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Effective Assistance of Counsel: In Quest of a Uniform Standard of Review

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EFFECTIVE ASSISTANCE OF COUNSEL: IN QUEST OF A UNIFORM STANDARD OF REVIEW†

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INTRODUCTION

Nearly a decade ago, the United States Supreme Court in *McMann v. Richardson*[1] held that the sixth amendment right to counsel was a right to effective assistance of counsel. The Court declared that criminal defense attorneys must act "within the range of competence demanded of attorneys in criminal cases,"[2] and that trial judges must "strive . . . to maintain proper standards of performance by attorneys . . . in their courts."[3] The Court has not elaborated, however, on what conduct the right to effective counsel requires of both defense counsel and the trial judge, or the procedure by which appellate review can best protect it.

Because the Supreme Court has failed to elaborate, lower federal courts and state courts have taken it upon themselves to establish standards for determining whether a criminal defendant's right to effective assistance of counsel was protected at trial. The efforts of these courts have resulted in a medley of standards, ranging from the "mockery of justice" test to a precise enumeration of attorney duties. Confusion reigns in the application and interpretation of these standards.

Recently, attempts have been made to define more precisely what constitutes ineffectiveness of counsel in order to prevent ineffectiveness

† This article is dedicated to the memory of Judge Harold Leventhal, United States Court of Appeals for the District of Columbia, who served as a faculty member of the Notre Dame Law School Summer London Program in 1979.

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1. 397 U.S. 759 (1970).
2. *Id.* at 771.
3. *Id.*

claims from arising and to provide a standard for appellate courts to determine which claims have merit. Several federal and state courts have adopted new standards to review ineffectiveness-of-counsel claims. These standards lighten the burden a defendant must carry to prove ineffectiveness of counsel and thereby overturn his conviction. Despite this recent trend, however, the standards that courts employ remain varied.

Some commentators have suggested that upgrading the quality of legal representation would decrease the number of claims relating to the ineffective assistance of counsel.[4] Various educational and professional programs have been recommended to improve legal representation.[5] Improvements in the quality of representation, however, will come slowly; their impact will not be felt for years to come. Meanwhile, criminal defendants continue to bear the burden of ineffective assistance of counsel.

The authors contend that the problem of ineffective assistance of counsel can only be resolved by establishing a uniform categorical standard for reviewing ineffective-assistance claims. Standards will prevent claims from arising as well as provide a standard of review for appellate courts. This article discusses the constitutional basis of the right to effective assistance, examines current standards used by the courts in evaluating ineffectiveness claims, assesses current proposals for rectifying ineffective representation, and recommends adoption of a "guidelines" approach as a curative measure.

I. The Constitutional Foundation of the Right to Effective Assistance of Counsel

The Supreme Court has indicated on more than one occasion that the sixth amendment right to the assistance of an attorney is a right to *effective* representation.[6] Unfortunately, beyond the bare assertion in *McMann v. Richardson*[7] that an indigent defendant is entitled to "reasonably competent" advice from his appointed counsel, the Court never has

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4. *See, e.g.*, Maddi, *Trial Advocacy Competence: The Judicial Perspective*, 1978 A.B. Foundation Research J. 105, 105-07.

5. *See, e.g.*, Burger, *Annual Report on the State of the Judiciary—1980*, 66 A.B.A.J. 295, 296 (1980).

6. *See, e.g.*, United States v. Morrison, 101 S. Ct. 665, 667 (1981) (Court responsive to proven claims that governmental conduct has rendered counsel's assistance to the defendant ineffective); Holloway v. Arkansas, 435 U.S. 475, 482 (1978) (requiring or permitting a single attorney to represent co-defendants with divergent interests over timely objection violates constitutional guarantee of effective assistance of counsel); Chambers v. Maroney, 399 U.S. 42, 53 (1970) (belated appearance of counsel with no prejudice to defendant is not a per se denial of right to effective assistance of counsel); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (Court has long recognized that the right to counsel is the right to effective assistance of counsel); Reece v. Georgia, 350 U.S. 85, 90 (1955) (effective assistance of counsel in a capital case is a constitutional requirement of due process); Von Moltke v. Gillies, 332 U.S. 708, 725 (1948) (sixth amendment right to counsel contemplates services of counsel devoted solely to interests of his client); Avery v. Alabama, 308 U.S. 444, 450 (1940) (mere formal appointment of counsel does not satisfy constitutional guarantee of assistance of counsel).

7. 397 U.S. 759 (1970).

explained the standard for determining attorney effectiveness. Consequently, the lower courts have looked to the fifth amendment[8] guarantee of a procedurally fair trial as well as to the substantive sixth amendment right to counsel,[9] which has resulted in a variety of standards among the circuits for evaluating effectiveness claims.[10]

The right to effective assistance of counsel emerged as a corollary to the basic right to counsel in *Powell v. Alabama.*[11] In *Powell* the Court held that due process requires an effective appointment of counsel for an indigent criminal defendant on trial for a capital offense if he is "incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like."[12] Significantly, the Court made clear that a mere pro forma appointment of counsel would not suffice if appointment would not result in effective aid to the defendant:

> It is not enough to assume that counsel thus precipitated into the case thought there was no defense and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. . . . The defendants were immediately hurried to trial. . . . Under the circumstances disclosed, we hold that defendants were not accorded the right to counsel in any substantial sense.[13]

Powell thus laid the foundation for later Court holdings that procedural practices preventing effective representation, if a right to representation exists, are unconstitutional.[14]

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8. The fifth amendment provides in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

9. The sixth amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

10. *See* Note, *Ineffective Assistance of Counsel: The Lingering Debate,* 65 CORNELL L. REV. 659 (1980); Note, *Effective Assistance of Counsel: A Constitutional Right in Transition,* 10 VAL. L. REV. 509 (1976); Note, *Drawing the Line on the Ineffective Assistance of Counsel Defense,* 37 WASH. & LEE L. REV. 1300 (1980). Justice White, dissenting in the denial of certiorari in Marzullo v. Maryland, 435 U.S. 1011 (1978), noted that the circuits were in "disarray" on the issue and that whether a minimum level of competence is necessary to satisfy the sixth amendment is a question of fundamental importance.

11. 287 U.S. 45 (1932).

12. *Id.* at 71. In *Powell* the black defendants were accused of raping two white women. The trial judge appointed the entire local bar for the purpose of arraignment and expected that the appointees would continue if no other attorney appeared for the defendants. The Supreme Court found that counsel appointed provided ineffective assistance to the defendants. *Id.*

13. *Id.* at 58.

14. A distinction exists between cases in which the defendant claims a denial of effective assistance of counsel because of some act or omission by the government's representatives or the trial court's interference with counsel's ability to perform, and those in which he is claiming to have been represented by an incompetent attorney. *Compare* United States v. Morrison, 101 S. Ct. 665 (1981) (Court has been responsive to proven claims that governmental conduct has rendered counsel's assistance to the defendant ineffective), *and* Holloway v. Arkansas, 435 U.S. 475 (1978) (single court-appointed attorney required by trial

The Court in *Powell* was concerned with procedural fairness and the fourteenth amendment[15] prohibition against a state's depriving a citizen of life without affording him due process of law. In *Johnson v. Zerbst*[16] the Court went one step further with respect to indigent defendants in *federal* court, holding that "[t]he Sixth Amendment withholds from the federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or physical liberty unless he . . . waives the assistance of counsel."[17] Furthermore, in *Glasser v. United States*,[18] the

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court to represent three defendants with conflicting interests could not provide effective assistance of counsel), *and* Glasser v. United States, 315 U.S. 60 (1942) (right to effective assistance of counsel denied when the trial court appoints a single attorney to represent two clients whose interests conflict), *with* Tollett v. Henderson, 411 U.S. 258 (1973) (counsel's failure to evaluate or inform himself of facts giving rise to constitutional claim might result in advice outside the range of competence for attorneys in criminal cases), *and* Chambers v. Maroney, 399 U.S. 42 (1970) (belated appointment of counsel not per se denial of effective assistance), *and* McMann v. Richardson, 397 U.S. 759 (1970) (plea of guilty based on reasonably competent advice is not open to attack on ground that counsel might have misjudged admissibility of confession), *and* Michael v. Louisiana, 350 U.S. 91 (1956) (failure of counsel to object to unconstitutional composition of grand jury does not overcome presumption of effectiveness if attorney experienced and no evidence of incompetence at trial).

15. The due process clause of the fourteenth amendment provides: "No state shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1, cl. 1.

In *Powell* the Court said that in certain fact situations, the assistance of counsel was indispensable to preserve the due process right to a fair hearing:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. . . . He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

287 U.S. at 68-69.

16. 304 U.S. 458 (1938).

17. *Id.* at 463.

18. 315 U.S. 60 (1942). In *Glasser*, which involved a conspiracy charge, the trial court appointed a single attorney to represent two co-defendants after being advised that the defendants had inconsistent, conflicting interests which could not be effectively represented by the same lawyer. The defendant Glasser contended that by doing so, the trial court "embarrassed and inhibited [counsel's] conduct of his [Glasser's] defense in that it prevented [counsel] from adequately safeguarding Glasser's right to have incompetent evidence excluded and from fully cross-examining the witnesses for the prosecution." *Id.* at 72. The Court held that Glasser had been denied "his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment" and ordered a new trial. The Court concluded from the record that because the trial court appointed Glasser's attorney to represent his co-defendants, his attorney's representation "was not as effective as it might have been." *Id.* at 76.

The issue in *Glasser* was whether the *trial court* had prevented the defendant's attorney from serving him effectively, not whether the attorney himself, in this court-imposed view of "struggle to serve two masters," had performed his duties incompetently. *Id.* at 75. Under these circumstances, the Court held that the defendant need not show that he was prejudiced, since "the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from

Court held that the sixth amendment right to counsel guaranteed *effective* assistance of counsel to criminal defendants in federal court.

