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Constitutional Law -- Due Process -- Incompetence of Defense Counsel

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problem of unjustified delay, began an inquiry that may have further constitutional implications. Unjustified delay before arrest may come to be forbidden as a violation of due process under the fifth or the fourteenth amendment just as such delay between arrest and trial is now forbidden by the sixth amendment.

Ross v. United States lacks the clarity necessary to preserve certainty in the law. Though the objectives of the court could better be achieved by relying upon a ground other than delay, law enforcement agencies should heed the warning that the statute of limitations is not inviolate if it appears that prosecution was unjustifiably delayed.

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Constitutional Law—Due Process—Incompetence of Defense Counsel

The petitioner in *Schaber v. Maxwell*[1] was convicted of murder and sentenced to death. At arraignment the presiding judge had entered an oral plea of not guilty on his behalf. Petitioner waived trial by jury, electing to be tried by a three-judge state court.[2] At the trial, the attorneys appointed to represent petitioner had virtually conceded that he was guilty of the acts alleged and, through their opening statement, indicated that they were relying solely upon the defense of insanity; yet they failed to enter a written plea of not guilty by reason of insanity required by Ohio law, without which the accused is conclusively presumed to have been sane at the time of the commission of the alleged offense.[3] After conviction and sentence, petitioner applied for a writ of habeas corpus in the federal district court alleging that counsel's failure to comply with the Ohio statute constituted incompetence and thus deprived him of effective assistance of counsel guaranteed by due process of law.[4]

[1] 348 F.2d 664 (6th Cir. 1965).

[2] OHIO REV. CODE ANNO. 2945.05 to -.06 (Page 1954).

[3] "A defendant who does not plead not guilty by reason of insanity is conclusively presumed to have been sane at the time of the commission of the offense charged." OHIO REV. CODE ANNO. § 2943.03 (*E*) (Page 1954). Section 2943.04 provides that all pleas other than guilty or not guilty shall be in writing, subscribed by defendant or his counsel, and shall immediately be entered upon the court record.

[4] Petitioner had exhausted his remedies in the state courts of Ohio. The Supreme Court of Ohio denied a petition for habeas corpus on the grounds that incompetence of counsel was a matter which must be raised on appeal. Schaber v. Maxwell, 348 F.2d 664, 667 n.3 (6th Cir. 1965).

The district court denied the application for the writ on the ground that the oral plea of insanity had in fact been accepted by the trial court. On petitioner's appeal to the United States Court of Appeals for the Sixth Circuit, it was held that the trial court did not accept the oral plea; consequently there had been no adjudication of petitioner's sanity.

In reversing petitioner's conviction the court held that

> under the facts and circumstances of this case we are of the opinion that petitioner was deprived of due process of law at his trial in the state court, . . . because of the failure of his counsel to file a written plea of 'not guilty by reason of insanity' and the conclusive presumption of sanity in the absence of a written plea.[5]

The right to counsel as guaranteed by the sixth and fourteenth amendments means effective assistance of counsel in the preparation of the accused's case.[6] The term "effective assistance of counsel" is generally used in two different senses. In a procedural sense, there must be timely assignment of counsel to allow an opportunity to prepare an adequate defense.[7] In addition courts use the term "effective assistance of counsel" in the sense of the quality of the defense actually rendered.[8] The principal case well demonstrates the problems created by claims of ineffective assistance of counsel pred-

[5] *Id.* at 673.

[6] *E.g.*, Powell v. Alabama, 287 U.S. 45 (1932). See Gideon v. Wainwright, 372 U.S. 335 (1963). A distinction must be made between those cases where there is a denial of the right to counsel and those cases where there was representation by counsel, but for some reason the representation was ineffective or inadequate.

[7] The concept of effective assistance of counsel is used to describe a procedural requirement, *i.e.*, that assignment of counsel be effective to allow useful participation in the preparation and trial of the defendant's case. See, *e.g.*, Hawk v. Olson, 326 U.S. 271 (1945) (assignment must be timely made to allow preparation); Avery v. Alabama, 308 U.S. 444 (1940) (denial of consultation privilege makes appointment a sham); Powell v. Alabama, 287 U.S. 45 (1932) (appointment of entire county bar not effective).

