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Incompetency and Inadequacy of Counsel as a Basis for Relief in Federal Habeas Corpus Proceedings

Ronald L. Palmer

COMMENTS

INCOMPETENCY AND INADEQUACY OF COUNSEL AS A BASIS FOR RELIEF IN FEDERAL HABEAS CORPUS PROCEEDINGS

by Ronald L. Palmer

Recently, increased attention directed to the constitutional rights of the criminally accused has presented the courts with a large number of cases involving the incompetency of counsel. This has been brought about primarily by the broadened availability of the federal habeas corpus remedy to state prisoners[1] and by the current developments with respect to right to counsel.[2]

The case of *Avery v. Alabama*[3] serves as the connecting link between the evolution of the right to assistance of counsel and the requirement of competent or adequate counsel. Justice Black speaking for the court indicated that the right to the assistance of counsel means effective assistance of counsel. Incompetent or inadequate counsel does not meet the "effective counsel"[4] or "due process"[5] requirements.

This comment will consider cases, most of which have arisen through habeas corpus applications,[6] concerned with the incompetency of counsel; *i.e.*, the effect of counsel's voluntary omission or com-

[1] The Supreme Court's decision in Fay v. Noia, 372 U.S. 391 (1963), redefining the "exhaustion of state remedies" doctrine, broadened the availability of the federal habeas corpus remedy to state prisoners. The court said that only state remedies *presently* available need be exhausted before petitioning for a writ of habeas corpus, and that a prisoner need not seek certiorari in the United States Supreme Court before seeking relief by habeas corpus. See Note, 18 Sw. L.J. 475 (1964).

[2] Gideon v. Wainwright, 372 U.S. 335 (1963), established a defendant's right to be represented by counsel in state criminal proceedings even though not indicted for a capital offense. Gideon has been extended to state misdemeanor proceedings. Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965). See Williams, *Federal Habeas Corpus and the State Courts*, 36 Miss. L.J. 520 (1965); Comment, 19 Sw. L.J. 593 (1965); 19 Sw. L.J. 853 (1965).

[3] 308 U.S. 444 (1940).

[4] U.S. CONST. amend. VI.

[5] U.S. CONST. amends. V, XIV.

[6] The procedural aspect of these cases involves (1) an application for a writ of habeas corpus in a federal district court, (2) the denial of the application and (3) the subsequent appeal of that decision. The applicable statutory provisions for habeas corpus applications are 28 U.S.C. 2241-55 (1948).

The purpose of a federal habeas corpus proceeding is to ascertain if the petitioner's detention violates the fundamental liberties safeguarded by the federal Constitution. Townsend v. Sain, 372 U.S. 293, 312 (1963). Such a proceeding is not a substitute for an appeal, nor are the courts functioning as "super-legislatures or glorified parole boards." United States *ex rel.* Feeley v. Ragen, 166 F.2d 976, 981 (7th Cir. 1948).

mission of acts directly connected with the conduct of the trial. Secondary consideration will be accorded to a discussion of the type of inadequacy which results from acts of counsel or a third party beyond counsel's control whose acts affect counsel's performance.[7] It should be borne in mind that the counsel being attacked by the petition is the original counsel who was unable to establish petitioner's innocence. The courts are not oblivious of the attraction to the disappointed prisoner of putting to public test the competency of his erstwhile defender.[8] They have recognized that the mind of the convicted defendant frequently fails to differentiate between incompetent counsel and unsuccessful counsel.[9] It has been stated that a common understanding among criminals is that any lawyer who cannot "walk his man out" is incompetent.[10] Justice Arnold, speaking in *Diggs v. Welch*,[11] states that the drafting of habeas corpus petitions has become a game in many penal institutions and the convict's period of enforced leisure allows him to use his ingenuity in attempting to try his former counsel. The courts recognize that many allegations of incompetency of counsel are frivolous and without merit, and thus they are certain to treat the great volume of petitions which make this allegation with some degree of dubiousness.

I. The Standard by Which Incompetency of Counsel is Judged

The courts, speaking more or less in the abstract, have often stated the necessary and desirable qualities of an attorney and the services he must provide to satisfy adequately a defendant's constitutional rights.

Perhaps the Seventh Circuit has stated the constitutional requirements of effective assistance of counsel most idealistically:

[7] The requirements of competency and adequacy of counsel will be discussed from the viewpoint of the constitutional requirements of "assistance of counsel" and "due process."

This Comment is not intended to delineate the minimum standard of professional competence required of counsel by the various tribunals. Compliance with only such minimum criteria would undoubtedly be morally unacceptable and against the scruples of the conscientious attorney. It is intended that this discussion will be of benefit and serve as a guide to those who may be retained or court-appointed counsel for a defendant who is attacking the competence of his former counsel on appeal or in a collateral proceeding.

The discussion will not encompass civil actions for negligence, incompetency or malpractice against an attorney, nor questions of disciplinary proceedings or disbarment for incompetency.