In *Betts v. Brady*[19] the Court refused to apply the substantive sixth amendment right to counsel to state criminal cases.[20] Consequently, in state courts, the due process clause of the fourteenth amendment continued to govern whether appointed counsel was required in a given case. Instead of an absolute guarantee of legal representation, defendants in state court were constitutionally entitled to an attorney only if specific circumstances required counsel to insure protection of the defendant's right to a procedurally fair trial.[21] *Betts* required counsel in state court proceedings only if the failure to provide representation would result in "a denial of fundamental fairness, shocking to the universal sense of justice."[22] This standard proved unsatisfactory and ultimately gave way. In *Gideon v. Wainwright*[23] the Court expressly overruled *Betts* and held that the sixth amendment guarantee is an essential element of fourteenth amendment due process that is binding on the states.[24] Consequently, due process prohibited a state court from imprisoning an indigent defendant on a felony charge unless the court appointed counsel to represent him.[25]

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its denial." *Id.* at 76. A court's duty to refrain from embarrassing counsel in its conduct of the defense by insisting or even suggesting that counsel undertake to represent divergent interests was held to be of *equal importance* with the court's duty to see to it that the accused has the assistance of counsel. *Id.*

19. 316 U.S. 455 (1942), *overruled,* Gideon v. Wainwright, 372 U.S. 335 (1963).

20. "The Sixth Amendment of the national Constitution applies only to trials in federal courts. The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment . . . ." 316 U.S. at 461-62.

21. As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.

Id. at 473.

22. *Id.* at 462.

23. 372 U.S. 335 (1963).

24. The Court held that the right to counsel falls within the category of "immunities . . . found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment . . . valid as against the States." *Id.* at 342 (citing Palko v. Connecticut, 302 U.S. 319 (1937), *overruled on other grounds,* Benton v. Maryland, 395 U.S. 784 (1969)).

25. Later cases make clear that the right to assistance of counsel applies in any criminal trial in which the defendant's liberty is at stake. Argersinger v. Hamlin, 407 U.S. 25 (1972) ("absent knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial"). *But see* Scott v. Illinois, 440 U.S. 367 (1979) (limiting the right to appointed counsel to proceedings that actually result in incarceration of the defendant).

The defendant's right to counsel arises at certain "critical stages" in the prosecution which may affect the conduct of the entire trial. A "critical stage" is a point in the proceedings at which the defendant might irretrievably lose certain rights or defenses which it is the duty of counsel to protect. Moore v. Illinois, 434 U.S. 220 (1977) (sixth amendment right to counsel attaches at pretrial identification after initiation of criminal proceedings against him); Coleman v. Alabama, 399 U.S. 1 (1970) (defendant entitled to the assistance of coun-

The Court never has defined the scope of the sixth amendment right to effective counsel. The question that has plagued the lower courts is whether the sixth amendment embodies a particular standard of attorney conduct that, if not met, would result in the denial of the defendant's right to counsel. Although it has been clear since *Powell* that due process does not permit mere pro forma representation, if counsel is required at all, the Court had never held until *McMann* that the sixth amendment requires a particular level of competence if the requirements of procedural due process have otherwise been satisfied at trial.[26] Consequently, the lower courts have disagreed on whether the proper line of inquiry in dealing with ineffectiveness claims is a fifth amendment analysis which looks at the overall fairness of the trial or a more absolute sixth amendment standard.[27]

A. The Fifth Amendment Approach

To determine whether a criminal defendant's right to effective counsel has been protected, most jurisdictions initially adopted the fifth amendment "fair trial" approach, which focused on whether the trial as a whole was fair to the defendant.[28] This approach required the court to consider any acts or omissions by the defense attorney that were claimed to have denied the defendant his right to effective assistance of counsel against this "fair trial" backdrop. The inquiry was not whether the defendant received minimally competent representation, but only whether counsel's performance was so inept that the defendant was unfairly prejudiced and therefore was denied his right to due process of law.[29] If

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sel at a preliminary hearing even though hearing is not a required stage in prosecution); United States v. Wade, 388 U.S. 218, 236 (1967) (defendant entitled to assistance of counsel at post-indictment pretrial line-up); Miranda v. Arizona, 384 U.S. 436 (1966) (individual held for questioning by police officers has the right to have counsel present and to have counsel appointed if he cannot afford his own); White v. Maryland, 373 U.S. 59, 60 (1963) (per curiam) (absence of counsel for defendant at preliminary hearing at which he entered a plea of guilty later introduced in evidence at trial violated his right to due process).

26. *See* Marzullo v. Maryland, 435 U.S. 1011 (1978) (White, J., dissenting) (denial of certiorari); Wainwright v. Sykes, 433 U.S. 72, 117-18 (1977) (Brennan, J., dissenting).

27. *See generally* Note, *Effective Assistance of Counsel: A Constitutional Right in Transition*, 10 VAL. L. REV. 509, 529-30 (1976); Comment, *A Standard for the Effective Assistance of Counsel*, 14 WAKE FOREST L. REV. 175, 181 (1978).

28. The "fair trial" rule developed as a corollary to the Court's holding in Palko v. Connecticut, 302 U.S. 319 (1937), *overruled on other grounds*, Benton v. Maryland, 395 U.S. 784 (1969). In *Palko* the Court attempted to delineate those portions of the Bill of Rights that were essential to "a scheme of ordered liberty." If a principle of criminal justice—such as the right to appointed counsel—was not considered "essential," states were free to administer justice without interference from the federal courts. The distinction between "essential" and "nonessential" principles of due process survives. *See, e.g.*, Apodaca v. Oregon, 406 U.S. 404 (1972) (unanimous jury not an essential element of due process); Williams v. Florida, 399 U.S. 78 (1970) (twelve man jury not a "necessary ingredient" of trial by jury).

29. The "fair trial"/"due process" approach, unlike cases involving more specific constitutional guarantees, inherently requires proof of prejudice. Note, *Ineffective Assistance of Counsel: The Lingering Debate*, 65 CORNELL L. REV. 659, 672 (1980). *See also* Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59

the reviewing court determined that the defendant got a fair trial despite his attorney's performance, an unfavorable verdict would not be overturned.

The argument against the "fair trial" approach is that it treats a specific sixth amendment right protected by substantive due process as merely one element of procedural due process. The Supreme Court has indicated that a substantial difference exists between the way a reviewing court treats claims that a defendant has been denied his due process right to a procedurally fair trial and claims that he has been denied a fundamental substantive right.[30] Since due process is a less rigid concept than are the specific provisions of the Bill of Rights, it is subject to a factual appraisal in each case to determine whether the defendant was prejudiced.[31] Even if the reviewing court finds ineffectiveness, other factors, such as the impartiality of the judge, on balance may show that due process was satisfied. Unlike specific rights, procedural due process does not require outright reversal if ineffectiveness is shown.

B. The Sixth Amendment Approach

A claim that a defendant has been denied a fundamental right protected by the due process clause of the fourteenth amendment is entitled to a stringent standard of review. The sixth amendment approach to ineffectiveness claims focuses only on whether incompetent assistance of counsel at trial effectively denied the defendant his basic sixth amendment right to counsel. The rationale for this approach is that ineffective representation converts the right to counsel into "a hollow right;"[32] ineffective representation is the same as no representation at all. Other aspects of the trial that may have mitigated the prejudicial effect of poor representation—for example, a fair and competent judge—are irrelevant since the only issue is whether the defendant was denied a fundamental sixth amendment right.

A sixth amendment approach, therefore, requires the reviewing court

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VA. L. REV. 927, 934-35 (1973); Note, *Only Ineffectiveness of Retained Counsel Which is Known to State Official or Renders Trial "Fundamentally Unfair" Invalidates State Conviction*, 89 HARV. L. REV. 593, 596 (1975).

30. Betts v. Brady, 316 U.S. 455, 461-62 (1942), *overruled on other grounds*, Gideon v. Wainwright, 372 U.S. 335 (1963).

31. 316 U.S. at 461-62; *see, e.g.*, Estes v. Texas, 381 U.S. 532, 542 (1965) ("[i]t is true that in most cases involving claims of due process deprivations we require a showing of . . . prejudice"). The violation of a specific constitutional provision, in contrast, generally does not require a showing of prejudice. *E.g.*, Dickey v. Florida, 398 U.S. 30, 54 (1970) ("[w]ithin the context of Sixth Amendment rights, the defendant generally does not have to show that he was prejudiced by the denial of counsel"); *see* Note, *Ineffective Assistance of Counsel: The Lingering Debate*, 65 CORNELL L. REV. 659, 678 (1980); Note, *Drawing the Line on the Ineffective Assistance of Counsel Defense*, 37 WASH. & LEE L. REV. 1300, 1304 (1980).

32. "The point is elementary that the right to counsel is hollow when counsel is not effective. The same policies that lie behind the *Gideon* right to counsel apply with equal force to the requirement that counsel be effective." Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927, 935 (1973).

to identify some minimum level of attorney competence. Most lower courts have agreed that the sixth amendment embodies a standard of competence.[33] In the absence of Supreme Court guidance, however, lower courts have been unable to agree on what that standard should be.

For many years, the Supreme Court had not defined the appropriate standard of competency. In most of the ineffectiveness cases that reached the Court, defendants claimed that some act or omission at the trial court level interfered with appointed counsel's ability to represent the defendant effectively rather than claiming that the attorney was unable, because of his own incompetence, to present the defendant's case.[34]

In *McMann v. Richardson,*[35] however, the Court held that the sixth amendment entitles the indigent defendant to "reasonably competent advice . . . within the range of competence demanded of attorneys in criminal cases."[36] Furthermore, trial judges were given the responsibility to maintain standards of competency for attorneys practicing before their courts.[37] Although *McMann* seems to suggest that only competent representation fulfills the defendant's sixth amendment right to counsel, the Court may have said much less.[38] Arguably, "reasonable competence" means that a defendant is entitled to have his conviction reversed only if he can demonstrate that his attorney's incompetence prejudiced the defendant's right to a fair trial. *McMann* thus is only a restatement of the fair trial/"mockery of justice" standard.

