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Ohio Supreme Court Rules of Superintendence for Courts of Common Pleas Rule 65: The Right to Effective Counsel—A Reality at Last?

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COMMENT

OHIO SUPREME COURT RULES OF SUPERINTENDENCE FOR COURTS OF COMMON PLEAS RULE 65: THE RIGHT TO EFFECTIVE COUNSEL—A REALITY AT LAST?

I. INTRODUCTION

In October of 1987, the Ohio Supreme Court took steps to ensure that the poor need not face death merely because they can not afford to retain experienced and adequate counsel.[1] Newly required levels of experience that counsel must have in order to be appointed to defend indigents who are charged with a capital crime or who are appealing a death sentence are specified in the recent Amendments to Rule 65 of the Supreme Court Rules of Superintendence for Courts of Common Pleas.[2] Rule 65 is both an attempt to ensure that the right to effective counsel is a reality for these indigent defendants and a mechanism for dealing with the numerous claims of ineffective assistance of counsel which have arisen in recent years.

This comment first reviews the historic background of the right to counsel and claims of ineffective assistance. Next, it examines the contents of Rule 65. Finally, this comment analyzes the potential effectiveness of Rule 65 in accomplishing the goal of providing counsel that is adequate and experienced with regard to the special issues that are often raised in death penalty cases.

II. BACKGROUND

No rule is enacted in a vacuum and presumably few rules are enacted without reason. Accordingly, it is in order to review the background of the issues around which Rule 65 revolves—the right to counsel and the standards for judging incompetent or ineffective assistance of counsel.

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1. *Amendments to the Supreme Court Rules of Superintendence for Courts of Common Pleas*, OHIO ST. B.A. REP., Nov. 16, 1987 at A-16 [hereinafter *Amendments*].

2. C. P. SUP. R. 65, ___ Ohio St. 3d ___ (19___) (a new rule added to the *Supreme Court Rules of Superintendence for Courts of Common Pleas*).

A. History of the Right to Appointed Counsel

1. At Trial

In *Powell v. Alabama*,[3] the United States Supreme Court observed that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."[4] While a statement such as this might seem self-evident in today's society, not everyone has always shared this understanding of the sixth amendment's guarantee and its implications on the fourteenth amendment's due process clause.[5] In *Powell,* the Court determined that in order to comply with due process requirements a defendant in a capital case who is unable to retain counsel or adequately defend himself must have counsel appointed, regardless of whether or not he requests such appointment.[6] Six years after *Powell*, the Court stated in *Johnson v. Zerbst*[7] that the sixth amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel."[8] Ultimately, the *Johnson* Court held that all federal criminal defendants facing loss of life or liberty are entitled to counsel.[9] However, it should be noted that in considering the right to counsel, the *Johnson* Court's main focus was on the sixth amendment's constraint on federal courts rather than the fourteenth amendment's constraint on state courts.[10]

In *Bute v. Illinois*,[11] the Court discussed the fourteenth amend-

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3. 287 U.S. 45 (1932).

4. *Id.* at 68–69.

5. The sixth amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense" and the fourteenth amendment states that "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." In *Powell,* the Court held that the due process clause of the fourteenth amendment embraced rights of a fundamental character and therefore included the sixth amendment's right to counsel. *Powell*, 287 U.S. at 67–68. Under the circumstances of the *Powell* case the Court determined that failure to provide counsel had resulted in a denial of the defendant's fourteenth amendment due process rights. *Id* at 71.

6. *Id.*

7. 304 U.S. 458 (1938).

8. *Id.* at 462–63.

9. *Id.* at 462.

10. *Id.* at 463. The Court reasoned, "The sixth amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." *Id.* The court also noted that the burden of proof was on the defendant to show that counsel was not intelligently waived. *Id.* at 468–69.

11. 333 U.S. 640 (1948).

ment due process issue and ruled that although the procedure followed by the state court in that case might not have been sufficient for a federal court, "[t]he Fourteenth Amendment . . . does not say that no state shall deprive any person of liberty without following the *federal* process of law as prescribed for the federal courts in comparable federal cases."[12] Hence, at this juncture the Court was still only willing to require that states appoint counsel when a defendant was charged with a capital crime or when special circumstances were present.[13]

In *Betts v. Brady*,[14] the Court made an even stronger pronouncement, holding that the Constitution did not require that every person who was charged with a serious crime in a state court be given the assistance of counsel in all circumstances.[15] Later, though, the breadth of the *Betts* holding was limited somewhat in *Gibbs v. Burke*[16] where the Court emphasized that the *Betts* decision should not be read to mean that counsel is never required to be appointed in noncapital state cases.[17] The *Gibbs* Court cautioned that "[t]he due process clause is not susceptible of reduction to a mathematical formula."[18] The Court concluded that it is the duty of the trial judge to make certain that there is a fair trial and that the defendant's rights are protected, since only a review of all the facts and circumstances of each individual case can show whether denial of counsel in a particular instance is "fundamentally unfair."[19]