[8] United States *ex rel.* Cooper v. Reincke, 333 F.2d 608, 614 (2d Cir.), *cert. denied*, 379 U.S. 909 (1964); United States v. Garguilo, 324 F.2d 795, 797 (2d Cir. 1963); Mitchell v. United States, 259 F.2d 787, 792 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958); Jones v. Huff, 152 F.2d 14, 15-16 (D.C. Cir. 1945); Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

[9] United States *ex rel.* Cooper v. Reincke, *supra* note 8.

[10] Mitchell v. United States, 259 F.2d at 792.

[11] 148 F.2d 667, 669 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

> As to the requirements under the Fourteenth Amendment, the services of counsel meet the requirements of the due process clause when he is a member in good standing at the bar, gives his client his complete loyalty, serves him in good faith to the best of his ability, and his service is of such character as to preserve the essential integrity of the proceedings as a trial in a court of justice.[12]

The Fifth Circuit has stated its concept of "effective counsel" in terms which might be characterized as a "reasonable counsel" standard: "We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance."[13]

The Tenth Circuit has made the following remarks on the desirable traits of effective counsel:

> We think the right to the effective assistance of counsel contemplates the guiding hand of an able and responsible lawyer, devoted solely to the interest of his client; who has ample opportunity to acquaint himself with the law and facts of the case, and is afforded an opportunity to present them to a court or jury in their most favorable light.[14]

The actual standard of incompetency applied by the overwhelming majority of the federal courts is stated as follows: *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.*[15] Although the application of this standard may vary among courts, there is no doubt an extreme case must be

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[12] United States *ex rel.* Weber v. Ragen, 176 F.2d 579, 586 (7th Cir.), *petition for cert. dismissed,* 338 U.S. 809 (1949).

[13] MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), *cert. denied,* 368 U.S. 877 (1961).

[14] Willis v. Hunter, 166 F.2d 721 (10th Cir.), *cert. denied,* 334 U.S. 848 (1948). See also United States *ex rel.* Boucher v. Reincke, 341 F.2d 977 (2d Cir. 1965); Hickock v. Crouse, 334 F.2d 95 (10th Cir. 1964), *cert. denied,* 379 U.S. 982 (1965).

[15] The following are representative recent cases listed by circuit approving and adopting this test. United States *ex rel.* Machado v. Wilkins, 351 F.2d 892 (2d Cir. 1965); United States *ex rel.* Boucher v. Reincke, *supra* note 14; United States *ex rel.* Cooper v. Reincke, 333 F.2d 608 (2d Cir.), *cert. denied,* 379 U.S. 909 (1964); United States v. Gonzalez, 321 F.2d 638 (2d Cir. 1963); United States v. Wight, 176 F.2d 376 (2d Cir. 1949), *cert. denied,* 338 U.S. 950 (1950); *In re* Ernst's Petition, 294 F.2d 556 (3d Cir.), *cert. denied,* 368 U.S. 917 (1961); James v. Boles, 339 F.2d 431 (4th Cir. 1964); Snider v. Cunningham, 292 F.2d 683 (4th Cir. 1961), *cert. denied,* 375 U.S. 889 (1963); Snead v. Smyth, 273 F.2d 838 (4th Cir. 1959); Lotz v. Sacks, 292 F.2d 657 (6th Cir. 1961); O'Malley v. United States, 285 F.2d 733 (6th Cir. 1961); Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957); United States *ex rel.* Feeley v. Ragen, 166 F.2d 976 (7th Cir. 1948); Mitchell v. Stephens, 353 F.2d 129 (8th Cir. 1965); Audett v. United States, 265 F.2d 837 (9th Cir. 1959), *cert. denied,* 361 U.S. 815 (1959); Cofield v. United States, 263 F.2d 686 (9th Cir. 1959); Application of Hodge, 262 F.2d 778 (9th Cir. 1958); Taylor v. United States, 238 F.2d 409 (9th Cir. 1956), *cert. denied,* 353 U.S. 938 (1957); Latimer v. Cranor, 214 F.2d 926 (9th Cir. 1954); Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), *cert. denied,* 358 U.S. 850 (1958); Jones v. Huff, 152 F.2d 14 (D.C. Cir. 1945); Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied,* 325 U.S. 889 (1945).

presented before any court would find incompetency of counsel.[16] Because of the duty imposed on the trial judge[17] and the prosecution[18] as officers of the state to intervene if it becomes apparent that the trial is a mockery of justice due to counsel's incompetency, a determination of incompetency by a federal district or appellate court is rare.

In applying the "mockery of justice" standard, the entire judicial proceeding as a whole is considered and not just the particular acts of defendant's attorney.[19] Conceivably, a petitioner's attorney could have been incompetent to some degree without the overall conduct of the trial being reduced to a mockery of justice. The degree of incomptency by counsel required to reduce a trial to a mockery of justice has been variously characterized as: that which amounts to no representation at all,[20] that which deprives the proceedings as a whole of judicial character;[21] a total failure to present the defendant's cause in any fundamental respect;[22] a lack of skill so great that in reality the defendant did not have a fair trial;[23] and an unawareness by counsel of a rule of law basic to the case which substantially weakens the defense.[24]

A very small percentage of cases have actually found incompetency of counsel sufficient to have reduced the trial to a sham. The following cases are illustrative of the extreme instances where such incompetency has been found. The failure of counsel to request a severance for a defendant indicted for larceny who was being tried with an accomplice indicted for rape, and the agreement of counsel to stipulate an inaccurate and coerced statement made by the defendant, has warranted a finding of such incompetency of counsel so as to violate the petitioner's constitutional rights.[25] Similarly, an attorney's failure to perfect an appeal because of ignorance of the correct

[16] Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

[17] Latimer v. Cranor, 214 F.2d 926 (9th Cir. 1954); United States *ex rel.* Darcy v. Handy, 203 F.2d 407 (3d Cir.), *cert. denied*, 346 U.S. 865 (1953).