In a subsequent case interpreting *McMann,* the Court made clear that mere mistakes in judgment by appointed counsel or even failure to recognize and investigate certain defenses do not necessitate a new trial.[39] The Court has never identified or particularized the kind of attorney conduct that would fall below the threshold level of minimum competence, nor has it described the manner in which trial judges are expected to protect the defendant's right to effective assistance. The burden of interpreting these phrases has been left to the lower federal and state courts.

II. Determining Ineffective Assistance of Counsel—Current Standards of Review

A. *The "Mockery of Justice" Standard*

After *Powell,* lower courts attempted to define the Supreme Court's mandate that the sixth amendment required "effective aid" of counsel. Because the Court did not formulate substantive guidelines to indicate

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33. *See* Note, *Ineffective Assistance of Counsel: The Lingering Debate,* 65 Cornell L. Rev. 659, 660-61 (1980).

34. For a discussion of the differences in types of claims, see note 14 *supra.*

35. 397 U.S. 759 (1970).

36. *Id.* at 771.

37. *Id.*

38. In *McMann* the Court stated that the defendant must show gross error by his attorney in advising the defendant to plead guilty. *Id.* at 772. It is unclear whether "gross error," therefore, is the standard to be applied.

39. Tollett v. Henderson, 411 U.S. 258 (1973).

what kind of attorney performance at trial might be deemed ineffective, lower courts developed the "mockery of justice" standard to deal with the problem.[40] The "mockery of justice" standard is being rejected gradually by the lower courts, however, and presently is used infrequently.[41]

The "mockery of justice" standard, despite its vague and imprecise language, may initially have been intended as a convenient "catch all" term to encompass a broad spectrum of attorney ineffectiveness. Courts were allowed to add their own descriptions and gloss to the term.[42] The

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40. *See, e.g.*, Jones v. Huff, 152 F.2d 14 (D.C. Cir. 1945) (total failure to present the case of accused in any fundamental respect); Diggs v. Welch, 148 F.2d 667 (D.C. Cir.) (representation so incompetent it becomes duty of court or prosecution to observe and correct), *cert. denied*, 325 U.S. 889 (1945); May v. State, 263 Ind. 690, 338 N.E.2d 258 (1975) (absent glaring and critical omission or succession of omissions evidencing in totality a mockery of justice, court will not attribute criminal conviction or affirmation to ineffective representation).

The "mockery of justice" standard is generally traced to Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945), *overruled*, United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973), *on remand*, Crim. No. 2002-71 (D.D.C.), *rev'd*, 624 F.2d 300 app. (D.C. Cir.), *aff'd en banc*, 624 F.2d 196 (D.C. Cir. 1976). Language that is even more descriptive of the term can be found in Williams v. Beto, 354 F.2d 698 (5th Cir. 1965), "only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense" does ineffectiveness exist. *Id.* at 704. For a breakdown of federal and state appellate standards of review, including jurisdictions currently using the "mockery of justice" standard, see Charts I & II in the APPENDIX *infra*.

41. Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.) (rejects sham and mockery standard; sixth amendment guarantee of effective assistance of counsel requires reasonably competent assistance), *cert. denied*, 445 U.S. 945 (1980); Cooper v. Fitzharris, 586 F.2d 1325, 1328 (9th Cir. 1978) (en banc) ("mockery of justice" standard rejected; sixth amendment standard of reasonably competent and effective representation adopted), *cert. denied*, 440 U.S. 974 (1979); United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978) (same); Marzullo v. Maryland, 561 F.2d 540, 543-44 (4th Cir. 1977) (rejecting "mockery of justice" standard; proper test is whether conduct is within range of competence generally found within profession), *cert. denied*, 435 U.S. 1011 (1978); Beasley v. United States, 491 F.2d 687, 692 (6th Cir. 1974) (rejecting "mockery of justice" standard; proper inquiry is sixth amendment test of whether counsel is "reasonably likely to render and renders reasonably effective assistance"); United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973) (rejecting "mockery of justice" standard for "guidelines" approach), *on remand*, Crim. No. 2002-71 (D.D.C.), *rev'd*, 624 F.2d 300 app. (D.C. Cir.), *aff'd en banc*, 624 F.2d 196 (D.C. Cir. 1976); Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970) (abandoning "farce and mockery" standard for sixth amendment approach).

The Seventh and Eighth Circuits have not specifically rejected the "mockery of justice" standard, but have interpreted it as requiring a minimum standard of competence. United States v. Easter, 539 F.2d 663 (8th Cir. 1976) (effective assistance of counsel means "the customary skills and diligence of a reasonably competent attorney"); United States *ex rel.* Williams v. Twomey, 510 F.2d 634 (7th Cir.) (attorney must meet minimum standards of professional responsibility), *cert. denied*, 423 U.S. 876 (1975).

42. For illustrations of variations, see note 40 *supra*. The "mockery of justice" standard has been criticized as too subjective and too reflective of a due process analysis rather than considering the more stringent requirements of the sixth amendment. *See* Beasley v. United States, 491 F.2d 687 (6th Cir. 1974) (court abandoned mockery of justice standard in favor of more stringent analysis of ineffective assistance of counsel). Nevertheless, jurisdictions retaining the standard defend its usefulness and maintain that no alternative is totally objective in reviewing ineffectiveness claims. *See* Bucci v. State, 263 Ind. 376, 332 N.E.2d 94

standard was an outgrowth of the due process/fair trial approach initially used by courts in reviewing ineffectiveness claims. The focus was not on the individual instances of ineffectiveness during trial but on the cumulative effect of these instances on the trial as a whole. Only if the cumulative effect cast obvious doubt on the reliability of the verdict was the trial deemed to be a mockery of justice due to the defense attorney's ineffectiveness.[43]

The "mockery of justice" standard has been criticized because it treats the sixth amendment guarantee to effective assistance of counsel as a procedural due process right and allows courts to overlook specific attorney misconduct during trial. Furthermore, under this standard the burden of proof is on the defendant to show how the alleged instances of ineffective assistance prejudiced his trial.[44] With this burden, the defendant's sixth amendment right is effectively reduced to a minimal procedural due process requirement.[45]

B. The "Malpractice" Standard

After the Court's pronouncement in *McMann v. Richardson*[46] that the defense counsel's conduct must fall "within the range of competence demanded of attorneys in criminal cases,"[47] a majority of the United States Courts of Appeals and state supreme courts rejected the "mockery of justice" standard and fashioned a "malpractice" standard based on the

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(1975).

> The search for objectivity should not obscure common-sense analysis. Indeed, if objectivity is thought to be that which excludes relativity, we cannot see that the federal [Sixth Circuit] standard is objective. From the point of view of a sensible defendant, any and all assistance of counsel which results in a verdict and a sentence more severe than he wishes is *ineffective* assistance. We adhere to the standard consistently followed by our courts for many years.

Id. at ___, 332 N.E.2d at 95 (emphasis in original).

43. *See, e.g.*, Jones v. Huff, 152 F.2d 14, 15 (D.C. Cir. 1945) ("combination of circumstances, if true, . . . constituted a total failure to present the cause of the accused in any fundamental respect").

44. The problem with the defendant carrying the burden of proof is not so much the burden itself but the degree of proof required before relief is given. A trial could be unfair to the defendant without being farcical or a mockery. One commentator expressed the dilemma in this way: it is "specious to define a 'fair trial' as one which is only a little better than a mockery and a farce, in effect no trial at all." Comment, *Incompetency of Counsel*, 25 BAYLOR L. REV. 299, 301 (1973). Indiana and a few other states require that the defendant not only show prejudice, but that he overcome a presumption that the defense attorney's representation was competent. "It must be presumed that appellant's attorney discharged his full duty and it should require strong and convincing proof to overcome this presumption." Schmittler v. State, 228 Ind. 455, ___, 93 N.E.2d 184, 191 (1950). *See also* United States v. Mayo, 646 F.2d 369 (9th Cir. 1981).

45. *See* Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 28 (1973) ("mockery of justice" standard "requires such a minimal level of performance from counsel that it is itself a mockery of the sixth amendment").

46. 397 U.S. 759 (1970).

47. *Id.* at 771. In Tollett v. Henderson, 411 U.S. 258 (1973), the Court repeated its "range of competence" mandate.

McMann "range of competence" language.[48]

Although these revised standards improved the review of ineffectiveness claims, they contained two major flaws. First, because specific instances of attorney misconduct vary from case to case, many courts have not enumerated which acts or omissions by counsel would fall outside of the "range of competence." Thus appellate review of attorney misconduct remains highly subjective. Second, the defendant retains the burden of showing that his case was adversely affected by his counsel's conduct.[49] Under the "malpractice" standard, the defendant need not prove that he was innocent and that the verdict would have been different if he had received effective assistance of counsel. Instead, he must prove that his counsel's conduct made the fact-finding process unreliable. This requirement partially resurrects the "fair trial" approach used by "mockery of justice" jurisdictions; the only difference is the degree of proof that the defendant must bear.

Although the "range of competence" language in the "malpractice" standard appears to be progressive in guaranteeing sixth amendment rights, without an enumeration of standards of attorney conduct and without a revision of the burden of proving prejudice, the change is of form and not of substance.

