Washington University Law Review

Volume 1976 | Issue 3

January 1976

Standard for Effective Assistance of Counsel, Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975)

STANDARD FOR EFFECTIVE ASSISTANCE OF COUNSEL

Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975)

Petitioner sought reversal of his conviction[1] for first degree murder,[2] claiming that he had been denied his sixth amendment right to effective[3] legal assistance because of his attorney's incompetence. The trial court refused to appoint counsel or grant an evidentiary hearing.[4] The

---

1. Petitioner's conviction and 99 year sentence were affirmed by the court of criminal appeals, and the Tennessee Supreme Court denied certiorari. Baxter v. Rose, 523 S.W.2d 930, 931 (Tenn. 1975).

2. The *pro se* petition was filed pursuant to the Post-Conviction Procedure Act, TENN. CODE ANN. § 40-3801 (1975). Section 40-3805 provides:

> Relief under this chapter shall be granted when the conviction or sentence is void or voidable because of the abridgment in any way of any right guaranteed by the constitution of this state or the Constitution of the United States, including a right that was not recognized as existing at the time of the trial if either constitution requires retrospective application of that right.

Many other states provide for similar post-conviction relief. *See, e.g.*, Post Conviction Hearing Act, PA. CONS. STAT. ANN. § 19-1180 (Purdon 1966). Most effectiveness challenges arise under a petition for habeas corpus. For discussion of the use of habeas corpus in competence challenges, see Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927 (1973). The challenge may also arise in a motion for a new trial. *See, e.g.*, United States v. Katz, 425 F.2d 928 (2d Cir. 1970). The defendant may allege incompetence during trial, but some courts hold it improper for the trial judge to investigate and correct the inadequacy of counsel. *See, e.g.*, State v. Dee, 218 N.W.2d 561 (Iowa 1974).

Direct appeal is another possible avenue of challenge, although an attorney is unlikely to attack his own competence. *See* notes 20-23 *infra*. This is one of the reasons that the Court of Appeals for the District of Columbia appoints different counsel to file appeals for convicted indigents. *See* Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 5 (1973).

3. Courts have used the term "effective," "competent," and "adequate" interchangeably. *See, e.g.*, Johnson v. United States, 506 F.2d 640, 645-46 (8th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975). For a discussion of the terms used, see notes 53-55 *infra* and accompanying text.

4. The court did not outline petitioner's allegations of incompetence, but did state that they raised a serious constitutional issue of effective assistance of counsel. Consequently, the lower courts had erred in dismissing the petition without both appointment of counsel and a hearing. The court reasoned that a hearing is necessary unless it is clear that under no circumstances would petitioner be entitled to relief. Baxter v. Rose, 523 S.W.2d 930, 938-39 (Tenn. 1975).

An evidentiary hearing to determine the incompetence of counsel is required in many jurisdictions. *See, e.g.*, Moore v. United States, 432 F.2d 730 (3d Cir. 1970). If the challenge arises in an application for federal habeas relief, the federal statute, 28 U.S.C. § 2255 (1970), applies:

> A motion for such relief may be made at any time.
> Unless the motion and the files and records of the case conclusively show

Tennessee Court of Criminal Appeals appointed counsel, but found petitioner's allegations merely conclusory,[5] refused to grant an evidentiary hearing, and affirmed the dismissal.[6] Imposing a new standard to determine effectiveness of counsel, the Tennessee Supreme Court reversed, remanded for an evidentiary hearing, and *held*: Article I, section 9, of the Tennessee constitution and the sixth amendment to the United States Constitution require that defendants in criminal cases

---

that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

Id.

The kinds of evidence admissible in competence hearings vary according to the jurisdiction. In federal courts, 28 U.S.C. § 2246 (1970), controls:

> On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

Id. The District of Columbia Circuit considers other evidence if submitted by affidavit. *See, e.g.*, United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973). The rationale is that "prejudice may not appear in the record precisely because counsel was ineffective." Bazelon, *supra* note 2, at 29. Other courts examine only the record. *See, e.g.*, State v. Kahalewai, 54 Hawaii 28, 501 P.2d 977 (1972).

5. Courts have split on who has the burden of proof in a competency challenge, but most place it on the defendant. *See, e.g.*, Hussick v. State, 19 Ore. App. 915, 529 P.2d 938 (1974); *In re* Bousley, 130 Vt. 296, 292 A.2d 249 (1972); State v. Thomas, — W. Va. —, 203 S.E.2d 445 (1974). One reason is that many jurisdictions presume that members of the bar are competent. *See, e.g.*, Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957); Kindle v. State, — Ind. App. —, 313 N.E.2d 721 (1974). Some courts have even applied the presumption when the attorney under attack was not licensed to practice before the trial court. *See, e.g.*, Farr v. United States, 314 F. Supp. 1125, 1132 (W.D. Mo. 1970), *aff'd*, 436 F.2d 975 (8th Cir.), *cert. denied*, 402 U.S. 947 (1971). *But see* Berry v. Gray, 155 F. Supp. 494 (W.D. Ky. 1957).