Finally, in 1963 the landmark case of *Gideon v. Wainwright*[20] was decided. Gideon was charged with a felony and was financially unable to retain counsel.[21] Under Florida law there was no provision for ap-

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12. *Id.* at 649. The Court also noted, in dicta, that if the charges in *Bute* had been capital charges, the trial court (even in the absence of an applicable state statute) would have been required to investigate as to the defendant's wish to have counsel, his ability to retain counsel, and if the defendant could not retain counsel, the court would have had to appoint counsel. *Id.* at 674. This requirement would seem to be even stricter than the one enunciated in *Powell*, since the Court apparently did not find any special circumstances in *Bute* that rendered the defendant unable to represent himself. *See* Gideon v. Wainwright, 372 U.S. 335, 371 (1963) (Clark, J., concurring).

13. *See supra* notes 3–9 and accompanying text.

14. 316 U.S. 455 (1942), *overruled in* Gideon v. Wainwright, 372 U.S. 335 (1963). Betts, an indigent charged with robbery, was unable to obtain counsel for his defense, since applicable state law only required appointment of counsel in cases where the defendant was charged with murder or rape. *Id.* at 457.

15. *Id.* at 445.

16. 337 U.S. 773 (1949).

17. *Id.* at 780. The Court delineated some special circumstances such as "ignorance, youth, or other incapacity . . . ." that in the past had been found to require appointment of counsel. *Id.*

18. *Id.* at 781.

19. *Id.* The court found that under the circumstances of the *Gibbs* case the defendant was not afforded a fair trial as a result of the lack of counsel and inadequate judicial guidance. *Id.*

20. 372 U.S. 335 (1963).

21. *Id.* at 337.

pointment of counsel under such circumstances and, thus, Gideon attempted to defend himself.[22] The Court began its opinion by noting the striking similarity between the facts in *Gideon* and those in *Betts*.[23] After reviewing the facts of *Betts*, the *Gideon* Court concluded that *Betts* should be overruled.[24] It was clear to the *Gideon* Court that if the *Betts* Court had found that the appointment of counsel for a criminal indigent defendant was a " 'fundamental right, essential to a fair trial,' "[25] such appointment would have been required in state courts by the fourteenth amendment, just as it is required by the sixth amendment in federal courts.[26] The Court in *Gideon* disagreed with the conclusion in *Betts* regarding the fundamental nature of the right to counsel and held that the sixth amendment's right to counsel was applicable to the states vis-a-vis the fourteenth amendment's due process clause.[27] The Court stressed that although "[t]he right of one charged with [a] crime to counsel may not be deemed fundamental and essential to fair trials in some countries . . . it is in ours."[28] Moreover, the Court noted that it was "an obvious truth" that an indigent defendant charged with a criminal act cannot obtain a fair trial without counsel.[29]

2. On Appeal

Even before its decision in *Gideon*, the Court took an important step toward defining an indigent's rights on appeal in *Griffin v. Illinois*.[30] The *Griffin* decision struck down an Illinois practice of only providing free trial transcripts for appeals to indigents who had been sentenced to death.[31] The Court stated that "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears

22. *Id.* Under Florida law a court could only appoint counsel for a capital defendant. *Id.*

23. *Id.* at 338. Like the defendant in *Gideon*, the defendant in *Betts* was unable to employ counsel, had his request for appointed counsel denied, and unsuccessfully attempted to conduct his own defense. Moreover, the defendant in *Betts* also claimed that he had been denied assistance of counsel in violation of the fourteenth amendment. *Id.*

24. *Id.* at 338–39.

25. *Id.* at 340 (quoting *Betts*, 316 U.S. at 471).

26. *Id.*

27. *Id.* at 342–43. The court discussed several earlier cases which had held that the right to counsel is fundamental one. *Id.* at 342–43. Additionally, the court emphasized that "[n]ot only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344.

28. *Id.* at 344.

29. *Id.*

30. 351 U.S. 12 (1956).

31. *Id.* All other defendants, whether indigent or not, were required to pay for trial transcripts. *Id.* at 14.

no rational relationship to a defendant's guilt or innocence . . . ."[32] The Court also held that although a state is not required to provide for appellate review, if it does provide for such review, the review must be provided on an equal basis for both the rich and the poor.[33]

A California practice of reviewing the record prior to deciding whether to appoint counsel for an indigent on an appeal of right was struck down in *Douglas v. California*.[34] The Court in *Douglas* reasoned that this practice drew an "unconstitutional line" between those appellants who could afford counsel and those who could not.[35] Under the California rule a rich appellant's appeal would only be decided after the submission of briefs in his favor and the presentation of an oral argument.[36] Conversely, the indigent's appeal would, in most cases, be denied unless the "barren record" spoke for the defendant or the "printed pages" demonstrated that an injustice ha[d] befallen him.[37] The *Douglas* Court concluded that "[w]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel in a state criminal case, there has been a discrimination between the rich and the poor which violates the Fourteenth Amendment."[38]

B. An Overview of What has Constituted Incompetent Representation

Although it has generally been held that incompetence of counsel is not grounds for a new trial where the defendant has employed his own counsel, the rationale of this rule has no application in a case where the defendant did not employ his own counsel.[39] Thus, claims of

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32. *Id.* at 17.