[18] *In re* Ernst's Petition, 294 F.2d 556 (3d Cir.), *cert. denied*, 368 U.S. 917 (1961); Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957); Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

[19] Mitchell v. United States, 259 F.2d 787, 794 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958); United States *ex rel.* Feeley v. Ragen, 166 F.2d 976 (7th Cir. 1948); Diggs v. Welch, *supra* note 18, at 670.

[20] Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957); United States *ex rel.* Feeley v. Ragen, *supra* note 19.

[21] Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

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

[23] Mitchell v. United States, 259 F.2d 787, 794 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

[24] Schaber v. Maxwell, 348 F.2d 664 (6th Cir. 1965), quoting from the opinion by Traynor, C. J. in People v. Ibarra, 34 Cal. Rptr. 863, 386 P.2d 487 (1963).

[25] Bowler v. Warden, Maryland Penitentiary, 334 F.2d 202 (4th Cir. 1964).

procedure, failure to challenge the sufficiency of an affidavit containing an error as to the crime with which defendant is charged, failure to object to damaging hearsay and questionable instructions by the court, and failure to save exceptions or request an instruction on intoxication when considered together reduced the trial to a mockery of justice.[26] Where the defendant was charged with forgery, the failure of his counsel to object to a coerced confession, call alibi witnesses, call a handwriting expert, or submit to the jury a handwriting sample which had been requested, reduced the trial to a sham.[27] Advising a defendant to plead guilty knowing that his confession was coerced and failing to prepare or investigate the case has been held to deprive an accused of the right to effective counsel.[28] Likewise the failure to take a procedural step (enter the correct plea) which subsequently rendered the accused's defense a nullity constitutes a mockery of justice.[29] It is evident from the foregoing illustrations, that the alleged incompetent acts must plainly prejudice the defendant and be of a gross nature and that in those cases where incompetency was found, invariably the finding was based on a combination rather than a single act or error by the attorney.[30]

Several earlier cases allude to a rebuttable presumption of competence if the attorney is licensed to practice law before the particular trial court.[31] Also, a strong presumption of competency and regularity of judicial proceedings exists if there is no written transcript of the trial proceedings available.[32] In appropriate circumstances, judicial notice has been taken of an attorney's competence.[33] Although the more recent cases rarely mention a presumption of competency, there is little doubt that such a presumption is tacitly recognized by the courts.

The Fifth Circuit, which has a substantial volume of habeas corpus proceedings, has not, until recently, adopted the "mockery of justice"

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[26] Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957).

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

[28] Jones v. Cunningham, 297 F.2d 851 (4th Cir. 1962), *cert. denied*, 375 U.S. 832 (1963).

[29] Schaber v. Maxwell, 348 F.2d 664 (6th Cir. 1965).

[30] This is supported by the dictum in Jones v. Cunningham, 297 F.2d at 855, where the court says, "It does not necessarily follow that the same result would be reached in a case in which only one, or even several, but less than all, of these factors are found to exist."

[31] United States *ex rel.* Feeley v. Ragen, 166 F.2d 976 (7th Cir. 1948); Maye v. Pescor, 162 F.2d 641 (8th Cir. 1947); Achtien v. Dowd, 117 F.2d 989 (7th Cir. 1941). *Cf.* Andrews v. Robertson, 145 F.2d 101 (5th Cir. 1944), *cert. denied*, 324 U.S. 874 (1945) (holding that the presumption is non-rebuttable).

[32] Strong v. Huff, 148 F.2d 692 (D.C. Cir. 1945).

[33] Wheatley v. United States, 198 F.2d 325, 327 (10th Cir. 1952): "It may be concluded that his competency and qualifications as a lawyer before the court was a matter of which the trial court had judicial knowledge and of which it could take judicial notice."

standard.[34] The prevalent standard applied in this circuit to incompetency of counsel allegations was the somewhat stricter test promulgated in *MacKenna v. Ellis*.[35] It was stated as follows: "*effective assistance of counsel means counsel reasonably likely to render and rendering effective assistance.*"[36] In at least one instance, the Fifth Circuit in applying this standard found an attorney to be incompetent where it is doubtful that the application of the "mockery of justice" rule would have led to the same result.[37]

Although few courts have actually discussed the issue, many have used language intimating that a dual standard of competency exists for privately retained counsel and court-appointed counsel. This inference arises from emphasis by the courts in many cases on the fact that the defendant's counsel was of his own choosing.[38]

This dichotomy in standard apparently had its roots in the older "agency theory" which imputed any lack of skill or incompetency of the attorney to the client who employed him. A client thus became bound by the acts of his attorney unless he repudiated them in open court.[39] With the advent of court-appointed counsel, the

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[34] In the recent case of Busby v. Holman, 356 F.2d 75 (5th Cir. 1966), the Fifth Circuit did recognize and apply the "mockery of justice" rule.