Other courts shift the burden to the state once defendant makes out a prima facie case of incompetence. The Court of Appeals for the District of Columbia requires the government to prove lack of prejudice once a defendant substantiates his initial allegations. *See* United States v. DeCoster, 487 F.2d 1197, 1204 (D.C. Cir. 1973). *See also* Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968). Other jurisdictions require the state to prove competency beyond reasonable doubt once the defendant makes a prima facie case. *See, e.g.*, Risher v. State, 523 P.2d 241 (Alas. 1974). *See also* Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1080 (1973).

Almost every jurisdiction requires the incompetence to be prejudicial. *See, e.g.*, McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974); Risher v. State, *supra*. This position accords with the "harmless constitutional error rule." *See* Chapman v. California, 386 U.S. 18, 20-21 (1967); Fahy v. Connecticut, 375 U.S. 85, 92 (1963); State v. Thomas, *supra*; Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1239 (1970); Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434, 1435-37 (1965).

6. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).

be afforded legal assistance within the range of competence demanded of attorneys in criminal cases.[7]

The sixth amendment, applied to the states through the fourteenth amendment,[8] guarantees that "[in] all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[9] Article I, section 9, of the Tennessee constitution contains a similar guarantee,[10] "identical in import" under Tennessee law.[11] Both constitutional provisions require the state to afford counsel not only at trial but at various other critical stages of a criminal prosecution.[12]

---

7. *Id.* at 939. The court also held that this standard applied to both appointed and privately retained counsel, rejecting the argument that a defendant who had retained counsel could not plead incompetence. *Id.* at 938.

Some courts distinguish between defendants represented by appointed and retained counsel by relying on a "principal-agent" rationale. Since the defendant hired the attorney as his agent, the attorney's actions are imputed to the accused; he cannot complain of inadequate representation. *See* Tompsett v. Ohio, 146 F.2d 95 (6th Cir. 1944). *See also* Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964). For a list of jurisdictions adopting this rule, see Polur, *Retained Counsel, Assigned Counsel: Why the Dichotomy?*, 55 A.B.A.J. 254, 254 n.2 (1969). The *Baxter* court reasoned that if a man is incompetent to represent himself at trial, he is also incompetent to evaluate his lawyer's skills and representation. 523 S.W.2d at 938.

A number of jurisdictions have declined to permit defendants represented by retained counsel to assert incompetence because the retained counsel is not an officer of the state. Consequently, these courts reason there is no state action and hence no constitutional deprivation. *See, e.g.*, United States *ex rel.* Darcy v. Handy, 203 F.2d 407 (3d Cir.) (per curiam), *cert. denied*, 346 U.S. 865 (1953); People v. Austin, 23 Ill. App. 3d 520, 319 N.E.2d 306 (1974); Anderson v. Peyton, 209 Va. 798, 167 S.E.2d 111 (1969). For a list of jurisdictions rejecting the state action theory, see Note, *Assuring the Right to an Adequately Prepared Defense*, 65 J. CRIM. L.C. & P.S. 302, 312 n.117 (1974).

The *Baxter* court rejected this argument on the wholly untenable theory that the sixth amendment right to counsel is not necessarily dependent on state action. 523 S.W.2d at 938. The federal guarantee of effective counsel, however, is relevant to state criminal proceedings only because of the due process clause of the fourteenth amendment, *see* Gideon v. Wainwright, 372 U.S. 350 (1963), which does require state action. The *Baxter* result is nonetheless defensible. The criminal trial itself obviously constitutes state action; the trial violates due process if defendant has ineffective counsel, whether appointed or retained.

The *Baxter* court also held that the state constitution guarantees the right to effective counsel. 523 S.W.2d at 938. *See* note 10 *infra* and accompanying text.

8. Gideon v. Wainwright, 372 U.S. 350 (1963).

9. U.S. CONST. amend. IV.

10. "That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel . . . ." TENN. CONST. art. I, § 9.

11. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).

12. *See* Mempa v. Rhay, 389 U.S. 128 (1967) (right to counsel at sentencing hear-

In *Powell v. Alabama*,[13] which established a fourteenth amendment due process right to counsel in capital cases, the United States Supreme Court recognized that inadequate representation may be the equivalent of none, and held that the right to counsel implicitly requires that legal assistance be effective.[14] The Court established no constitutional

ing); United States v. Wade, 388 U.S. 218 (1967) (accused entitled to counsel at post-indictment indentification line-up); *In re* Gault, 387 U.S. 1 (1967) (right to counsel at juvenile proceedings if confinement may result); Miranda v. Arizona, 384 U.S. 436 (1966) (person must be advised of right to counsel upon arrest); Escobedo v. Illinois, 378 U.S. 478 (1964) (accused has right to counsel at police interrogation); White v. Maryland, 373 U.S. 59 (1963) (counsel required at federal preliminary hearing); Douglas v. California, 372 U.S. 353 (1963) (indigent prisoners entitled to free counsel for direct appeals). In Argersinger v. Hamlin, 407 U.S. 25 (1972), the right to counsel was extended to every defendant who faces possible imprisonment if convicted. In a concurring opinion, Justice Powell stated that "the adversary system functions best and most fairly only when all parties are represented by *competent* counsel." *Id.* at 65 (emphasis added).

