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Inadequate Assistance of Criminal Trial Counsel: The Standards for Illinois

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NOTES AND COMMENTS

INADEQUATE[1] ASSISTANCE OF CRIMINAL TRIAL COUNSEL: THE STANDARDS FOR ILLINOIS

Before *Gideon v. Wainwright*[2] applied the sixth amendment to the states, problems of adequacy of counsel were solely state matters[3] involving the interpretation of state constitutions. The Illinois Constitution of 1870 provides that "in all criminal prosecution, the accused shall have the right to appear and defend in person and by counsel." Illinois courts have generally interpreted this provision to mean a duly licensed attorney.[4]

Since *Gideon*, the due process clause of the fourteenth amendment of the U.S. Constitution has required the states to incorporate the sixth amendment into their criminal proceedings. The sixth amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." A federal standard has thus been applied to state criminal proceedings.

However, although a federal standard has been applied, the nature of the standard is still unclear.[5] The U.S. Supreme Court has provided only a few general hints; it has said counsel must be "effective,"[6] "competent"[7] and "able."[8] Such general terms, however, are not of much practical value to lower courts because they do not specify what actual errors in defense counsel's conduct require reversing state criminal convictions.

I. The Precedents

With no U.S. Supreme Court cases specifically determining when counsel is inadequate and with a kaleidoscope of standards for inadequacy among Illinois decisions, confusion permeates the law. To re-order this confusion, a few of the major Illinois decisions reversing criminal convictions for inadequacy of counsel will be examined.[9]

[1] The writer uses the term "inadequate" throughout the paper to indicate that type of assistance of counsel which justifies courts in overturning convictions. The term "incompetent" is often used, but is misleading. People v. Dean, 31 Ill. 2d 214, 21 N.E.2d 405 (1964).

[2] 372 U.S. 333 (1963).

[3] Except of course when the charges are federal.

[4] People v. Cox, 12 Ill. 2d 265, 146 N.E.2d 19 (1957).

[5] People v. Morris, 3 Ill. 2d 437, 121 N.E.2d 810 (1954).

[6] Powell v. Alabama, 287 U.S. 45 (1932).

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

[8] Reynolds v. Cochran, 365 U.S. 525 (1961).

[9] See also, People v. Cox, 12 Ill. 2d 265, 146 N.E.2d 19 (1957); People v. Gardiner, 303 Ill. 204, 135 N.E. 422 (1922); People v. Shulman, 299 Ill. 125, 132 N.E. 530 (1921); People v. Chapman, 36 Ill. 2d 305, 223 N.E.2d 110 (1967); People v. DeSimone, 9 Ill. 2d 522, 138 N.E.2d 556 (1956).

One of the first Illinois decisions overturning a criminal conviction for inadequacy of counsel was *People v. Blevins*.[10] In *Blevins*, appointed counsel signed an affidavit stating that (1) they had not had sufficient time to prepare the case; (2) they had only limited criminal experience; and (3) they could not reasonably compete with the prosecution since outside attorneys were allowed to aid the state's attorney. The court reversed Blevins' conviction in order to protect the defendant from undue oppression. The reversing court believed that the trial court should have exercised "greater caution where the counsel are appointed by the court than where they are his own voluntary selection."[11]

In *People v. Nitti*,[12] the Supreme Court of Illinois reversed the murder conviction of an Italian immigrant who could not speak English. Nitti's retained attorney was so unfamiliar with the rules of evidence that the court questioned whether he was of sound mind. A layman, the court said, could have examined witnesses better than the defense attorney. Though Nitti's attorney had a license at the time of the trial, the court considered "the gross incompetency and stupidity of counsel"[13] because of the ignorance of the defendant. The court observed: "It is quite clear from the record that defendants' interests would have been much better served with no counsel at all than the one they had."[14]

Illinois' landmark decision regarding inadequacy of counsel is *People v. Morris*.[15] There the court reversed a conviction because (1) the appointed defense counsel admitted that he had not discussed the case with the defendant until the day of the trial, (2) the lawyer had told the defendant that everything was useless, and (3) counsel overlooked the valid defense of dismissal for want of prosecution. The court held that overlooking the defense alone did not justify reversing the defendant's conviction, but that error coupled with lack of preparation and scant attention to the case was sufficient. The court admonished the public defender to be zealous in the defense of the accused.