[35] 280 F.2d 592 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961).

[36] *Id.* at 599; quoted with approval in Pineda v. Bailey, 340 F.2d 162, 164 (5th Cir. 1965). In Popeko v. United States, 294 F.2d 168 (5th Cir. 1961), *cert. denied*, 374 U.S. 835 (1963), the court considered the question of incompetency of counsel on appeal (rather than in a collateral habeas corpus proceeding) and said that to show incompetency, a defendant must prove; (1) a deliberate purpose of the attorney to deprive him of a fair trial, (2) that attorney's actions are so grossly negligent as to deprive defendant of a fair trial.

[37] In MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961), the court applied the test *to protect* defendants from the possible errors of young, inexperienced attorneys. At 601 the court makes the following comment:

> As we see it, an essential element of a fair trial of a defendant with court-appointed counsel is trial court sensitivity to protecting the defendant against hasty trials and against obvious mistakes of young, inexperienced, appointed counsel. A genuflection in the direction of justice by the pro forma appointment of counsel . . . is something less than adequate judicial guidance and the furnishing of effective counsel to accused.

[38] Root v. Cunningham, 344 F.2d 1 (4th Cir.), *cert. denied*, 382 U.S. 866 (1965); Popeko v. United States, 294 F.2d 168 (5th Cir. 1961), *cert. denied*, 374 U.S. 835 (1963); Lotz v. Sacks, 292 F.2d 657 (6th Cir. 1961); Snead v. Smyth, 273 F.2d 838 (4th Cir. 1959); Anderson v. Bannan, 250 F.2d 654 (6th Cir. 1958); Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957); Taylor v. United States, 238 F.2d 409 (9th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957); Morton v. Welch, 162 F.2d 840 (4th Cir.), *cert. denied*, 332 U.S. 779 (1947); *Ex parte* Haumesch, 82 F.2d 558 (9th Cir. 1936).

[39] This theory is well illustrated by the following language used by the court in Tompsett v. Ohio, 146 F.2d 95, 98 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945):

> The incompetency or negligence of an attorney employed by a defendant does not ordinarily constitute grounds for a new trial and a fortiori will not be grounds for the application of the Fourteenth Amendment. . . .
>
> The concept of this rule is that the lack of skill and incompetency of the attorney is imputed to the defendant who employed him, the acts of the attorney thus becoming those of the client and so recognized and accepted by the court, unless the defendant repudiates them by making known to the court at the time his objection. . . . A defendant cannot seemingly acquiesce in

courts were naturally reluctant to hold a defendant bound by acts of an attorney not of his own selection; thus the dual standard arose.

Another theory, which has been advanced in a few cases as a basis of charging a defendant with the acts of an attorney employed by him, is based on the interpretation of the constitutional guarantee. This theory draws a distinction between a lack of competent counsel and a denial of the right to competent counsel, the latter being construed as the extent of the constitutional guarantee.[40]

There is also some mention in early cases of the existence of a non-rebuttable presumption of competency of an attorney hired by a defendant if the attorney is properly licensed to practice law.[41] In view of later cases stressing the right of a defendant to "effective assistance of counsel," it is doubtful if this idea has any efficacy.

The Third Circuit, in deciding *United States ex rel. Darcy v. Handy*,[42] appeared to have buried the remnants of the dual standard of competency which had long lurked in the background without ever being either fully established or completely discredited. In *Darcy* the court said, "nor should it be deemed to be a pertinent distinction that defendant's counsel is selected by himself or by members of his family or his friends rather than appointed by the court."[43] Although this statement seems unequivocal, a later case in the Third Circuit intimates that the question of the dual standard of competency is not conclusively settled.[44]

The vast majority of federal habeas corpus cases involving an allegation of incompetency of counsel, have made no reference to or distinction between privately retained and court-appointed coun-

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his attorney's defense of him or his lack of it and, after the trial has resulted adversely to defendant, obtain a new trial because of the incompetency, negligence, fraud or unskillfulness of his attorney.

Cf. Nelson v. California, 346 F.2d 73 (9th Cir. 1965).

[40] *E.g.*, Hudspeth v. McDonald, 120 F.2d 962 (10th Cir.), *cert. denied*, 314 U.S. 617 (1941). The court made the following statement:

> There is a vast difference between lacking the effective assistance of competent counsel and being denied the right to have the effective assistance of competent counsel. It is the denial of the right to have such assistance that gives the right to challenge a judgment of conviction by writ of habeas corpus.

Supra at 968.

This language was recently quoted and approved in Davis v. Bomar, 344 F.2d 84 (6th Cir.), *cert. denied*, 382 U.S. 883 (1965).