[8] The term effective assistance is used to evaluate the quality of the defense representation rendered. When the defendant attacks his conviction alleging that trial counsel had a conflict of interests, the substance of the attack would seem to be that the conflict of interests lowered the quality of the representation rendered. See, *e.g.*, Glasser v. United States, 315 U.S. 60 (1942) (accused's defense rendered less effective). *But see* Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958) (procedural requirement, not quality of defense rendered). See generally Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964).

icated upon charges that defense counsel in a criminal case was incompetent.[9]

The Supreme Court has never undertaken to establish a standard of quality for defense counsel in criminal cases, but the lower federal and the state courts have enunciated various standards of quality required by the Constitution.[10] It would seem that to substantiate a claim of incompetence, the defendant must allege acts or omissions by counsel that are the result of insufficient knowledge of the law or facts of the case. A decision by counsel when he lacks a sufficient knowledge of the facts or law of the case that a reasonable inquiry would have produced is manifestly incompetent.[11] In *Turner v. Maryland*[12] defense counsel apparently made no investigation of the facts or law involved in the case. The defendant's conviction was reversed because appearance without study or preparation for useful participation in the trial is not a satisfaction of the constitutional right to the effective assistance of counsel. In *Application of Tomich*[13] the defendant was convicted on the basis of evidence obtained by illegal search and seizure because counsel failed to make a pre-trial motion to suppress as required by state law. The court held that the mistake of counsel required "the finding that petitioner was without the 'effective' assistance of counsel that is guaranteed by the Constitution."[14] The defendants in *Lunce v. Overlade*[15] were represented by counsel who was completely unacquainted with the law of the jurisdiction. Counsel did not challenge the sufficiency of the affidavit, which apparently did not charge the crime for which the defendants were tried and convicted; furthermore, he failed to save his exceptions. In reversing the conviction, the Court of Appeals for the Seventh Circuit held, that "the record made by Ohio counsel in his defense of petitioners irrefutably demonstrates that he was so ignorant of Indiana law and procedure

[9] See generally, 78 HARV. L. REV. 1434 (1965); 49 VA. L. REV. 1531 (1963).

[10] *E.g.*, Pineda v. Bailey, 340 F.2d 162 (5th Cir. 1965) (defense with zeal); Hickock v. Crouse, 334 F.2d 95 (10th Cir. 1964), *cert. denied*, 379 U.S. 982 (1965) (defense with all counsel's skill); Willis v. Hunter, 166 F.2d 721 (10th Cir. 1948), *cert. denied*, 334 U.S. 848 (1948) (defense by able lawyer).

[11] Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963).

[12] 303 F.2d 507 (4th Cir. 1962).

[13] 221 F. Supp. 500 (D. Mont. 1963), *aff'd* 332 F.2d 987 (1964).

[14] *Id.* at 505.

[15] 244 F.2d 108 (7th Cir. 1957).

that it was virtually impossible for him to protect or even to assert petitioners' rights."[16] Defense counsel in *Poe v. United States*[17] advised the defendant not to take the witness stand because counsel believed certain statements by the defendant could be used to impeach him. In fact, the statements were inadmissible and could not have been so used. The district court for the District of Columbia in reversing the conviction said, "where the defense is substantially weakened because of the unawareness on the part of defense counsel of a rule of law basic to the case, the accused is not given the effective representation guaranteed him by the Constitution."[18] Petitioner's allegation of incompetence in *Schaber v. Maxwell* would seem to come within this category. Counsel elected to rely on the defense of insanity, but did not have an adequate knowledge of the applicable state law, with the result that petitioner was conclusively presumed to be sane.

Courts are generally reluctant to allow claims charging that counsel was incompetent.[19] There is a presumption that counsel is effective and competent,[20] and mere general criticism of the attorney's conduct is insufficient to substantiate a claim of incompetence. The defendant must allege with particularity the acts or omissions alleged to constitute incompetence.[21] This burden is further complicated by the general proposition that acts of counsel involving judgment or trial strategy cannot be asserted as incompetence.[22]

[16] *Id.* at 110.

[17] 233 F. Supp. 173 (D.D.C. 1964).

[18] *Id.* at 178.

[19] See, *e.g.*, Johnson v. United States, 267 F.2d 813 (9th Cir.), *cert. denied*, 361 U.S. 889 (1959) (petition fabricated with aid of cell-mates).

[20] Michel v. Louisiana, 350 U.S. 91, 101 (1955).