The court in *Morris* discovered a dual standard of care in the precedents: reversal for inadequacy was possible if counsel were appointed, but not if he were retained. The court then established a new standard for inadequacy:

> (1) actual incompetency of counsel, as reflected by the manner of carrying out his duties as trial attorney; and (2) substantial prejudice resulting therefrom, without which the outcome would probably have been different.[16]

Unfortunately, the court in *Morris* did not explain whether this new standard

[10] 251 Ill. 381, 96 N.E. 214 (1911).
[11] *Id.* at 390, 96 N.E. at 218.
[12] 312 Ill. 73, 143 N.E. 448 (1924).
[13] *Id.* at 89, 143 N.E. at 451.
[14] *Id.* at 89, 143 N.E. at 541.
[15] 3 Ill. 2d 437, 121 N.E.2d 810 (1954).
[16] *Id.* at 449, 121 N.E.2d at 817.

of inadequacy was intended to apply equally to retained and appointed counsel. Other courts though have cited *Morris* in support of the dual standard of care which limits the new standard of inadequacy to appointed counsel.

The Supreme Court of Illinois in *People v. Birdette*[17] reversed a conviction for armed robbery primarily because the defendant continually objected to representation by a public defender. The court explained:

> When it is considered that the public defender was appointed for the defendant almost a year before his trial, that the assistant public defender who appeared for him admitted that he had never talked to the defendant, the defendant earnestly protested that he lacked confidence in the ability of the assistant public defender to properly represent him, and that the assistant public defender failed to object to any of the cross-examination pertaining to conviction of misdemeanors, we are of the opinion that the defendant did not receive the fair and impartial trial to which he is entitled under the constitution of the state of Illinois and the U.S. Constitution.[18]

The record in *People v. Odom*,[19] where the defendant was convicted of burglary and theft, contained the following errors of appointed counsel which justified reversal: (1) no preliminary motions, (2) no motions to suppress an involuntary confession or to instruct the jury to disregard the confession, (3) no motion to suppress improper exhibits, and (4) no questioning of the obvious inconsistencies in the evidence presented. After admonishing the public defender to be zealous in defending the rights of the accused, the court observed:

> A defendant's right to aid of counsel is not satisfied by the mere formality of an appointment of an attorney by the court but requires effective representation through all stages of trial and when such representation is of such low calibre as to deprive him of a fair trial on the issues, the guarantees of due process are violated.[20]

The conviction of the defendant in *People v. McCoy*[21] was reversed for the following reasons: (1) the defendant's retained counsel introduced evidence differing from the defendant's theory of the case; (2) the defense attorney favorably read prosecution evidence to the jury; (3) the attorney failed to move for mistrial when irrelevant and highly prejudicial evidence was presented to the jury. The court reasoned that while the attorney's conduct did not reduce the trial to a farce, it was of such low caliber as to deprive the defendant of any chance of being found not guilty.

In *U.S. ex. rel. DeMary v. Pate*,[22] the federal district court issued a writ of habeas corpus in a burglary conviction despite the fact that the conviction had

[17] 22 Ill. 2d 577, 177 N.E.2d 170 (1961).
[18] *Id.* at 581-582, 177 N.E.2d at 173.
[19] 71 Ill. App. 2d 480, 218 N.E.2d 116 (1966).
[20] *Id.* at 487, 218 N.E.2d at 119-120.
[21] 80 Ill. App. 2d 257, 225 N.E.2d 123 (1967).
[22] 277 F. Supp. 48 (N.D. Ill. 1967).

been affirmed by each level of the courts of Illinois. The facts which the courts believed warranted the issuing of the writ were as follows: (1) the public defender consulted with the defendant only four times, when continuances were granted; (2) the attorney did not even ask the defendant to fill out the routine forms of the public defender's office; (3) he failed to object to the admission of an involuntary confession; (4) he failed to examine witnesses in a beneficial manner; and (5) he failed to subpeona or contact a key witness. The court noted:

> In short, prejudicial error resulted at the trial from a total lack of reasonably conscientious effort directed toward the preparation of a defense. Thus, in this case there was not that effective assistance of counsel and that essential integrity of a trial which due process demands in all cases.[23]

In *People v. Jackson*[24] the court held that the conduct of the trial demonstrated that "defendant's [appointed] counsel did not measure up to that expected of a competent and conscientious trial attorney."[25] Although the court limited its decision to the facts of the particular case, it did reverse the defendant's conviction for the sale of narcotics. Defense counsel in Jackson's trial failed to (1) move to suppress evidence, (2) make written motions for change of venue, (3) prevented the prosecution from leading witnesses, (4) object to hearsay testimony, (5) make routine pre-trial motions, (6) support the defendant's theory of the case, (7) object to erroneous instructions, and (8) object to erroneous closing statements by the prosecution.

