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The Right to Effective Counsel in Criminal Cases

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I. INTRODUCTION

Under the Constitution of the United States as well as the laws of many states, a defendant in a criminal action is entitled not merely to the formality of representation by any counsel but also to some degree of efficacy in this representation. Determining whether this right to effective counsel has been violated is a difficult problem. One source of difficulty is the potential conflict between two strong public policy considerations: the desire to spare a defendant the injustices which can result from ineffective representation as opposed to the need for finality of judgments and the orderly functioning of the judicial system. The danger to the orderly administration of justice created by overturning convictions for failures of counsel is greater than the corresponding dangers inherent in reversing convictions on most other grounds. There, the party's lawyer ordinarily must object at the trial to the alleged error if it is to be available as a ground on appeal. This gives the trial court an opportunity to correct its own error. If the trial judge fails to do so, the objection is preserved for appeal. In cases involving a denial of effective counsel, however, the situation will often escape the attention of the trial court, and there will normally be no specific objections on which the reviewing court can focus its attention.

Cases in this area also tend to involve unusually difficult problems of proof, particularly in cases where, in the course of a trial, an attorney has employed tactics which seem reasonable at the time but which to hindsight seem incompetent. These two sets of policy considerations—the need for the orderly administration of justice and the difficulties of proof which are implicit in many types of cases in this area—are the major factors which may properly lead courts to hesitate in dealing with cases of allegedly ineffective representation.

It is important that these valid considerations be distinguished from the natural prejudice of the legal mind against granting relief to remedy the errors of a party's own attorney. Since the normal functioning of an adversary system depends on the principle that a party is bound by the actions of his attorney, those who are closely involved in such a system will often be strongly inclined against permitting exceptions to this rule. An important consideration in light of the particular situations discussed below is whether a refusal to grant relief is based on a real consideration of public policy, or on the natural bias against allowing a party to escape the consequences

of his lawyer's actions and against granting an unfamiliar form of relief.

The courts have rarely attempted to reduce the decisions in this field to meaningful categories.[1] This failure can be attributed partly to the fact that a denial of effective counsel can take many forms and partly to the relative infrequency of cases which deal with this right. Few jurisdictions have had a sufficient number and variety of cases to allow either the creation of a general standard or the useful classification of cases. Moreover, the fact that each state confronted with this problem is generally dealing with the right to counsel provision in its own constitution discourages the courts from referring to cases and rules which have arisen in other jurisdictions.

For purposes of this discussion, the many types of denials of effective counsel will be grouped into three main categories. The first of these categories is the failure of counsel caused by external circumstances. This includes cases in which the inefficacy is attributed to some cause other than the attorney himself, such as orders of the trial court or the denial of access to the client. The second category deals with cases which involve failures of counsel caused by the status or the incompetence of the attorney. This category includes factors arising from conflicts of interest, lack of training, and other inadequacies of counsel which can be considered separately from the performance of the attorney in the course of the trial itself. The third category concerns errors of counsel committed during the trial of the particular case.

II. The Mockery of Justice Rule

Although an absolute right to counsel in federal courts has long been granted defendants in capital cases,[2] it was not until 1938 in *Johnson v. Zerbst*[3] that the right to counsel provision of the sixth amendment was held to grant more than the right to be represented by an attorney of one's own choosing. There the court ruled

1. Professor Beaney in his work in the field uses six classifications: Dissatisfaction with Appointed Counsel, Limitations on the Services of Counsel, Conflicts of Interest, Inadequate Preparation of Counsel, Ineffective Counsel, and Absence of Counsel during the Proceedings. Beaney, The Right to Counsel in American Courts (1955).

2. 1 Stat. 118 (1790).

3. 304 U.S. 458 (1938). "Right," in Hohfeldian terms, is defined as an affirmative claim against another. "Another use of the term 'right,' possibly less usual but by no means unknown, is to denote that one person is not subject to the power of another person to alter the legal relations of the person said to have the 'right.' . . . In such cases the real concept is one of exemption from legal power, *i.e.*, 'immunity.'" Hohfeld, Fundamental Legal Conceptions 8 (1923). Thus, the author would suggest that the often used phrase, "right to counsel," might be considered as an immunity rather than a right.

that the sixth amendment extends to the defendant an absolute right to counsel in federal criminal cases. This right was made applicable to the states under the fourteenth amendment in *Powell v. Alabama*[4] and *Gideon v. Wainright*.[5]

The expansion of the right to counsel from a right to have an attorney appear in court, to the more general right of providing him with counsel, has been accompanied by a recognition that this right is not satisfied by mere formality and requires more than token representation. Thus, in *Von Moltke v. Gillies*,[6] it was held that although the trial court had actually appointed counsel for the defendant, there was still a violation of the defendant's right to counsel since the attorney's appearance was so brief as to be a mere formality. It was determined that the trial judge paid only "token obedience to his constitutionally recognized duty to appoint counsel for petitioner."

