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Effectice Representation—An Evasive Substantive Notion Masquerading as Procedure

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COMMENT

EFFECTIVE REPRESENTATION—AN EVASIVE SUBSTANTIVE NOTION MASQUERADING AS PROCEDURE

Recent cases show an increasing judicial concern with the right to counsel for an indigent accused.[1] This concern flows from the constitutional requirement of a fair trial for every accused, and has culminated with *Gideon v. Wainright*,[2] establishing the right to counsel in the state courts in all cases. Concommitantly, a related concept of *effective* representation has acquired momentum. It dates from the language of *Powell v. Alabama*.[3] This latter concept encompasses answers to the question of what amounts to competent and/or effective counsel. The answers to the question have proved to be delicate and shifting in emphasis from concern about "competency of counsel" to a broader concern about "effective representation."

The concept of "effective representation" is young. However, the state courts have been examining analogous, representational situations for some time. Thus, the factors early deemed relevant to considerations regarding "competency of counsel" have played an important role in the present attempt of courts to circumscribe the question of what requisite qualities are implicit in the norm of "effective representation."

The main thrust of this comment examines the manner in which the norm of "effective representation" varies with the stage of the proceedings. Federal and state appellate court opinions will be analyzed for express statements of decision-influencing factors, and further for factors not articulated. Finally, the considerations which pour actual meaning into the legal norm of "effective representation" will be identified and evaluated in relation to the overriding objective of securing a constitutionally guaranteed fair trial.

The Competency Standard Before Powell

Long before Mr. Justice Sutherland initiated the "effective representation" concept in *Powell*, the state courts had been measuring

[1] For a comprehensive discussion of the most recent developments, see Morris, *Poverty and Criminal Justice*, 38 Wash. L. Rev. 667 (1963).
[2] 372 U.S. 335 (1963).
[3] 287 U.S. 45 (1932).

counsel's conduct by a standard of competency.[4] As an initial proposition, the courts applied the presumption that a duly licensed lawyer having met the requirements of law was competent. This presumption, as well as a number of other constituent factors of "competent representation," presented a procedural question in the sense that it had to be met in every case. Other examples of such a procedural requirement were statutory mandates[5] for competent counsel, and court-made requirements that all counsel must be at least licensed to practice.

Evidence that a substantive requirement also existed can be seen when the courts occasionally looked behind the procedural requirement of appointment to ascertain whether counsel's conduct in fact aided the accused. Thus, in the early case of *State v. Jones*,[6] the appellate court, on the basis of the trial record concluded that counsel's conduct during the trial demonstrated a substantial lack of legal knowledge which deprived the accused of a fair trial. However, although the *Jones* case is an example of gross incompetence compelling the court to reverse the conviction, other cases[7] demonstrated a reluctance by courts to test the *quality* of representation. Thus, most early allegations of incompetency were confined to incapacity, primarily intoxication.[8] But nonetheless the question was procedural because if counsel's assistance was to be meaningful it required that in *every* case he be mentally alert in all respects.

Slowly a shift in emphasis from a procedural requirement to a substantive requirement began to take place. Thus, an appointment of a lawyer who represented a co-defendant with conflicting interests was inadequate.[9] Of equal inefficacy was the forced appointment of a lawyer who loudly protested that he was prejudiced toward the defendant.[10] An even clearer substantive violation appeared when the appointed counsel failed to present crucial evidence[11] or witnesses.[12] The focus turned from the requirement of what the state should provide

[4] The question has been discussed elsewhere. See Comment, 33 WASH. L. REV. 303 (1958); Note 4 U.C.L.A. L. REV. 400 (1957); Fellman, *The Right to Counsel Under State Law*, 1955 WIS. L. REV. 281, 309; Note, 8 ARK. L. REV. 484 (1953); Comment, 47 COLUM. L. REV. 115 (1947).

[5] KAN. GEN. STAT. 62-1304 (1953 Supp.); but Kansas curiously only requires competent counsel on appeal. See also ME. REV. STAT. ch. 148 § 11 (1954).

[6] State v. Jones, 12 Mo. App. 93 (1882).

[7] Spears v. Commonwealth, 253 S.W.2d 566 (Ky. 1950); Blitstein v. State, 218 Wis. 356, 259 N.W. 715 (1935); Simmons v. State, 116 Ga. 583, 42 S.E. 779 (1902).

[8] State v. Keller, 57 N.D. 645, 223 N.W. 698 (1929).

[9] People v. Rose, 348 Ill. 214, 180 N.E. 791 (1932).

[10] State v. Jones, 174 La. 1074, 142 So. 693 (1932).

[11] People v. Schulman, 299 Ill. 125, 132 N.E. 530 (1921).

[12] People v. O'Brien, 110 App. Div. 26, 96 N.Y. Supp. 1045 (1905).

the accused in every case to attention of what part counsel had played in assisting accused in the particular case.

A similar development took place in the federal courts. *Hagan v. United States*[13] is representative. Since the trial judge had considerable experience and counsel for the co-defendant failed to notice any mental deficiency in the appointed attorney, the court held there had been a substantial defense presented. While there was no finding of incompetency, the case does typify the shift in emphasis from a procedural requirement to a substantive requirement. The procedural requirement alone would have been met merely by counsel's presence, but satisfaction of the substantive requirement compelled the court to look beyond counsel's mere presence and scrutinize his conduct in the discharge of his duty.

With the decision in *Powell v. Alabama*[14] the previous shift in emphasis from a procedural requirement to a substantive requirement was fully unveiled. Mr. Justice Sutherland cast the die by using the term "effective representation." The mere literal use of this term forces a reviewing court to do more than see that accused is represented. Instead, an appellate court following this literal command must look to see what *in fact* counsel has done or failed to do in his duty to aid the accused—a substantive question of due process.