Congress has recognized the importance of effective legal representation by enacting the Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1964), *as amended* (Supp. II, 1972), which provides compensation and investigative expenses for attorneys representing indigents in federal court. *See* Margolin & Wagner, *The Indigent Criminal Defendant and Defense Services: A Search for Constitutional Standards*, 24 HASTINGS L.J. 647 (1973); Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 CORNELL L. REV. 632 (1970); Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 IOWA L. REV. 249 (1970).

13. 287 U.S. 45 (1932).

14. Under *Powell* due process in capital cases requires more than nominal representation: it requires "effective representation." Commenting on the appointment of the entire bar of Scottsboro, Alabama, as defense counsel, Justice Sutherland stated "that the duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in preparation and trial of the case." *Id.* at 71. In Avery v. Alabama, 308 U.S. 444 (1940), the Court affirmed the principle that ineffective representation may amount to a denial of the right to counsel. Justice Black wrote for the majority:

> [T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.

Id. at 446. *See also* White v. Ragen, 342 U.S. 760 (1945). The Court went a step further in Glasser v. United States, 315 U.S. 60 (1942), overturning Glasser's conviction because the attorney also represented a codefendant whose interests conflicted with Glasser's. Justice Murphy stated:

> [T]he Sixth Amendment contemplates that such assistance be untrammeled and unimpaired . . . . If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.

Id. at 70. In Johnson v. Zerbst, 304 U.S. 458 (1938), the Court applied the sixth amendment to all federal prosecutions.

In Betts v. Brady, 316 U.S. 455 (1942), however, it held that due process does not

standard for effective representation, however, stating merely that nominal representation is insufficient to satisfy due process.[15]

Until the mid-1960's, all federal and state courts determined the effectiveness of legal assistance according to the standard formulated by the Court of Appeals for the District of Columbia in *Diggs v. Welch*:[16] Criminal convictions could be overturned for ineffective representation only if counsel were so incompetent that the trial was a "farce and mockery of justice."[17] Five federal circuits[18] and approximately half of the states[19] continue to adhere to this test. These courts fear that

require counsel to be furnished in every criminal case. This stunted the growth of the right to counsel in state courts until 1963, when Gideon v. Wainwright, 372 U.S. 350 (1963), expressly overruled *Betts*. *See* Beany, *The Right to Counsel: Past, Present and Future*, 49 VA. L. REV. 1150 (1963).

15. 287 U.S. at 71.

16. 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

17. The court stated "[T]he trial shocked the conscience of the court and made the proceedings a farce and a mockery of justice." *Id.* at 670. The Tennessee Supreme Court applied a similar test in State *ex rel.* Richmond v. Henderson, 222 Tenn. 597, 439 S.W.2d 263 (1969):

> Incompetency of counsel such as to be a denial of due process and effective representation by counsel must be such as to make the trial a farce, sham, or mockery of justice.

Id. at 599, 439 S.W.2d at 264 (citations omitted).

The District of Columbia Circuit was one of the first jurisdictions to reconsider this rule. In Bruce v. United States, 379 F.2d 113 (D.C. Cir. 1967), the court stated:

> These words are not to be taken literally, but rather as a vivid description of the principle that the accused has a heavy burden in showing the requisite unfairness.

Id. at 116 (footnote omitted). *See also* Commonwealth *ex rel.* Washington v. Maroney, 427 Pa. 599, 235 A.2d 349 (1967).

18. *See* Dunker v. Vinzant, 505 F.2d 503 (1st Cir. 1974); United States v. Yanishefsky, 500 F.2d 1327 (2d Cir. 1974); United States *ex rel.* Little v. Twomey, 477 F.2d 767 (7th Cir.), *cert. denied*, 409 U.S. 1078 (1972); Johnson v. United States, 380 F.2d 810 (10th Cir. 1967). For a discussion of the standard in the Eighth and Fourth Circuits, see note 35 *infra*.

19. State v. Phillips, 16 Ariz. App. 174, 492 P.2d 423 (1972); Haynie v. State, 257 Ark. 542, 518 S.W.2d 492 (1975); Palmer v. Adams, 162 Conn. 316, 294 A.2d 297 (1972); Parker v. State, 295 So. 2d 312 (Fla. Ct. App. 1974); State v. Wozniak, 94 Idaho 312, 486 P.2d 1025 (1971); People v. Austin, 23 Ill. App. 3d 520, 319 N.E.2d 306 (1974); Greer v. State, — Ind. —, 321 N.E.2d 842 (1975); Winter v. State, 210 Kan. 597, 502 P.2d 733 (1972); State v. Flanagan, 254 La. 100, 222 So. 2d 872 (1969); State v. LeBlanc, 290 A.2d 193 (Me. 1972); People v. Green, 42 Mich. App. 154, 201 N.W.2d 664 (1972); State v. O'Neill, 299 Minn. 60, 216 N.W.2d 822 (1974); Parham v. State, 229 So. 2d 582 (Miss. 1969); State v. Noller, 142 Mont. 35, 381 P.2d 293 (1963); Warden v. Lischko, 90 Nev. 221, 523 P.2d 6 (1974); State v. Gillihan, 85 N.M. 514, 514 P.2d 33 (1973); State v. Sneed, 284 N.C. 606, 201 S.E.2d 867 (1974); State v. Peoples, 28 Ohio App. 2d 162, 162 N.E.2d 463 (1971); State v. Lewis, 255 S.C. 466, 179 S.E.2d 616 (1971); Bonsal v. State, 502 S.W.2d 813 (Tex. 1973); Alires v. Turner,

abandoning the farce and mockery standard would promote frivolous appeals,[20] and discourage attorneys from accepting appointments to defend indigents for fear of subsequently being adjudicated incompetent[21] or subjected to fines[22] or civil malpractice suits.[23]