Even before the right to counsel in the federal courts was fully developed, some states recognized that under their own laws a defendant who was unable to employ counsel had a right to have counsel provided for him.[7] In these states, it seems to have been consistently recognized that the right demands more than token representation.[8] Thus, it appears that, whenever the law grants a defendant the right to be represented by counsel in spite of his inability to employ his own attorney, some minimum standard of competence and efficacy must be assumed to exist. This minimum standard may be called the "mockery of justice rule." This constitutes the lowest common denominator in determining the adequacy of representation.

This rule had its origin in mob trial cases such as *Moore v. Dempsey*[9] where five negro defendants charged with the murder of a white man had been tried in an atmosphere so charged with mob violence that both the jury and the defense attorney appear to have been intimidated to such an extent that the trial became a hollow formality. The attorney had not even followed the obvious course of asking for a change of venue, and it was alleged that, had the defendant been acquitted, no juror could have continued to live in the community. Although this case did not turn entirely on the lack of effective counsel, it has led to the rule that, whenever the

4. 287 U.S. 45 (1932).
5. 372 U.S. 335 (1964).
6. 332 U.S. 708 (1947).
7. See, *e.g.*, *In re* Jingles, 27 Cal. 2d 500, 165 P.2d 12 (1946); Jones v. State, 48 Ga. 224, 172 S.E. 471 (1933); Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920); People v. McLaughlin, 291 N.Y. 480, 53 N.E.2d 356 (1941).
8. *Ibid.*
9. 261 U.S. 86 (1923).

failure of a defendant's counsel is so gross as to render the entire trial a sham or a mockery of justice, the conviction is invalid. This rule has been stated in various ways by different courts. Some say that the representation must have been "so ineffective as to amount to no counsel at all"[10] or to "virtually no representation,"[11] but, however stated, this test requires a total failure of counsel so grave that it amounts to a breakdown of the judicial process.

Another illustration of the extreme circumstances necessary to bring about a reversal under the mockery of justice rule can be found in *Jones v. Huff*.[12] There it was alleged that the defendant's lawyer had failed to object to the introduction of a confession obtained by use of the "third degree," that he failed to call witnesses who would have established the defendant's innocence, and that he refused to comply with a juror's request for a sample of the defendant's handwriting. The court concluded that "these were not mere mistakes of counsel or errors in the course of trial. If true they constituted a total failure to present the case of the accused in any fundamental respect."[13] This case demonstrates the gross errors necessary to meet the test set out by the "mockery of justice" rule, and it appears that no single act of incompetence, however inexcusable and damaging, can satisfy this test. The cumulative effect of an attorney's errors must be sufficient to render the proceedings a sham. In one sense, the mockery of justice rule is not a standard for determining efficacy or competence, but is rather a criterion for determining whether a defendant has, in any meaningful sense, been represented by counsel at all. The following sections will discuss the applicability of other rules for deciding whether a defendant has been deprived of his right to effective counsel in those cases in which courts have gone beyond the bare minimum of the mockery of justice rule.

III. Failures Caused by External Circumstances

A case in which the courts have generally been liberal in granting relief involves a failure of counsel caused by some factor beyond the control of the attorney or his client. The most obvious example of such a situation is the case in which an order of the trial court prevents the attorney from fully representing his client. Thus, convictions have been reversed where a court has ordered the attorney to cease representing the defendant in or out of court,[14]

10. State v. Benson, 247 Iowa 297, 72 N.W.2d 438 (1955).
11. United States *ex rel.* Feeley v. Ragen, 166 F.2d 976 (7th Cir. 1948).
12. 152 F.2d 14 (D.C. Cir. 1945).
13. *Id.* at 15.
14. Meeks v. United States, 163 F.2d 598 (9th Cir. 1947).

and where the trial judge has pronounced a defendant guilty before hearing the defense attorney's final argument.[15]

Instances of such direct interference with counsel are rare, however, and the problem of failure of counsel caused by action of the trial court arises more often through the court's failure to allow time for the attorney to prepare his case. Some cases involving lack of time for preparation are so extreme that reversal was clearly indicated. For example, a lawyer in the courtroom had been appointed just as the case was being brought to trial and allowed only a few minutes for preparation and consultation with his client.[16] Such extreme facts are not the only basis for reversal. Depending on the circumstances of the case, periods of seven days[17] or more may be deemed so inadequate as to require reversal. With proper circumstances, the period could be a good deal longer, since, as some cases suggest, the attorney should be offered the opportunity for a thorough investigation of the facts and preparation of his case for trial.[18]

Another way in which the action of the trial court can amount to a denial of defendant's right to effective counsel is by preventing the attorney from conferring with his client. Here too, reviewing courts have been active in upholding the rights of the defendant. Thus, one case was reversed after the trial judge warned the defendant not to discuss the case with his lawyer.[19] More difficult cases deal with the point in the proceedings in which a consultation may be held. In *People v. Lathram*,[20] the court held that the right to counsel includes the right of the defendant to confer with his attorney whenever he deems it necesary in order that the defendant may assist in conducting his defense and in giving information to his attorney. Refusal to allow this consultation has been held to be a denial of effective representation.