The quality of the representation in Powell was found defective in two ways: First, the appointment was too general in that the entire local bar was appointed as defense counsel. Thus, the onus of responsibility was upon no one in particular. Second, the appointment was too close to the time of the trial, thus denying counsel the opportunity with which to prepare adequately. This action by the Court, in going behind the mere formal appointment makes it hard to fit *Powell's* holding into the traditional procedural rules. In the sense that it is closely related to the fair trial concept of a proper notice and hearing, the *Powell* requirement of "effective representation" is a procedural requirement; but it is substantive in the sense that it looks beyond the state's duty to provide adequate legal mechanisms for notice and hearing and instead, with certain limitations, concentrates on counsel's conduct and the factors that affect his conduct of the defense. The latter view of due process has prevailed in the federal system. For example, not only must counsel have been appointed in sufficient time to prepare,[15] but he must, in fact, by his trial appearance demonstrate

[13] 9 F.2d 562 (8th Cir. 1925). [14] 287 U.S. 45 (1932).
[15] Jones v. Cunningham, 297 F.2d 851, 855 (4th Cir. 1962).

that he has performed the tasks of reasonable preparation.[16] Surely, this latter is a substantive notion. Further, counsel cannot effectively proceed with accused's defense if the prosecuting witness is a past, and possibly a prospective, business client[17] or if other conflicting interests such as a contrary defense of a co-defendant exists.[18] Neither can the court appoint counsel with conflicting interests in the form of desired employment with the prosecuting district attorney against whom they seek to defend accused's case,[19] particularly when this conflict is combined with appointed counsel's inexperience.[20] As the federal courts have formulated the concept, not only is investigation important prior to trial, but, in addition, the effects of such a proper investigation on the trial are considered of particularly great significance in that it allows counsel to function with an informed judgment.[21]

Notwithstanding the past substantive application of both "effective representation" and its historical predecessor "competent representation," a recent case, *Mitchell v. United States*,[22] characterized "effective representation" as a procedural due process concept. An examination of the problem which the court faced in that case, will aid in explaining the court's result, but not its reasoning. The allegations of "ineffective representation" in *Mitchell* were counsel's failure to move for acquittal, failure to cross examine, failure to object to hearsay evidence, and failure to object to jury instructions. Each allegation involves a question of counsel's professional judgment. As the court pointed out, as yet, no aptitude test or other means to measure skill is available. Up to this point the court is correct and the observation by the court gives us a clue to the result. Even lacking a standard to measure professional judgment, a substantive requirement still remains that counsel *exercise* judgment during the course of the trial and this requirement can be tested by ascertaining whether counsel exercised an *informed* judgment. Thus, the court's inquiry should have focused on what counsel did in preparation. However, the court's choice of dismissing the allegations on the basis that "effective representation" is a procedural

[16] Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962) *cert. denied* 372 U.S. 978 (1963). Turner v. Maryland, 303 F.2d 507, 511 (4th Cir. 1962).
[17] Tucker v. United States, 235 F.2d 238 (9th Cir. 1956). *But see* United States v. Pugh, 106 F. Supp. 209 (D. Guam 1952).
[18] Glasser v. United States, 315 U.S. 60 (1942); Kyle v. United States 263 F.2d 657 (9th Cir. 1959).
[19] MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1961).
[20] *Ibid.*
[21] Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962) *cert. denied* 372 U.S. 978 (1963).
[22] 259 F.2d 787 (D.C. Cir. 1958).

requirement, demonstrates how easily and improperly substantive requirements can be distinguished into nonexistence by the use of legal abstractions.

Once it is accepted that "effective representation" is and should be a substantive due process consideration, a further examination is necessary of what the contents of the concept are and how they vary with the stage of the proceedings. Also, the factors that affect the substance of the concept need identification. This investigation follows.

The Stages of the Defense Counsel's Responsibility

While the same abstract standard—effective representation—can be applied to the entire proceeding, its content varies with the stage in question. For example, an omission in pre-trial investigation which overlooks a substantial defense will pervade all subsequent proceedings, whereas a failure to object to incompetent evidence during the trial, viewed in the entire trial context, may be of little significance. A chronological consideration of the stages will serve to demonstrate the varying demands.

Before the Trial—Preparation. At this initial stage, two demands are particularly important: First, counsel must consult and advise accused of his rights and the alternatives open to accused.[23] Second, from this consultation counsel should elicit sufficient information to begin preparation of the defense.[24] As one court has stated, "No legal representation is worthy of the name if the lawyer makes no investigation of the background of the client's plea. . . ."[25] Thus, obviously the actual preparation undertaken is the key to effectiveness. This preparation should include a reasonably thorough factual investigation[26] which encompasses interviewing and procuring witnesses,[27] ascertaining the accused's mental capacity, if it is open to question,[28] and, in general, ascertaining and establishing each substantial defense of the accused.[29] However, even though counsel has a duty to prepare, the level of

[23] McKenzie v. State, 233 Miss. 216, 101 So.2d 651 (1958). *But see* United States v. Haug, 21 F.R.D. 22 (N.D. Ohio 1957). See also Penn v. Smyth, 188 Va. 367, 49 S.E.2d 600 (1948) where lack of consultation was held insufficient of itself to show ineffective representation.

[24] Brubacker v. Dickson, 310 F.2d 30 (9th Cir. 1962) *cert. denied* 372 U.S. 978 (1963). Jones v. Cunningham, 297 F.2d 851 (4th Cir. 1962).

[25] *Id.* at 855.

[26] Brubaker v. Dickson, 310 F.2d 30, 38, 39 (9th Cir. 1962) *cert. denied* 372 U.S. 978 (1963). Turner v. Maryland, 303 F.2d 507, 511 (4th Cir. 1962).

[27] Jones v. Huff, 152 F.2d 14, 15 (D.C. Cir. 1945).

[28] Brubaker v. Dickson, 310 F.2d 30, 35, 38 (9th Cir. 1962) *cert. denied* 372 U.S. 978 (1963).

[29] *Id.* at 38.

effectiveness is not measured by the amount of time consumed in oral discussion and research.[30]

The duty to interview witnesses means not only the defendant's witnesses, but the adverse witnesses as well, and should these witnesses give equivocal statements as to recollection, then concurrent with his interview duty, counsel has the right to secure prior statements by the witnesses previously given to the state.[31] If counsel does not have sufficient time to adequately investigate, secure witnesses, and prepare the defense, because he was appointed an unreasonably short time before trial, then he should move for a continuance. The court will commit reversible error if it refuses such a motion unless it is shown that the defendant has been remiss in the protection of his own rights by failing to secure counsel or, perhaps by failing to request appointed counsel.[32] However, the granting of a continuance is within the trial judge's discretion and is not easily overturned.[33] After the investigation has acquainted counsel with the details of the case, he should further consult with the accused and advise him of the alternatives[34]—whether to plead guilty or go to trial. Thus, the accused, if he can appreciate his situation, can make an informed choice on the basis of counsel's advice.[35] If the accused is incapable of making such a decision, then counsel would decide for him.[36]

At the Trial. At this stage counsel is required to make on-the-spot decisions. These decisions of necessity involve an exercise of judgment. As long as this exercise of judgment is done on the basis of sufficient information as a consequence of proper preparation, counsel's decision should not be open to the speculation and surmise of second-guessing by the appellate court. Formulating a standard of professional judgment is impossible,[37] and without such a standard the question of trial tactics is a question of individual choice easily second guessed after an adverse result. Only an outer limit, *i.e.*, repeated gross misjudgment, could readily establish ineffectiveness. However, the need for an exercise of *informed* judgment cannot be overemphasized. Thus counsel