33. *Id.* at 18. However, the Court did not say that this meant a court must provide a complete transcript to every indigent. Other methods of reporting the proceedings could be used in various cases. *Id.*

34. 372 U.S. 353 (1963).

35. *Id.* at 357.

36. *Id.* at 356.

37. *Id.*

38. *Id.* at 353. The court later declined to extend *Douglas'* requirement that counsel be appointed for indigents on their first appeal of right to discretionary appeals. Ross v. Moffitt, 417 U.S. 600, 617 (1974).

39. Tompsett v. Ohio, 146 F.2d 95 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945). The general rule is that when the defendant employs counsel of his own choice "lack of skill and incompetency of the attorney is imputed to the defendant . . . the acts of the attorney thus becoming those of his client" unless the defendant objects and lets the court know that he does not agree. *Id.* at 98. However, if the "defendant is ignorant of his rights and unacquainted with the course of proceedings in criminal cases" and his employed counsel's representation is so incompetent "as to amount practically to no representation" then the general rule does not apply. *Id.* Where counsel is appointed, rather than chosen by the defendant, the underlying rationale for viewing the acts of the attorney as those of the defendant does not seem to exist. Indeed, it is arguable that even more stringent safeguards should be afforded the defendant with appointed counsel.

incompetence or ineffective assistance by counsel obviously have great ramifications for the indigent defendant. In *McMann v. Richardson*,[40] the United States Supreme Court observed that "[i]t has long been recognized that the right to counsel is the right to the *effective* assistance of counsel."[41] Exactly what constitutes competent or effective counsel, though, has been stated in different ways and put to different tests in various courts. The Court of Appeals for the Fifth Circuit has "interpret[ed] the right to counsel as the right to effective counsel . . . not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance."[42] Such a pronouncement fails to provide a clear standard by which to judge the assistance of counsel. A more useful standard for judging effective assistance was offered by the Court of Appeals for the Sixth Circuit in *Scott v. United States*.[43] The *Scott* court held that "[o]nly if it can be said that what was or was not done by the defendant's attorney . . . made the proceedings a farce and a mockery of justice, shocking to the conscience of the Court, can a charge of inadequate legal representation prevail."[44]

The Ohio Supreme Court has found that counsel was effective where "[he] performed conscientiously and, at least, as well as a lawyer with ordinary training and skill in the criminal law."[45] Moreover, a very functional two-part test for determining whether counsel's assistance was ineffective was applied by the Ohio Supreme Court in *State v. Lytle*.[46] After noting that A.B.A. standards could be helpful, though not the law of the state, the court held that the first step in examining the competency of counsel was to determine "whether there has been a substantial violation of any of defense counsel's essential duties to his client."[47] In the second, "analytically separate" step, the court must

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40. 397 U.S. 754 (1970).

41. *Id.* at 771 n.14 (1970) (emphasis added).

42. *See* MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960) (criticizing the district court's appointment of an inexperienced attorney over the defendant's objection).

43. 334 F.2d 72 (6th Cir.), *cert. denied*, 379 U.S. 842 (1964).

44. *Id.* at 73; *see also* Schaber v. Maxwell, 348 F.2d 664 (6th Cir. 1965); State v. Crutcher, 17 Ohio App. 2d 107, 244 N.E.2d 767 (1969). The court in *Crutcher* cited the standard that was applied in *Scott* and said that "[e]fficiency of counsel in a criminal trial implies skill and preparation in endeavoring to produce the desired result." *Id.* at 115, 244 N.E.2d at 771.

45. State v. Lockett, 49 Ohio St. 2d 48, 64–65, 358 N.E.2d 1062, 1073 (1976), *overruled in part as stated in* State v. Downs, 51 Ohio St. 2d 47, 364 N.E.2d 1140 (1977), *cert. granted*, 434 U.S. 889 (1977), *rev'd on other grounds*, 438 U.S. 586 (1978). The court also noted that counsel's failure to make objections was not a reversible error, merely because they may seem to have been inappropriate in hindsight. *Id.* at 64, 358 N.E.2d at 1073.

46. 48 Ohio St. 2d. 391, 358 N.E.2d 623 (1976).