Illinois courts have thus applied many different standards to a variety of facts in reversing criminal convictions. Obviously the facts of each case are extremely important in deciding whether defense counsel has provided adequate assistance. Certain facts, however, stand out as particularly important.

II. The Relevant Facts

The relevant facts regarding defense counsel which justify reversing convictions for inadequacy of counsel may be classified into five interrelated categories: (1) the requirement of certification, (2) the amount of experience, (3) the extent of trial preparation, (4) the effect of trial tactics, and (5) the method of selection.

The Requirement of Certification

While the sixth amendment guarantees the criminally accused the right to assistance of counsel, it does not define the characteristics of adequate assistance by counsel. The term "counsel" generally means one knowledgeable in the law. Since the states license those with sufficient legal knowledge to represent clients,

[23] *Id.* at 53.
[24] 96 Ill. App. 2d 99, 238 N.E.2d 234 (1968).
[25] *Id.* at 103, 238 N.E.2d at 236-237.

and presumably no others, a license to practice law is a public representation of legal knowledge.[26] Assistance of counsel, therefore, means the assistance of a licensed attorney.[27]

A man or woman with a license to practice law is presumed competent to represent clients by virtue of that license. The court in *U.S. ex rel Feeley v. Ragen* explained:

> . . . whenever the court in good faith appoints or accepts the appearance of a member of the bar in good standing to represent a defendant, the presumption is that such counsel is competent. Otherwise he would not be in good standing at the bar and accepted by the court. The constitutional requirements have been met as to the necessity of counsel.[28]

Another court, which supported this reasoning, observed: "There are competent, more competent and most competent lawyers."[29] Despite the implications of the language in these cases, the presumption that a license means competence is "rebuttable, not conclusive."[30] If the situation were otherwise, no convictions could ever be reversed for inadequacy of counsel, which is contrary to the precedents.

The logic of the courts which employ this presumption is questionable. First, the courts frequently invoke the presumption that a license means competence to avoid discussing the merits of a claim of inadequacy. The argument that an attorney is competent because he is an attorney thus begs the question. Second, the presumption unnecessarily increases the burden of proof for a convict to demonstrate his innocence. After conviction, the burden is on the defendant to prove injustice even without a presumption. Third, the presumption protects lawyers who may not have served their clients well, instead of protecting the accused from possible injustice. The presumption of innocence can easily be subverted by the intentional or negligent errors of an attorney.

Lack of knowledge of the law in spite of a license, instead of lack of a license, seems to justify reversing criminal convictions for inadequacy of counsel. The requirement of a license may be waived;[31] but knowledge of the law, the root of the license requirement, probably cannot be waived.[32] Indeed, Illinois courts have reversed criminal convictions for inadequacy of counsel where the defense counsel was licensed but demonstrated lack of familiarity with the rules of evidence,[33] with substantive defenses,[34] and with basic criminal procedure.[35]

[26] People v. Nitti, 312 Ill. 73, 143 N.E. 448 (1924).
[27] People v. Cox, 12 Ill. 2d 265, 146 N.E.2d 19 (1957).
[28] U.S. *ex rel.* Feeley v. Ragen, 166 F.2d 976, 980 (7th Cir. 1948).
[29] U.S. *ex rel.* Weber v. Ragen, 176 F.2d 579, 586 (7th Cir. 1949).
[30] Achtien v. Dowd, 117 F.2d 989, 992 (7th Cir. 1941).
[31] People v. Cox, 12 Ill. 2d 265, 146 N.E.2d 19 (1957).
[32] Powell v. Alabama, 287 U.S. 45 (1932).
[33] People v. Nitti, 312 Ill. 73, 143 N.E. 448 (1924); People v. Shulman, 299 Ill. 125, 132 N.E. 530 (1921).
[34] People v. Morris, 3 Ill. 437, 121 N.E.2d 810 (1954).
[35] People v. Jackson, 96 Ill. App. 2d 99, 238 N.E.2d 234 (1962); People v. DeSimone, 9 Ill. 2d 522, 138 N.E.2d 556 (1956).