Actions of the trial court, of course, are not the only external circumstances which may result in a failure of effective counsel. The privacy of the consultation between the attorney and his client, for example, may be violated. Thus, cases in which authorities have tapped tele-

15. Floyd v. State, 90 So. 2d 105 (Fla. 1956).

16. See, *e.g.*, United States v. Helwig, 159 F.2d 616 (3d Cir. 1947) (one minute to prepare). See also Hawks v. Olsen, 326 U.S. 271 (1945).

17. 297 N.Y. 81, 74 N.E.2d 657 (1947).

18. See, *e.g.*, Edwards v. State, 204 Ga. 384, 50 S.E.2d 10 (1948). See also State v. Speller, 230 N.C. 345, 53 S.E.2d 294 (1949), which is interesting in that it held that a denial of effective counsel resulted from the court's failure to allow time for the attorney to prepare his case on a collateral issue—the constitutionality of the method of choosing prospective jurors for the case.

19. United States v. Venuto, 182 F.2d 519 (3d Cir. 1950).

20. 192 Cal. App. 2d 216, 13 Cal. Rptr. 325 (1961).

phone consultations[21] or used an eavesdropping device[22] have resulted in overturned convictions.

The normal judicial generosity in the area of failures of counsel caused by external circumstances is further demonstrated by the general rule that in cases of this type a defendant need not prove that specific prejudice resulted from the situation. Such a showing was held unnecessary in *People v. Lathram*[23] and in *Shapiro v. United States*.[24] The latter, an unusual case, involved a military attorney who was tried and convicted for misconduct in his defense of a court-martialed soldier. Counsel for the defendant had been given insufficient time to prepare a case and the conviction was held to be void in spite of the fact that the defendant, a lawyer himself, might have defended himself adequately.

Leniency of reviewing courts in this area is justified where the actions of the trial court or of some party other than the defense attorney himself causes the denial of counsel. In these cases, the fact that there is no method of calling complaints to the attention of the trial court and of preserving them for appeal is of little importance since counsel may object during the trial. Furthermore, the difficulty of determining whether a violation of the right to counsel has occurred is not great in most of these cases, since the issue will generally turn on a single action which appears plainly in the record. Thus, the appellate courts are freed of the burden, common in similar cases, of making a difficult judgment based on the record as a whole, rather than on specific issues appearing therein. Instead, they can fashion a reasonably objective standard in dealing with the problem of whether acts of third parties result in a violation of a defendant's right to effective counsel.

IV. Failures Caused by Status or Incompetence of Counsel

The second class of failures of effective counsel—those caused by the general status or incompetence of the attorney as distinct from specific acts or omissions of an attorney during the trial—may be subdivided into two groups. The first includes cases in which the circumstances cast doubt upon the attorney's loyalty, good faith, or zeal in regard to the defendant's cause, while the second group deals with cases of incompetence.

The usual case involving a lack of loyalty on the part of the

21. Coplan v. United States, 191 F.2d 749 (D.C. Cir. 1951).
22. State v. Cory, 62 Wash. 2d 371, 382 P.2d 1019 (1963), 17 Vand. L. Rev. 568 (1964).
23. *Supra* note 20.
24. 69 F. Supp. 205 (Ct. Cl. 1947).

attorney concerns a conflict of interest, often in the representation of co-defendants. In an obvious case of a conflict of interest, habeas corpus was granted a petitioner who had been tried with three co-defendants, all represented by the same attorney. Each of the other defendants had defended himself by accusing petitioner of the crime. In spite of the conscientious efforts of the attorney, it had been impossible for one lawyer to represent all the defendants fairly.[25] Other circumstances can create an unconscionable conflict of interest. Thus, where counsel has also been an attorney for one of the witnesses, and this relationship has prevented him from engaging in a thorough cross-examination, the conviction should be reversed.[26] The problem can also arise when defendant's attorney holds some public office. In *Berry v. Gray*,[27] habeas corpus was granted a prisoner whose lawyer had been a county attorney bound by statute to assist the state.

In dealing with cases involving conflicts of interest, courts have generally held that, although there must be a real conflict and not merely a joint representation of co-defendants,[28] a showing that actual prejudice resulted from the conflict will not be required. Thus, in *Craig v. United States*,[29] where a conflict of interest had prevented the cross-examination of two witnesses, the court admitted that the results of such a cross-examination were speculative, but found that the representation "was not as effective as it might have been," and this alone was held sufficient for reversal. In these cases, such liberality seems warranted, since the problem of proving a conflict generally turns only on proof of the fact that the attorney was counsel for another party whose interests at the trial were adverse to those of the defendant, a matter which is generally susceptible of clear proof.

When the alleged indifference or lack of loyalty of an attorney appears in some form other than a conflict of interest, however, the problems of proof can be most difficult. Thus, while frequently stating that a defendant is entitled to the devoted services of counsel,[30] the courts have required convincing proof of disloyalty or indifference. In *McDonald v. Hudspath*,[31] the court refused to grant habeas corpus

25. Wright v. Johnson, 77 F. Supp. 687 (N.D. Calif. 1948). See also People v. Lanigan, 140 Pac. 224 (Calif. 1943).

26. See, *e.g.*, Tucker v. United States, 235 F.2d 238 (9th Cir. 1956).

27. 155 F. Supp. 494 (W.D. Ky. 1957).