47. *Id.* at 396, 358 N.E.2d at 627. With regard to the A.B.A. standards, the Ohio Supreme Court reasoned that it was "misleading to decide an issue of competency by using, as a measuring rod, only those criteria defined as the *best of available practice* in the defense field." *Id.*

decide if "the defense was prejudiced by counsel's ineffectiveness."[48] This two-part test is similar to the test that was ultimately developed and applied by the United States Supreme Court eight years later.[49]

In two companion cases, decided in 1984, the United States Supreme Court provided some guidelines for how lower courts should judge claims of incompetent or ineffective assistance. In *United States v. Chronic*,[50] the Court recognized that " '[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.' "[51] Although the Court admitted that in some circumstances prejudice to the defendant is so likely that a court could infer that there was ineffective assistance,[52] the Court nonetheless reversed the decision by the Court of Appeals for the Tenth Circuit which inferred ineffective assistance from the facts of the *Chronic* case, instead of presuming competence and requiring proof of "an actual breakdown of the adversarial process . . . ."[53]

Following the *Chronic* decision, in *Strickland v. Washington*,[54] the Court set out the general parameters of what a defendant must prove in order to establish a claim of ineffective assistance of counsel. The Court stated that it must first be determined whether "counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the sixth amendment."[55] However, the Court cautioned that it is not enough to merely show such erred performance; the defendant must also "show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[56] The Court stressed that the review of counsel's per-

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48. *Id.* at 396–97, 358 N.E.2d at 627. The court observed that licensed counsel will be presumed to be competent, and the defendant will bear the burden of proving otherwise. *Id.* at 397, 358 N.E.2d at 627.

49. *See infra* notes 50–57 and accompanying text (discussing the standard for ineffective counsel set forth in Strickland v. Washington, 466 U.S. 668 (1984)).

50. 466 U.S. 648 (1984).

51. *Id.* at 654 (quoting Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

52. *Id.* at 658. Some examples of such circumstances are situations involving a complete denial of counsel or situations where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659.

53. *Id.* at 652–53, 657–59, 662 (emphasizing that "only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial.").

54. 466 U.S. 668 (1984).

55. *Id.* at 687.

56. *Id.*

formance must be "highly deferential" and that "every effort [should] be made to eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time."[57]

Thus, over the last half century courts have sought to define the boundaries of the right to effective assistance of counsel and it is against this backdrop that Rule 65 was written.

C. *Overview of the Rule*

Rule 65 delineates the qualifications that an attorney must possess in order to be appointed as counsel for an indigent who is charged with a capital crime or who is appealing a death sentence. According to the comments of the committee that drafted Rule 65, the qualifications for appointments closely parallel the qualifications "by the Ohio Public Defender Commission set out in Ohio Admin. Code 120-1-10."[58] However, the Ohio Public Defender standards are not mandatory on the courts, whereas Ohio Supreme Court standards are mandatory.[59]

Section I of Rule 65 is divided into requirements for appointed trial counsel and appointed appellate counsel. At both the trial and appellate levels, the appointed counsel must "[b]e admitted to the Ohio Bar or admitted to practice pro hac vice."[60] At the trial level, at least two attorneys must be appointed for an indigent charged with a capital crime and at least one of them must have an Ohio law office and Ohio criminal trial experience.[61] The "lead counsel" must have three years of criminal or civil litigation experience, some special training in de-

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57. *Id.* at 689.

58. *Amendments, supra* note 1, at A-18. Although OHIO ADMIN. CODE § 120-1-10 (1988) is substantially similar to C. P. SUP. R. 65, there are some distinctions worth noting. Section 120-1-10 sets out qualifications that appointed counsel must meet in order for a county to seek reimbursement for defense costs from the Ohio Public Defender Commission. Additionally, the OHIO ADMIN. CODE does not have a separate requirements parallel to C. P. SUP. R. 65 § I(A)(2)(b) nor to § I(A)(2)(c). *Id.* These sections in C. P. SUP. R. 65 require that lead trial counsel, in addition to meeting other requirements must "[h]ave at least three years of litigation experience, criminal or civil; and . . . [h]ave had some specialized training in the defense of persons accused of capital crimes". C. P. SUP. R. 65 §§ I(A)(2)(b), I(A)(2)(c). The qualifications required for trial level co-counsel are the same in both C. P. SUP. R. 65 § I(A)(3) and OHIO ADMIN. CODE § 120-1-10(A)(1)(c). The qualifications to be met by appellate counsel are the same in both C. P. SUP. R. 65 §§ I(B)(1)–(2) and OHIO ADMIN. CODE § 120-1-10(A)(6)(a)–(b). Exceptions allowing counsel to be appointed even if they do not meet the requirements are substantially similar in both C. P. SUP. R. 65 and OHIO ADMIN. CODE § 120-1-10. C. P. SUP. R. 65 §§ I(A)(4), I(B)(3); OHIO ADMIN. CODE § 120-1-10 (A)(1)(d), (A)(6)(c).

59. *Amendments, supra* note 1, at A-18.

