on the issue of the burden of proof.

In summary, it is apparent that whatever position finally reached in each circuit regarding the allocation of the burden of proof in ineffectiveness cases, the outcome depends on a balancing of the juxtapositioned ideal and practical interests. The mockery of justice circuits, representing one extreme, require the defendant to show a strong case in order to justify relief. The foremost consideration in this approach is the negative practical consequence of any stricter sixth amendment position; unfortunately, the constitutional guarantee of effective assistance is largely overlooked. On the other hand, the position of the Sixth Circuit in *Beasley v. United States*[215] and Mr. Justice Stewart, concurring in *Chapman*, requires only that the defendant show incompetency by the objective standard. This extreme represents the judiciary's interest to protect fully the rights of an accused in the constitutionally mandated adversary system; here, however, the practicalities which other circuits consider so important are disregarded. Yet the ineffectiveness issue is further complicated among the circuits adopting both the sixth amendment and the harmless error tests with respect to the burden of proving prejudice or its absence. In all these diverse ways, however, most circuits try to balance the competing interests. Each has attempted to screen the number of ineffectiveness cases on court dockets and to protect valid convictions while also according full protection to the defendant's constitutional right to effective assistance. Unfortunately, to date the circuits have adopted methods with little uniformity or cohesiveness.

RESOLVING THE CONFLICT: SOME OBSERVATIONS

An overview of the federal courts' positions discloses the need for an authoritative resolution of the ineffectiveness of counsel issue. Following the Supreme Court's general directive that the sixth amendment be given greater consideration, the circuits have become widely divergent in their movement away from the tradi-

213. Chapman v. California, 386 U.S. 18, 24 (1967).
214. 498 F.2d at 220.
215. 491 F.2d 687 (6th Cir. 1974). *See* p. 543 *supra*.

tional position based solely on fifth and fourteenth amendment due process notions. Where the transition will end is open to speculation. It is the thesis of this note that the resolution sought to be effected should, above all else, respect the defendant's established right to effective assistance. Only secondarily should courts consider those justifiable arguments of "practicality" which have pervaded their thinking in the past.

Clearly, the traditional mockery of justice approach to ineffectiveness of counsel claims is coming into disrepute. At its apex, the farce and mockery standard had both a legal basis in due process reasoning and a persuasive practical rationale. When *Gideon* made the right to counsel directly applicable to the states, however, both bases were eroded. The direct language of the sixth amendment challenges the appropriateness of due process fairness concepts in effectiveness cases. The sixth amendment's explicit focus is on the "assistance of counsel," therefore, objective examination of the quality of counsel's performance should be foremost in considering a defendant's claim of ineffectiveness. In addition, by insisting that the basic elements of the adversary system be given utmost consideration, the Supreme Court forced the circuits to compromise their remaining arguments of efficiency and finality. In that compromise, the practice of giving the judge unbridled discretion in determining overall fairness for the purpose of limiting ineffectiveness claims could no longer be countenanced. The Sixth Circuit's harsh criticism of the subjective approach is representative of this new attitude:

> Phrases often take on a life of their own. Divorced from the context in which they were born, they spawn new results based on interpretations of themselves, rather than on a close scrutiny of the actual holdings for which they were a description. . . . The phrase "farce and mockery" has no obvious intrinsic meaning. What may appear a "farce" to one court may seem a humdrum proceeding to another. The meaning of the Sixth Amendment, does not, of course, vary with the sensibilities and subjective judgments of the various courts. The law demands objective explanations, so as to ensure the even dispensation of justice.[216]

It is thus clear that the due process mockery of justice standard simply does not comport with the constitutional requirements of effective defense representation. The subjective approach con-

216. 491 F.2d at 692.

siders the trial as a whole, whereas the sixth amendment's attention is on the specific conduct of defense counsel that is alleged to be defective. Consistent with this rationale, an extreme position requires that each allegation of ineffectiveness be adjudged solely by its departure from objective standards of competency.[217]

Yet, as a practical matter, courts find that they cannot ignore the consequences of such an absolute guarantee of the right to effective assistance. One circuit judge notes that if he were to consider seriously every claim of ineffectiveness before him, he might have to send back half the convictions in his circuit.[218] Moreover, there is an ever-increasing number of prisoners' petitions on court dockets,[219] and a proportionately large number are based on ineffectiveness claims. Since adopting a strict standard of competency would have the effect of broadening a defendant's opportunity to claim successfully that his counsel was ineffective,[220] the price paid in terms of lost convictions might be high.[221] If nothing else, the public's demand for effective law enforcement dictates that claims of ineffectiveness be handled with restraint. The challenge, therefore, is to find the best method by which to save the valid convictions while also protecting to the fullest extent possible each defendant's sixth amendment right to effective assistance.