28. Lebron v. United States, 229 F.2d 16 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 974 (1956); Farris v. Hunter, 144 F.2d 63 (10th Cir. 1944).

29. 217 F.2d 355, 358 (6th Cir. 1954). See also Glassner v. United States, 315 U.S. 60 (1941). In People v. Bopp, 279 Ill. 184, 116 N.E. 679 (1917), the court reversed a conviction where one attorney represented two defendants who had entirely separate alibis holding that it was sufficient that a conflict might have arisen between the two defenses.

30. Jackson v. State, 316 P.2d 213 (Okla. 1957).

31. 113 F.2d 984 (10th Cir.), *cert. denied*, 311 U.S. 683 (1940). McDonald later was successful in an action brought in the Ninth Circuit alleging the same facts.

even though the attorney-client relationship had disintegrated to such an extent that, at the time of the trial, the defendant was the complainant in a suit to disbar his attorney, and the attorney had stated his willingness to be discharged. In those rare cases where disloyalty of the attorney is shown it seems clear that the courts will grant relief. In *State v. Jones*,[32] the lawyer had objected to being appointed defense attorney in a murder trial on the ground that he had been a friend of the victim and was so prejudiced against the accused that he was unable to represent him properly. The trial judge ordered him to take the case in spite of this protest, but the conviction was reversed on appeal.

Another circumstance that may prove strong enough to cause the reversal of a conviction based on lack of loyalty is evidence that counsel was intimidated by a threat of violence or by community pressure. Thus, in *Downer v. Dunaway*,[33] where there had been a mob attack on the jail, where counsel had been appointed only one hour before the trial, and where the trial itself lasted one day, the court relied on *Moore v. Dempsey*[34] in holding that there had been no adequate representation. Future litigation in this area may arise in cases where lawyers representing Negro defendants bow to community custom or pressure and fail to challenge the composition of a jury which has been selected by racially discriminatory means. In such a case there would be sufficient grounds for holding that a lawyer had failed to give his client unwavering loyalty.[35]

In cases involving incompetence of counsel, the same contrast exists between allegations relying on specific facts which can be easily proved or disproved and general allegations of incompetence or stupidity. Cases which are susceptible of clear proof arise in the rare instances in which a defendant has been represented by a person who has not been admitted to the bar. In *Jones v. State*,[36] the court reversed the conviction of a defendant who had been represented by two law students, whom the trial court had inadvertantly appointed. The court held that, where the supposed counsel had not been admitted to the bar, there was a complete denial of the right to counsel and it was not necessary to examine the record of the trial to see whether prejudice had actually occurred. The same result was reached in

32. State v. Jones, 174 La. 1074, 142 So. 693 (1932).
33. 53 F.2d 586 (5th Cir. 1931).
34. *Supra* note 9.
35. See Cobb v. Balham, 339 F.2d 95 (5th Cir. 1954), where the court voided a conviction because of racial discrimination in the selection of jurors and expressly pretermitted the question whether the failure of counsel to challenge the jury panel violated defendant's right to effective representation.
36. 57 Ga. 603, 195 S.E. 316 (1938).

People v. Cox[37] where the defendant had hired a man who falsely represented himself to be a lawyer. It is doubtful, however, that a mere failure of an out-of-state attorney to obtain leave to try a particular case in the jurisdiction will cause a court to hold that a denial of effective counsel has occurred.[38] A problem also arises in the case of a defendant who has been jointly represented by a layman and a qualified lawyer. In *Higgins v. Parker*,[39] such representation was held to be adequate, but the court relied on the fact that throughout the trial the licensed attorney had taken an active part in the defense. Had he been only an attorney of record, the court might well have reached the opposite result. Thus, in *People v. Cox*,[40] defendant's unlicensed counsel was assisted by a regularly qualified attorney, but, since the qualified attorney did no more than question some of the veniremen, his presence failed to cure the defective representation.

In cases where a defendant has been represented by a licensed attorney, it is highly difficult to secure the reversal of a conviction on the grounds of the attorney's ignorance or incompetence. Some defendants have alleged that they were denied effective counsel because of their lawyer's inexperience. But inexperience alone does not usually justify a holding of failure of counsel.[41] Where sheer ignorance or incompetence of counsel is alleged, most courts have held that a defendant will be deemed to have been deprived of his right to counsel only when the attorney's incompetence has rendered the trial a mockery of justice.[42] In light of the serious problems of proof in establishing the incompetence of the lawyer, the rule is probably sound, but in some cases it has led to extreme results, since it appears that no degree of incompetence will suffice so long as there is a genuine contest in the trial court. Thus, in *Hagan v. United States*,[43] an allegation that the defendant's attorney had been suffering from a severe mental illness was deemed legally insufficient, since the record showed that there had been a spirited trial. In dealing with most of the cases in this category, however, the courts have generally been wise in differentiating between the cases which seldom present

37. 12 Ill. 2d 265, 146 N.E.2d 19 (1957).