60. C. P. SUP. R. 65 §§ I(A)(2)(a), I(A)(3)(a), I(B)(2)(a). To be admitted to practice *pro hac vice* is to be admitted to practice for this occasion. BLACK'S LAW DICTIONARY 1091 (5th ed. 1979).

61. C. P. SUP. R. 65 § I(A)(1).

fending capital defendants, and at least one of the four following qualifications:

i. Experience as "lead counsel" in the jury trial of at least one capital case;
ii. Experience as "co-counsel" in the trial of at least two capital cases;
iii. Experience as "co-counsel" in the trial of a capital case; and
— Experience as "lead counsel" in the jury trial of at least one murder or aggravated murder case; or
— Experience as "lead counsel" in ten or more criminal or civil jury trials, at least three of which were felony jury trials; or
iv. Experience as "lead counsel" in at least:
— Three murder or aggravated murder jury trials; or
— One murder or aggravated murder jury trial and three felony jury trials; or
— Three aggravated or first- or second-degree felony jury trials in a Common Pleas Court within the past three years, at least one of which shall have involved a charge of a violent crime.[62]

These qualifications for "lead counsel" are more stringent than those required for "co-counsel".

"Co-counsel" at the trial level must meet one of six qualifications:

i. Qualify as "lead counsel" under (A)(2) above;
ii. Experience as "lead" or "co-counsel" in a capital case;
iii. Experience as "co-counsel" in one murder or aggravated murder trial;
iv. Experience as "lead counsel" in one first-degree felony jury trial;
v. Experience as "lead" or "co-counsel" in at least two felony jury or civil jury trials in Common Pleas Court; or
vi. Specialized training in the defense of persons accused of capital crimes.[63]

Thus, Rule 65 provides an indigent capital defendant not only with experienced "lead counsel" but also with experienced "co-counsel."

The appellate counsel provisions also require that two attorneys be appointed where "the court has ordered the death penalty and where trial counsel has been granted leave to withdraw or supplemental counsel is being appointed."[64] In an appellate case, both attorneys must have "adequate criminal appellate, post-conviction, or habeas corpus experience . . . ."[65] While only one of the attorneys must have an Ohio law office, both attorneys must have three years of litigation expe-

62. *Id.* § I(A)(2)(d).

63. *Id.* § I(A)(3). The rule also provides that counsel not meeting the qualifications may still be appointed if the committee is satisfied that competent representation will be provided. *Id.* § I(A)(4).

64. *Id.* § I(B)(1).

65. *Id.*

rience in addition to either experience as counsel in the appeal of a capital case or experience as counsel in the appeal of at least three felony convictions within the past three years along with special training in appeal of capital cases.[66]

Rule 65 also creates a Committee on the Appointment of Counsel (Appointment Counsel) for Indigent Defendants in Capital Cases and specifies the selection of committee members, eligibility for membership, terms, powers, duties, and various other details of the committee.[67] According to the subcommittee comments, the Appointment Committee will compile, update, and distribute lists of attorneys eligible for appointment.[68]

In its final section, Rule 65 outlines the procedures that must be followed in appointing counsel.[69] This section requires that counsel be appointed in capital cases for indigent defendants in accordance with Section I, yet it allows local rules to provide additional qualifications.[70] Additionally, no appointment should be made or accepted which creates an excessive workload which would prevent counsel from providing quality representation.[71] The appointing court must notify the Appointment Committee of appointments and of the final disposition of the case.[72]

III. ANALYSIS

Rule 65 evolved out of concerns on the part of the Ohio Supreme Court[73] and practitioners who were often involved with death penalty

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66. *Id.* §§ I(B)(1), I(B)(2). As with trial counsel, the rule provides for exceptional circumstances, in which counsel not meeting these qualifications may still be appointed. *Id.* § I(B)(3).

67. *Id.* § II.

68. *Amendments, supra* note 1, at A-20–21. The performance of appointed counsel will also be monitored by the Appointment Committee. *Id.*

69. C. P. SUP. R. 65 § III.

70. *Id.* § III(A). This section states:

> All municipal county, common pleas, and appellate courts within the State shall appoint counsel to represent indigent defendants charged with a capital offense in accordance with Section I of this Rule. Each court shall be free to adopt local rules requiring qualifications in addition to the minimum requirements established by this Rule.

Id.

71. *Id.* According to this section "[t]he appointing court shall not assign, and counsel shall not accept, an appointment which creates a total workload so excessive that it interferes with or effectively prevents the rendering of quality representation in accordance with constitutional and professional standards." *Id.* The subcommittee comments refer to excessive workloads as the greatest obstacle in providing quality services for indigents. *Amendments, supra* note 1, at A-16, A-23.

72. C. P. SUP. R. 65 § III(B). The final section of the rule also allows courts to provide appointed counsel with certain support services such as investigators, forensic experts, and mental health professionals, as provided for by both state and federal law. *Id.* § III(C).