[30] United States v. Wight, 176 F.2d 376, 379 (2nd Cir. 1949).
[31] Vetter v. Superior Court, 189 Cal. App. 2d 132, 10 Cal. Rptr. 890 (1963).
[32] Perkins v. Commonwealth, 305 S.W.2d 937 (Ky. 1957).
[33] Avery v. Alabama, 308 U.S. 444, 446 (1940); Griffiths v. United States, 172 F.Supp. 691 (Ct. Cl. 1959).
[34] The court in Brubaker v. Dickson, 310 F.2d 30, 35 (9th Cir. 1962), n. 18 makes this implicit in its holding.
[35] Nail v. State, 231 Ark. 70, 328 S.W.2d 836, 845 (1959).
[36] Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962).
[37] Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir. 1945).

cannot do an incomplete job of pre-trial preparation, omit substantial defenses and expect effectively to represent accused at the trial.[38]

Nevertheless, certain failures at the trial have resulted in an ineffectiveness finding. Failure to object when the trial judge criticized the accused and failure to object to other incompetent evidence both lead to a similar conclusion.[39] Equally as defective is the failure to take any exceptions and the neglect to make essential routine motions.[40] And certainly counsel who criticizes his own client in front of the jury is not representing his client properly.[41] Counsel's failure to present crucial witnesses or evidence,[42] or ineptness to such an extent that the evidence could not be introduced, even with the trial judge's assistance,[43] lead to similar conclusions. However, counsel's failure to make possible appropriate motions does not compel a finding that he represented ineffectively.[44] Should an accused, after appropriate advice, plead guilty, then counsel has the further duty to consult with the accused before sentencing on the guilty plea.[45] Particularly is this required if the state has a separate procedure and hearing for sentencing.[46]

After the Trial. Counsel's duties do not end with a verdict or a

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[38] Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962).

[39] Wilson v. State, 222 Ind. 63, 51 N.E.2d 848 (1943).

[40] Lloyd v. State, 15 Okla. Crim. 130, 175 Pac. 374 (1918); State v. Bouse, 199 Ore. 676, 264 P.2d 800 (1953).

[41] Wilson v. State, 222 Ind. 63, 51 N.E.2d 848 (1943); Kidder v. People, 115 Colo. 72, 169 P.2d 181 (1946).

[42] Jones v. Huff, 152 F.2d 14 (D.C. Cir. 1945); Johnson v. United States, 110 F.2d 562 (D.C. Cir. 1940); People v. Schulman, 299 Ill. 125, 132 N.E. 530 (1921); People v. O'Brien, 110 App. Div. 26, 96 N.Y. Supp. 1045 (1905).

[43] People v. Schulman, *supra* note 42.

[44] Failure to move for change of venue or continuance, United States *ex rel.* Darcy v. Handy, 203 F.2d 407 (3rd Cir. 1952); Sweet v. Howard, 155 F.2d 715 (7th Cir. 1946); Coates v. Lawrence, 46 F. Supp. 414 (S.D. Ga. 1942). Failure to move for trial judge's disqualification on the ground that the judge had sufficient knowledge pertaining to the defense which would have enabled him to form an opinion, State v. Bentley, 46 N.J. Super. 193, 134 A.2d 445 (1957). Failure to attack a defective indictment, McConnaughy v. Alvis, 100 Ohio App. 245, 136 N.E.2d 127, *aff'd* 165 Ohio St. 102, 133 N.E.2d 133 (1956). Failure to move to suppress evidence, United States v. Springfield, 178 F. Supp. 347 (N.D. Cal. 1959). Waiver of arraignment, Fluty v. State, 224 Ind. 652, 71 N.E.2d 565 (1947). *But see* Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957) where failure to request instructions or object to instructions proffered was part of the ground for ineffective representation.

[45] Brubacker v. Dickson, 310 F.2d 30 (9th Cir. 1962). Compare State *ex rel.* Denning v. Riggs, 251 Minn. 120, 86 N.W.2d 723 (1955) where there was duty to further give accused advice even though the guilty plea was not well advised.

[46] For an example of how one court handled this problem see Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962). An interesting note at this point is the non-existence of a separate sentencing procedure in Washington and its possible effect of compelling counsel to present the proper witness for mitigation, etc., during the course of the trial to assist the court in the determination of a proper sentence.

plea of guilty. He must still advise accused of his appeal possibilities[47] and perform whatever further advocate functions are required. As mentioned above, if the jurisdiction has a separate sentencing procedure, counsel will be expected to be present[48] and to present matters in mitigation. Should the circumstances justify it, he may be expected to move for a new trial.[49] Securing the appeal will be an additional duty counsel will be expected to fulfill.[50]

Thus at each stage of the defense proceedings, effective representation attaches a responsibility to counsel which varies with the stage in question. As the discussion below will indicate, this variant duty has major significance when attempting to determine what standard must be applied to ascertain whether effective representation has in fact been given.

DECISION INFLUENCING FACTORS

To ascertain what the appropriate standards should be, the factors affecting the decisions must be extracted either from the express language of the opinions, or the context of the social situation. Some factors are important only at one stage of the defense; others, such as counsel's conflict of interests, cut across the entire proceedings.

Sufficient time to prepare the defense is of prime importance. This includes time to investigate the facts,[51] and further, once the facts have been determined and critical witnesses ascertained, the appointment must have been made with sufficient time to allow counsel to locate the witnesses.[52] Since the jury plays a critical role in a fair trial, there must be sufficient time to allow counsel to investigate the jury panel.[53] An opportunity to interview the witnesses, even though incarcerated, must be given counsel,[54] particularly since this is his duty.[55] If the facts are of record from a prior trial, counsel's burden may be lessened,[56]

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[47] Turner v. Maryland, 303 F.2d 507 (4th Cir. 1962); Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962). But compare Willis v. Hunter, 166 F.2d 721 (10th Cir. 1948).

[48] See note 46 *supra.*

[49] People v. Hall, 413 Ill. 615, 110 N.E.2d 249 (1953).

[50] See Turner v. Maryland, 303 F.2d 507, 511 (4th Cir. 1962).

[51] Lloyd v. State, 241 Ind. 192, 170 N.E.2d 904 (1960); People v. Avilez, 86 Cal. App.2d 289, 194 P.2d 829 (1948); State v. Howard, 238 La. 595, 116 So.2d 43 (1959). The latter case sustained the conviction but recognized that the time required varies with the individual situation.

[52] Wright v. Johnston, 77 F. Supp. 687 (N.D. Cal. 1948).