---

22 Utah 2d 118, 449 P.2d 241 (1969); Anderson v. Peyton, 209 Va. 798, 167 S.E.2d 111 (1969).

20. Dictum in State v. Sneed, 284 N.C. 606, 613, 201 S.E.2d 867, 871 (1974), expressed concern over this problem: "to impose a less stringent rule would be to encourage convicted defendants to assert frivolous claims which could result in unwarranted trial of their counsels." Judge Bazelon was willing to concede this:

> [T]he issue in effectiveness of counsel cases is not the culpability of the lawyer but the constitutional right of the client. There will, no doubt, be many ill-founded claims of ineffectiveness—there are now—but such claims are an occupational hazard of the profession.

Bazelon, *supra* note 2, at 25. *See* Note, *Effective Assistance of Counsel*, 49 VA. L. REV. 1531 (1963). A stringent test might also adversely effect trial tactics. Attorneys might be overly cautious, or might even be deliberately incompetent to have convictions vitiated. *See* Norman v. United States, 100 F.2d 905 (6th Cir.), *cert. denied*, 306 U.S. 660 (1934); Kaus & Mullen, *The Misguiding Hand of Counsel—Reflection on Criminal Malpractice*, 21 U.C.L.A.L. REV. 1191, 1198 n.118 (1974).

21. Concern about lawyers' reputations is misplaced. Truly inadequate representation deserves no protection, and decent representation need not result in a trial of the lawyer who provided it.

Bines, *supra* note 2, at 940 n.69. Courts have sometimes protected the identity of attorneys charged with incompetence. *See* Note, *supra* note 5, at 1450 n.109, *citing* United States v. Re, 336 F.2d 306 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964) (opinion referred to counsel as Mr. "Z"), and Porter v. United States, 298 F.2d 461 (5th Cir. 1962) (Mr. "Barrister"). *See generally* Grano, *supra* note 5.

22. Fines have been levied pursuant to FED. R. APP. P. 46(c) for failing to appeal. *See, e.g.*, Bines, *supra* note 2, at 972 n.206, *citing* United v. Rivera, 473 F.2d 1372 (9th Cir. 1972), *and* United States v. Smith, 436 F.2d 1130 (9th Cir. 1970).

23. Apparently no criminal defendant has ever successfully sued appointed counsel. *See, e.g.*, Sullens v. Carroll, 446 F.2d 1392 (5th Cir. 1971); Underwood v. Woods, 406 F.2d 910 (8th Cir. 1969); Jones v. Warlick, 364 F.2d 828 (4th Cir. 1966). *See also* Comment, *Liability of Court-Appointed Defense Counsel for Malpractice in Federal Criminal Prosecutions*, 57 IOWA L. REV. 1420 (1972) (discussion of *Sullens* and the immunity doctrine).

Bazelon concurs:

> One [remedy] is the private malpractice suit brought by a defendant who has suffered because of his attorney's inadequacy. When standards that clearly articulate counsel's duty to his client are developed, such suits may be more practical, but whatever it may become, this form of action is not at all significant now.

Bazelon, *supra* note 2, at 17.

A number of defendants have unsuccessfully attempted suit under 42 U.S.C. § 1983 (3) (1970). For example, Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968), held that § 1983:

> provides a remedy only against one acting under color of state law. Safir, a private attorney, does not fall within this category, despite the fact that he had been appointed by the court.

Id. at 233.

The Supreme Court has not directly addressed the issue of the standard of competence required by the sixth amendment in criminal trials. In *McMann v. Richardson*,[24] however, the Court did discuss the caliber of advice required for a defendant to enter a knowing and intelligent guilty plea.[25] The Court held that a guilty plea was intelligent and thus voluntary only if based on "reasonably competent" legal advice.[26] "Reasonably competent" advice was defined as that within the "range of competence demanded of attorneys in criminal cases."[27]

Some courts have applied the *McMann* "range of competence" rule to all ineffective assistance claims.[28] Other courts rejecting the farce

---

24. 397 U.S. 759 (1970).

25. Defendant alleged that his guilty plea was motivated by a coerced confession that counsel advised would be admissible. The confession was made prior to Jackson v. Denno, 378 U.S. 368 (1964), which invalidated New York's confession procedures. The Court held that counsel's failure to anticipate this decision did not constitute ineffective representation. 397 U.S. at 772.

26. In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession.

397 U.S. at 770 (footnote omitted).

27. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on *whether that advice was within the range of competence* demanded of attorneys in criminal cases. On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand defendants facing felony charges are entitled to the *effective assistance of competent counsel.* Beyond this matter, we think for the most part, it should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and the judges should strive to maintain proper standards of performance by attorneys who are representing defendants in their criminal cases in courts.