[41] Andrews v. Robertson, 145 F.2d 101 (5th Cir. 1944), *cert. denied*, 324 U.S. 874 (1945): "In my opinion, a defendant's representation by a licensed attorney of his own choice satisfies the constitutional mandate and a trial judge has no authority to pass upon the relative merits or capacities of licensed attorneys . . . even though the judge might think the attorney entirely incompetent." *Supra* at 102.

[42] 203 F.2d 407 (3d Cir.), *cert. denied*, 346 U.S. 865 (1953).

[43] *Id.* at 417.

[44] *In re* Ernst's Petition, 294 F.2d 556, 558 (3d Cir.), *cert. denied*, 368 U.S. 917 (1961).

sel. Inasmuch as the incompetency standard is based on the constitutional guarantee of "right to effective counsel," there would not seem to be any basis for a dual standard, and apparently the agency theory is outdated.

II. Bases for Allegations of Incompetency or Inadequacy of Counsel

A. *Mistakes, Errors Of Judgment, Trial Strategy*

The federal courts in reviewing allegations of incompetency of counsel have left no doubt that mistakes or errors of judgment,[45] negligence,[46] or even some degree of incompetency[47] by counsel does not necessarily constitute a violation of a defendant's constitutional rights. The court usually will not consider specific acts of counsel separately, instead they view the proceeding as a whole to see if the defendant's constitutional right to effective counsel has been violated.[48] The refusal by the courts to consider in detail the constitutional aspects of each allegedly erroneous act is predicated upon the recognition by the courts that few trials are totally free from mistakes by counsel.[49]

A frequent allegation of incompetency by a petitioner is based on the failure of his trial counsel to object to a defect in an indictment. These types of defects are by their nature non-jurisdictional and not violative of due process (or else they could be attacked directly and not via an allegation of incompetency of counsel). These defects are referred to by the courts as "minor defects."[50] The two principal cases which have discussed in detail the effect of the failure of counsel to object to such defects have left little doubt as to the hesitancy of the courts in inferring incompetency from such acts.[51] The courts, generally, list several factors which preclude any inference of incompetency from the failure to object to an indictment defect; a failure by petitioner to show actual harm as a result

[45] *E.g.*, Snead v. Smyth, 273 F.2d 838, 842 (4th Cir. 1959); Edwards v. United States, 256 F.2d 707, 708 (D.C. Cir.), *cert. denied*, 358 U.S. 847 (1958); United States *ex rel.* Feeley v. Ragen, 166 F.2d 976, 980-81 (7th Cir. 1948).

[46] United States *ex rel.* Hamby v. Ragen, 178 F.2d 379 (7th Cir. 1949), *cert. denied*, 339 U.S. 905 (1950); Norman v. United States, 100 F.2d 905 (6th Cir.), *cert. denied*, 306 U.S. 660 (1939).

[47] United States *ex rel.* Feeley v. Ragen, 166 F.2d 976 (7th Cir. 1948).

[48] Edwards v. United States, 256 F.2d 707 (D.C. Cir.), *cert. denied*, 358 U.S. 847 (1958); Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

[49] *E.g.*, Diggs v. Welch, *supra* note 48.

[50] Snead v. Smyth, 273 F.2d 838 (4th Cir. 1959). If the defect affects a court's jurisdiction or is violative of due process in itself, the question of incompetency of counsel is moot.

[51] Snead v. Smyth, *supra* note 50; Bostic v. Rives, 107 F.2d 649 (D.C. Cir. 1939), *cert. denied*, 309 U.S. 664 (1940).

of the defect,[52] a showing that a successful objection to the defect would only gain a time delay,[53] a showing that the petitioner actually had knowledge of facts omitted in the indictment,[54] a failure by the petitioner to request a bill of particulars,[55] and a failure by petitioner to raise the issue of the defect prior to the habeas corpus proceeding.[56] From the language used by the courts, it is evident that a finding of one or any combination of these factors would negate any possible inference of incompetency of counsel. Since a case will rarely arise where one or more of these factors are not present, it can be stated almost unequivocally that the failure of counsel to object to a minor defect in an indictment is not a valid basis for an attack on the competency of trial counsel.

One of the most common and unfruitful allegations of incompetency of counsel is that of bad trial strategy. The courts are most emphatic in refusing to consider any action which may be characterized as trial strategy as an indication of incompetency.[57] If any reason, regardless of how remote, can be propounded to justify the attorney's course of conduct, the courts will characterize such action as trial strategy.

The failure of counsel to urge a defendant's insanity as a defense to the crime with which he is charged is characterized by the courts as trial strategy.[58] Thus, no inference of incompetency can be drawn from it. This is true even if the evidence of insanity, if it had been offered, would have been sufficient to warrant submission of the issue to the jury.[59]

The decision whether a defendant should or should not testify in his own behalf is often attacked by petitioners for writ of habeas corpus as showing evidence of incompetency. The courts have held this to be an obvious exercise of judgment and trial strategy by an attorney and not a basis for any inference of incompetency.[60] Only if an

[52] Snead v. Smyth, 273 F.2d 838, 842 (4th Cir. 1959); Bostic v. Rives, *supra* note 51, at 651.