[21] *E.g.*, Gilpin v. United States, 252 F.2d 685 (6th Cir. 1958) (allegation of general incompetence insufficient); United States *ex rel.* Weber v. Ragen, 176 F.2d 579 (7th Cir. 1949), *cert. denied*, 338 U.S. 809 (1949) (allegation of old age insufficient); United States v. Helwig, 159 F.2d 616 (3d Cir. 1947) (allegation of inexperience not sufficient).

[22] The acts of counsel that are considered to be within the ambit of counsel's judgment are too numerous to be listed here. See, *e.g.*, Johnson v. United States, 333 F.2d 371 (10th Cir. 1964) (failure to object to illegal confession); Tompa v. Virginia *ex rel.* Cunningham, 331 F.2d 552 (4th Cir. 1964) (failure to call particular witnesses); Rivera v. United States, 318 F.2d 606 (9th Cir. 1963) (failure to request bill of particulars); Snead v. Smyth, 273 F.2d 838 (4th Cir. 1959) (failure to object to jury instructions); United States v. Duhart, 269 F.2d 113 (2d Cir. 1959) (failure to use one of several available defenses); Sweet v. Howard, 155 F.2d 715 (7th Cir. 1949), *cert. denied*, 336 U.S. 950 (1949) (failure to seek change of venue); Diggs v. Welch, 148 F.2d 667 (D.C. Cir. 1945), *cert. denied*, 325 U.S. 889 (1945) (advice to plead guilty).

However, where counsel makes several erroneous decisions in trial tactics that result in a total failure to present the cause of the accused, courts will find that degree of incompetence necessary to constitute a violation of due process.[23] For example, election between various available defenses is normally considered a matter of trial strategy, but where the defense actually rendered is highly insubstantial in relation to those not offered, doubt will be cast on the hypothesis that counsel made a competent and intelligent choice.[24] Thus, in general it is said that a tactical decision by counsel, to come within the immunity referred to above, must be based on an informed professional opinion.[25] In addition, the convicted defendant must show prejudice resulting from counsel's incompetence or demonstrate the result of the trial might have been different except for the incompetent conduct.[26] Some courts apparently extend the burden of proof even further and require the defendant to prove that counsel's conduct was so incompetent that it amounted to a breach of counsel's duty to represent faithfully his client.[27] In any event the defendant must prove the incompetence of counsel made the trial a sham,[28] a farce or mockery of justice,[29] or the equivalent of no defense at all.[30] In short the defendant must prove an extreme case.

[23] For example, where defense counsel failed to object to a coerced confession, failed to use certain witnesses, and offered no evidence, the court found incompetence that violated due process. Each of these could be considered a tactical decision, but the aggregate of the decisions constituted a total failure to present the cause of the accused. Jones v. Huff, 152 F.2d 14 (D.C. Cir. 1945).

[24] *E.g.,* Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), *cert. denied,* 372 U.S. 978 (1963).

[25] For example, the decision not to argue the case to the jury would normally be a matter of trial tactics, but where the decision is the result of counsel's determination that his conscience would not allow him to argue the case, the court will find incompetency constituting a denial of due process. Johns v. Smyth, 176 F. Supp. 949 (E.D. Va. 1959).

[26] *E.g.,* United States v. Duhart, 269 F.2d 113 (2d Cir. 1959); Anderson v. Bannan, 250 F.2d 654 (6th Cir. 1958) (per curiam); DuBoise v. North Carolina, 225 F. Supp. 51 (E.D.N.C.), *aff'd,* 338 F.2d 697 (4th Cir. 1964).

[27] *E.g.,* Bouchard v. United States, 344 F.2d 872 (9th Cir. 1965), Kennedy v. United States, 259 F.2d 883 (5th Cir. 1958), *cert. denied,* 359 U.S. 994 (1959).

[28] *E.g.,* United States *ex rel.* Mitchell v. Thompson, 56 F. Supp. 683 (S.D.N.Y. 1944).

[29] *E.g.,* Rivera v. United States, 318 F.2d 606 (9th Cir. 1963); O'Malley v. United States, 285 F.2d 733 (6th Cir. 1961); United States v. Wight, 176 F.2d 376 (2d Cir. 1949).

[30] *E.g.,* Turner v. Maryland, 303 F.2d 507 (4th Cir. 1962); Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957).