The Amount of Experience

General inexperience or lack of experience in criminal matters are facts which courts have considered when reversing criminal convictions for inadequacy of counsel.[36] Alone, however, the lack of experience of the defense counsel does not justify findings of inadequacy. One court explains: "[W]hile it is true that inexperience may result in incompetence; it is not necessarily equated with it."[37] Nonetheless, Illinois courts frequently mention the duty of the trial court to appoint able and experienced counsel.[38]

Since lack of experience alone does not justify arguments of inadequacy of counsel, experience may not be a valid factual consideration. Counsel's inexperience may only add weight in support of a court's decision to reverse for inadequacy. Were inexperience a valid reason for finding inadequacy, new lawyers, without experience, would have great difficulty gaining entrance to the profession. The argument of the court in *Goodwin v. Swenson* goes to the heart of the manner:

> . . . that petitioner's trial counsel "is an able lawyer who had had experience in the trial of criminal cases, including the defense of persons charged with murder" . . . is totally beside any relevant point; the question in a Sixth Amendment case is whether one who may well be an admittedly able lawyer did or did not render effective assistance in the defense of an accused under all the facts and circumstances of the particular case. The most able and competent lawyer in the world cannot render effective assistance in the defense of his client if his lack of preparation for trial results in his failure to learn of readily available facts which might have afforded his client a legitimate justiciable defense. Our determination is not an adjudication that [the defense attorney] generally is not a competent and able lawyer; that question is not at issue. This case determines only that the assistance which . . . [the defense attorney] was able to render in the defense of the petitioner, under all the facts and circumstances of this case, did not comply with the command of the Constitution of the United States.[39]

Thus while inexperience may cause inadequacy, inadequacy is better indicated by other facts.

The Extent of Trial Preparation

Preparation for trial is an essential element of a defendant's right to assistance of counsel.[40] Although the trial record is the only evidence considered on appeal, the record may not indicate the amount of preparation for trial. Since a defendant's rights may be prejudiced by lack of preparation not reflected in the record, collateral attack of the proceedings via habeas corpus or

[36] People v. Blevins, 251 Ill. 381, 96 N.E. 214 (1911).

[37] People v. Gonzales, 40 Ill. 2d 233, 237, 239 N.E.2d 783, 787 (1968).

[38] People v. Morris, 3 Ill. 2d 437, 121 N.E.2d 810 (1954); People v. Jackson, 96 Ill. App. 2d 99, 238 N.E.2d 234 (1968).

[39] 287 F. Supp. 166, 182-183 (W.D. Mo. 1968).

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

post-conviction hearing is allowed in order to present evidence supporting claims of constitutional violations. Three facts relating to the preparation for trial are particularly significant: (1) lack of time to prepare for trial, (2) lack of effective meetings between the accused and his attorney, and (3) failure to investigate the facts.

The first relevant fact regarding preparation is the adequacy of time to prepare for trial. The amount of time an attorney spends preparing for trial does not necessarily reflect the outcome of the trial since many other factors intervene; but some amount of time is needed to organize and investigate the issues of a case. Frequently, the quality and depth of preparation, not the amount of time expended, is the factor determining the outcome of a case. Insufficient time, however, may prevent adequate preparation and provide the accused with only pro forma representation.[41] The amount of time necessary to prepare a case will vary with the difficulty of the factual and legal issues.