[53] State v. Speller, 230 N.C. 345, 53 S.E.2d 294 (1949).

[54] Wilson v. State, 93 Ga. App. 229, 91 S.E.2d 201, 202 (1956).

[55] Vetter v. Superior Court, 189 Cal. App.2d 132, 10 Cal. Rptr. 890 (1963).

[56] Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947).

but this does not excuse failure to allow counsel sufficient time to prepare.[57]

A final reflection on the time factor would lead to the conclusion that in any of the above instances the requisite amount of time will vary with: 1) the charge against the accused, 2) counsel's knowledge of the law involved, and 3) the relative complexity of the facts.[58] Then should additional time be needed, counsel should request a continuance and it must be denied before the effective representation question arises.

Ineffective representation can occur when conflicts of interest between counsel and accused's defense arise. For example, an attorney seeking employment with the district attorney, who is the adversary in accused's case, will be a sufficient circumstance to cause the court to question whether accused was defended with the requisite zeal.[59] Even as late in the proceedings as sentencing, the accused can be denied effective representation if counsel represents co-defendants, one of whom was convicted of a lesser charge and would suffer a lighter penalty.[60] A conflict in co-defendant's defenses, unforeseen prior to trial, will be sufficient to affect the effectiveness of the representation.[61] A conflict which is particularly gregarious occurs when counsel has represented the prosecuting witness in a prior civil action and is hopeful that he may represent him again.[62] The consequence to accused is the lack of the required zealous defense. When the defense counsel acts at the prosecuting attorney's request without knowledge of the facts and for the purpose of waiving the preliminary hearing, the expectable result is ineffective representation.[63] An even more obvious conflict of interests is the appointment of the prosecuting attorney to get the accused a suspended sentence.[64] However, a disagreement between the accused and his appointed counsel is not the sort of conflict of interest which necessarily will void the representation.[65] Also, there is ineffective representation when the appointed lawyer presided as judge pro tempore at the arraignment. The attempt to function in both roles,

[57] See cases cited *supra* note 51.
[58] United States v. Wight, 176 F.2d 376 (2nd Cir. 1949).
[59] MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960).
[60] Kyle v. United States, 263 F.2d 657, 660 (9th Cir. 1959).
[61] Craig v. United States, 217 F.2d 355 (6th Cir. 1954).
[62] Tucker v. United States, 235 F.2d 238 (9th Cir. 1950). *But cf.* United States v. Pugh, 106 F. Supp. 209 (D. Guam 1952), *rev'd on other grounds* 212 F.2d 761 (9th Cir. 1954).
[63] People v. Chesser, 29 Cal.2d 815, 178 P.2d 761 (1947).
[64] Hernandez v. State, 138 Tex. Crim. 4, 133 S.W.2d 585 (1939).
[65] State *ex rel.* Sweet v. Hancock, 224 Ind. 225, 66 N.E.2d 131 (1948). The court felt that providing a public defender system was the extent of the assistance the state could give and accused had the hard choice of counsel he disliked or no representation.

although at different times, affects counsel's ability to aid effectively.[66] Similarly, an appointment in the face of a statement of counsel showing a strong prejudice against the defendant is also defective.[67] The latter situation coupled with a counsel who criticizes his own client before the jury demonstrates clearest evidence of inadequate assistance.[68] Lack of interest or a repressed interest of counsel also may be generated by fear of mob compulsion.[69]

Should counsel be appointed with sufficient time to prepare and without any patent conflicts of interest, effective representation will be tested by counsel's performance of the expected functions. Logically, it would seem that if counsel is to perform effectively, then his first duty in preparing the defense is to consult with the accused.[70] There is a right to such consultation,[71] and that right is one of confidential consultation.[72] The minimum requirement is that counsel inform accused of his rights.[73] A single consultation may be sufficient, but this depends upon what the accused and counsel determine as sufficient.[74] Consultation during recess has been held adequate to satisfy the requirement,[75] but this seems a questionable holding if in fact accused was not fully apprised of his rights and counsel was not fully aware of the major defensive possibilities, particularly since counsel in question was the third attorney in succession who had been appointed to represent accused. A total failure by appointed counsel to consult with accused was held not to be a denial of effective representation.[76] Perhaps this latter holding can be explained on the basis of the presumptions of regularity of the proceedings[77] and of competence of counsel that courts constantly use in this area.[78] The existence of these presumptions and blind misapplication of them due to failure to examine the individual situation often lead to questionable results.

Before some courts will entertain a plea that counsel did not have

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[66] Tokash v. State, 232 Ind. 668, 115 N.E.2d 745 (1953). *Contra,* State v. Burrel, 120 N.J.L. 277, 199 Atl. 18 (1938).
[67] State v. Jones, 174 La. 1074, 142 So. 693 (1932).
[68] Wilson v. State, 222 Ind. 63, 51 N.E.2d 848 (1943).
[69] Roper v. Territory, 7 N.M. 255, 33 Pac. 1014 (1893); State v. Weldon, 91 S.C. 29, 74 S.E. 43 (1911).
[70] McKenzie v. State, 233 Miss. 216, 101 So.2d 651 (1958).
[71] Stagemeyer v. State, 133 Neb. 9, 273 N.W. 824 (1937).
[72] State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963).
[73] Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1950).
[74] Fluty v. State, 224 Ind. 652, 71 N.E.2d 565 (1947).
[75] Slaughter v. United States, 89 A.2d 646 (D.C. Mun. App. 1952).
[76] Penn v. Smyth, 188 Va. 367, 49 S.E.2d 600 (1948).
[77] Beckett v. Hudspeth, 131 F.2d 195 (10th Cir. 1942).
[78] United States *ex rel.* Weber v. Ragen, 176 F.2d 579 (7th Cir. 1949).

enough time to consult with accused, there must be a showing that the defect was brought to the attention of the trial judge and the time must have been so short that it is likely that the accused did not get aid or advice.[79] Alternatively, it is sometimes stated that the prosecutor has the duty to halt the proceedings for gross ineptness.[80] Such holdings are sound only if the facts do not disclose the accused's lack of mental capability or lack of appreciation for his difficulty. Should these deficiencies exist, accused would not be able to call the defect to the trial judge's attention.[81] In this latter respect a recent New York decision[82] presents some difficulty. The court said that if the essential assistance of counsel *could* have been given accused, despite the short consultation period, then it may not be said that the *court* denied accused adequate representation of counsel, even though *in fact* accused may not have been adequately or properly represented. In light of recent cases[83] holding that the court will not subject the question of satisfaction of accused's rights to surmise or speculation, the New York court's approach is vulnerable.