C. *The "Guidelines" Approach*

Realizing that the "mockery of justice" and "malpractice" standards are inadequate without an enumeration of specific standards of attorney conduct that is in the "range of competence," several courts have formulated guidelines for defense counsel to follow.[50] The guidelines often incorporate an American Bar Association (ABA) proposal of standards for defense counsel.[51] Other courts go one step beyond the ABA standards in

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48. *See, e.g.*, Drakes v. Wyncik, 640 F.2d 912 (8th Cir. 1981) (counsel required to exercise customary skill and knowledge prevailing at time and place of trial); Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978) (reasonably effective and competent defense standard), *cert. denied*, 440 U.S. 974 (1979); United States *ex rel.* Williams v. Twomey, 510 F.2d 634 (7th Cir.) (minimum standard of professional representation required), *cert. denied*, 423 U.S. 876 (1975). For a breakdown of federal and state jurisdictions using the "malpractice" standard in its divergent forms, see Charts I & II in the APPENDIX *infra*.

49. For a detailed discussion of the prejudice issue and a survey of jurisdictions that have attempted to modify the defendant's burden, see Comment, *Current Standards for Determining Ineffective Assistance of Counsel: Still a Sham, Farce or Mockery?*, 1979 S. ILL. U.L.J. 132, 145-48.

50. The Fourth Circuit uses a "guidelines" approach. The guidelines were enunciated in Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968), and provide: (1) an attorney must confer with his client as early as possible and as often as necessary; (2) an attorney must advise his client of the charges against him and of his rights; (3) an attorney must ascertain and develop all appropriate defenses; (4) an attorney must conduct all necessary investigations; and (5) an attorney must allow time for reflection and preparation. 389 F.2d at 226.

51. The Fourth Circuit's guidelines, for example, were derived from the A.B.A., PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION AND THE DEFENSE FUNCTION (Approved Draft 1971).

an effort to inform all parties what conduct constitutes effective assistance of counsel.[52] The guidelines define not only acceptable conduct for the attorney at trial, but also what conduct is required both before and after trial.

Although there are numerous arguments against the use of the "guidelines" approach,[53] the clear advantage is that this approach states what normative conduct comprises effective assistance in every criminal case. The "mockery of justice" and "malpractice" standards do not define this conduct, and the reviewing court must struggle on a case-by-case basis to find a minimal competence level. Thus, predictable outcomes upon review and qualitative controls over attorney conduct are sacrificed.

D. The "Harmless Error" Approach

All fifty states[54] and the federal system[55] have a "harmless error" provision which prohibits appellate reversals based on errors that do not

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52. *See* United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973), *on remand,* Crim. No. 2002-71 (D.D.C.), *rev'd,* 624 F.2d 300 app. (D.C. Cir.), *aff'd en banc,* 624 F.2d 196 (D.C. Cir. 1976). In *DeCoster* Judge Bazelon urged all courts to use the ABA proposal as a guideline to articulate duties which defense counsel has an affirmative duty to perform for his client. The duties Judge Bazelon includes in his opinion are: (1) the duty to confer with the client as promptly and as often as necessary to elicit all information about matters of defense; (2) the duty to discuss with the client all potential strategies and tactical choices; (3) the duty to promptly advise the client of his rights, and prompt action on the part of counsel to preserve those rights; (4) the duty to be concerned with the client's release from custody, as well as the duty to conduct necessary pretrial examinations; and (5) the duty to conduct factual and legal investigations. *Id.* at 1203-04. *See also* Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), *cert. denied,* 393 U.S. 849 (1968). For a breakdown of federal and state courts using the "guidelines" approach, see Charts I & II in the APPENDIX *infra.*

53. Appellate courts have avoided using the "guidelines" approach for various reasons. The foremost argument against it arises from the fear that if more conduct-specific standards were applied, a larger number of convictions would be reversed. For further discussion of this criticism, see text accompanying notes 103-06 *infra.* It should be noted, however, that though a short-term deluge of appeals and claims might occur, the application of the "guidelines" approach would have the long-term effect of reducing the number of claims. Once clear and concise standards of conduct are announced, both defendants and their attorneys will know what the sixth amendment requires.

The reluctance of appellate courts to implement more definitional standards may also stem from the "club mentality," under which courts equate a claim for ineffective assistance with a smear on a particular counsel's reputation. In Angarano v. United States, 312 A.2d 295 (D.C. 1973), Judge Nebecker said that an ineffectiveness claim "is not a device to be used on appeal except in the most severe cases of glaring ineptitude. . . . [T]his area of challenge to a conviction must be thus limited so as not to pose an unwarranted professional hazard to the bar who must defend in those cases . . . ." *Id.* at 300. The "club mentality" problem would be overcome if courts could be persuaded that the finding of ineffective assistance is not a judgment on the overall competence of the attorney, but of a particular instance of ineffective representation. Judge Bazelon of the District of Columbia Circuit Court of Appeals suggested that the term "ineffective assistance of counsel" be changed to a phrase less derogatory to the defense attorney. "Failure of the criminal process" was one such suggestion. Bazelon, *The Realities of* Gideon *and* Argersinger, 64 GEO. L.J. 811, 823 (1976).

54. *See* Chapman v. California, 386 U.S. 18, 22 (1967).

55. FED. R. CRIM. P. 52(b).

affect the substantial rights of the criminal defendant. In *Chapman v. California*[56] the United States Supreme Court extended the harmless error principle to constitutional errors, saying that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless." [57] The *Chapman* Court further held that the substantive standard for determining whether an error was constitutionally harmless was a matter of federal rather than state law.[58] In *Chapman* the California state court applied a "harmless error" standard that placed primary emphasis upon the presence of other substantive evidence which showed that proof of guilt was overwhelming.[59] The Supreme Court stressed that the standard should emphasize the impact of the error upon the "substantial rights" of the defendants.[60] Accordingly, the Court held that a constitutional error could be viewed as harmless only if the beneficiary of the error, the state, proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[61]

The *Chapman* Court acknowledged that earlier cases such as *Gideon v. Wainwright*[62] had indicated that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."[63] Although *Chapman* recognized that failure to appoint counsel would be harmful per se, the Court did not attempt to define what conduct by counsel would constitute a denial of the sixth amendment right to effective assistance of counsel. The lower courts were left to decide whether the *Chapman* "harmless error" rule or the "automatic reversal" rule (error harmful per se) should be applied.[64]

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56. 386 U.S. 18 (1967).

57. *Id.* at 22.

58. "Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much a matter of a federal question as what particular constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Id.* at 21.

59. People v. Teale, 63 Cal. 2d 178, 404 P.2d 209, 45 Cal. Rptr. 729 (1965), *rev'd sub nom.* Chapman v. California, 386 U.S. 18 (1967).

60. 386 U.S. at 22.

61. *Id.* at 24.

62. 372 U.S. 335 (1963). In *Gideon* the Court held that a state's failure to appoint counsel in a noncapital criminal case deprived the indigent defendant of due process of law under the fourteenth amendment. *Id.* at 344.

63. 386 U.S. at 23.

64. In Hamilton v. Alabama, 368 U.S. 52 (1961), the Supreme Court held that arraignment was a critical stage in a state's criminal process and that counsel was needed at that time to protect the defendant's rights. The Court further concluded that the degree of prejudice "can never be known" because only counsel present at the time "could have enabled the accused to know all defenses available to him and to plead intelligently." *Id.* at 55. In Chambers v. Maroney, 399 U.S. 42 (1970), however, the Court refused to adopt a per se rule requiring reversal of every conviction following tardy appointment of counsel. It emphasized an examination of the totality of the circumstances surrounding the tardy appointment. The rejection of the per se rule by the *Chambers* Court does not bar a court from recognizing a prima facie presumption of ineffective assistance upon a showing of tardy appointment. With this presumption, the burden then is shifted to the prosecution to show

As a result of the Supreme Court's benign neglect of the issue of prejudice in ineffectiveness claims, lower courts continue to grant relief only if the defendant can show prejudice. Unlike *Chapman*, however, most courts hold that the defendant, not the state, has the burden of proof.[65] The Eighth Circuit, for example, in attaching the burden of proving prejudice to a "mockery of justice" standard stated: "[T]he mockery standard was not intended . . . [to] be taken literally, but rather . . . [to] be employed as an embodiment of the principle that a petitioner must shoulder a heavy burden in proving unfairness."[66] Prejudice is found only if the petitioner's allegations of ineffectiveness are coupled with colorable claims of innocence.[67] If the verdict would not have been affected, the "harmless error" rule dictates that relief be restricted to cases in which the allegedly unconstitutional conduct prejudiced the outcome of the trial.[68]

At odds with the Eighth Circuit's standard is the standard employed by the Fourth Circuit. In *Coles v. Peyton*[69] the court stated that counsel's failure to abide by specific guidelines enunciated by the court "constitute[d] a denial of effective representation of counsel unless the state . . . [could] establish lack of prejudice thereby."[70] Efforts to go one step beyond *Coles* by reversing a conviction, regardless of a showing of prejudice, once allegations of ineffectiveness have been proved have failed.[71] The per

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that the late appointment did not result in prejudice to the defendant. Garland v. Cox, 472 F.2d 875 (4th Cir. 1973). The late appointment of counsel is a common ground for attacking effectiveness of counsel. In Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied,* 393 U.S. 849 (1968), the court held that competent assistance of counsel necessarily requires adequate time for preparation, including appropriate legal and factual investigation of all possible defenses.

Notwithstanding the holding in *Chambers,* the Court has approved a per se rule of ineffective assistance in cases in which the same attorney represented two defendants whose interests were clearly in conflict. Glasser v. United States, 315 U.S. 60 (1942). *But cf.* Morgan v. United States, 396 F.2d 110 (2nd Cir. 1968) (suggesting that reversal unnecessary if conflict too minimal to have affected result).

65. *See generally* Flynn, *Adequacy of Counsel: The Emerging Fair Trial Issue for the Seventies?,* 47 N.Y. ST. B.J. 19 (Jan. 1975).

66. McQueen v. Swenson, 498 F.2d 207, 214 (8th Cir. 1974).

67. *See generally* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. CHI. L. REV. 142 (1970).