The second relevant fact regarding preparation is the effectiveness of pretrial consultation between attorney and client at the trial level. Such consultation is essential to the attorney's knowledge of the facts of the case. If the attorney does not speak to the defendant or if the client does not communicate the facts of the case to the attorney, the already difficult problem of trial representation is made virtually impossible. Convictions have been reversed where no consultations occurred,[42] where consultations were not effective,[43] and where the court failed to deal appropriately with the uncooperative defendant.[44]

The final fact relevant to trial preparation is the extent of the defense attorney's investigation of the facts. The defense attorney should verify the defendant's story, explore the prosecution's case, and gather evidence supporting the defendant's case. Convictions have been reversed when the defense attorney neglected to explore obvious leads or to substantiate obvious defenses.[45]

The Effect of Trial Tactics

The conduct of defense counsel during the trial frequently determines whether the defendant received adequate assistance of counsel. The trial record, including the defense counsel's motions, objections, and general presentation, is evaluated when the issue of adequacy is raised: the defense counsel's conduct is considered on the whole. Although the courts are reluctant to reverse criminal convictions for inadequacy of counsel, convictions have been reversed where

[41] Powell v. Alabama, 287 U.S. 45 (1932); Avery v. Alabama, 308 U.S. 444 (1940); U.S. v. Wight, 176 F.2d 376 (2d Cir. 1949); Smotherman v. Beto, 276 F. Supp. 579 (N.D. Texas 1967); People v. Blevins, 251 Ill. 381, 96 N.E. 214 (1911).

[42] People v. Birdette, 22 Ill. 2d 577, 177 N.E.2d 170 (1961).

[43] People v. Morris, 3 Ill. 2d 437, 121 N.E.2d 810 (1954); U.S. *ex rel.* DeMary v. Pate, 277 F. Supp. 48 (N.D. Ill. 1967).

[44] People v. Chatman, 36 Ill. 2d 305, 223 N.E.2d 110 (1967); People v. Birdette, 22 Ill. 2d 305, 177 N.E.2d 170 (1961).

[45] U.S. *ex rel.* DeMary v. Pate, 277 F. Supp. 48 (N.D. Ill. 1967).

counsel contradicted the defendant's theory of the case,[46] where counsel had a conflict of interest,[47] where counsel's conduct was below average,[48] and where counsel failed to make any relevant motions.[49]

Trial mistakes generally do not deprive the defendant of due process of law. No counsel is perfect. The sixth amendment does not guarantee the defendant a successful defense. One court explains:

> We know that some good lawyer gets beat in every law suit. He made some mistakes. The printed opinions that line the walls in our offices bear mute testimony to that fact. His client is entitled to a fair trial, not a perfect one.[50]

The courts are reluctant to reverse convictions. Their reluctance reflects a policy decision directed at keeping "criminals" off the streets and a fear of the possible consequences of being lenient; but in view of the presumption of innocence, this reluctance is probably not justified.

The first fear which the courts believe justifies their reluctance to reverse criminal convictions for inadequacy of counsel is that a genuine trial tactic, perhaps an unorthodox defense, may be confused for a blunder by attorneys who were unfamiliar with the needs of the trial.[51] Why should the tactical opinion of one lawyer prevail over that of another? Hindsight should not deprecate a genuine trial tactic.[52]

The danger of confusing a genuine trial tactic with a mistake is not great and is safeguarded by the fact that a convict must prove his counsel performed inadequately. Nonetheless, defense counsel's acts which do not help the defendant's case or which contradict it, must be questioned. The test of a valid defense tactic is how it is likely to aid the defendant's case. If the defendant can prove that a mistake of counsel prejudiced his trial and if his attorney cannot rationally explain his action, the mistake should not be rationalized as an ill-conceived but valid trial tactic within a legal system which presumes the innocence of the accused.[53] Although everyone makes mistakes, a criminal attorney's errors may cost the defendant his life. To protect lawyers from justifiable questioning instead of protecting the accused from the deprivation of life or liberty seems unjust.

The second fear which the courts believe justifies their reluctance to reverse convictions is that they may be swamped with litigation if the rules regarding adequacy of counsel were liberalized. One court elaborates:

[46] People v. McCoy, 80 Ill. App. 2d 257, 225 N.E.2d 133 (1967); People v. Jackson, 96 Ill. App. 2d 99, 238 N.E.2d 234 (1968).
[47] Porter v. U.S., 298 F.2d 461 (5th Cir. 1962).
[48] People v. Jackson, 96 Ill. App. 2d 99, 238 N.E.2d 234 (1968).
[49] People v. Chatman, 36 Ill. 2d 305, 223 N.E.2d 110 (1967).
[50] U.S. *ex rel.* Weber v. Ragen, 176 F.2d 579. 586 (7th Cir. 1949).
[51] People v. Kirkrand, 14 Ill. 2d 86, 150 N.E.2d 788 (1958).
[52] People v. Washington, 41 Ill. 2d 16, 241 N.E.2d 425 (1968).
[53] People v. Chatman, 36 Ill. 2d 305, 223 N.E.2d 110 (1967).