73. Letter from Justice Douglas, Ohio Supreme Court, to Randall M. Dana, State Public Defender (June 18, 1986) [hereinafter Douglas Letter] (on file with University of Dayton Law

cases.[74] There was a generalized recognition that capital cases were different from noncapital cases[75] and a mounting perception that there had been too many reversals of death sentences based on findings of ineffective assistance.[76] In response to these concerns a subcommittee of the Ohio State Bar's Criminal Justice Committee drafted Rule 65 and submitted it to the Executive Committee for approval.[77] The Executive Committee approved Rule 65 and shortly thereafter presented it to the Ohio Supreme Court where the rule was formally adopted in October of 1987.[78]

The rule sets out in detail the qualifications that an attorney must have either to be appointed as counsel for an indigent defendant charged with a capital crime or to be appointed as counsel for an indigent who is appealing a death sentence.[79] Basically these qualifications attempt to ensure that the appointed counsel is at least moderately experienced in dealing with the issues that commonly arise in capital cases or appeals from death sentences. The necessity of appointing experienced counsel in such cases has been expressed by several Ohio courts. In *State v. Williams*,[80] the Trumball County Court of Appeals stated that "[a]s a matter of policy, we feel that a trial court should avoid appointing inexperienced attorneys to represent defendants indicted for serious offenses."[81] Similarly, in *State v. Toney*[82] the Mahoning County Court of Appeals observed not only that courts should refrain from appointing inexperienced counsel on appeals, but also that it was "the obligation of experienced criminal practitioners to accept appointment to represent indigent defendants in appeals."[83] Clearly, these courts recognized the need for experienced counsel. Unfortunately there was no assurance that all Ohio courts would recognize and appreciate this need. By adopting Rule 65, which is mandatory for all Ohio

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Review). Justice Douglas' letter begins by voicing concerns about the questions raised by *State v. Johnson*, 24 Ohio St. 3d 87, 494 N.E.2d 1061 (1986). Douglas Letter, *supra*, at 1. He suggests that "a procedure for training and selecting capital crime case counsel should be developed . . . and, if appropriate, be submitted to this court for consideration. Possibly this court could then adopt rules and/or guidelines . . . and thereby avoid, for the most part, charges that appointed counsel was not effective." *Id.* 1–2.

74. Telephone interview with John Rion, Co-chairman of the Ohio State Bar Criminal Justice Committee (Feb. 8, 1988) [hereinafter Rion Interview] (on file with University of Dayton Law Review).

75. *See infra* notes 82–85 and accompanying text.

76. Rion Interview, *supra* note 74; *see also infra* notes 86–98 and accompanying text.

77. Rion Interview, *supra* note 74.

78. *Id.*

79. *See supra* notes 47–54 and accompanying text.

80. 19 Ohio App. 2d 234, 250 N.E.2d 907 (1969).

81. *Id.* at 237, 250 N.E.2d at 911.

82. 23 Ohio App. 2d 203, 262 N.E.2d 419 (1970).

83. *Id.* at 206, 262 N.E.2d at 422.

courts, the Ohio Supreme Court provided such an assurance.[84] Furthermore, with Rule 65's detailed guidelines there is no question as to what constitutes "experienced counsel." Mandatory application of standardized requirements promotes a more equal and uniform operation of Ohio's criminal justice system. Rule 65 assures that an indigent in one jurisdiction in Ohio charged with a capital crime or appealing a capital sentence will receive counsel with experience comparable to the counsel provided in any other Ohio jurisdiction.

In light of Justice Clark's concurring opinion in *Gideon v. Wainwright*,[85] Rule 65 could be criticized for applying only to defendants who are either facing or appealing a death sentence. Justice Clark stressed that "the Constitution makes no distinction between capital and noncapital cases."[86] However, Rule 65 affords capital and noncapital defendants with the same constitutional rights. All defendants, capital and noncapital alike, will still receive their right to effective counsel. The fact that Rule 65 specifically delineates the necessary qualifications of counsel appointed for indigent capital defendants should not be construed to mean that indigent noncapital defendants may be denied effective and experienced counsel by the courts of Ohio.

Rule 65 is an honest recognition that death penalty cases raise unique problems or issues.[87] Ohio is trying to assure that indigent defendants in capital cases will be adequately defended by experienced attorneys capable of dealing with the complex issues raised in a capital case. Capital cases involve special considerations as a result certain procedures which are often unique to the capital case such as bifurcated trials, presentation of mitigating evidence, and review by appellate courts of the proportionality and reliability of the sentence.[88] The drafting committee's comments note that although "counsel [may be] quite able to try a complex criminal case [he] may not be competent to handle a penalty trial in a capital case."[89] It is painfully obvious that once a death sentence has been carried out there can be no correction

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84. *See supra* note 46 and accompanying text.

85. 372 U.S. 335, 347 (1963) (Clark, J., concurring).