Counsel's misconduct will be a determinative factor in deciding whether effective representation has been given. Tampering with the evidence will produce a negative result when counsel is forced to admit that he has done so before the jury.[84] The same result can be expected when an attorney is adjudged in contempt and prevented from assisting accused.[85] However, advice by counsel attempting to induce accused to swear to a fabricated defense will not work in accused's favor;[86] nor will remarks by counsel disparaging the court, lead to a holding of ineffective representation.[87] However, misconduct, manifested by counsel's abandoning the defendant during the trial and before the jury, will lead to a result in accused's favor.[88]

Various types of disabilities of counsel will force an ineffective representation conclusion. Intoxicated counsel will be found ineffective,[89] but in some instances, due to application of a more stringent standard, the court will not find ineffectiveness if the lack of sobriety did not

[79] Powell v. United States, 149 F. Supp. 356 (M.D. Ala. 1957).
[80] Melanson v. O'Brien, 191 F.2d 963, 968 (1st Cir. 1951).
[81] Williams v. Kaiser, 323 U.S. 471, 477 (1945).
[82] People v. Tomaselli, 7 N.Y.2d 356, 165 N.E.2d 551 (1960).
[83] MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1961).
[84] Grandsinger v. Bovey, 153 F. Supp. 201 (D. Neb. 1957).
[85] Meeks v. United States, 163 F.2d 598 (9th Cir. 1947).
[86] Payne v. Commonwealth, 257 Ky. 743, 79 S.W.2d 204 (1935).
[87] People v. MacDonald, 365 Ill. 233, 6 N.E.2d 182 (1936).
[88] Garner v. State, 97 Ark. 63, 132 S.W. 1010 (1910).
[89] State v. Keller, 57 N.D. 645, 223 N.W. 698 (1929)

convince the trial court that accused was not getting a fair trial.[90] A form of misconduct can be evidenced by a lack of good faith assistance.[91] However, this begins to overlap with the conflict of interest factor, as a case where the attorney was a friend of accused's purported victim would demonstrate.[92] Also counsel may not be able to perform properly because he suffers from mental or physical disability. For example, where counsel was deaf, old, and unable to follow the proceedings, the court held these facts to be of sufficient significance to justify reversal.[93] However, where counsel was committed to an institution for the mentally deranged shortly after the trial, the court felt the fact that neither counsel for co-defendant nor the trial judge suspected the deficiency vitiated the imputation of incompetency.[94] This rationale is at least questionable. The focus of the court's attention should have been upon whether or not the defect affected the total presentation of the defense, not just the performance in the area. In the area of counsel's disability there appears to be a feeling generated by appellate courts that it is the function of the trial court to protect the accused's interests, and that when an insane or intoxicated attorney is before the court's scrutiny it is inconceivable that an insane or intoxicated attorney would be able to prejudice his client. Thus, if a case is prosecuted to finality, there is the customary presumption that the proceedings were regular[95] which is difficult to overcome, even if later it appears that the disability is shown to have existed during the trial. In instances of affirmative misconduct, this view and the operation of the presumption may be realistic, but its absolute application rules out the possibility of ascertaining whether or not there have been prejudicial omitted defenses.

Counsel's ill health may be another determinative factor in finding ineffectiveness.[96] However, the question again is one within the trial judge's discretion,[97] and a finding of abuse of discretion is a difficult matter. If the question is one of physical exhaustion, considerations

[90] Some courts leave this to the trial judge's discretion, People v. Harrison, 46 Cal. App.2d 779, 117 P.2d 19 (1941). But a federal court states, at least in the case of employed counsel, that the defendant who trusts himself to care of such an individual must bear the consequences, Hudspeth v. McDonald, 120 F.2d 962 (10th Cir. 1941).

[91] United States *ex rel.* Foley v. Ragen, 52 F. Supp. 265 (N.D. Ill. 1943).

[92] State v. Jones, 174 La. 1074, 142 So. 693 (1932).

[93] People v. Butterfield, 37 Cal. App.2d 140, 99 P.2d 310 (1940).

[94] Hagan v. United States, 9 F.2d 562 (8th Cir. 1925).

[95] Beckett v. Hudspeth, 131 F.2d 195 (10th Cir. 1942).

[96] Woolsey v. People, 98 Colo. 62, 53 P.2d 596 (1936); Jones v. State, 147 Fla. 677, 3 So.2d 388 (1941).

[97] Jones v. State, *supra* note 96. See also State v. Mastricovo, 221 La. 312, 59 So.2d 403 (1952).

similar to those discussed above apply.[98] Also, intoxication is not only a question of misconduct, but also a capacity defect.

Legal incapacity in various forms can prevent adequate representation. Appointment of someone not authorized to practice law is defective representation.[99] So if the attorney is a non-resident, or is not admitted to the local bar and he then attempts to conduct the defense without sufficient knowledge of local law, the finding will be ineffective representation.[100] Where the attorney appointed to represent accused had been removed from the roll of the state bar for nonpayment of dues, and thus was not authorized to practice law under the rules of the supreme court of that state, it was held that accused was deprived of his right to have the trial court appoint qualified counsel.[101] However, conduct of the defense by a disbarred attorney was held to be adequate where no prejudice was shown.[102] This decision is questionable because facts of prejudice, resulting from an attorney's disbarment, will more than likely not appear in the record, but particularly in a small community, have a disastrous prejudicial effect on a reputation basis. A court adhering to "record-worship"[103] will not be able to take these extra record factors of prejudice into consideration.

Inexperience of counsel has long been a basis for alleging incompetency,[104] and more recently ineffective representation. The first obstacle for an accused to overcome is the presumption of competency that exists by having been admitted to practice.[105] The inexperience allegation alone will not be sufficient to overcome this presumption.[106] However, complete inexperience in criminal cases resulting in consistent serious blunders or leaving appointed counsel no match for the prosecuting attorneys has been a ground for reversal of the conviction.[107] By itself, inexperience should not be decisive, but combined

[98] Tiller v. State, 110 Ga. 250, 34 S.E. 204 (1899); Hayne v. State, 99 Ga. 212, 25 S.E. 307 (1896).

[99] Jones v. State, 57 Ga. App. 344, 195 S.E. 316 (1938); Baker v. State, 9 Okla. Crim. 62, 130 Pac. 820 (1912).

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

[101] Martinez v. State, 318 S.W.2d 66 (Tex. Crim. 1958). *Cf.* McKinzie v. Ellis, 185 F. Supp. 931 (S.D. Tex. 1960).

[102] State v. Johnson, 64 S.D. 162, 265 N.W. 599 (1936).

[103] See Comment, 47 COLUM. L. REV. 115, 120-22 (1947).