In considering claims of incompetent counsel, some courts draw a distinction between retained and appointed counsel.[31] The majority of courts recognizing the distinction hold that ineptness and incompetency of the retained attorney is imputed to the defendant and the client is bound by the acts of the attorney unless he repudiates them in open court.[32] However, those courts that base the distinction on the agency rationale recognize that the rule has no application when it is made to appear that the defendant is unacquainted with criminal procedure and is ignorant of his rights.[33] It would seem there is little valid basis for the rule since the exception should apply in almost every instance. Even the intelligent and educated laymen will have only limited skill in the science of law and the intricacies of criminal procedure. Some courts refuse relief where counsel is retained, on the theory that incompetent acts of retained counsel are not state action and thus there is no violation of the fourteenth amendment.[34] But when the incompetence of the attorney results in an unfair trial, it would seem that the trial and the subsequent conviction constitute sufficient state action within the prohibitions of the fourteenth amendment.[35]

Regardless of whether counsel is appointed or retained, courts considering claims of incompetence are confronted with the same basic problems. In both situations, the ultimate consideration is whether the acts of counsel deprived the defendant of a fair trial. The standards applied by the courts should assure relief in those cases where counsel's incompetence has resulted in a substantial failure to present the accused's case. Every court considering claims of incompetence is confronted with the difficult task of determining how many errors counsel can make in a case before the defendant is deprived of a fair trial.[36] By its very nature, this must be an

[31] *E.g.*, United States *ex rel.* Darcy v. Handy, 203 F.2d 407 (3d Cir. 1952), *cert. denied*, 346 U.S. 865 (1953); Tompsett v. Ohio, 146 F.2d 95 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945); *Ex parte* Haumesch, 82 F.2d 558 (9th Cir. 1936); See, Annot., 74 A.L.R.2d 1390 (1960).

[32] *E.g.*, Tompsett v. Ohio, 146 F.2d 95 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945).

[33] *Id.* at 98.

[34] *E.g.*, United States *ex rel.* Darcy v. Handy, 203 F.2d 407 (3d. Cir. 1952), *cert. denied*, 346 U.S. 865 (1953).

[35] It is well understood that private acts do not violate the fourteenth amendment, but where the state judicial machinery adds impetus to that conduct, there is state action sufficient to violate the fourteenth amendment. See Shelley v. Kraemer, 334 U.S. 1 (1948).

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

ad hoc determination with a consideration of the facts and circumstances in each case. While the courts must assure relief in those cases where there has been a denial of the effective assistance of counsel, they also must attempt to provide a solution that will avoid burdening the courts with full-scale hearings on frivolous and inadequately supported claims of incompetence.[37]

The reviewing courts must judge counsel's conduct by some external standard. If the convicted defendant alleges that counsel made an error of law, the courts can more objectively determine if the conduct was incompetent. However, when the defendant alleges counsel made an error in trial tactics, as is most frequently the case, the courts are required to apply a highly subjective test and view counsel's conduct retrospectively. By its very nature, advocacy is an art that is difficult to appraise. For the present, it would seem that the fair trial standard, coupled with the requirements of alleging particular acts and showing prejudice, is the most satisfactory solution. It would seem that where counsel has committed a clear error of law, the defendant will have little difficulty in alleging the particular act and proving resulting prejudice.[38] The courts should continue to apply rigid standards in attacks on counsel's tactics and judgment. The best trial lawyers often disagree on the proper strategy for a given case, and this variance of views on professional technique should not be deemed incompetence. It has been suggested that in any case where the trial judge is aware that counsel is conducting the trial in an incompetent manner, he should permit substitution of counsel and declare a mistrial if the defendant so desires.[39] However, it would seem more desirable for the court to

[37] For example, one convict alleged his trial counsel was incompetent because counsel was delinquent in payment of his State Bar dues at the time of trial. White v. Beto, 322 F.2d 214 (5th Cir. 1963), *cert. denied*, 376 U.S. 925 (1964).

[38] It can be argued that the requirements of alleging particular acts of incompetence and showing prejudice place an undue burden on the incarcerated prisoner who frequently drafts his on petition for post-conviction relief. However, the indigent defendant will usually have access to the assistance of appointed counsel on request. See Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289, 296 (1964); N.C. GEN. STAT. § 15-220 (1965) (providing for counsel to indigents proceeding under post-conviction statute).