Id. at 770-71 (emphasis added) (footnote omitted). *Accord,* Tollett v. Henderson, 411 U.S. 258 (1973). *But cf.* Chambers v. Maroney, 399 U.S. 42 (1970); 48 J. URBAN L. 989 (1971); 31 OHIO ST. L.J. 852 (1970).

28. *See* State v. Kahalewai, 54 Hawaii 28, 501 P.2d 977 (1974) (effective counsel does not mean errorless counsel, but counsel whose assistance is "within the range of competence demanded of attorneys in criminal cases"). *Accord,* State v. Massey, 207 N.W.2d 777 (Iowa 1973); State v. Fleury, 111 N.H. 294, 282 A.2d 873 (1971).

Although not using the same terminology, some jurisdictions have developed a similar concept. In Moore v. United States, 432 F.2d 730, 736-37 (3d Cir. 1970), the court stated:

> [T]he standard of adequacy . . . is the exercise of the customary skill and knowledge which normally prevails at time and place. [W]hat is required is normal and not exceptional representation . . . .

Accord, Risher v. State, 523 P.2d 421 (Alas. 1974) (customary skill and knowledge of attorneys fairly skilled in the criminal law); Commonwealth v. Saferian, — Mass. —,

and mockery standard have adopted different approaches, defining the standard of adequacy as "reasonably effective assistance,"[29] "reasonably competent assistance,"[30] "genuine and effective assistance,"[31] "conscientious and meaningful representation,"[32] "a fair trial,"[33] or

315 N.E.2d 878 (1974) (behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer); State v. Leadinghorse, 192 Neb. 485, 222 N.W.2d 573 (1974) (at least as able as a lawyer with ordinary training and skill in criminal law); State v. Anderson, 117 N.J. Super. 507, 285 A.2d 234 (Super. Ct. 1971) (legal services equal to normal customary skill and knowledge); State v. Harper, 57 Wis. 2d 543, 205 N.W.2d 1 (1973) (ordinarily prudent lawyer, skilled and versed in criminal law).

29. Two examples of this standard are Hudson v. Alabama, 493 F.2d 171 (5th Cir. 1974), and Beasley v. United States, 491 F.2d 687 (6th Cir. 1974). The *Hudson* Court phrased the rule as:

> Under the standards of this circuit, Hudson was entitled to counsel reasonably likely to render and rendering reasonably effective assistance.

493 F.2d at 173. *Beasley* held:

> [T]he assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. . . . Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations.

491 F.2d at 696. The language in *Beasley* is confusing since the "ordinary training and skill" terminology is similar to the "normal range of competence" standard. This results in a mixture of tests. Ordinary training and skill also implies that the "reasonableness" of counsel's actions is to be measured by the performance of the average criminal defense lawyer under the "reasonably effective assistance" test. Tennessee approved the *Beasley* approach in Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).

30. United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973) ("reasonably competent assistance of an attorney acting as his diligent conscientious advocate").

31. *See* Harris v. State, 293 A.2d 291 (Del. 1972) (genuine and effective legal assistance); Green v. Warden, 3 Md. App. 266, 238 A.2d 920 (1968) (genuine and effective legal assistance); State v. Goode, 84 S.D. 369, 171 N.W.2d 733 (1969) (adequate and effective assistance). This standard, however, only restates the issue; the level of representation to which defendants are entitled is still unclear. *See* notes 53-55 *infra* and accompanying text.

32. State v. Desroches, 110 R.I. 497, 293 A.2d 913 (1972).

33. Three states measure effectiveness by whether the accused received a "fair trial." Missouri defines the test simply:

> [I]f the action (or inaction) of counsel were of such character as to result in a substantial deprivation of a defendant's constitutional right to a fair trial, relief should be granted.

Thomas v. State, 516 S.W.2d 761, 765 (Mo. Ct. App. 1974). *Accord, In re* Bousely, 130 Vt. 296, 292 A.2d 249 (1972) (a fair and impartial trial upon the merits); State v. Robinson, 75 Wash. 2d 230, 233, 450 P.2d 180 (1969), *quoting* State v. Thomas, 71 Wash. 2d 470, 429 P.2d 231 (1967) (was the accused "afforded an effective representation and a fair and impartial trial?"). *See* Note, *Incompetency of Counsel*, 25 BAY. L. REV. 299 (1974); Comment, *Effective Representation—An Evasive Substantive Notion Masquerading as Procedure*, 39 WASH. L. REV. 819 (1964).

"any reasonable basis" for counsel's actions.[34] Some courts have nominally adhered to the farce and mockery rule while actually applying a more rigorous standard.[35] These courts reason that incompetent

34. The leading case advocating this standard is Commonwealth *ex rel.* Washington v. Maroney, 427 Pa. 599, 235 A.2d 349 (1967):

> Our inquiry ceases and counsel's assistance is deemed constitutionally effective once we are able to conclude that the particular course chosen by counsel had *some reasonable basis* designed to effectuate his client's interests.