68. *Id.* at 170.

69. 389 F.2d 224 (4th Cir.), *cert. denied,* 393 U.S. 849 (1968). For the standards enunciated in *Coles,* see note 50 *supra.*

70. 389 F.2d at 226. In accord with this decision is Moore v. United States, 432 F.2d 730 (3d Cir. 1970), in which the Court abandoned its presumption of prejudice arising from late appointment of counsel and shifted the burden to the state to show the absence of prejudice. The court held that a showing of late appointment presents strong evidence of prejudice. *Id.* at 735-37.

71. *E.g.,* Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied,* 440 U.S. 974 (1979). In *Cooper* the court overruled a prior decision in which it had held that if a petitioner carried the burden of establishing the overall ineffectiveness of counsel, his conviction must be reversed without any further showing of prejudice. Cooper v. Fitzharris, 551 F.2d 1162 (9th Cir. 1977), *overruled en banc,* 586 F.2d 1325 (9th Cir. 1978), *cert. denied,* 440 U.S. 974 (1979).

se rule of prejudice is applied only if counsel is not provided at all or is prevented somehow from performing his adversarial function.[72]

Unless the Supreme Court rules that a substantiated claim of ineffective assistance of counsel is a per se violation of a defendant's constitutional rights, the "harmless error" rule will continue to be used by federal and state appellate courts. In light of this reality, the lower appellate courts should realize that the burden of proof places an undue hardship on the defendant.[73]

III. A Critique of the Current Standards—Procedures to Protect the Right to Effective Counsel

The ineffective assistance of counsel claim in its various forms[74] may be raised at several points during the criminal proceeding, but it is usually raised on appeal. None of the procedural alternatives sufficiently protect the right to effective assistance of counsel.

Initially, the claim may be raised at the trial level by a motion for mistrial. This procedure is rarely used, since the defense counsel is not likely to attack his own performance with such a motion. The next opportunity for the defendant's claim to be heard is on direct appeal of the conviction. Appellate courts are, however, by their nature, in the position to give remedial relief to such claims only after an extended period of time has lapsed since the defendant has received the ineffective assistance. It is the trial court, however, that has the initial view of claims of ineffectiveness and the power and responsibility to eliminate or cure instances of ineffectiveness when they arise. The question from the bench, "Is the defense ready?" can no longer substitute for the trial court's duty to make sure that the defense counsel has adequately completed factual and legal investigations of a case before it comes to trial. Although an appellate finding of ineffectiveness would result in a reversal of the conviction and a new trial, the major difficulty with appellate review of ineffectiveness claims is that the reviewing court is limited to the evidence as it appears in the trial record. Often that record has been inadequately made by the same counsel whose effective trial representation is at issue.[75]

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72. 586 F.2d at 1332.

73. The burden of proof issue is analyzed in Judge Bazelon's majority opinion in United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973) (*DeCoster* I), *on remand,* Crim. No. 2002-71 (D.D.C.), *rev'd,* 624 F.2d 300 app. (D.C. Cir.), *aff'd en banc,* 624 F.2d 196 (D.C. Cir. 1976). Note, however, that this portion of Bazelon's opinion in *DeCoster* I was modified by United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1976) (*DeCoster* III), in an opinion by the late Judge Leventhal.

74. Various terms have been used to designate the right to effective assistance of counsel. For a discussion of terminology as applied to this issue, see Albert & Brody, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,* 13 Colum. J.L. & Soc. Prob. 1 (1977).

75. *See generally* Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases,* 59 Nw. U.L. Rev. 289, 290 (1964); *see also* Gard, *Ineffective Assistance of Counsel—Standards and Remedies,* 41 Mo. L. Rev. 483, 499

Because of the drawbacks to motions at trial and direct appeals, the majority of ineffective-assistance-of-counsel claims arise during post-conviction proceedings collaterally attacking the conviction, such as petitions for a writ of habeas corpus.[76] In filing a petition for the writ, the defendant must allege that he was denied his sixth amendment right to effective assistance of counsel during his trial.[77] At an evidentiary hearing on the claim, the court considers not only the trial record but other extrinsic evidence as well.[78] If the court finds enough specific examples of ineffectiveness on the part of defense counsel, a more extensive hearing on the claim may follow.[79] If the hearing reveals further evidence of sixth amendment infringement and resulting prejudice to the defendant's case, the writ issues and the defendant is released from prison.[80] If the state decides not to proceed with a new trial, the defendant remains free.[81] Habeas corpus proceedings have been criticized, however, because of their

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(1976).

76. The Indiana Supreme Court, which retains the mockery of justice standard for ineffectiveness claims, strongly criticized the use and abuse of habeas corpus proceedings to review incompetency claims, especially if the ineffectiveness claim has already been heard on direct appeal. In *Langley v. State* the court said:

> While we concede to no less than a profound concern for the maintenance of strict adherence to the notion of fundamental fairness and due process throughout the course of a criminal proceeding, it might at the same time be admitted that our seemingly over indulgent attitude towards the preservation of a criminal defendant's "rights" has been prompted by the increasingly liberal manner in which the federal courts have interpreted the extent of their jurisdiction in such matters. A cursory reading of such cases as *Townsend v. Sain* . . . and *Fay v. Noia* . . . demonstrates the relative ease with which a duly convicted felon may invoke the jurisdiction of the federal courts on a petition for habeas corpus, thereby placing the very integrity of a state's criminal proceeding in question. Clearly, then, it may be said that one of the functions of our post conviction remedy rules is to preserve what sanctity remains to this state's disposition of a criminal charge by allowing a convicted criminal defendant ample opportunity to present claims for relief in the courts of this state before resort must be had to the federal courts.

256 Ind. 199, ___, 267 N.E.2d 538, 540-41 (1971). The Indiana Court's complaint of *Fay v. Noia* was remedied by the decision in Wainwright v. Sykes, 433 U.S. 72 (1977), in which the Supreme Court reversed an order of the Fifth Circuit Court of Appeals requiring a hearing in the Florida state courts on the habeas corpus petitioner's claim of ineffective assistance of counsel. The Court held that a federal habeas corpus review would be barred absent a showing of "cause" and "prejudice" attendant to a state procedural waiver. *Id.* at 90-91. For the "cause" and "prejudice" test used in *Sykes*, see Francis v. Henderson, 425 U.S. 536, 542 (1976).

For a discussion of the attitudes of courts upon reviewing habeas corpus proceedings in which the ineffectiveness of counsel claim is raised, see Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927 (1973); Friendly, *Is Innocence Irrelevant?—Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

77. *See generally* 6 WEST'S FED. PRAC. MANUAL § 6801 (1970 & Supp. 1980).

78. Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 11 (1962).

79. 6 WEST'S FED. PRAC. MANUAL § 6809 (1970 & Supp. 1980).

80. *Id.*

81. *Id.*

relative ineffectiveness in curtailing the number of claims made on this issue.[82]

Alternatives to habeas corpus relief exist for the misrepresented criminal defendant. The defendant may bring a malpractice suit under state tort law or under 42 U.S.C. § 1983, which provides for a civil cause of action if the plaintiff has been deprived of constitutional rights.[83] The malpractice suit can be brought only after the defendant's trial, however, and is not remedial of his own right to a fair trial. Moreover, the defendant-turned-plaintiff faces a heavy burden of proving in either suit that his attorney was ineffective.[84] Finally, if the defendant-turned-plaintiff is indigent, he can ill-afford the legal costs of suing his former defense attorney.[85] Another suggested alternative is disciplinary action by the local bar association against the defense attorney.[86] The greatest problem with this approach is that the bar's standards are advisory and do not offer any direct relief for the defendant except, perhaps, in the form of vindication.[87]

IV. PROPOSALS FOR CHANGE

Two different approaches are necessary to deal with the problem of ineffective assistance of counsel. First, measures must be undertaken that prevent claims of ineffectiveness from ever arising. Educational programs and standards of attorney conduct are two notable examples. The second approach provides means by which appellate courts can analyze the merit of ineffectiveness claims. Guidelines, for example, may aid a court in determining whether counsel has fulfilled his duty to his client. Although some overlap is inherent in these two approaches, each category is considered separately to facilitate discussion.

A. Preventative Measures

Three different preventative measures have emerged: (1) self-disci-

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82. *See, e.g.*, Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927, 959-70 (1973).

83. 42 U.S.C. § 1983 (1976). For general discussions of malpractice suits, see Gard, *Ineffective Assistance of Counsel—Standards and Remedies*, 41 MO. L. REV. 483, 499 (1976); Zilly, *Recent Developments in Legal Malpractice Litigation*, 6 LITIGATION 8 (1979).

84. *See* McCord v. Barley, 636 F.2d 606 (D.C. Cir. 1980) (legal standards for ineffective counsel same as for malpractice).

85. The Supreme Court has eliminated one obstacle to the defendant-turned-plaintiff's suit against his court-appointed attorney. Some circuit courts had offered court-appointed counsel absolute immunity from malpractice lawsuits. White v. Bloom, 621 F.2d 276, 280 n.3 (8th Cir. 1980). The Supreme Court held recently that federal common law immunity available to other court officials does not extend to court-appointed lawyers. Ferri v. Ackerman, 444 U.S. 193 (1979).

86. *See* Gard, *Ineffective Assistance of Counsel—Standards and Remedies*, 41 Mo. L. REV. 483, 499 (1976).