38. See, *e.g.*, State v. Derby, 143 Kan. 590, 56 P.2d 57 (1936).

39. 354 Mo. 888, 191 S.W.2d 668, *cert. denied*, 327 U.S. 801 (1945). See also State v. Johnson, 64 S.D. 162, 265 N.W. 599 (1936), where the defendant was represented by a disbarred attorney and a regularly licensed attorney.

40. *Supra* note 36.

41. United States v. Helwig, *supra* note 16 (attorney had been at the bar one year); People v. Winchester, 352 Ill. 237, 185 N.E. 580 (1933).

42. Wilcoxon v. Aldridge, 102 Ga. 634, 153 S.E.2d 873 (1941). Se also Diggs v. Welch, 148 F.2d 667 (D.C. Cir. 1945).

43. 9 F.2d 562 (8th Cir. 1925).

difficult problems of proof and those that frequently present virtually insoluble ones. The cases in which the alleged failure of effective counsel rests on a single allegation susceptible of clear proof, such as those involving conflicts of interest and representation by a layman, there has been liberal treatment. But the courts remain cautious in dealing with those cases which involve allegations of general incompetence or disloyalty.

V. Failures Caused by Errors in the Course of the Trial

The category which raises the most difficult problems involves specific errors of counsel in the course of the trial. Most courts accept the rule stated in *Diggs v. Welch*,[44] where the appellate court held that once the trial court had discharged its duty by appointing a competent attorney the defendant's right to counsel had been satisfied and subsequent errors of counsel would be ignored unless they rendered the trial a mockery of justice. Certain courts, however, have found particular errors of counsel sufficiently grave to warrant overturning convictions.

A distinction may be drawn between rights of the defendant which are procedural and do not tend to affect the outcome of the trial—such as the right to quash an indictment for curable defects—and more substantial rights. Courts have been reluctant to grant relief in cases where a purely procedural right has been sacrificed by the attorney. In *McConnaughy v. Alvis*,[45] a conviction was upheld although the attorney had failed to move to quash the indictment for a clear error on its face and had failed to contest the venue even though there was considerable doubt as to which county had been the site of the crime. Similarily, in *People v. Keagle*,[46] counsel's refusal to accept the trial court's offer of a mistrial was held not to have resulted in a failure of effective counsel. A more difficult situation arises when an attorney fails to appeal or commits procedural errors which prevent an appeal. In *People v. Boreman*,[47] a failure to obtain a bill of exceptions and file an appeal within the time granted by the trial court did not amount to ineffective representation. In *People v. Buck*,[48] however, it was suggested that where a sentence of death has been imposed it may be the duty of counsel to appeal.

A denial of effective counsel may also result where the attorney has unwisely recommended a plea of guilty. In cases where the decision

44. *Supra* note 42.
45. 100 Ohio App. 245, 136 N.E.2d 127 (1955).
46. 7 Ill. 2d 408, *cert. denied*, 351 U.S. 942 (1955).
47. 401 Ill. 566, 82 N.E.2d 459, *cert. denied*, 336 U.S. 927 (1948).
48. 6 App. Div. 2d 528, 179 N.Y.S.2d 1007 (1958).

was reasonable when made, the fact that in retrospect it appears to have been unfortunate will not suffice to vitiate the conviction.[49] But where the recommendation that defendant plead guilty has been negligently or ignorantly made, there are good reasons for upsetting the conviction since obviously this error alone completely destroys the defendant's case and may do more harm than any number of minor errors committed in the course of trying the case under a not guilty plea. In *People v. Abraham*,[50] where defendant's attorney had simply advised him to plead guilty if he had committed the crime, the court reversed the conviction.

Perhaps the most difficult cases in this area involve alleged errors of counsel in failing to raise a defense or to present evidence since such allegations concern decisions which can wholly destroy a defendant's case but which rest so heavily on the tactical judgment of the attorney that it is most difficult to determine whether any error has been committed. This problem can often arise from an attorney's failure to plead a defense of insanity. In *United States v. Plummer*,[51] it was held that defendant's right to effective counsel was not violated when his lawyer, who had thoroughly considered the possibility of pleading insanity, reasonably decided not to raise the defense. But in a more difficult case it was held that, where counsel failed to plead that a defendant was insane at the time of trial and where defendant had been properly adjudged insane shortly before and after the trial, there was a denial of due process and a defect of counsel sufficient to render the trial a mockery of justice.[52] In other cases, courts have been reluctant to overturn a conviction for counsel's failure to raise a defense unless it is sufficiently harmful to invoke the mockery of justice rule.[53]

A similar problem arises in cases dealing with an attorney's failure to attack the prosecution's case either by cross-examination or by objection to inadmissible evidence. The same problems of proving dereliction by the attorney apply as it is generally impossible to determine whether the attorney was unaware of the situation or was simply exercising his judgment as to proper tactics. This is especially true in cases of failure to object to questions or evidence, since frequent objections may prejudice a jury against the defendant's case.