Id. at 604, 235 A.2d at 352 (emphasis original). Alabama, Oregon, and West Virginia all gauge effectiveness by this test. Taylor v. State, 291 Ala. 756, 287 So. 2d 901 (1973); Rook v. Cupp, 17 Ore. App. 205, 526 P.2d 605 (1974); State v. Thomas, — W. Va. —, —, 203 S.E.2d 445, 461 (1974). The West Virginia test apparently rests in part on the general reputation of the challenged attorney. — W. Va. at —, 203 S.E.2d at 461. Courts seeking to clarify or elaborate their standards often employ a mixture of approaches. *See* note 29 *supra.*

35. California courts hold that a trial is a sham and farce whenever counsel's inadvertance or action renders a crucial defense unavailable to the defendant. People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963). In People v. Thomas, 43 Cal. App. 3d 862, 869, 118 Cal. Rptr. 226, 230 (1974) (emphasis added), the court stated:

> When challenging the competence of counsel, the defendant must affirmatively show that the omissions of defense counsel involved a critical issue, and that the omissions *cannot be explained on the basis of any knowledgeable choice of tactics.*

See Comment, *Standards to Guarantee Effective Assistance of Counsel,* 8 SANTA CLARA LAW. 108 (1967).

The Eighth Circuit also uses a modified "farce and mockery" test. *See* Cardarella v. United States, 375 F.2d 222 (8th Cir. 1967). In McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974), the court noted:

> Stringent as the "mockery of justice" standard may seem, we have never intended it to be used as a shibboleth to avoid a searching evaluation of possible constitutional violations; nor has it been so used in this circuit. It was not intended that the "mockery of justice" standard be taken literally, but rather that it be employed as an embodiment of the principle that a petitioner must shoulder a heavy burden in proving unfairness.

Id. at 214. In Johnson v. United States, 506 F.2d 640 (8th Cir. 1974), *cert. denied,* 420 U.S. 973 (1975), the court appeared to endorse the range of competence test:

> The standard to be applied in assessing a claim of ineffective or inadequate representation is based on the particulars of each case and is not easily reduced to any formula . . . .
>
> . . . A more appropriate nomenclature for the standard would be to test the degree of competence prevailing among those licensed to practice before the bar.

Id. at 645-46. Nevertheless, the Eighth Circuit recently affirmed the "farce and mockery" language of *Cardarella* and the *McQueen* burden requirement in Sheril v. Wyrick, 524 F.2d 186 (8th Cir. 1975). For a discussion of *McQueen* and the Eighth Circuit standard, see Note, *The Right to Effective Counsel in Criminal Trials: Judicial Standards and the California Bar Association Response,* 5 GOLDEN GATE L. REV. 499 (1975). The author concluded that the Eighth Circuit's standard is actually closer to the reasonable competence standard than to the farce and mockery test. *Id.* at 507.

The Fourth Circuit standard is unclear. In Coles v. Peyton, 389 F.2d 224 (4th Cir.

legal representation upsets the adversary system critical to an effective trial,[36] and believe this concern overrides the problems of promoting frivolous appeals and discouraging appointed counsel.[37]

1968), the court reversed a conviction using language that suggested a "reasonable competence" standard. In Bennett v. Maryland, 425 F.2d 181 (4th Cir. 1970), however, the court denied relief because counsel's errors did not reduce the trial to a "farce." Since *Coles* involved pretrial preparation while *Bennett* challenged trial tactics, the cases might be reconciled by concluding that the Fourth Circuit applies a different test for preparation than for trial conduct.

Two other jurisdictions have applied the "farce and mockery" test to distinguish preparation from trial tactics. In Vaughan v. Commonwealth, 505 S.W.2d 768 (Ky. 1974), the Kentucky Court of Appeals stated:

> The rule to which the judge referred is one that relates to *trial performance* by the attorney and not to the matter of time for preparation for trial. Our cases do not hold that the failure to allow an attorney adequate time for preparation for trial is a ground for relief only if the attorney's conduct of the trial is so hopelessly bad as to make the trial a farce.

Id. at 771 (emphasis original). For a discussion of the *Vaughan* case, see Note, *Kentucky's Standard for Ineffective Counsel: A Farce and A Mockery*, 63 KY. L.J. 803, 821 (1975). In People v. Bennett, 29 N.Y.2d 462, 467, 280 N.E.2d 637, 639, 329 N.Y.S.2d 801, 804 (1972) the New York Court of Appeals held:

> [W]here . . . the record unequivocally demonstrates a complete lack of investigation or preparation whatever on the only possible defense available, the lawyer, far from providing the sort of assistance which the Constitution guarantees to the most lowly defendant, has, in truth, rendered the "trial a farce and a mockery of justice."

Wallace v. Kern, 392 F. Supp. 834 (E.D.N.Y. 1973), illustrates the importance accorded to pretrial preparation. *Wallace* issued an injunction limiting the caseload of each legal aid society attorney to 40 indicted felony defendants awaiting trial, even though "[t]here was no proof . . . that the representation of any defendant on an actual trial or plea has been 'farcical,' one of the tests used to upset a conviction." *Id.* at 844. The court reasoned that the lawyers were so overburdened by their caseload that they were unable to make the decisions necessary to render adequate representation. *Id.* at 845.