> To allow a prisoner to try the issue of the effectiveness of his counsel under a liberal definition of the phrase is 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.[54]

The danger of a flood of litigation probably does not outweigh the judiciary's responsibility of redressing wrongs. The same court which above elaborated upon the danger of a flood of litigation recognized that assertions alone will not justify claims of inadequate counsel; the convict must sufficiently corroborate facts which would justify a hearing on the issue of inadequacy of counsel.[55] Fictitious and insufficient claims may be screened by requiring a minimum of factual corroboration in addition to the pleadings. If ultimately necessary, a reformed administrative or court structure could protect those unjustly convicted because of the inadequacy of their counsel.

The third fear which courts believe justifies their reluctance to reverse convictions is that over-zealous defense attorneys may perpetuate frauds upon the court. One court explains:

> Ordinarily, a defendant who retains counsel of his own selection is responsible if that counsel does not faithfully serve his interest. Any other rule would put a premium on pretended incompetence of counsel; for if the rule were otherwise, a lawyer with a desperate case would have only to neglect it in order to insure reversal or vacation of the conviction.[56]

This same logic may be applied to appointed counsel.

The safeguards against lawyers defrauding the courts are extensive. A lawyer's self-interest is directly linked to the courts. He is an officer of the courts. He would lose clients, and therefore his livelihood, if he made the kind of blunders which would justify an appellate court to reverse a conviction. In addition to losing his reputation, an over-zealous attorney may subject himself to disbarment or other sanctions. Also, the lawyer's client would have no guarantee that the courts would not see through the deception or that they would even reverse the conviction.

Although the safeguards protecting the courts are extensive, few safeguards insure adequate assistance of counsel to an ignorant client. The agency theory of representation is not much help. The attorney is an agent who serves two masters: the courts and the client. As principal, the defendant has the right to control the actions of the attorney; but the defendant, unknowledgeable in the law, usually lacks the ability to protect himself. Courts have frequently admonished attorneys to be zealous in the defense of their clients. Only the courts can pressure lawyers to perform their full duties regarding defendants in criminal proceedings.

[54] Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir. 1945).
[55] *Id.*
[56] People v. Mitchell, 411 Ill. 407, 407-08, 104 N.E.2d 285, 285 (1952).

Method of Selection

Illinois courts recognize a double standard of care for defense attorneys depending upon whether they were appointed or retained. If counsel is appointed, his errors will be examined for inadequacy; but if counsel is retained, his errors are not reviewed. Since many cases recognize that appointed counsel may not be extremely diligent, the first part of the double standard of care is not usually disputed. However, the second part of the double standard is controversial. This controversy regarding the standard of care of retained counsel is amply demonstrated by the following statement:

> It is only in cases where the attorney for the defendant is one appointed by the court and is inexperienced in the trial of criminal cases, or where an attorney is stupidly and obstinately recreant in performing his duty toward his client that the court will consider the charge [of inadequacy]. Furthermore, poor representation by an attorney of a defendant's own choosing is of no legal moment.[57]

This statement is contradictory: retained counsel's poor representation is of "legal moment" if a "stupidly and obstinately recreant" retained counsel's representation may be inadequate.

On one hand, some Illinois courts argue that the errors for retained counsel are totally irrelevant to whether a defendant received due process of law. One early case argues:

> Pierce employed his own counsel in the court below. The record does not disclose that he was either incompetent or remiss in performing his duties toward plaintiff in error. But even if it were otherwise, plaintiff in error's contention that he was poorly represented at the time of trial would be of no legal moment, as his attorney was of his own choosing.[58]

On the other hand, some courts argue that convictions may be overturned when retained counsel was incompetent or remiss in representing his clients.[59] Whether this standard of care for retained counsel is sufficiently similar to the standard of care for appointed counsel to destroy the double standard is unclear.