87. *See, e.g., In re* Eldridge, 530 S.W.2d 221 (Mo. 1975) (Eighth Circuit struck defense attorney's name from role of practicing attorneys for failing to file habeas corpus petition properly; Missouri Supreme Court only issued reprimand).

pline by members of the bar and adherence to rules of professional conduct;[88] (2) the specialization approach, which would set up separate requirements for lawyers wishing to do trial work;[89] and (3) the continuing education approach, which would require all lawyers to attend a prescribed number of legal courses and seminars each year to update their knowledge of the law.[90]

In his Annual Report on the State of the Judiciary-1980 before the American Bar Association,[91] Chief Justice Burger shed some light on the need for preventative measures to ensure attorney competence. Reviewing legal education of the 1970's, standards for admission to the bar, regulation of the bar, and the relationship of these factors to the quality of lawyers' performance in the trial courts, the Chief Justice concluded that a "serious problem" still exists in terms of the quality of some lawyers'

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88. *See* Discussion Draft of ABA Model Rules of Professional Conduct, 48 U.S.L.W. No. 32 (February 19, 1980). The Discussion Draft has not been approved by the House of Delegates and thus does not represent the views of the ABA. The Draft has been circulated for comment and is subject to further study and revision. Section 1.1 (*Competence*), states: "[A] lawyer shall undertake representation only in matters in which the lawyer can act with adequate competence. Adequate competence includes the specific legal knowledge, skill, efficiency, thoroughness, and preparation employed in acceptable practice by lawyers undertaking similar matters." *Id.* at 3. The section then gives lengthy definitions to each of these attributes of competence and comments.

89. For a discussion of the specialization approach advocated by Chief Justice Burger, see Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973). Justice Burger points out three causes of inadequate performance in trial advocacy: (1) the assumption that every person admitted to the bar is qualified to give effective assistance on every kind of legal problem that arises; (2) the failure of law schools to provide adequate and systematic programs by which students may focus on the elementary skills of advocacy; and (3) the inability of prosecutor and public defender offices to provide the same kind of apprenticeships for their new lawyers as are provided by large law firms. *Id.* at 231-32.

Chief Justice Burger proposes a four-point program as a first step in specialist qualification: (1) rejection of the notion that admission to the bar connotes competence to be an advocate in trial courts in matters of serious competence; (2) postponement of broad and comprehensive specialty certification until positive progress has been achieved in the specialty of trial advocacy; (3) development of means to evaluate qualifications of lawyers competent to render the effective assistance of counsel in the trial of cases; and (4) enlistment of the various professional legal associations in an effort to collaborate in prompt and concrete steps to accomplish a workable, enforceable certification of trial advocates. *Id.* at 240-41.

90. *See* Wolkin, *A Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 574 (1975). Mandatory continuing legal education programs would require the attorney to attend a prescribed number of classroom hours annually. The mandatory system, however, would fail to discriminate among lawyers in terms of their relative competence and would not relate the required course content to the individual lawyer's needs. *Id.* at 576.

A better solution, suggests Wolkin, would be a bar-operated system of monitoring the individual lawyer's professional competence. The monitoring agency would be empowered to investigate complaints of incompetence, to determine whether a basis for them existed, and to prescribe and require remedial measures. This system would address its attention to the incompetent lawyer, rather than to the lawyer who is constantly updating his legal skills and education. *Id.* at 574-77. For a further discussion of these views, see Wolkin, *More on a Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 1064 (1975).

91. Burger, *Annual Report on the State of the Judiciary—1980*, 66 A.B.A.J. 295 (1980).

performance in trial courts.[92] The Chief Justice did, however, acknowledge efforts to deal with this problem: a re-examination of the standards of professional conduct by the Association; the expansion of existing programs of training and creation of new ones by the nation's law schools; and the Judicial Conference of the United States' exploration of the need for standards for admission to practice in the federal courts and its development of pilot projects to test these standards.[93]

In a 1979 report, the Committee to Consider Standards for Admission to Practice in Federal Courts[94] called for an expansion of the continuing education approach to provide minimum competence for federal trial practice.[95] The Committee recommended: (1) formation of performance review committees in each judicial district to deal with cases of alleged incompetence by lawyers already admitted to federal practice; (2) adoption of district rules to provide opportunities for second and third year law students to participate under supervision in case preparation and trial; (3) formation by the Judicial Conference of a standing committee on federal court admission to promote uniform national standards and monitor testing methods and continuing legal education; (4) clarification of the ABA Code of Professional Responsibility provisions that relate to trial work; (5) a requirement that an attorney seeking to practice in federal courts pass a federal law bar examination in addition to state bar exams; and (6) a requirement that an attorney have at least four previous "trial experiences" to qualify for federal court appearances.[96]

The Committee's report was accepted unanimously by the Judicial Conference, and an implementation committee has been created to institute pilot programs in several federal districts.[97] Pilot programs were instituted so that the Judicial Conference could test the necessity for, and the value of, special admissions standards.[98]

B. Curative Measures

Although preventative measures are necessary to ensure long-term

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92. *Id.* at 296.

93. *Id.*

94. The committee is chaired by Chief Judge Devitt of the United States District Court for the District of Minnesota.

95. *Final Report of the Committee to Consider Standards for Practice in the Federal Courts,* from the Devitt Committee of the Judicial Conference of the United States, released September 19-20, 1979 for comment, and officially adopted by the Judicial Conference as reported in *The National Law Journal,* Monday, October 8, 1979, at 20. *See also* Devitt, *Improving Federal Trial Advocacy,* 16 JUDGES J. 40 (1977).

96. 64 A.B.A.J. 1650, 1650-51 (1978). "Trial experiences" could include law school trial advocacy course participation, second chairing, observing, or actually participating at real trials. At least two of these "trial experiences" would have to be in actual trials. *Id.* at 1650.

97. Burger, *Annual Report on the State of the Judiciary—1980,* 66 A.B.A.J. 295, 296 (1980). For a criticism of the Devitt Committee Report, see Otorowski, *Some Fundamental Problems with the Devitt Committee Report,* 65 A.B.A.J. 713 (1979).

98. Burger, *Annual Report on the State of the Judiciary—1980,* 66 A.B.A.J. 295, 296 (1980).

solutions for ineffective assistance problems, they do not provide needed short-term relief to defendants suffering from the present effects of attorney ineffectiveness. Curative measures taken by some appellate courts in the form of specific guidelines of competent conduct provide some of this relief.

A recent decision in the District of Columbia Court of Appeals, *United States v. DeCoster*,[99] illustrates the two schools of thought in this area. The "categorical" approach advocates using rigid guidelines and would shift to the government the burden of proving that ineffectiveness was harmless to the defendant.[100] The "judgmental" approach, on the other hand, maintains that ineffectiveness claims should be reviewed on a case-by-case basis and would leave the burden of showing prejudice, as well as ineffectiveness, on the defendant.[101]

1. Use of guidelines

The proponents of the judgmental approach suggest that the use of guidelines will eventually encourage the prosecution and trial judge to interfere with the conduct and tactical decisions of defense counsel.[102] They argue that a "defense attorney's function consists, in large part, of the application of professional judgment to an infinite variety of decisions in the development and prosecution of the case."[103] Thus a court "must be wary lest its inquiry and standards undercut the sensitive relationship between attorney and client and tear the fabric of the adversary system."[104] The proponents of the judgmental approach argue that the guidelines used by the proponents of the categorical approach were not developed to be minimum standards for the practitioner. Rather, they are recommendations formulated to guide the attorney in the representation of his client.[105] Thus the judgmentalists conclude that "generalized standards may be little more than a 'semantic merry-go-round' . . . [The end result is that] courts will condemn only a performance that is egregious and probably prejudicial."[106]

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99. 624 F.2d 196 (D.C. Cir. 1976). The opinion of the court, delivered by Judge Leventhal, represents one school of thought while the dissenting opinion of Judge Bazelon represents the other.

100. *See, e.g., id.* at 245 (Robinson, J., concurring in result); *id.* at 264 (Bazelon, J., dissenting). It should be noted that Judge Robinson introduced a hybrid of the pure categorical approach. He rejects the premise that the guidelines do any more than illustrate "contemporary thought on what a competent performance should offer." *Id.* at 250 n.44. (Robinson, J., concurring in result). He accepts the premise that once a showing of competence has been made, the burden shifts to the government to show the infirmity harmless. *Id.* at 260-61.

101. *Id.* at 214-17.

102. *Id.* at 208. For a discussion of other arguments against the "guidelines" approach, see note 53 *supra*.

103. 624 F.2d at 203.

104. *Id.*

105. *Id.* at 205.

106. *Id.* (quoting A.B.A., PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION 11 (Approved Draft 1971)).

Categoricalists, on the other hand, argue that the guidelines are necessary to "provide the court with an objective basis for assessing the adequacy of representation."[107] Conceding that "inevitably there will be disparities in the quality of representation,"[108] they argue that the sixth amendment guarantees to every defendant in a criminal proceeding a certain minimum level of competent legal representation.[109] Categoricalists argue that there are certain legal tasks defined by the guidelines that can never be ignored.[110] They reject the notion that guidelines are "merely 'aspirational,' "[111] and they do not find offensive the intrusion of a trial judge, who has the "ultimate responsibility for ensuring the accused receives a fair trial, with all the attendant safeguards of the Bill of Rights,"[112] when the object of the intrusion is to forestall ineffective representation.[113] Categoricalists, of course, concede that "counsel's conduct must be evaluated in the context of a particular case and that not every deviation from a perfect or even average performance makes out a claim of ineffectiveness."[114] Nonetheless, they conclude that if the guidelines are breached and the breach is substantial,[115] the defendant has a consti-

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107. 624 F.2d at 277 (Bazelon, J., dissenting).

108. *Id.* at 266 (Bazelon, J., dissenting).

109. *Id.* at 276 (Bazelon, J., dissenting). On this point both schools of thought agree, though they articulate different minimums. The proponents of the judgmental approach feel that the "claimed inadequacy must be a serious incompetency that falls measurably below the performance of fallible lawyers." *Id.* at 208. In contrast, the proponents of the categorical approach would condemn any conduct that falls below that to be expected from a "reasonably competent attorney acting as a diligent, conscientious advocate." *Id.* at 267 (Bazelon, J., dissenting). *See also* United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973) (initially articulating this standard), *on remand,* Crim. No. 2002-71 (D.D.C.), *rev'd,* 624 F.2d 300 app. (D.C. Cir.), *aff'd en banc,* 624 F.2d 196 (D.C. Cir. 1976).