86. *Id.* at 349. Justice Clark also observed that the proposition that "deprival of liberty may be less onerous than deprival of life [is] a value judgement not universally accepted." *Id.* (Clark, J., concurring).

87. *See* Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 303–04 (1983). Professor Goodpaster contends that "[t]rials about life differ radically in form and in issues addressed from those about the commission of a crime, and the cases must be treated differently." *Id.* at 303.

88. *See id.*

89. *Id.* The Drafting Committee comments note that Rule 65's qualifications for appointed counsel are intended to reduce the risk of erroneous convictions and death sentences. *Amend-*

made if error is found, no pardon, not even any commutation. In his concurrence in *Ake v. Oklahoma*,[90] Justice Burger stressed that "[i]n capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases."[91]

Another concern that prompted the adoption of Rule 65 was the growing perception that too many reversals occurred in death penalty cases because of claims of ineffective assistance, particularly at the penalty phase.[92] An illustrative case is *State v. Johnson*.[93] In *Johnson*, the Ohio Supreme Court found that the defendant's right to effective assistance of counsel had been denied and therefore reversed his conviction, vacated his death sentence, and remanded the case.[94] The court stated that defendant's counsel had been unprepared for the penalty phase and that he presented no mitigating evidence as a result of his failure to investigate the defendant's background.[95] In fact, the court noted that the only " 'evidence' . . . heard by the jury was a lengthy unsworn statement by appellant protesting his innocence, followed by a closing argument . . . actually berating the jurors for their guilty verdict and repeatedly urging them to 'reconsider the evidence.' "[96] The court reasoned that there was a difference between making a tactical decision not to present mitigating evidence and failing to comply with the duty to investigate the defendant's background to see if there was mitigating evidence.[97]

In a case from the Court of Appeals for the Eleventh Circuit, *Blake v. Kemp*,[98] an attorney's alleged ineffective assistance at the penalty phase was analyzed using the standard set forth in *Strickland v. Washington*.[99] Blake's attorney testified in a later hearing that "he made no preparations whatsoever for the penalty phase . . . because he believed that Blake would be found not guilty by reason of insanity. It was his philosophy that a lawyer should try 'to win [a case] rather than

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90. 470 U.S. 68, 87 (1985) (Burger, J., concurring).

91. *Id.* at 87 (Burger, J., concurring). In *Ake* the Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a state provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one." *Id.* at 74.

92. Rion Interview, *supra* note 74.

93. 24 Ohio St. 3d 87, 494 N.E.2d 1061 (1986).

94. *Id.* at 88, 494 N.E.2d at 1063.

95. *Id.* at 90–91, 494 N.E.2d at 1064.

96. *Id.*

97. *Id.* Defense counsel also failed to object either at the guilt phase or the penalty phase of the trial to a specification in the indictment that was not one of the statutorily enumerated aggravating circumstances allowed to be considered in imposing a death sentence. *Id.* at 92–93, 494 N.E.2d at 1065–66.

98. 758 F.2d 523 (11th Cir. 1985).

99. 466 U.S. 668, 687 (1984); *see also supra* notes 49–53 and accompanying text.

prepare for losing it.' "[100] Applying the *Strickland* standard, the court found that Blake's deficiencies as counsel satisfied the first step of the test and concluded that "an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness."[101] Even with this rather clear example of ineffective assistance, however, it was still necessary for the court to proceed to the second step of the *Strickland* standard. This step requires the defendant to show that his counsel's deficient performance resulted in prejudice to his defense.[102] In evaluating Kemp's claim of prejudice to his defense the Court of Appeals considered whether there was a "reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[103] Ultimately, the court concluded that the defendant had met his burden of showing he had been prejudiced since there was "a reasonable probability that he would have received a lesser sentence" had his attorney sought any mitigating evidence.[104]

Rule 65 also addresses another problem faced by appointed counsel—the potential decline in effectiveness due to excessive workload.[105] In *King v. Strickland*,[106] the Court of Appeals for the Eleventh Circuit examined the problem of how excessive workloads can lessen an attorney's effectiveness. As a result of various circumstances, the most pervasive one being that the lead counsel had just completed a large and consuming trial which had left him exhausted, the court found that the defendant in *King* had received ineffective assistance at the penalty phase of his trial.[107] Even though counsel's condition was mainly discussed in the court's review of the guilt phase of the trial,[108] such a severely impaired condition undoubtedly lessened counsel's effectiveness throughout all phases of the trial. Yet, the court said that even though the testimony as to counsel's condition "[gave] it some pause . . . . A tired lawyer is not necessarily an ineffective lawyer."[109] It may be true that a tired lawyer can still be an effective lawyer. But it is equally true that as an attorney's level of exhaustion goes up, the possibility of him

100. *Blake*, 758 F.2d at 533.
101. *Id.* at 533.
102. *Id.*
103. *Id.* (quoting *Strickland*, 466 U.S. at 694).
104. *Id.* at 534.
105. *See supra* note 62 and accompanying text.
106. 714 F.2d 1481 (11th Cir. 1983).
107. *Id.* at 1486–91.
108. *Id.* at 1486.
109. *Id.* at 1487.

being truly effective in defending his client must go down. Rule 65's concern about excessive workload is warranted.