The double standard of care for defense counsel depending upon whether he is appointed or retained is under attack. The precedents supporting the double standard of care may be unreliable since *People v. Morris*,[60] the foremost Illinois decision on inadequacy, is ambiguous. When the court in *Morris* arrived at a new standard of inadequacy after examining precedents which upheld a double standard of care, it failed to clarify whether its new standard of inadequacy was limited to appointed counsel. A subsequent case applied the new standard of

[57] People v. Ventura, 415 Ill. 2d 587, 590, 114 N.E.2d 710, 712 (1953).

[58] People v. Pierce, 387 Ill. 608, 615, 57 N.E.2d 345, 348 (1944).

[59] People v. Nitti, 312 Ill. 73, 143 N.E. 448 (1924), is only one example of inadequate counsel cases reversed where counsel was retained.

[60] 3 Ill. 2d 437, 121 N.E.2d 810 (1954).

inadequacy of *Morris* to retained counsel indicating that no double standard of care actually exists.[61] The cases citing *Morris* in support of different standards of care for appointed and retained counsel may have misconstrued the opinion.

Additionally, the logic of this double standard of care seems questionable. No reasonable justification for distinguishing between the standard of care of appointed counsel and that of retained counsel exists. Poor persons who cannot afford to retain counsel should not be given second-class assistance; the rules of evidence, of criminal law, and of constitutional law do not change when counsel is appointed.[62] One court agrees: ". . . appointed counsel is held to the standard of diligence and competence that is to be expected of a lawyer who is retained to represent his client."[63] Another court, is an even more significant statement writes: ". . . the Constitution assures a defendant effective representation by counsel whether the attorney is one of his own choosing or court-appointed."[64]

III. The Standards

The standards which courts have used in determining the adequacy of counsel may be categorized as follows: (1) representation which substantially prejudiced the defendant, (2) representation by counsel who was actually incompetent, (3) representation which made the trial a sham or a farce, (4) representation of such low caliber as to be no representation at all, and (5) representation which lacks fundamental fairness and substantial injustice. Naturally, these standards are interrelated.

Prejudice

One frequently cited standard of inadequacy which the courts have used to justify overturning convictions is representation which substantially prejudices the defendant's case.[65] Since almost everything the defense counsel does affects the case in some way, the defendant may be prejudiced. Several courts use the adjective "substantial" to describe the amount of prejudice necessary to overturn a conviction. The problem, according to these courts, is where to draw the line between "substantial" and "unsubstantial" prejudice. Unfortunately, the courts have not specifically defined what "substantial" means. One court's opinion indicates the difficulty in applying the substantial prejudice standard:

> The fact that a person charged with a crime is poorly defended will not justify a reversal of the judgment where it is reasonably supported by the evidence . . . , but where the evidence is close, as it is in this case,

[61] People v. Cox, 12 Ill. 2d 265, 146 N.E.2d 19 (1957).

[62] People v. Smith, 32 Ill. 2d 88, 203 N.E.2d 879 (1965); People v. Danin, 28 Ill. 2d 464, 193 N.E.2d 25 (1963).

[63] People v. Kirkrand, 14 Ill. 2d 86, 92, 150 N.E.2d 788, 790 (1958).

[64] Porter v. U.S. 298 F.2d 461 (5th Cir. 1962).

[65] People v. Morris, 3 Ill. 2d 437, 121 N.E.2d 810 (1954); People v. Cox, 12 Ill. 2d 265, 146 N.E.2d 19 (1957).

> and it is clear that the prosecuting attorney has taken advantage of the accused because he was poorly represented, and the trial court has permitted such advantage to be taken, then we will consider the errors, not withstanding the failure to properly preserve the questions of review.[66]

This court fails to realize that poor representation may make a judgment appear reasonably supported by the evidence when in fact it is not. Also, the determination of when evidence is "close" presents numerous problems of interpretation.

The U.S. Supreme Court, however, has clearly warned of the dangers of fine distinctions regarding what constitutes "substantial prejudice":

> To determine the precise degree of prejudice sustained by . . . [the defendant] . . . as a result of the court's appointment of . . . counsel . . . is at once difficult and unnecessary. 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.[67]

Although some showing of injury to the defendant is appropriate, the nature and authority of this warning should caution courts that "substantial prejudice" may not be a valid standard of inadequacy.