[39] Lumbard, *The Adequacy of Lawyers Now in Criminal Practice*, 47 J. AM. JUD. SOC'Y 176, 181 (1964). *But see* United States *ex rel.* Darcy v. Handy, 203 F.2d 407 (3d Cir. 1953), *cert. denied*, 346 U.S. 865 (1953) (indicating such intervention might be a violation of the defendant's right to develop his defense).

advise counsel of his mistakes and allow a recess for counsel to correct his errors. For example, in the *Schaber* case, the court said: "[I]n this case the mistake of counsel in a sense may have been induced by the failure of the trial court to indicate in any way that a written plea was necessary. . . ."[40]

Incompetence charges have a potentially detrimental effect on counsel. In those cases where the charge is sustained, counsel's professional reputation suffers even though his performance in the case may be no indication of his general level of professional capacity. Even where the charge of incompetence is unsupported, counsel may be professionally embarrassed and inconvenienced by the necessity of appearing in court to defend his actions. The courts therefore recognize that in addition to their duty to protect an accused from an unfair trial, they also have a duty to protect lawyers from unwarranted claims of incompetence.[41] Courts are fearful that frequent claims of incompetence will make lawyers reluctant to enter the criminal bar or accept court assignments.[42] The threat of charges of incompetence may deter counsel from taking those calculated risks that are normally equated with good advocacy.

The ultimate solution to alleviating the problems raised by claims of incompetent counsel may lie with the organized bar. There is general recognition that the criminal bar is inadequate for the demanding task of properly representing criminal defendants, particularly indigents.[43] The public tends to disparage the criminal lawyer, which may explain the reluctance of members of the bar to enter criminal work to any extent greater than absolutely necessary.[44] Bar associations should expend every effort to increase the status of the criminal bar in the view of the public and the profession. Only when there is an ample number of qualified members of the bar, interested and participating in criminal defense, can the supply of competent counsel meet the needs of the accused defendants for

[40] 348 F.2d 664, 673 (6th Cir. 1965).

[41] *E.g.*, DuBoise v. North Carolina, 225 F. Supp. 51 (E.D.N.C.), *aff'd*, 338 F.2d 697 (4th Cir. 1964). The courts generally recognize that an attack on the attorney's competence waives the attorney-client privilege and will permit counsel to defend his actions and testify as to understandings reached between counsel and client. See, *e.g.*, United States v. Butler, 167 F. Supp. 102 (E.D. Va. 1957), *aff'd*, 260 F.2d 574 (4th Cir. 1958).

[42] Gray v. United States, 299 F.2d 467, 468 (D.C. Cir. 1962).

[43] Lumbard, *The Adequacy of Lawyers Now in Criminal Practice*, 47 J. AM. JUD. SOC'Y 176 (1964).

[44] *Id.* at 179-80.

adequate representation. In the majority of cases the erring lawyer is reputable and professionally competent; he has merely committed error that made him ineffective in the disputed case. It would seem obvious that disciplinary action is warranted only if the performance of the attorney is such that it reflects on the integrity of the profession. Assuming that decisions in recent years are indicative of the trend, courts will become more objective and more demanding as to the quality of representation required by the Constitution. The organized bar should begin now to take steps that will aid the courts in formulating an adequate and workable standard. The efforts of the bar have been highly successful in solving problems for providing counsel to indigent defendants. It can be assumed that they will be successful in devising objective standards in evaluating the defense rendered in a given case.

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Constitutional Law—Religious Segregation of Public Schools—The Wearing of Distinctive Religious Garb by Public School Teachers While Teaching

In *Moore v. Board of Educ.*[1] a parent-taxpayer sought a declaratory judgment to the effect that defendant school board's method of operating three of the schools in the district violated the first amendment and Ohio constitutional prohibitions[2] against the establishment of religion. Also, a declaratory judgment was sought against the placement plan, the effect of which was to create three schools totally Catholic and one predominantly non-Catholic, on the ground that it was a denial of equal protection of the law under the fourteenth amendment as applied in *Brown v. Board of Educ.*[3] Prayer for an injunction to prohibit these practices was joined with the request for declaratory relief. The plaintiff further sought an injunction against the wearing of religious garb by nuns while teaching in public schools on the ground that it introduced sectarianism into the schools.

The court held that there was a governmental establishment of religion and issued an injunction accordingly, stating that the total effect of all of defendant's practices was to use public school funds

[1] 4 Ohio Misc. 257, 212 N.E.2d 833 (C.P. 1965).
[2] OHIO CONST. art. 1, § 7. See note 23 *infra*.
[3] 347 U.S. 483 (1954).