36. Chief Justice Burger has compared the criminal justice system to a tripod, with the court, the prosecutor, and the defense counsel as the legs. Unless all are equally strong the imbalance renders the system ineffectual. *Judicial Conference, Minimum Standards for Criminal Justice*, 49 F.R.D. 347, 360 (10th Cir. 1969). For discussion of Chief Justice Burger's views on the effectiveness of counsel issue see Lamb, *The Making of a Chief Justice: Warren Burger on Criminal Procedure, 1956-1969*, 60 CORNELL L. REV. 743, 778-786 (1975).

37. There is growing awareness that criminal defendants are not receiving adequate representation. *See* McMann v. Richardson, 397 U.S. 759, 770-71 (1970); Bazelon, *supra* note 2. Chief Justice Burger believes that one-third to one-half of attorneys representing felony defendants are not qualified to "render fully adequate representation." Burger, *The Special Skills of Advocacy*, 42 FORD. L. REV. 227, 234 (1973). Judge Bazelon agreed:

> [W]hat I have seen in 23 years on the bench leads me to believe that a great many—if not most—indigent defendants do not receive the effective assistance of counsel guaranteed by the 6th Amendment.

Bazelon, *supra* note 2, at 2. *See also* Wilkey, *A Bar Examination for Federal Courts*,

The leading case adopting the "reasonable competence" standard is *United States v. DeCoster*,[38] in which the District of Columbia Circuit relied in part on *McMann* to repudiate the "farce and mockery" standard it had created. In an opinion by Judge Bazelon, the court held: "[A] defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."[39] The court outlined specific conduct required of counsel to ensure effective representation and instructed lower courts and attorneys to look to the American Bar Association Standards for the Defense Function (Defense Function Standards) for guidance.[40]

The Defense Function Standards[41] establish norms for counsel's actions in the following areas: access to counsel, lawyer-client relationship, investigation and preparation, control and direction of litigation, disposition without trial, trial, and postconviction remedies.[42] For example, the standard concerning investigation and pretrial preparation states that counsel should make a "prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty."[43]

---

61 A.B.A.J. 1091 (1975); Wolkin, *More on a Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 1064, 1064 (1975); Note, *The Right to Effective Counsel in Criminal Trials: Judicial Standards and the California Bar Association Response*, 5 GOLDEN GATE L. REV. 449 (1975).

38. 487 F.2d 1197 (D.C. Cir. 1973). *See* note 30 *supra.*

39. 487 F.2d at 1201.

40. *Id.* at 1203. For *DeCoster*'s handling of the burden of proof issue, see note *5 supra.*

41. *See generally* Clark, *The American Bar Association Standards: Prescription for an Ailing System*, 47 NOTRE DAME LAW. 429 (1972). The American Bar Association sponsored this project, begun in 1963, in an effort to improve the criminal justice system. Committees consisting of federal and state trial and appellate judges, prosecutors, defense, and other lawyers, and law professors drafted the guidelines.

42. ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Compilation, 101-36 (1974).

43. ABA DEFENSE FUNCTION STANDARD 4.1. Standard 8.6 of this section pertains to a lawyer's role when presented with a challenge to the competence of another lawyer:

> **Challenges to the effectiveness of counsel.**
>
> (a) If a lawyer, after investigation, is satisfied that another lawyer who served in an earlier phase of the case did not provide effective assistance, he should not hesitate to seek relief for the defendant on that ground.
>
> (b) If a lawyer, after investigation, is satisfied that another lawyer who served in an earlier phase of the case provided effective assistance, he should so advise his client and he may decline to proceed further.
>
> (c) A lawyer whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the accusation, even though this involves revealing matters which were given in confidence.

In *Baxter v. Rose*,[44] the Tennessee Supreme Court reviewed the decisions of each federal circuit and noted the trend toward a more rigorous standard of effective representation.[45] The court reasoned that legal assistance need not be so incompetent as to render a trial a "farce and mockery" in order to violate the sixth amendment right to counsel.[46] The "normal range of competence" test was deemed the "better standard."[47] The court did not consider it "necessary or proper" to enunciate a precise formula and was "content to leave the matter resting on a foundation of reasonable competence as tested by the authorities as herein set out."[48] The court stated the "authorities" were to be the Defense Function Standards, and the "duties and criteria as set forth in *DeCoster*" and *Beasley v. United States*.[49]

The Tennessee Supreme Court's rejection of the "farce and mockery" standard is commendable.[50] The court's opinion is not. The opinion contains neither the reasons for adopting the "range of competence" test, nor an explanation of why it is superior to those

---

44. 523 S.W.2d 930 (Tenn. 1975).

45. *Id.* at 932-36. In Morgan v. Hogan, 494 F.2d 1220 (1st Cir. 1974), the court indicated a willingness to change standards.

46. 523 S.W.2d at 936.

47. *Id.*

48. *Id.*

49. 491 F.2d 687 (6th Cir. 1974).

50. Since every defendant is entitled to a fair trial, the farce and mockery standard does not serve the goals of the legal system. Trials become unfair before they become a farce and a mockery.

Justice Black long opposed standards couched in terms of "mockery of justice" or "shocking to the conscience of the court." In Rochin v. California, 342 U.S. 165, 175 (1952) (dissenting opinion), Black stated:

> I believe that faithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards stated by the majority.
>
> What the majority hold is that the Due Process Clause empowers this Court to nullify any state law if its application "shocks the conscience" or offends "a sense of justice" . . . .