[104] State v. Jones, 12 Mo. App. 93 (1882). See also People v. Ives, 17 Cal.2d 459, 110 P.2d 408 (1941). Louisiana requires that for defense of capital cases, counsel with five years experience must be appointed, LA. REV. STAT. tit. 15, § 143 (1950).

[105] State v. Bird, 31 Wn.2d 777, 198 P.2d 978 (1948).

[106] Simmons v. State, 116 Ga. 583, 42 S.E. 779 (1902).

[107] People v. Winchester, 352 Ill. 237, 185 N.E. 580 (1933) (criminal inexperience on hearsay evidence); State v. Bouse, 199 Ore. 676, 264 P.2d 800 (1953) (same on allowing prejudicial evidence). Wheatley v. United States, 198 F.2d 325 (10th Cir. 1952).

with omissions, and other errors,[108] it acquires greater weight. However, policy considerations weigh heavily in the court's refusal to condemn counsel on the basis of inexperience, because this would discourage younger members of the bar—the source of the bulk of indigent accused representation—from accepting the appointments.

The state's interest is a factor influencing the decisions. Thus, it has been held that accused is not entitled to relief even though he had no effective assistance of counsel, unless the state, through the court, prosecutor, or other law enforcement officer, denied or interfered with the accused's right to effective aid.[109] Similarly, another court has said that the fact that counsel's incompetence exists does not establish that the state deprived the accused of any constitutional right. This is a misplaced "state-action" concept. Thus, the courts by placing emphasis on this improper factor conclude that accused had not been ineffectively represented. The Washington court has seemingly been influenced by analogous factors. For example, when accused has a strong case against him, the court felt that it would have been of no avail to remand the case even for gross blunders of counsel, because from the trial court's record the result would have to be the same.[110] Even the fact that assigned counsel was negligent or otherwise at fault in performing his assigned duty did not warrant reversal of a conviction where the state did not fail to perform any duty it owed to accused.[111] Such an approach is unrealistic in failing to account for the accused's need for a fair trial. Modern constitutional interpretations lead to the conclusion that counsel's performance of a thorough, effective job is the most critical facet of the trial. Thus, to shift the emphasis from an affirmative duty on defense counsel and substitute for it a burden on the court, or the prosecutor, is to dilute the heart of our adversary system.[112]

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[108] Sanchez v. State, 199 Ind. 235, 157 N.E. 1 (1927), where counsel had a lack of knowledge of the law in that he was unaware of subpoena power. Lloyd v. State, 15 Okla. Crim. 130, 175 Pac. 374 (1918), where counsel failed to preserve a record or present the issue of a lesser offense.

[109] People v. Tomaselli, 7 N.Y.2d 350, 165 N.E.2d 551 (1960).

[110] Farrell v. Lanagan, 166 F.2d 845 (1st Cir. 1948). See also State v. Griffiths, 52 Wn.2d 721, 328 P.2d 897 (1958), where a similar attitude prevails because of the court's view of the strong case against the accused. See also People v. Odlum, 91 Cal. App.2d 761, 205 P.2d 1106 (1949), where counsel represented to the defendant that a state officer had made a commitment which if actually made would vitiate the plea, and if the acts of the state officer were innocently made would corroborate the representation of counsel and the defendant has relied upon them and thus been prevented from execising his free will and judgment, the state in its solicitude cannot accept the benefit of the plea.

[111] People v. Tomaselli, 7 N.Y.2d 350, 165 N.E.2d 551 (1960).

[112] Mitchell v. United States, 259 F.2d 787, 793 (D.C. Cir. 1956).

DECISIONS DURING THE COURSE OF THE TRIAL—QUESTIONS OF JUDGMENT

A standard for counsel's exercise of judgment is difficult if not impossible to ascertain. Thus most informed exercise of judgment is characterized as "trial tactics" and only repeated gross misjudgment is condemned. As one court has stated: "There are no tests by which it can be determined how many errors an attorney may make before his batting average becomes so low as to make his representation ineffective."[113] Another court's view is that the law does not require perfection in representation by counsel but only that such representation be with reasonable skill and diligence.[114] However, even against such a standard, misapprehension of substantive law can be the basis for an ineffective representation finding.[115]

Of course, when the error in judgment is repeated and gross, the holding must be incompetency or ineffectiveness.[116] At such a point the court would have a duty to intervene.[117] Even a court that refuses to find ineffective representation unless the proceedings degenerate to the stage where the court should intervene is not inflexible. Thus, where counsel by conscience was prevented from defending accused in accordance with the customary standards of an attorney, the situation formed the basis for ineffective representation even though the court and prosecutor failed to intervene.[118]

Determinations of what witnesses to call are questions of judgment for the attorney,[119] but in a particular situation failure to call witnesses who will establish a substantial defense will lend weight to the final determination of ineffective representation.[120] However, when counsel failed to object to a leading question, the court attempted to surmise what counsel's motivation was, imputing to him tactical genius.[121] By the same token, courts have deemed failure to suppress evidence,[122] failure to object to admission of a coerced confession,[123] failure to present proof of good moral character,[124] and failure to prove bad

[113] Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir. 1945).
[114] Bays v. State, 240 Ind. 37, 159 N.E.2d 393 (1959).
[115] United States *ex rel.* Hall v. Ragan, 60 F. Supp. 820 (N.D. Ill. 1945).
[116] State v. Bouse, 199 Ore. 676, 264 P.2d 800 (1953).
[117] *Ibid.* But it may be reversible error for the judge to intervene, United States *ex rel.* Darcy v. Handy, 97 F. Supp. 930 (M.D. Pa. 1951).
[118] Johns v. Smyth, 176 F.Supp. 949 (E.D. Va. 1959).
[119] Lewis v. Sanford, 79 F. Supp. 77 (N.D. Ga. 1948).
[120] Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962).
[121] Harris v. United States, 239 F.2d 612 (5th Cir. 1957).
[122] United States v. Springfield, 178 F. Supp. 347 (N.D. Cal. 1959).
[123] People v. Boyce, 314 Mich. 608, 23 N.W.2d 99 (1946).
[124] Fluty v. State, 224 Ind. 652, 71 N.E.2d 565 (1947).

character of the victim,[125] as questions of trial strategy for counsel's judgment, and not the basis for finding ineffective representation. Failure to put the accused on the stand is a question of balancing advantages and disadvantages which counsel in exercise of judgment must perform,[126] but leaving this decision to the accused may be a failure to perform counsel's advisory function.[127]