110. Judge Bazelon includes among these certain tasks: "conferring with the client without delay and as often as necessary; fully discussing potential strategies and tactical choices; advising the client of his rights and taking all actions necessary to preserve them; and conducting appropriate factual and legal investigations." United States v. DeCoster, 624 F.2d 196, 277 (D.C. Cir. 1976) (Bazelon, J., dissenting).

111. *Id.* at 276 (Bazelon, J., dissenting).

112. *Id.* at 298.

113. *Id.*

114. *Id.* at 281-82.

115. The test ascribed to by the proponents of the categorical approach was developed initially by Judge Bazelon in United States v. DeCoster, 487 F.2d 311 (D.C. Cir. 1973), *on remand,* Crim. No. 2002-71 (D.D.C.), *rev'd,* 624 F.2d 300 app. (D.C. Cir.), *aff'd en banc,* 624 F.2d 196 (D.C. Cir. 1976). The test is three-pronged: (1) Did counsel violate one of the articulated duties? (2) Was the violation "substantial"? and (3) Has the government demonstrated that the infirmity was harmless beyond a reasonable doubt? *Id.* at 275. Judge Bazelon's failure to explicitly define "substantial" in this initial articulation of the test created some confusion. *See, e.g.,* United States v. DeCoster, 624 F.2d 196, 225 (D.C. Cir. 1976) (MacKinnon, J., concurring); United States v. Pinkney, 543 F.2d 908, 916 (D.C. Cir. 1976) (suggesting that the term contemplates a showing of the breach of a duty by counsel as well as a showing of prejudice to the defendant). Judge Bazelon clarified this ambiguity when he stated that the violation of one of the articulated duties is substantial unless "excusable" or "justifiable." He defined "excusable" and "justifiable," to make clear that the categorical approach does not contemplate a showing of prejudice. *Id.* at 282 (Bazelon, J., dissenting).

tutionally cognizable claim of ineffective assistance.[116]

2. Burden of proof

The far more controversial and fundamental difference between the categorical and judgmental approaches lies in the allocation of the burden of proving incompetence. The proponents of the judgmental approach impose upon the defendant the burden of not only showing ineffectiveness, but also prejudice.[117] The judgmentalists focus on the consequences of an alleged failure in effective representation.[118] Although some claims of ineffective assistance do constitute a denial of the right to the assistance of counsel, other claims, though amounting to the denial of the right to a fair trial, fall short of a denial of the right to the assistance of counsel.[119] A claim that the right to a fair trial has been denied, unlike a claim of ineffectivness, requires that prejudice be shown.[120] Since claims of ineffectiveness based on incompetence or unwillingness do not, in the view of judgmentalists, rise to the level of a denial of effective representation, an additional burden is imposed upon the defendant. In support of this position, the judgmentalists rely on Supreme Court and lower court precedent.[121] They argue that if the defendant seeking to overturn a conviction has access to the information required to show prejudice, he rightfully should be required to shoulder the burden.[122] Finally, they argue that the government should not be required "to disprove the existence of prejudice" if "scanty evidence" of ineffective representation exists.[123] Otherwise, judgmentalists say, "an almost impenetrable obstacle to sustaining convictions [is created] . . . [which] would lead to highly objectionable intrusions into the adversary system."[124]

Proponents of the categorical approach would, upon a showing of

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116. 624 F.2d at 282 (Bazelon, J., dissenting).

117. Even judgmentalists disagree on exactly what is required of a defendant to show prejudice. Although some feel that actual prejudice must be shown, others would require only a showing of substantial prejudice, and still others would require only a showing of likely prejudice. *See, e.g.*, United States v. DeCoster, 624 F.2d 196, 206 (1976) ("counsel's deficiency 'likely' deprived him of an otherwise available, substantial ground of defense") (citing Commonwealth v. Saferian, 366 Mass. 89, 96, 315 N.E.2d 878, 883 (1974)); Bruce v. United States, 379 F.2d 113, 116-17 (1967) ("incompetence . . . has in effect blotted out the essence of a substantial defense"); People v. Pope, 23 Cal. 3d 412, 424-25, 590 P.2d 859, 865-66, 152 Cal. Rptr. 732, 738-39 (1979) ("counsel's acts or omissions related in the withdrawal of a potentially meritorious defense"). Those who support a requirement of showing only likely prejudice find the more relaxed standard appropriate because without it they are "seriously troubled by the likelihood of injustice." 624 F.2d at 206.

118. 624 F.2d at 208.

119. *Compare id.* at 200-02 *with id.* at 222 (MacKinnon, J., concurring). The proponents of the judgmental approach agree on the question of classification. They differ, however, on the parameters to be used in the classification.

120. *Id.* at 200-02.

121. *See, e.g., id.*

122. *Id.* at 227-28 (MacKinnon, J., concurring).

123. *Id.*

124. *Id.*

failure of counsel in some substantial respect, presume prejudice and impose upon the government the burden of demonstrating that the infirmity was harmless beyond a reasonable doubt.[125] The categoricalists focus on "the quality of counsel's performance,"[126] rather than on the consequences of counsel's actions. Categoricalists hold as their staff the sixth amendment itself,[127] arguing that the failure of counsel in any substantial respect constitutes a constructive denial of the right to counsel[128] which, in turn, engages analysis of the sixth amendment "right to counsel."[129] In support of this position, they, like the proponents of the judgmental approach, cite persuasive authority.[130] They also champion the cause of the indigent defendant, arguing that "[i]f the Sixth Amendment is to serve a central role in eliminating second-class justice for the poor, then it must proscribe second-class performances by counsel, whatever the consequences in a particular case."[131] Conceding that there may be some cases in which an appellate court can accurately gauge prejudice,[132] the categoricalists assert that prejudice to the defendant may take many forms[133] and thus will often be "incapable of any sort of measurement."[134] To impose the burden of showing prejudice on a defendant is, they say, "to . . . condition the right to effective assistance of counsel on the defendant's

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125. Judge Bazelon sums up the essence of the categorical approach as follows:

> All that the accused must show to establish a Sixth Amendment violation is that the counsel's acts or omissions were substantially enough to have deprived him of the effective assistance of counsel in his defense. He need not prove that counsel's violations were ultimately harmful in affecting the outcome of his trial. Quite simply, the inquiry into the adequacy of counsel is distinct from the inquiry into guilt or innocence. The Constitution entitled every defendant to counsel who is "an active advocate in behalf of his client." Where such advocacy is absent, the accused has been denied effective assistance regardless of his guilt or innocence.

Id. at 288 (Bazelon, J., dissenting). *See also id.* at 300 (Wright, C.J., dissenting).

126. *Id.* at 275 (Bazelon, J., dissenting).

127. *Id.* at 265-66, 275-76.

128. "Indeed, ineffective assistance is not far removed from total lack of assistance . . . ." *Id.* at 260 (Robinson, J., concurring in result).

129. Proof of prejudice is generally not a condition precedent to establishing the contravention of a right specifically enumerated in the Constitution. This includes the sixth amendment right to the effective assistance of counsel. In contrast, most cases involving claims of due process deprivations require a showing of prejudice. For a discussion of these differences, see notes 30 & 31 *supra* and accompanying text.

130. *See* United States v. DeCoster, 624 F.2d 196, 250-58 (1976) (Robinson, J., concurring in result); *id.* at 288-93 (Bazelon, J., dissenting).

131. *Id.* at 275 (Bazelon, J., dissenting). Judge Bazelon emphasizes what the categorical approach can offer to the indigent defendant. *Id.* at 295-300. Claims of ineffective assistance, however, are not confined to the context of appointed counsel. All persons standing accused in a criminal prosecution, whether indigent or paying clients, have the right to the effective assistance of competent counsel. McMann v. Richardson, 397 U.S. 759, 770-71 (1970). The categorical approach applies with equal force to indigents and paying clients.

132. *See* United States v. DeCoster, 624 F.2d 196, 293 (1976) (Bazelon, J., dissenting).

133. *See, e.g., id.*

134. *Id.* at 292 (Bazelon, J., dissenting) (quoting United States v. Hurt, 543 F.2d 162, 168 (D.C. Cir. 1978)).

ability to demonstrate his innocence,"[135] a position that clearly is inconsistent with our system of criminal justice.[136] " '[T]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial.' "[137]

V. RECOMMENDATIONS

A. *Preventative Measures*

Although some reforms already have been instituted to prevent the incompetence of counsel, they have fallen short of providing specific relief to victimized defendants. Specialization requirements, for example, unless made retroactive, would not affect trial lawyers already in practice. Furthermore, neither specialization nor continuing education requirements would eliminate ineffectiveness claims arising from attorney indifference or overwork,[138] nor would these proposals reach lawyers who persist in providing poor representation due to bad character, laziness, or apathy.

In 1978, the American Bar Foundation asked judges from across the country for their opinion of performances by counsel in their courtrooms.[139] The report indicated that lack of trial preparation was the most frequently cited area of incompetence.[140] To deal with incompetence of

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135. *Id.* at 288-89 (Bazelon, J., dissenting).

136. *Id.* The presumption of innocence is basic to our system of criminal law. *See* Coffin v. United States, 156 U.S. 432, 453 (1895).

137. United States v. DeCoster, 624 F.2d 196, 292-93 (1976) (Bazelon, J., dissenting) (quoting Glasser v. United States, 315 U.S. 60, 76 (1942)).

138. *See* Passmore v. Estelle, 594 F.2d 115 (5th Cir. 1979) (attorney submitted one sentence appellate brief); Thomas v. State, 251 Ind. 546, 242 N.E.2d 919 (1969) (conviction reversed because of inadequate representation of indigent defendant by public defender).