Judge Bazelon also severely criticized this standard: "The mockery test requires such a minimal level of performance from counsel that it is itself a mockery of the sixth amendment." Bazelon, *supra* note 2.

In a system of justice in which defendants are presumed innocent until proven guilty beyond a reasonable doubt the "farce and mockery" standard is inconsistent with the system of constitutional safeguards. Society gives the benefit of any doubt based on reasonableness to the accused. It is inconsistent to place a heavy burden on the defendant who, solely because of his counsel's incompetence, could not raise reasonable doubt of his guilt.

adopted in other jurisdictions.[51] More importantly, the court failed to establish a precise and workable constitutional standard; it merely relied on the "generalities of *McMann*" and referred lower courts to *DeCoster, Beasley*, and the Defense Function Standards.[52] *DeCoster* and *Beasley* enunciate the test for effective assistance in different terms; and both differ slightly from the standard enunciated in *Baxter*. *DeCoster* requires "reasonably competent assistance,"[53] while *Beasley* demands "reasonably effective assistance."[54] The court failed to differentiate these two general standards, or to relate them to the more specific criteria of the Defense Function Standards. The consequence is a test of competence which cannot be easily understood or applied; courts and counsel remain confused on precisely what is the minimum standard expected of defense counsel.

Because effectiveness may be the functional equivalent of competence, there may be no practical difference between *Beasley* and *DeCoster*. The inability to define precisely or to distinguish between these terms may be the crux of the problem of defining a constitutional standard for legal assistance.[55] *Baxter* does nothing to resolve this ambiguity and in fact perpetuates it by simultaneously adopting several slightly differing standards.

Although not well articulated, the *Baxter* court's reliance on *McMann* and the Defense Function Standards is well placed. The *McMann* rule of "reasonable competence" probably governs the case. *McMann* held that an attorney's advice on guilty pleas must reach that level,[56] and advice is functionally indistinguishable from other action demanded of an attorney.[57] Accepting *McMann* as controlling, courts

---

51. *See* notes 29-34 *supra*.
52. 523 S.W.2d at 938.
53. United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973).
54. Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974).
55. *See* note 3 *supra*.
56. *See* notes 24-27 *supra* and accompanying text.
57. A lawyer's duty extends equally to all phases of his professional capacity. The American Bar Association defines the role of defense counsel:

> The primary role of counsel is to act as champion for his client. In this capacity he is the equalizer, the one who places each litigant as nearly as possible on an equal footing under the substantive and procedural law under which he is tried.

ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *supra* note 42, at 109. The ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-19, defines counsel's position in a similar manner:

> [T]he advocate, by his zealous preparation and presentation of facts and law,

must resolve what conduct satisfies the "range of competence." The ABA Defense Function Standards are an excellent starting point. The Standards provide specific, uniform guidelines readily available to both counsel and judge.[58] Although the ABA disavows use of the Standards to evaluate the performance of trial counsel when challenged on appeal,[59] a number of courts have recognized them as authoritative.[60] In most instances the Standards should provide a clear guide. If the Standards do not address a specific course of conduct, the reviewing court must examine counsels' actions on an ad hoc basis, perhaps applying a "reasonable basis" test to the challenged action.[61]

A strict constitutional standard of adequate representation is a natural and necessary consequence of the expansion of the sixth amendment right to counsel. Tennessee is another jurisdiction that has found it constitutionally impermissible to maintain the farce and mockery standard, albeit for shallow and confusing reasons. In well-reasoned and articulate opinions, courts should follow the *Baxter* result and define effective representation with reference to *McMann* and the ABA Defense Function Standards.[62]

---

enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.

58. *See* notes 41-43 *supra* and accompanying text.

59. [T]he standard is intended as a guide to honorable professional conduct and performance. These standards are not intended as criteria for the judicial evaluation of the effectiveness of counsel to determine the validity of a conviction; they may not be relevant in such judicial evaluation depending upon all the circumstances.

ABA DEFENSE FUNCTION STANDARD 1.1(f).

60. *See* United States v. DeCoster, 487 F.2d 1197 (1973); Taylor v. State, 291 Ala. 756, 287 So. 2d 901 (1973); State v. Harper, 57 Wis. 2d 543, 205 N.W.2d 1 (1973). Judge Bazelon approved the use of these criteria, stating: "those minimal standards should, in turn, be expanded and refined on a case by case basis, as the court gains experience with their application." Bazelon, *supra* note 2, at 32. *See* Clark, *supra* note 41, at 435.

61. *See* note 34 *supra.*

62. A number of other methods have been implemented to improve criminal defense representation. The United States District Court for Maryland provides defense counsel with a checklist of functions to be performed. *Report on Criminal Justice Act, Form D*, 36 F.R.D. 277, 338 (D. Md. 1965). Professor Grano supports a similar idea recommending that, in order to prod counsel into providing better representation, counsel file work sheets detailing the time and efforts spent on the case. Grano, *supra* note 5, at 1241. The District of Columbia has an Advisory Board of criminal lawyers with the power to suspend attorneys from eligibility for appointment if found incompetent. Bazelon, *supra* note 2, at 17.