The disparity between the circuits on the ineffectiveness issue thus reflects the oft-recurring tension between what appears to be the most expedient course of action and that which would most protect a defendant's rights. Regarding the right to effective assistance, *Gideon* seems to have resolved this tension in favor of preserving the all-important adversary process. Nevertheless, the right to effective assistance continues to present unique problems concerning the concurrent interest of preserving convictions validly obtained. In this respect, ineffective assistance stands in contrast to most instances in which the Supreme Court has found constitutional error, where practical and remedial compliance with the Court's new requirements is usually easy to obtain. To comply with the Court's prohibition against admitting illegally obtained evidence,[222] for example, the prosecution can decline

217. *See, e.g.*, Beasley v. United States, 491 F.2d 687 (6th Cir. 1974).

218. Bazelon, *supra* note 8, at 22-23.

219. *See* 1970 AD. OFF. REP. 122 (Table 17). During the decade of the sixties, filings of Federal prisoners' petitions rose from 5,854 in 1960 to 11,655 in 1970, an increase of 220%. At the same time, filings by state prisoners in federal courts rose from 872 in 1960 to 11,812 in 1970, an increase of 1200%. *Id.*

220. *See* note 15 *supra*.

221. *See* Bines, *supra* note 15, at 943-44.

222. *See, e.g.*, Miranda v. United States, 384 U.S. 436 (1966).

to introduce or the judge can suppress the inadmissible evidence; to honor the Court's ban on prosecutorial comment on a defendant's silence,[223] a trial judge and prosecutor need only see to it that such comments are not made. Generally, both the trial judge and prosecutor have the opportunity to control these types of constitutional error and to preserve the validity of trial proceedings.

However, the same degree of control over the error is not present in constitutional violations stemming from ineffective assistance. A distinguishing feature of the sixth amendment right to effective assistance of counsel is the trial court's general inability to control inadequate representation and effectively rectify its consequences prior to judgment. Yet an absolute requirement that counsel always be effective would hold the judge and prosecutor accountable, in that the case may be reversed or remanded, even though they had little control over defense mistakes in trial tactics and oversights in investigation.[224]

The practical consequence of the strictest approach, reversing a case upon a mere showing of incompetence under an objective standard, is that every mistake or omission of defense counsel represents a potential lost conviction, regardless of the impartiality or reliability of the result.[225] For all its benefits in ensuring protection of the defendant's constitutional rights, such a standard often threatens to render convictions invalid for reasons beyond the control of the trial officers. As a practical matter, the trial court's lack of opportunity to rectify ineffective representation prior to judgment has certainly had a bearing on the appellate courts' unwillingness in the past to overturn such convictions.

To recognize the unique nature of the right to effective assistance of counsel is to suggest the appropriate remedy for its violation. Permitting the harmless error test may be the best answer to the present tension between the "practical" and the "ideal." Thus, past concern over the loss of too many otherwise valid convictions[226] need no longer dilute the vitality of the sixth amendment or subvert its legitimate interest in protecting the equitable functioning of the adversary system of criminal justice. Sincere concern for the principles underlying the right to the effective

223. *See* Griffin v. California, 380 U.S. 609 (1965).

224. *See* Mitchell v. United States, 259 F.2d 787, 792-93 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

225. *See* Bines, *supra* note 15, at 944.

226. Mause, *supra* note 181, at 520.

assistance of counsel dictates the desirability of a harmless error test for this type of constitutional violation.