[53] Bostic v. Rives, 107 F.2d 649, 651 (D.C. Cir. 1939), *cert. denied*, 309 U.S. 664 (1940).

[54] See note 52 *supra*.

[55] Snead v. Smyth, 273 F.2d 838 (4th Cir. 1959).

[56] *Ibid.*

[57] See Nelson v. California, 346 F.2d 73 (9th Cir. 1965); United States *ex rel.* Machado v. Wilkins, 351 F.2d 892 (2d Cir. 1965); Burkett v. Mayo, 173 F.2d 574 (5th Cir.), *cert. denied*, 337 U.S. 933 (1949). *Cf.* United States v. Garguilo, 324 F.2d 795 (2d Cir. 1963).

[58] James v. Boles, 339 F.2d 431 (4th Cir. 1964); Snider v. Cunningham, 292 F.2d 683 (4th Cir. 1961).

[59] Snider v. Cunningham, *supra* note 58. *But cf.* Schaber v. Maxwell, 348 F.2d 664 (6th Cir. 1965).

[60] Hall v. Warden, Maryland Penitentiary, 313 F.2d 483 (4th Cir.), *cert. denied*, 374 U.S. 809 (1963).

attorney refused to allow a defendant to testify in his own behalf against the defendant's express wishes and without his acquiescence would the court consider such evidence in determining if the petitioner's constitutional rights have been violated.[61] Similarly, the courts have characterized counsel's failure to subpoena or call certain witnesses as an exercise of judgment and trial strategy and not a basis for an allegation of incompetency.[62]

The failure of counsel to seek an appeal is often assailed by petitioners as showing incompetent representation. The courts properly realize that the decision, as to whether a particular case should be appealed, is one properly within the province of the counsel's discretion.[63]

Another important exercise of judgment by counsel which is often attacked is counsel's advice to a defendant to enter a plea of guilty. The petitioner typically recites that counsel used coercion, undue influence, or intimidation to persuade him to plead guilty.[64] The courts uniformly hold that counsel's urging a defendant to enter a guilty plea does not show incompetent representation.[65] This includes a threat by counsel to withdraw from the case unless such plea is entered.[66]

Occasionally the courts will consider the intelligence and education of a particular defendant in determining if he was qualified to use his judgment in planning his defense strategy. A defendant who imposes his strategy on defense counsel and who is familiar with the legal issues involved cannot later complain because counsel followed his desires.[67] However, a court will not impute a lack of skill or negligence by counsel to a defendant who is ignorant of his rights and not familiar with criminal proceedings,[68] and counsel may in good faith disregard a defendant's express instructions concerning trial strategy under such circumstances.[69] On the other hand, the

[61] *Ibid.*

[62] O'Malley v. United States, 285 F.2d 733 (6th Cir. 1961); Flourre v. United States, 217 F.2d 132 (6th Cir. 1954).

[63] McCoy v. Bomar, 333 F.2d 959 (6th Cir. 1964); Riddle v. McLeod, 240 F.2d 206 (10th Cir.), *cert. denied,* 353 U.S. 967 (1957).

[64] Davis v. Bomar, 344 F.2d 84 (6th Cir.), *cert. denied,* 382 U.S. 883 (1965); Application of Hodge, 262 F.2d 778 (9th Cir. 1958); Shepherd v. Hunter, 163 F.2d 872 (10th Cir. 1947); Crum v. Hunter, 151 F.2d 359 (10th Cir. 1945), *cert. denied,* 328 U.S. 850 (1946); Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied,* 325 U.S. 889 (1945). *Cf.* Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957).

[65] See cases cited note 64 *supra.*

[66] Davis v. Bomar, 344 F.2d 84 (6th Cir.), *cert. denied,* 382 U.S. 883 (1965).

[67] United States *ex rel.* Boucher v. Reincke, 341 F.2d 977 (2d Cir. 1965).

[68] Tompsett v. Ohio, 146 F.2d 95, 98 (6th Cir. 1944), *cert. denied,* 324 U.S. 869 (1945). See also Bowler v. Warden, Maryland Penitentiary, 334 F.2d 202, 205-06 (4th Cir. 1964).

[69] Pierce v. Hudspeth, 126 F.2d 337 (10th Cir. 1942) (counsel refused to challenge a juror or recall a witness contrary to defendant's instructions).

courts usually will not consider an attorney's lack of experience as an indication that he does not possess the judgment and skill required to conduct an accused's defense.[70]

B. *Insufficient Preparation*

Insufficient preparation may result from the neglect of a defendant's attorney or because defendant's attorney was not given sufficient notice to enable him to adequately prepare. There is no doubt today that the mere appointment of counsel by the court with no further participation by that counsel is a denial of effective assistance of counsel.[71] Likewise a perfunctory appearance by counsel without any study or preparation does not meet the constitutional requirements.[72] Thus, the courts realize that adequate time for preparation is a basic factor in providing effective assistance of counsel.[73] The problem is what constitutes adequate time for preparation?[74]

The general rule followed by the federal courts is to consider the complexity of each individual case, both in reference to the facts and the law involved, and on this basis determine if counsel had adequate time to prepare.[75] This concept apparently evolved from Justice Black's statement in *Avery v. Alabama*,[76] "that the examination and preparation of the case, in the time permitted by the trial judge, had been adequate for counsel to exhaust its every angle is illuminated

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[70] Edwards v. United States, 256 F.2d 707 (D.C. Cir.), *cert. denied*, 358 U.S. 847 (1958); United States v. Helwig, 159 F.2d 616 (3d Cir. 1947). *But see* MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961).