Failure to utilize defenses would be thought to present the question of effectiveness, but courts have generally held that such a matter is again a question of exercise of discretion.[128] Failure to require an alibi charge is not ineffective representation.[129] Failure to utilize a defense of insanity is similarly a question of advice and judgment and not a basis for error.[130] However, a holding that refusal to present a defense shifts the responsibility to the accused to disclose the defense would seem to defeat the entire purpose of requiring assistance of counsel.[131] Nevertheless, such a requirement has been espoused,[132] and the same court stated further that if counsel would not present the defense, accused must then appeal to the court to assign him counsel who would. Not only does this defeat the purpose of requiring counsel, but other defects in this approach are readily apparent. Accused would be typically unfamiliar with the legal subculture's language and may not have a complete knowledge of the types of defenses his facts may present,[133] and thus not only be incapable of disclosing this to his attorney, but incapable of objecting to the trial court when counsel refuses or neglects to present such defenses. The task of translating the facts of the accused's problem into the language of the legal subculture is for counsel.[134] It is unrealistic to expect the accused, particularly should he be suffering from a mental defect or low mentality, to disclose his "true defense"[135] to the attorney. The underlying, inarticulated reason sustaining the conviction may be that the court fears accused has a defense, but purposely fails to disclose it, in hope

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[125] *Ex parte* Lovelady, 207 S.W.2d 396 (Tex. Crim. 1948).

[126] State v. English, 85 N.W.2d 427 (N.D. 1957); Jones v. State, 224 Ark. 134, 273 S.W.2d 534 (1954).

[127] *Compare* Nail v. State, 231 Ark. 70, 328 S.W.2d 836 (Ark. 1959) *with* Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1950).

[128] Commonwealth *ex rel.* Carey v. Prison Keeper 370 Pa. 604, 88 A.2d 904 (1952).

[129] Bays v. State, 240 Ind. 37, 159 N.E.2d 393 (1959).

[130] People v. Heirens, 4 Ill.2d 131, 122 N.E.2d 231 (1954). *But see* Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962).

[131] State v. Arrellano, 68 Nev. 134, 227 P.2d 963 (1951).

[132] *Ibid.* See also People v. Garrow, 130 Cal. App.2d 75, 278 P.2d 475 (1955).

[133] Williams v. Kaiser, 323 U.S. 471, 477 (1945).

[134] Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962).

[135] See, *e.g.*, Sayre v. Commonwealth, 194 Ky. 338, 238 S.W. 737, 739 (1922).

of getting a second trial.[136] Again, the court should not hypothesize that such is the case, but examine the facts and ascertain whether in the given instance the accused has actually attempted concealment.[137] Failure to present arguments to the jury is another matter for counsel's judgment, falling within the category of trial tactics. However, when counsel refuses to argue to the jury because of his own pre-judgment of the accused's guilt, the conclusion is ineffective representation.[138]

Where the accused has employed his own counsel rather than having court appointed counsel, some courts have felt the basis for a distinction exists.[139] The distinction is created by use of an agency concept. By the agency rule the acts of the attorney are imputed to the client, and the client is bound by them.[140] This may even be the result when counsel is appointed by the court.[141] As a consequence the accused must raise objection to his counsel's conduct while the trial is progressing rather than wait until the trial is over and then attempt to assert the misconduct as a defense.[142] The reason behind this judicial attitude is a concern that the accused and counsel may collude in an effort to get the court to grant a new trial on the ground of this planned but concealed misconduct.[143] Collusion may be a real possibility, but nevertheless, if the courts presume that counsel is competent then it would not seem too far afield for them to presume high professional ethics.[144] Also, a blind application of the agency principle is unrealistic. The courts are taking a facet of commercial law and, as an expedient, applying it to criminal law. The analogy is not sound, because the agency relationship assumes that the principle has control of the situation, and guides the agent. However, in the criminal law case, the contrary is of necessity the case; if it were not, then there would be no need for counsel. Concern about possible collusion is realistic. But to require an accused, unlearned in the vagaries of the law and unaware of counsel's omissions, to voice his objections during the trial can very

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[136] *Ibid.*

[137] A noteworthy approach is that of the court in Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962).

[138] Johns v. Smyth, 176 F.Supp. 949 (E.D. Va. 1959).

[139] Hendrickson v. Overlade, 131 F. Supp. 561 (N.D. Ind. 1955). *But see* Sanchez v. State, 199 Ind. 235, 157 N.E. 1 (1927).

[140] Sayre v. Commonwealth, 194 Ky. 338, 238 S.W. 737 (1922).

[141] Edwards v. United States, 265 F.2d 909 (6th Cir. 1959).

[142] Hudspeth v. McDonald, 120 F.2d 962 (10th Cir. 1941); Sayre v. Commonwealth, *supra* note 140.

[143] People v. Mitchell, 411 Ill. 407, 104 N.E.2d 285 (1952).

[144] Perhaps though counsel of the sort Judge Lumbard refers to as "class two" counsel would not be deserving of such recognition, see Lumbard, *The Adequacy of Lawyer Now in Criminal Practice*, 47 J. AM. JUD. SOC'Y 176 (1964).

well operate to deprive him of a fair trial. Even if accused does object during the trial, the trial judge may refuse to listen.[145] So, while the conflict of policy interests between the accused's necessity for a fair trial and hampering the effective administration of justice presents a difficulty, a realistic court, rather than making a cursory dismissal on doctrine, would closely scrutinize the facts to ascertain whether the post trial objection is valid and whether collusion in fact exists.[146]

LIMITATIONS OF REVIEW

The limitation on the scope of review presents the most serious problem to the accused in his effort to call to the court's attention the questions of ineffectiveness, particularly those that lie outside the record. On direct attack, appellate courts adhere strictly to the record.[147] Since there is a presumption of regularity[148] from the face of the record the burden on the defendant is doubly difficult.

Collateral attack leaves room for some hope, but the situation still is uncertain. In the early case of *Frank v. Mangum*[149] the Supreme Court showed a willingness to go beyond the record in a habeas corpus case. However, that case was distinguished into nonexistence.[150] As a result, the federal courts have refused in habeas corpus actions to go beyond the record to consider the adequacy of representation.[151] However, the Supreme Court has drawn a valuable distinction which has recently been followed.[152] In *Palmer v. Ashe*[153] it was pointed out that although the record may be relevantly considered in a habeas corpus proceeding it is relevant only in so far as it refutes the accused's contentions; but where the record is mute, constitutional rights would not be sacrificed merely because their denial is not set forth. Thus, particularly in instances of omissions due to inadequate pre-trial preparation, the court will go beyond the record in habeas corpus proceedings. If the state hearing was less than a "full and fair evidentiary hearing" on the rehearing, then the federal district court may have to re-