While Rule 65 has many potential benefits, there are also a number of concerns about the rule that deserve consideration as well. First, in order for any rule to be effective, it must be followed. After delineating the requirements for "lead counsel," "co-counsel," and appellate counsel,[110] Rule 65 provides for exceptional circumstances whereby an attorney who fails to meet these requirements may still be appointed as counsel.[111] The rule provides that "[i]f an attorney does not meet the qualification requirements . . . the attorney may still be court-appointed . . . if it can be demonstrated to the satisfaction of the majority of the Committee . . . that competent representation will be provided to the defendant."[112] Those familiar with past practices of judges appointing counsel based on political, personal, or independent criteria, may be concerned about this exception to Rule 65. Clearly, the breadth of the aforementioned exception is quite extensive in that the committee is given a non-exclusive list of criteria to consider when making such an exception.[113] However, it should be noted that this discretion is not placed in the hands of individual judges, but in the hands of the independent Appointment Committee.[114] Thus, Rule 65 does provide some safeguards which should prevent possible abuse of the exceptional circumstances provision of the rule.

A second concern relates to how Rule 65 will affect future claims of ineffective assistance by counsel. Justice Douglas expressed the hope that by instituting such a rule, Ohio could "avoid, for the most part, charges that appointed counsel was not effective."[115] The National Legal Aid and Defender Association has recognized that "the right of many indigent capital defendants to a lawyer sufficiently skilled in

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110. C. P. SUP. R. 65 §§ I(A)(2), I(A)(3), I(B)(2).

111. *Id.* §§ I(A)(4), I(B)(3).

112. *Id.*

113. *Id.* Both of the "exceptional circumstances" sections direct the Appointment Committee to consider experience, special training and "[a]ny other relevant considerations." *Id.*

114. *Id.*; *see also supra* notes 60–61 and accompanying text. In order to ensure that the committee is independent, qualified, and diverse, selection criteria, eligibility requirements, and overall composition of the committee is strictly regulated by C. P. SUP. R. 65 § II. Of the five committee members, "[t]hree . . . shall be selected by a majority vote of . . . the Supreme Court of Ohio; one . . . by the Ohio State Bar Association; and one . . . by the Ohio Public Defender Commission." *Id.* § II(A)(1). In addition to certain eligibility requirements of legal background no member of the committee is to hold the office of prosecuting attorney or other similar office. *Id.* § II(A)(2). Finally, in order to guarantee a diverse makeup in the overall composition of the committee, the rule provides: "No more than three members shall be registered members of the same political party; No more than two members shall reside in the same county; and No more than one shall be a judge." *Id.* § II(A)(3).

115. *See* Douglas Letter, *supra* note 73, at 2.

practice to render quality assistance is not being fulfilled."[116] Logically, requiring counsel to meet certain standards in order to be appointed to represent indigent capital defendants should increase the quality of counsel provided, and thereby result in a corresponding decrease in the number of claims of ineffective assistance of counsel. However, it would be most unfortunate if a rule to help indigent capital defendants was used in the future to foreclose the possibility of successful claims of ineffective assistance by the very defendants it was designed to protect. Certainly, it can be expected that the number of meritorious claims of ineffective assistance will decrease. Yet, even the committee which drafted Rule 65 noted that the rule must not be used as a rubber stamp measure; declaring all counsel appointed according to the requirements to have been effective counsel regardless of the circumstances or merits of an individual case.[117] A defendant must still have the opportunity to prove that his counsel failed to provide effective assistance as judged by the *Strickland* standard.[118]

IV. CONCLUSION

Rule 65 recognizes the principles developed throughout the history of the right to counsel. The Rule seeks to ensure that indigents charged with a capital crime or appealing from a death sentence will find that the right to effective assistance of counsel truly provides effective assistance, rather than just a mere promise of effective assistance. Presumably, requiring appointed counsel to meet high standards will help not only to reduce the number of reversals based on ineffective assistance, but also to reduce the number of ineffective assistance claims that will need to be brought. Attorneys with more experience will be better equipped to handle the intricacies of capital trials and appeals. Although Rule 65 is not without its difficulties, such a rule is a step toward making the right to effective counsel a *reality* for indigent capital defendants.

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116. National Legal Aid and Defender Association, Standards for the Appointment and Performance of Counsel in Death Penalty Cases (Dec. 1, 1987) (on file with University of Dayton Law Review).

117. *Amendments*, *supra* note 1, at A-16, A-18.

118. *See supra* notes 46–50 and accompanying text.