[71] MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961). The court made the following observations: "A genuflection in the direction of justice by the pro forma appointment of counsel . . . is something less than adequate judicial guidance and the furnishing of effective counsel to accused." *Supra* at 600.

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

[73] Cofield v. United States, 263 F.2d 686, 688 (9th Cir.), *rev'd on other grounds*, 360 U.S. 472 (1959):

> A showing that the time allowed for consultation was brief and that the facilities made available for such consultation were unsatisfactory lends color to a charge that legal representation was inadequate. No matter how capable and zealous an attorney may be, unreasonable curtailment of time or lack of proper facilities may prevent the attorney from affording adequate legal representation.

Willis v. Hunter, 166 F.2d 721, 723 (10th Cir.), *cert. denied*, 334 U.S. 848 (1948): "We think the right to the effective assistance of counsel contemplates the guiding hand of an able and responsible lawyer . . . who has ample opportunity to acquaint himself with the law and facts of the case. . . ."

[74] "Preparation" has been defined as familiarization with prior court proceedings and the current status of the case, Jones v. Cunningham, 297 F.2d 851, 855 (4th Cir. 1962), *cert. denied*, 375 U.S. 832 (1963), and knowledge of the facts and law upon which the defendant was advised, United States v. Wight, 176 F.2d 376 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950).

[75] Underwood v. Bomar, 335 F.2d 783 (6th Cir. 1964), *cert. denied*, 380 U.S. 921 (1965); United States *ex rel.* Tillery v. Cavell, 294 F.2d 12 (3d Cir. 1961), *cert. denied*, 370 U.S. 945 (1962); United States v. Wight, *supra* note 74.

[76] 308 U.S. 444 (1940).

by the absence of any indication . . . that they could have done more had additional time been granted."[77] This examination of the facts in each individual case leads to a wide variance in the actual length of time found to be adequate for preparation. The appointment of counsel two days before the trial,[78] the same day as the trial,[79] six hours before the trial,[80] and fifteen minutes before the trial[81] have been upheld as allowing adequate time for preparation. Appointment of counsel ten minutes[82] and one minute[83] before the trial has been held to be inadequate time for preparation. Thus, there is no standard to be applied; the situations must be analyzed on a case-by-case basis.

C. *Conflict Of Interest*

One of the more stringent requirements of effective counsel which the courts have evolved concerns the possible conflict of interest of an attorney in conducting an accused's defense. This is generally spoken of by the court's in terms of "inadequate counsel" rather than "incompetent counsel" as the actual conduct of the trial is not usually considered. If a substantial conflict of interest is shown, the courts tend to find "inadequate representation" even though the attorney's performance may not reflect any incompetency.

The most common conflict of interest problem arises when one attorney represents both the defendent being tried and a witness who is called to testify at the trial. This is often the result of one attorney being appointed to represent several defendants charged with the same crime. Where such conflict has arisen, the continued representation of both interests without a full disclosure to and approval by both parties has been held to be a denial of effective counsel.[84] Similarly, if a witness at the defendant's trial is a regular client of the attorney, then there may be sufficient conflict of interest to deny the defendant effective counsel.[85]

The appointment of an attorney who had a job application filed

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[77] *Id.* at 452. *Cf.* Michel v. Louisiana, 350 U.S. 91 (1955).

[78] Underwood v. Bomar, 335 F.2d 783 (6th Cir. 1964), *cert. denied*, 380 U.S. 921 (1965).

[79] United States *ex rel.* Tillery v. Cavell, 294 F.2d 12 (3d Cir. 1961), *cert. denied*, 370 U.S. 945 (1962).

[80] Baldwin v. United States, 260 F.2d 117 (4th Cir. 1958), *cert. denied*, 360 U.S. 938 (1959).

[81] United States v. Wight, 176 F.2d 376 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950).

[82] Martin v. Virginia, 349 F.2d 781 (4th Cir. 1965).

[83] United States v. Helwig, 159 F.2d 616 (3d Cir. 1947).

[84] Porter v. United States, 298 F.2d 461, 463-64 (5th Cir. 1962); Hayman v. United States, 187 F.2d 456 (9th Cir. 1950), *vacated and remanded*, 342 U.S. 205 (1952).

[85] Tucker v. United States, 235 F.2d 238 (9th Cir. 1956).

with the district attorney's office has been held to be a denial of effective counsel because of the possible conflict of interest.[86] In cases where the defendant's attorney has held a part time job as United States Commissioner,[87] or as city attorney,[88] however, no conflict of interest has been found as long as the particular case did not involve the attorney in his official capacity.