Incompetency

The second standard of inadequacy, which is frequently associated with the "substantial prejudice" standard, is representation by counsel who is actually incompetent. No clear definition of incompetence of counsel exists. On one hand courts have wondered whether defense counsel was of sound mind.[68] Certainly, if the courts interpreted actual incompetency to mean insanity, few if any cases would be overturned. The insanity of the defense counsel would probably justify overturning a conviction, but reversals are not limited to that situation. On the other hand, some courts have used "incompetent" as another way of saying "inadequate."[69] The use of the term "incompetence" only obscures the issues. The term provides no guidance to the courts in determining what is inadequate representation.

Sham or Farce

The third standard of inadequacy which courts have used to overturn convictions is representation which made the trial a sham or a farce.[70] "[I]t must be shown that the proceedings were a farce and a mockery of justice."[71] What constitutes a sham or farce is unclear even though one case cites this standard as *the* Illinois standard.[72] This standard originated in U.S. Supreme

[66] People v. Gardiner, 303 Ill. 204, 206-207, 135 N.E. 422, 423 (1922).
[67] Glasser v. U.S., 315 U.S. 60, 75-76 (1953).
[68] People v. Nitti, 312 Ill. 73, 143 N.E. 448 (1924).
[69] People v. Morris, 3 Ill. 2d 437, 121 N.E.2d 810 (1954).
[70] U.S. *ex rel.* Feeley v. Ragen, 166 F.2d 976 (7th Cir. 1948).
[71] Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir. 1945).
[72] People v. Washington, 41 Ill. 2d 16, 241 N.E.2d 425 (1968).

Court civil rights cases in which the court judged the trial as a totality before arriving at a conclusion.[73] This standard relates not to the right to counsel as much as the right to a fair trial. Therefore, a trial may be a sham or farce even with adequate representation. Extensive infringement upon the defendant's rights is probably required to invoke this standard.

Low Caliber—No Representation

The fourth standard of inadequacy is representation of such low caliber as to amount to no representation at all. Since the sixth amendment insures the right to assistance of counsel, counsel which amounts to no counsel is a denial of the right. This standard is frequently linked to the "sham or farce" standards:

> . . . his conviction will not be reversed for incompetency unless it can be said that the representation was of such low caliber as to amount to no representation at all, or that it was such as to reduce trial to a farce.[74]

While the two standards thus co-exist, conduct which would justify reversal under this standard need not be as severe as that which would be necessary under the "sham or farce" theory. The same court elaborates:

> While we do not believe that the representation given the defendant in this case reduced the trial to a farce, we do believe that the caliber of representation afforded the defendant in this case was such as would deprive the defendant of any chance of being found not guilty.[75]

Nonetheless, representation of such low caliber as to amount to no representation is still a narrow standard of inadequacy: representation equivalent to no representation is considerably different from representation of low caliber. The problem for the courts under this standard is determining when representation is of such low caliber as to equal no representation. Although this standard may be more restrictive than the "substantial prejudice" standard, the tasks of the courts using either standard are comparable.

Fundamental Fairness—Substantial Justice

The ultimate standard of inadequacy is the due process clause itself; this standard pre-empts all others. Was the kind of representation the defendant received fair and just? If the convicted defendant can prove by a preponderance of the evidence that his representation was not generally fair and just, due process would seemingly require that he be granted a new trial. One Illinois court recognized the strength of this argument:

> . . . even without exploring the issue of whether defendant's representa-

[73] *E.g.*, Powell v. Alabama, 287 U.S. 444 (1932).
[74] People v. McCoy, 80 Ill. App. 2d 257, 263-264, 225 N.E.2d 123, 126 (1967).
[75] *Id.* at 264, 225 N.E.2d at 126.

> tion was such as to reduce the trial to a farce, it is our opinion that the total facts, peculiar to this case, disclose a violation of the ideas of fundamental fairness and right which attaches to present day concepts of due process of law.[76]

Although one court's general feeling of fairness may differ from another's, this "due process" standard should be used to determine if the defendant received adequate assistance of counsel until the U.S. Supreme Court established a better standard. "Fair and just" should probably be liberally construed in order to preserve the presumption of innocence and protect the rights of defendants who have been improperly convicted.

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[76] People v. Cox, 12 Ill. 2d 265, 272-73, 146 N.E.2d 19, 24 (1957).