49. See, *e.g.*, People v. Robillard, 55 Cal. 2d 88, 358 P.2d 295 (1960), where the decision to plead guilty was made as part of a definite and reasonable trial plan designed to portray the defendant as merely an erring youth. The failure of the plan did not reflect on the competence of the attorney who devised it. See also Shepherd v. Hunter, 163 F.2d 872 (10th Cir. 1957).

50. 228 Ind. 179, 91 N.E.2d 358 (1950).

51. 171 F. Supp. 1 (D.C. Cir. 1959).

52. People v. Reeves, 412 Ill. 555, 107 N.E.2d 861 (1952).

53. See Wilson v. State, 268 Ala. 86, 105 So. 2d 66 (1958).

In *Harris v. United States,*[54] the court held that failure of counsel to object to leading questions did not have the effect of violating the defendant's right to effective counsel. In *Slaughter v. United States,*[55] failure to cross-examine the prosecuting witness or to bring out the fact that the witness had a criminal record was also held to be a matter of trial tactics. The case of *Edwards v. United States*[56] stated that only the mockery of justice rule would apply to allegations of errors regarding strategy, tactics, mistake, and inexperience of counsel, and that a defendant is bound by his attorney's decisions as to strategy.

Despite the general soundness of this rule, it is easy to imagine situations in which particular errors in the course of the trial are too grave to be mistaken for tactical decisions of the attorney. In *People v. Ibarra,*[57] a bold decision by the Supreme Court of California, a conviction for the possession of narcotics was reversed when it appeared that the defense attorney had failed to object to the admission of the heroin which had been obtained by an illegal search because he was under the false impression that by objecting to the search he would waive his primary defense (that his client had never been in possession of the heroin). Although the court stated that it was relying on the mockery of justice rule and held that the attorney's ignorance of a basic rule of law reduced the trial to a sham, it is clear that a single error as to a rule of law in one alternative defense can rarely serve to meet the stringent requirements of the mockery of justice rule. Another departure from the rule was made in the bizarre case of *State v. Karston.*[58] There two defendants had pleaded guilty to a charge of first degree murder and under state law the only alternatives were death and life imprisonment. In his closing argument, counsel for the two defendants said that although he realized that both were guilty of murder in the first degree he felt that the circumstances called for differences in the punishment of the two defendants—with the inevitable inference that he felt that one of his clients should be hanged. The conviction was reversed on account of this error, although the decision can be partly explained on the ground of a conflict of interest. In effect, these two cases show the difficulty of going beyond the mockery of justice rule in the area of specific errors at trial since both rely on a peculiar factual situation. In *Ibarra,* the court was able to determine positively that counsel's decision not to challenge the evidence was not based on a valid tactical

54. 239 F.2d 612 (5th Cir. 1957).
55. 89 A.2d 646 (Mun. Ct. App. D.C. 1952).
56. 256 F.2d 707 (D.C. Cir. 1958).
57. People v. Ibarra, 34 Cal. Reptr. 863, 386 P.2d 847 (1963).
58. 247 Iowa 32, 72 N.W.2d 463 (1955).

consideration because of a statement which the attorney made to the trial court revealing his ignorance of the law in regard to alternative defenses, while in *Karston* the factual situation was unique. The strict attitude of the courts in dealing with errors of this sort is justified by the difficulties of proof and the consideration of finality of judgments. It is also justified by the fact that in this particular area more cases involving the right to counsel will arise, since individual errors by normally competent attorneys will be much more common than in cases of total incompetence or disloyalty.

VI. COUNSEL OF CHOICE AND APPOINTED COUNSEL

A major issue which affects most aspects of the right to effective counsel is whether, in deciding if a defendant has been denied this right, the courts will distinguish between privately employed counsel and counsel appointed by the court. Such a distinction clearly would not apply to those cases where the failure of counsel has been caused by external circumstances, but in all other cases there is a split of authority on the question. At first glance, there seem to be strong reasons for holding that the court will scrutinize the actions of appointed counsel more closely than those of counsel chosen by the defendant himself. The foremost consideration is the glaring inequity of arbitrarily selecting an attorney for the defendant and then holding the defendant responsible for that attorney's errors. It seems far less shocking to allow a defendant to suffer for the errors of an attorney whom he has personally selected. It may well be asked how much of this apparent difference can be attributed to an actual difference in the degree of injustice in the two cases and how much results from the inevitable bias of a legal mind accustomed to dealing with an adversary system such as ours, which depends for its daily functioning on the principle that a client must be bound by the actions of his attorney. It is true, however, that a defendant selecting his own attorney normally has some opportunity to discover the qualifications of his attorney. Another reason why errors made by an attorney of defendant's own choosing should not be considered on appeal is that, since a defendant has the power to waive his right to counsel altogether, he can be deemed to have waived the right to effective counsel to the extent of any errors made by an attorney whom he freely selects. These considerations have led many courts to hold that they will more readily hold that a defendant has been denied the right to effective representation in cases where his attorney has been appointed by the court than in cases in which he has been represented by an attorney whom he has chosen. Some have held that in cases where the defendant has been represented by counsel

of his own choice, a conviction will not be overturned on the grounds of failure of counsel unless the counsel's performance is so defective as to render the trial a sham or a mockery of justice. Thus, in *People v. Robillard*,[59] the court said that,

> the handling of the trial by counsel of accused's own choice will not be declared inadequate except in those rare cases where his counsel displays such a lack of diligence and competence as to reduce the trial to a farce or a sham.