The fact that an attorney is under indictment for solicitation of business,[89] or that the defendant has filed a grievance with a bar committee against the attorney representing him,[90] is not a sufficient conflict of interest to be considered a denial of effective assistance of counsel. A contention that an attorney representing an unpopular cause has a conflict of interest due to the possible prejudice of the local community, which includes his clientele, has also been rejected.[91]

D. *Unethical Conduct*

In the bizarre case of *Bovey v. Grandsinger*,[92] the court was concerned with the effect of flagrant unethical conduct by defendant's attorney on defendant's right to effective assistance of counsel. During a recess in the defendant's trial, his attorney attempted to enlarge a bullet hole in a leather belt offered in evidence by the prosecution to allow defendant's attorney to argue that the victim was slain by a gun of a larger calibre than that which the defendant possessed. This attempt to alter the exhibit was discovered and the actions of the attorney were recorded and admitted within hearing of the jury. The court held that undoubtedly the attorney's acts deprived the petitioner of effective assistance of counsel.[93]

Although perhaps not accurately characterized as unethical conduct, there has been some discussion as to whether, as a matter of law, an attorney who is delinquent in his bar dues is adequate counsel. Formerly, delinquency in paying bar dues was held to prevent counsel from adequately representing a defendant.[94] This view has been overruled on the basis that the right to counsel of one's choice

[86] MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961). The court says, "We consider undivided loyalty of appointed counsel to client as essential to due process." *Supra* at 599.

[87] Audett v. United States, 265 F.2d 837 (9th Cir.), *cert. denied*, 361 U.S. 815 (1959).

[88] Harris v. Thomas, 341 F.2d 560 (6th Cir. 1965).

[89] United States *ex rel.* Bloeth v. Denno, 313 F.2d 364 (2d Cir.), *cert. denied*, 372 U.S. 978 (1963).

[90] Swope v. McDonald, 173 F.2d 852 (9th Cir.), *cert. denied*, 337 U.S. 960 (1949).

[91] Hickock v. Crouse, 334 F.2d 95, 99 (10th Cir. 1964), *cert. denied*, 379 U.S. 982 (1965).

[92] 253 F.2d 917 (8th Cir.), *cert. denied*, 357 U.S. 929 (1958).

[93] *Cf.* Bolden v. United States, 266 F.2d 46 (D.C. Cir. 1959) (a reprimand to counsel for arriving late and for keeping his hands in his pockets and leaning on the table during examination of a witness did not show inadequacy of counsel).

[94] MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961).

is a very personal right and cannot be denied because the counsel chosen is delinquent in his bar dues.[95]

E. *Mental Condition*

Several cases have considered the allegation by a petitioner that his trial counsel was insane or mentally ill at the time of trial thus denying him effective assistance of counsel.[96] This allegation is usually based on the discovery by the petitioner of a prior or subsequent mental disorder suffered by his counsel.[97] The courts have unanimously refused to find a denial of effective assistance of counsel based on such an allegation. The reasoning adopted by the courts is that if the trial judge did not notice any irrational behavior by counsel and if the trial did not constitute a "mockery of justice" then the petitioner's constitutional rights have not been violated.

III. Conclusion

As a result of the expanding emphasis being accorded the right to be represented by counsel, the standard which court-appointed counsel must meet will probably be stricter. The courts realize that representation by an incompetent attorney may be as harmful to a defendant as no representation at all.[98]

In accordance with the trend to raise the standard of competency required to meet the constitutional right of effective assistance of counsel, the courts in the future may consider factors heretofore thought to be irrelevant. If the question is close concerning counsel's competency, the courts may well consider the attorney's previous related experience. Similarly, in a close case the courts may consider the age and experience of the attorney involved.[99] This discussion should sound a warning to those practitioners who are newly admitted to the bar or who have had limited exposure to criminal trial practice. To protect their reputations, these members of the bar should be especially thorough in their preparation of court-appointed cases.

Although the trend is toward raising the standard of competency required of counsel to be considered "effective assistance of counsel," it is doubtful if the courts will depart from the "mockery of justice"

[95] White v. Beto, 322 F.2d 214 (5th Cir. 1963), *cert. denied*, 376 U.S. 925 (1964).

[96] United States *ex rel.* Cooper v. Reincke, 333 F.2d 608 (2d Cir.), *cert. denied*, 379 U.S. 909 (1964); Andrews v. Robertson, 145 F.2d 101 (5th Cir. 1944), *cert. denied*, 324 U.S. 874 (1945); Pierce v. Hudspeth, 126 F.2d 337 (10th Cir. 1942); Hagan v. United States, 9 F.2d 562 (8th Cir. 1925).

[97] Pierce v. Hudspeth, *supra* note 96; Hagan v. United States, *supra* note 96.

[98] See text accompanying note 20 *supra*.

[99] MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961).

rule. The rule is flexible and general enough to allow the courts to consider all the factors of any individual case and use their discretion. Thus the courts can actually quote the "mockery of justice" rule but raise the standard by finding certain acts now constitute a trial a mockery of justice where previously they would not have been so considered.

In the final analysis, the "mockery of justice" rule leaves the determination of incompetency to the federal district courts. This is very desirable as few are better qualified to determine the competency of counsel than a judge who observes counsel at work as a part of his daily routine.