However, it should be recognized that *Chapman v. California*,[227] the leading case on the efficacy of the harmless error test for constitutional error, does not adequately reflect, nor does it purport to reflect, a proper balancing of the interests regarding the burden of proving the presence or absence of prejudice resulting from ineffectiveness. Instead, *Chapman* supplies only an artificial rule-of-thumb which places the burden of persuasion on the beneficiary of the error to prove the absence of prejudice.[228] This standardized rule, which may be valid in other contexts, is wholly inappropriate to the ineffectiveness situation. In view of the unique nature of the right to effective assistance, any rule placing the burden absolutely on either party in ineffectiveness cases would be unfortunate in examining the issue of prejudice. Certainly, no legitimate purpose is served in punishing the prosecution for errors over which it had no control, particularly where evidence demonstrating prejudice may be more readily within the production power of the defendant. The concern of *United States v. DeCoster*[229] is also well-founded insofar as the defendant should not have to bear the equally onerous task to show how introduction of certain evidence would have changed the course of the trial.[230] Thus, as one court has noted,[231] a "more equitable sharing of the burden of proof seems appropriate."[232] The burden should be placed according to the exigencies of each case, considering such factors as the severity of the error and each party's relative ability to produce the needed evidence of prejudice.

It should be recognized that what is primarily at stake in all ineffectiveness cases is the defendant's sixth amendment rights. Consistent with this recognition, the trend in the federal courts is to depart from the subjective due process rationale and to adopt stricter objective protection of the defendant's right to effective assistance. However, many inconsistencies still remain. Appropriately, Mr. Chief Justice Burger once asserted:

> Of this I am sure: our profession cannot fulfill the promises implicit in the idea of the rule of law and equal

227. 386 U.S. 18 (1967).
228. *Id.* at 24.
229. 489 F.2d 1197 (D.C. Cir. 1973).
230. *Id.* at 1204.
231. McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974).
232. *Id.* at 219.

> justice under law if we content ourselves with being experts and specialists in great concepts but amateurs in execution.[233]

Nowhere is the truth of this statement more apparent than in the case of ineffective criminal defense representation. Unquestionably, ineffective and amateurish counsel has often undermined the sixth amendment promise of equal partisan advocacy. The challenge for the courts today is to find a solution that will put the great concept of sixth amendment effective assistance into workable execution. Applying objective standards for defense competency together with the harmless error test for constitutional error thus serves as a viable remedy to the ineffectiveness problem.

This remedy, however, should not be seen as a permanent solution to the ineffectiveness problem. An objective analysis of defense counsel's competency, coupled with the harmless error test, may indeed protect the defendant's sixth amendment right; but it does so only after the fact. The long-range challenge is to weed out incompetent counsel—"walking violations of the sixth amendment"[234]—before the ineffectiveness occurs. In this respect, methods should be devised to screen out these "walking violations" prior to their appointment to an indigent defendant. Further guidelines might be provided for judges to effectively identify and remedy ineffectiveness during trial. Additional solutions may largely be found outside the courtroom. More study is needed to explore several possibilities: how law schools might better prepare new lawyers for effective criminal defense work, how public defender systems can be improved, and how the legal bar might more directly impose sanctions upon careless defense representation.[235] Unfortunately, incompetent lawyers will probably continue to plague trial courts. Nonetheless, affirmative steps can and should be taken in advance to ensure that each criminal defendant receives a genuinely adversary trial.

The current disagreement between the circuits on the ineffectiveness issue is obviously more than a healthy squabble over the standard of competency. Rather, the issue is more basic: whether due process considerations or sixth amendment considerations should be controlling in claims alleging the ineffective as-

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233. Burger, *Has the Time Come?*, 55 F.R.D. 119, 126 (1970).

234. Bazelon, *supra* note 8, at 2.

235. For introductory discussions of these and other possible alternative solutions and their attendant problems, *see* Bines, *supra* note 15, at 970-83; Bazelon, *supra* note 8, at 17-20, 38-46.

sistance of counsel. Although the trend is to comport with the stricter requirements of the sixth amendment, even the changing circuits are not unanimous in how that mandate should be carried out. Until the Supreme Court of the United States determines the most equitable manner of dealing with such claims, the desired even dispensation of justice cannot be assured.