The Illinois court has stated, however, that "poor representation by an attorney of defendant's own choosing is of no legal moment."[60] Even under this rule, however, a conviction may be reversed where the errors of counsel are unusually shocking. In one such case, the Illinois court reversed the conviction of an uneducated defendant whose trial counsel had displayed such remarkable incompetence that the court observed that he "seemed to be unfamiliar with the simplest rules of evidence and incapable of comprehending the rules when suggested to him by the trial court"[61] and concluded that the defendant would have fared much better with no counsel at all. It seems, therefore, that no court will go so far as to hold that errors of counsel of choice can never be grounds for reversal. But it is also clear that in many jurisdictions it will be extremely difficult to have a conviction overruled for failure of effective counsel in any case where defendant has been represented by counsel of his own choice.[62] This rule leads to the paradoxical result that a defendant whose attorney is appointed by the court is entitled to a higher standard of performance than a defendant who selects and hires his own attorney. It can be argued that there is less danger of indifference or disloyalty on the part of a privately employed lawyer, and in any event no court has suggested that the counsel of choice should be held to a higher standard of competence.

The better rule, it is believed, is stated in *Craig v. United States*,[63] which held that it is immaterial whether counsel is chosen or appointed. Although it may be true that there is less danger of indifference or lethargy on the part of privately retained attorneys, no good reason appears for denying a defendant redress when palpable errors do occur simply because he chose to employ his own attorney. The argument that since a defendant can waive his right to counsel altogether he may fairly be deemed to have waived it to the extent

59. *Supra* note 49.
60. People v. Ventire, 415 Ill. 587, 114 N.E.2d 710 (1953).
61. People v. Avitti, 312 Ill. 73, 143 N.E. 448 (1924).
62. See Burton v. United States, 151 F.2d 17 (D.C. Cir. 1945).
63. 217 F.2d 355 (6th Cir. 1954).

of errors made by an attorney he has selected, overlooks the fact that waiver of a right must be made intelligently and deliberately. Moreover, while the thesis that defendant who accepts appointed counsel relys heavily upon the trial court is undoubtedly correct, it is also true that an individual who employs his own attorney may be relying on the courts which, by licensing an attorney, hold him out as a qualified member of the bar.

VII. ENFORCEMENT OF THE RIGHT TO EFFECTIVE COUNSEL

When a defendant seeks redress for the denial of his right to effective counsel, there is seldom any difficulty with the forms of action available, since relief can normally be sought either through appeal or through habeas corpus. Relief may also be granted by the trial court itself through a motion for a new trial or a writ of error *coram nobis*.[64] It is possible, however, that a defendant will find that one of these routes is blocked. Obviously, the problem commonly arises when the period allowed for an appeal has passed and the defendant is left to seek habeas corpus. Another type of problem arises when the defendant is prevented from raising the issue of effective counsel on appeal because the events constituting the denial of counsel were outside the scope of the trial itself. In *Von Moltke v. Gillies*,[65] for example, the defendant had received defective legal advice from lawyer-agents of the government during imprisonment and in the trial court had waived her right to counsel and pleaded guilty in reliance on this advice. Thus, the denial of counsel had not taken place during the trial and it was said that habeas corpus was the only available means of attacking the judgment.

Habeas corpus, however, seems to be an adequate remedy. Allegations that effective counsel was lacking raise constitutional questions which have led many jurisdictions to hold that a denial of the right to counsel terminates the jurisdiction of the court,[66] thereby making habeas corpus a clearly appropriate remedy.

The major problems that have arisen in seeking redress have concerned the burden of proof which a defendant is required to meet. In this respect, habeas corpus may be a more doubtful remedy than appeal, since it appears that courts will require the petitioner to bear a heavier burden of proof in an action for habeas corpus, and the proceedings of the trial court will be given a stronger presumption of

64. United States v. Harris, 155 F. Supp. 17 (S.D. Calif. 1957).

65. 332 U.S. 708 (1948).

66. See, *e.g.*, Martin v. United States, 182 F.2d 225 (5th Cir. 1950); *In re* Motz, 100 Ohio App. 296, 136 N.E.2d 430 (1955); Petition of Potts, 296 P.2d 180 (Okla. 1956).

regularity.[67] There is also some indication that courts look with disfavor on petitions for habeas corpus based on denials of effective counsel. In *Jones v. Huff*,[68] the court observed that "it is well known that the drafting of petitions for habeas corpus has become a game in many penal institutions, and the opportunity to try an unsuccessful former lawyer has undoubted attraction to a disappointed prisoner."[69] In spite of this substantial problem, it should also be noted that, in many cases of inadequate representation, a defendant will have little time to learn that his attorney's performance was defective until after the time for appeal has passed.