[145] United States *ex rel.* Foley v. Ragan, 52 F.Supp. 265, 272 (N.D. Ill. 1943).
[146] See note 137 *supra.*
[147] Hagen v. United States, 9 F.2d 562, 564 (8th Cir. 1925) and People v. Graff, 104 Cal. App. 2d 32, 34, 230 P.2d 654, 656 (1951). *But cf.* State v. Lei, 59 Wn.2d 1, 365 P.2d 609 (1961) where the court went outside the record to consider affidavits of counsel justifying his conduct of the defense.
[148] Beckett v. Hudspeth, 131 F.2d 195 (10th Cir. 1942).
[149] 237 U.S. 309, 331 (1915).
[150] Riddle v. Dyche, 262 U.S. 333, 335 (1923).
[151] Thomas v. Hunter, 153 F.2d 834, 838 (10th Cir. 1946).
[152] Palmer v. Ashe, 342 U.S. 134, 137 (1951) establishes the distinction discussed in the text, and Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962) follows it.
[153] 342 U.S. 134, 137 (1951).

determine the questions.[154] The Ninth Circuit Court of Appeals[155] has applied this type of reasoning to ineffective representation, by recognizing that while direct appeals should be limited to the record,[156] it is not proper to do so for a collateral attack. This would seem to be the sound approach, since it is a rare trial when ineffectiveness, particularly incompetency, is so clear as to appear on the record. This is even more clearly the case with counsel's omissions. At most the record will show some tactical blunders, and if incompetency was so overt as to show on the record, in most instances the trial would be stopped by the trial judge in his effort to further justice. But failure to call all the necessary witnesses or to do sufficient research, lack of knowledge of how to go about completely protecting a client, or even mental or emotional problems and conflicts of interest between attorney and client are not matters which generally are seen by the court, or which fall within the trial record. Thus, perhaps even on direct attack the court should not confine itself to a "record worship," but should examine the allegations, and if they appear valid remand for a hearing to demonstrate their validity. If ineffectiveness is then established, the accused must be given a new trial. To raise the question of ineffective representation more than a mere general criticism of the counsel's conduct of the case is necessary.[157] What must be done is to make a specific allegation of ineffectiveness, spelling out in detail in what respects counsel has failed to perform.[158] If this is done, the appellate court will find it easier to remand for a hearing.

Policy Factors Militating Against Reversal

An examination of the factors considered relevant on the question of effective representation is incomplete unless the underlying policy questions that affect the decisions are also scrutinized. Thus, since members of a lawyer-trained court will have a deep understanding for the problems of presenting a defense and conducting a trial, it is evident that they will be understandably reluctant to aid a convicted accused in attempts to try their counsel. For the appellate court to sustain the accused's contention that his counsel did not effectively represent him amounts to a condemnation of the lawyer's professional status without

[154] Townsend v. Sain, 372 U.S. 293 (1963).
[155] Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962).
[156] *Id.* at 32, n. 4.
[157] Sweet v. Howard, 155 F.2d 715 (7th Cir. 1946).
[158] Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957).

a hearing.[159] The radial effects of such condemnation may be a disbarment proceeding[160] and/or a malpractice suit on the basis of the appellate court's finding in accused's case. It is not easy for judges who experienced similar difficulties and appreciate the problems involved to subject counsel to such penalties. Further radial effects could be to discourage the younger members of the bar from readily accepting defense appointments[161] for fear of being subjected to the above recourse. Another policy factor operating against a finding of ineffective representation is the possible interference with the administration of justice.[162] This is manifested in the form of a judicial fear that a liberal interpretation of effectiveness would "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."[163] One other court has expressed a view that such a remedy could have an adverse effect on prison discipline.[164]

This is an area of the law which is difficult and delicate to handle. No member of the bench wishes to brand a member of the bar as a poor representative of the profession. This and the other policy considerations tend to make the courts cautious. Perhaps this reticence is justified, since in the final analysis, many allegations of ineffective representation may be unsupported and merely the product of an unhappy convict's desire for retribution.

But accepting all of these considerations, the view espoused by most courts still is too rigid. The approach that follows a doctrine-bound rule is not desirable even though it may impose a lighter burden. When we consider that it is recognized by both practitioners and laymen[165] that an accused otherwise certain to be convicted has on more than one occasion been acquitted because of the advocacy of an able criminal lawyer, we become aware of the importance of counsel's role in the defense. Thus, it would have to be concluded that the most desirable approach in terms of securing adequate representation is that followed by the Ninth Circuit Court of Appeals in utilizing and requiring a close judicial scrutiny of all the facts of the individual situation when

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159 State v. Dreher, 137 Mo. 11, 38 S.W. 567 (1897).

160 See United States *ex rel.* Hall v. Gagan, 60 F. Supp. 820 (N.D. Ill. 1945).

161 Mitchell v. United States, 259 F.2d 787, 793 (D.C. Cir. 1959).

162 State v. Dreher, 137 Mo. 11, 38 S.W. 567 (1897).

163 Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir. 1954).

164 Carvell v. United States, 173 F.2d 348 (4th Cir. 1949).

165 NOBLE & AVERBUCH, NEVER PLEAD GUILTY (1955); STONE, CLARENCE DARROW FOR THE DEFENSE (1941).

those facts have been appropriately and specifically put before the court.

STANDARDS

The level of performance is discussed last, because only after all the factors and policy considerations are examined, can a full appreciation of the standards or the judicial omission thereof, be had. At this point it should be obvious that the performance required of counsel must vary with the stage of the proceedings being examined. Omissions in pretrial preparation, having a substantial effect upon the final result, cannot be measured by the same standard as failure to object to leading questions or failure to make an appropriate motion during the trial. However, as the above review would indicate, the courts have been following just such a course. Even though the concept of effective representation applies to the entire proceedings, its content varies with each particular stage and thus it also presents the hazard of misapplication unless the courts are cognizant that each individual situation must be scrutinized independently and not handled by attempting to force outmoded doctrines to fit the situation.

The ultimate objective in each situation is the due-process—fair trial. But in achieving this objective courts espouse such standards as "mockery of justice" and a trial reduced to a "sham and a farce." Such standards may be appropriately applicable in the instance of conduct during the trial, since they address themselves to affirmative conduct, and would set a high standard for judging the exercise of judgment, but they are totally unsatisfactory in application to faulty pre-trial preparation. The major difficulty is one of emphasis. The latter two tests focus upon affirmative conduct, and thus when stare decisis is called upon and past doctrine is unveiled to solve a problem of omitted defenses, these standards lead to a totally unjust result.

In conclusion, we can say that in certain stages of the proceedings, such as exercise of judgment during the trial, a standard of performance is impossible to establish. Nonetheless, a court's function should be to concentrate its attention on the stage in question and scrutinize the alleged malfunction in that context, viewing it against the desired objective of a fair trial.

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