Another problem which often arises in cases dealing with the right to counsel is whether a defendant has effectively waived his right. It is normally held that the defendant alone has the burden of proving that the right was not waived.[70] Although the problem of a general waiver of the right to counsel is not present in cases dealing only with effective counsel, defects may be waived by a defendant's failure to object in the trial court if, under the circumstances, he should have known of them at the time.[71]

VIII. Applicability of Federal Standards to the States

It is clear that some degree of effective representation is demanded by the due process clause of the fourteenth amendment. Is the standard of effective counsel under the fourteenth amendment identical with the standard required by the sixth amendment? In *Hawk v. Olsen*,[72] the Supreme Court reversed a state court's denial of habeas corpus to a petitioner whose attorney had lacked adequate time to consult with the defendant or prepare the case. The court, however, did not indicate what standard of effective representation it was applying. The facts were extreme; defense counsel had entered the case as the jury was being selected and had not had any prior consultation with the defendant. The Court, therefore, could have reversed the state court's decision even under the mockery of justice rule. In a district court decision, it was held that the mockery of justice rule was indeed the applicable test. The court held that, "the due process clause of the federal constitution does not require

67. Miller v. Hudspeth, 164 Kan. 688, 192 P.2d 147 (1948).
68. 152 F.2d 14 (D.C. Cir. 1955).
69. *Id.* at 16.
70. Moore v. State, 355 U.S. 155 (1957).
71. See, *e.g.*, Drolet v. Commonwealth, 335 Mass. 382, 140 N.E.2d 165 (1957), where defendant's attorney left the courtroom during the trial and the defendant failed to object, the trial judge reasonably assumed that the defendant had consented to his departure.
72. 326 U.S. 271 (1945).

this Court to reconsider the tactics adopted by counsel in conducting petitioner's defense in the absence of facts tending to show that the trial was reduced to a mockery of justice."[73]

There are, however, strong indications that the due process clause incorporates the more liberal rules for determining effective counsel which are being developed under the sixth amendment. When considering at what point during the proceedings counsel must be provided, the states have been held to the strict rule that a defendant is entitled to the assistance of counsel at every stage of the proceedings.[74] In dealing with an analogous issue—the right of an accused to confront the witnesses against him—the Court recently held that the sixth amendment's guarantee of this right is directly incorporated in the fourteenth amendment. In *Pointer v. Texas*,[75] the majority ruled that this right is a "fundamental right essential to a fair trial," and said that "the right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceeding."[76] The majority cited the right to counsel as another sixth amendment right which is fundamental to a fair trial. Thus, it appears that, at least in the future, the federal courts will hold the states to the same standards of effective representation as are applicable to federal prosecutions.

IX. CONCLUSION

The results reached by the courts in dealing with cases of ineffective counsel form a more coherent pattern than the courts' frequent use of ad hoc language in these cases would suggest. To some extent, the three categories of cases set forth above reflect important aspects of this pattern. Jurisdictions which apply a different standard in dealing with privately employed and appointed counsel tend to apply their double standard most often in cases falling within the second category, dealing with failures related to the status or competence of counsel, and the third category, which includes cases of errors in the course of trial. The double standard does not apply to cases in the first category, where the failure of effective representation is caused by some factor beyond the control of the attorney.

In the important matter of policy considerations, the difficulties which lead the courts to deny relief for failures of effective representation become increasingly severe in the second and third categories. The problems of proof are no more difficult than those encountered in

73. Application of Atchley, 169 F. Supp. 313, 318 (N.D. Calif. 1958).
74. See Hawk v. Olsen, *supra* note 72.
75. 380 U.S. 400 (1965).
76. *Id.* at 406.

other cases so long as the allegations are within the class of denials caused by external circumstances, but in the second class of cases—while some types of cases such as conflicts of interest remain susceptible of normal proof—other types raise peculiarly difficult problems. And, in the cases of errors occurring in the course of trial, problems of proof are very great in all but the most exceptional cases. The need for finality is also more apparent in the second and third groups of cases, since in these cases the trial court has little opportunity to correct the situation, and the inadequacy of counsel may only appear as an allegation on appeal or often on a petition for habeas corpus long after the time for appeal has expired.

Also, the false policy considerations resulting from prejudice against an unfamiliar remedy are increasingly manifest in the latter categories. Most cases in the first group can be understood in familiar terms simply as errors of the trial court or of other officials. The second group also contains some familiar concepts such as conflicts of interest, while the third group seems alien to most of our legal traditions. It is not surprising, therefore, that the courts are inclined to be most liberal with cases falling under the first heading and to insist increasingly on the single test of the mockery of justice rule in dealing with the last two groups.

Since cases in this area have generally been decided on an ad hoc basis, some such division of these cases into meaningful categories is a necessary requisite to a formulation of the law in this field. If the courts begin to categorize the separate problems and to recognize the patterns which have begun to emerge, the law in this area can become more meaningful and its improvement in specific details will be possible.

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