For detailed listings of specific attorney conduct that has been held that ineffective, see Comment, *Effective Assistance of Counsel,* 16 AM. CRIM. L. REV. 67 (1978); Annot., 26 A.L.R. Fed. 218 (1976).

139. Maddi, *Trial Advocacy Competence: The Judicial Perspective,* 1978 A.B. FOUNDATION RESEARCH J. 105 (1978). The survey included over 1400 judges of general jurisdiction in state and federal courts. The judges who responded reflect the general geographic distribution, types of caseloads, and law school origins of the United States judiciary. *Id.* at 111-14. Maddi explored demographic and other variables that might have accounted for variation in these judgments; in relatively few instances, however, were these extrinsic factors related to evaluations of advocacy competence. *Id.* at 130-37.

The survey was undertaken in response to a general concern within the bar about the level of competence of trial lawyers. *E.g.,* Burger, *Remarks on Trial Advocacy: A Proposition,* 7 WASHBURN L.J. 15 (1967). Initiated and carried out before recent public debate and speculation focused on the statistics of incompetency, its purpose was to examine what judges perceived to be the quality of trial advocacy. Maddi, *supra,* at 107-09. The survey was directed at judges as principal observers of trial attorneys in action and as potential critics of their performance. *Id.* at 108.

140. Maddi, *supra* note 139, at 125. In the survey, judges were asked to consider all trial attorneys who appeared before them in the year before the survey and to rate those attorneys on a scale ranging from "exceptionally competent" to "predominantly incompetent." In addition, judges were asked to rate, on the same basis, plaintiffs' attorneys and defendants' attorneys in each of their five most recent trials. Almost 87% of those specific

trial advocates, judges often provided advice and rebuke in chambers.[141] Few had ever instituted formal disciplinary action based on incompetence.[142] Judges who advocated certification of trial specialists and required apprenticeship to ensure the competence of the trial bar gave more negative assessments of the competence of counsel than those who did not.[143] The report indicated, however, that few trial advocates actually performed incompetently. Thus, the report suggested using expanded disciplinary measures to deal with instances of incompetence on a case-by-case basis rather than instituting more general measures that would burden the entire system.[144]

Trial courts, however, rarely take a direct hand in the investigation of defense counsel preparation or potential for effective representation at trial.[145] Moreover, appellate courts are reluctant to reverse a decision on a claim that the trial court did not proscribe the harmful actions or omissions of defense counsel.[146] Yet, it is the trial court that must first ex-

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trial performances were rated minimally competent or better. *Id.* at 118.

141. *Id.* at 129.

142. *Id.* at 130.

143. *Id.* at 140-41. When asked whether the quality of trial advocacy had changed during the judge's tenure on the bench, 32% observed noticeable improvement, whereas about 19% perceived noticeable deterioration in the quality of trial advocacy. The remaining 49% reported little or no change. *Id.* at 121.

The survey also considered whether incompetency of counsel prejudiced the right of litigants in contested trials. Thirteen percent of the judges observed no prejudice, 44% reported that the rights of the litigants had been significantly prejudiced in 58% or fewer of their trials, and that only about 3% estimated prejudice of rights in 50% or more of their trials. *Id.* at 122.

144. *Id.* at 145. Additional surveys have been completed concerning the current state of trial advocacy, all of which draw conclusions from the Maddi report. For a detailed description of these surveys and their implications on any aforementioned proposals for reform in the area of trial advocacy, see Cramton & Jensen, *The State of Trial Advocacy and Legal Education: Three New Studies*, 30 J. LEGAL EDUC. 253 (1979).

145. *See, e.g.*, United States v. Rogers, 471 F. Supp. 847 (E.D.N.Y.), *aff'd sub nom.* United States v. Raife, 607 F.2d 1000 (2d Cir. 1979). In *Rogers* a 21-year-old defendant, motivated in part by economic considerations, opposed a disqualification motion by the government. The government argued that defendant's retained counsel, who was 84 years old and suffering from hearing and other physical problems, was not competent to provide the representation required of criminal defense counsel. Although the court acknowledged that a defendant's right to retain counsel of his own choosing ordinarily should not be disturbed, the court, after finding specific instances of misconduct, granted the motion noting:

> Where the integrity of the judicial process is at stake the court must surely possess the power to take whatever steps are necessary to preserve the orderly course of proceedings and to cure . . . "incipient miscarriage of justice developing before [our] eyes," . . . even if it means disqualifying an attorney from continuing his representation of a defendant.

471 F. Supp. at 854 (quoting United States v. Williams, 411 F. Supp. 854, 858 (S.D.N.Y. 1976)).

146. *See, e.g.*, Pierce v. United States, 402 A.2d 1237 (D.C. 1979). In *Pierce* the defendant's conviction for first-degree murder was reversed because the trial judge failed to conduct an on-the-record factual inquiry into an appointed counsel's pretrial request for co-counsel. Under the scheme in the jurisdiction, counsel could have been substituted in "the interests of justice" or co-counsel could have been appointed in "extremely difficult" cases.

amine claims of ineffective assistance and must exercise its power and responsibility to cure these instances of ineffectiveness when they arise. Even the Supreme Court has admonished that "judges should *strive* to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."[147] Thus a trial judge must, even in a "mockery of justice" jurisdiction, closely scrutinize the conduct of counsel and stringently interpret and apply the standards of effectiveness used in his jurisidiction.[148]

More specifically, the trial judge should: (1) inform counsel what kind of preparation is expected of him at the time he makes his first appearance before the court on a particular case; (2) question defendants who offer guilty pleas to determine whether their pleas are being prompted by ineffective representation; (3) stop any proceeding in which counsel makes a major or crucial mistake that could prejudice the defendant's case;[149] and (4) act independently and with discretion in whatever manner is necessary to protect a defendant's rights from attorney complacency and incompetency.[150] The trial judge should exercise caution to avoid abusing his discretion in his zeal to protect a defendant's right to

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By failing to conduct a factual inquiry designed to determine if these conditions were present, the court found that the trial judge had abdicated his responsibility to protect the right of the accused to have the effective assistance of counsel. The dissent, however, felt that the approach of the majority "grievously erodes the broad and historically vested discretion of trial judges." *Id.* at 1246 (Harris, J., dissenting). *See also* State v. Bush, ___ W. Va. ___, 255 S.E.2d 539 (1979). In *Bush* a defendant's conviction for forcible rape was reversed because the trial judge denied a motion for a continuance by defense counsel, leaving counsel only three days after appointment to prepare for trial. Although the court's decision rested largely on a state constitutional provision guaranteeing a continuance when the defendant has not had a reasonable time to prepare a defense, the court noted:

> [T]he substantial and legitimate interest of the State on the prompt and efficient administration of the criminal justice system, and the interests of criminal defendants in the guarantee of a speedy trial cannot be allowed to erode the fundamental right to the effective assistance of counsel and a fair trial.

Id. at 547.

147. McMann v. Richardson, 397 U.S. 759, 771 (1970) (emphasis added).

148. *See, e.g.*, Smith v. State, ___ Ind. ___, 396 N.E.2d 898 (1979). In *Smith* the Supreme Court of Indiana, despite maintenance of a "mockery of justice" standard, reversed and remanded for new trial a case in which the trial court erred in applying the standard.

149. For an interesting example of a case in which the trial judge should have immediately cured an obvious blunder by an attorney, see Sincox v. United States, 571 F.2d 876 (5th Cir. 1978). In *Sincox*, while the jury was being polled, one juror indicated that he had a "reasonable doubt" about the defendant's guilt. The defendant's retained counsel, however, failed to object. The court noted that "[c]ounsel's failure to do anything to protect the fundamental rights of his client was an inexcusable mistake of grand proportion." *Id.* at 879. Accordingly, the court found that it was incumbent upon the trial judge either to order the jury to retire for further deliberations or to dismiss the jury at this sensitive stage of the proceeding. Since it was the trial judge who was conducting the polling, "it [was] he who [was] in the best position to be aware of whatever happens." *Id.*

150. One commentator suggests that for trial courts to overcome their reluctance to investigate and oversee attorney preparation, appellate courts must clearly define the actions trial judges can take to protect a defendant's rights. *See* Bazelon, *The Realities of* Gideon *and* Argersinger, 64 GEO. L.J. 811, 830 n.87 (1976).

the effective assistance of counsel.[151]

Although a trial judge should conduct a meaningful inquiry into a defendant's claim of ineffective assistance, there should be no per se rule branding such failure reversible error.[152] The inflexibility of a per se rule could result in erroneous determinations of ineffectiveness in some cases and thereby create attorney wariness that might undermine the flexibility necessary for effective representation.

Perhaps the ideal method of preventing claims of ineffectiveness from ever arising is to provide performance standards. These standards will guide attorneys in their courtroom conduct and, thereby, alleviate the need for constant judicial inquiry into ineffectiveness claims. Chief Judge Bazelon of the District of Columbia Circuit emphasized the need for performance standards:

> [I]n light of these shortcomings, efforts to upgrade the training of trial lawyers or to provide them with post-graduate training must not displace efforts to develop and enforce performance standards for defense counsel. I admit that articulating standards for what is required of counsel will be of little value if there are no lawyers competent enough to follow the standards. Conversely, improving the training lawyers receive also will be of little value if we are unclear as to what defense counsel must do, or not vigilant in assuring that the requirements are met, even by reversing convictions if necessary. Far from being incompatible, the specialization and continuing education approaches, and the development of clear standards for defense counsel, reinforce one another.[153]

Judge Bazelon's emphasis on specific standards is appropriate to prevent many incompetency claims from arising. Specific standards spotlight incompetence arising from lack of preparation. Thus attorneys who prepare properly before entering court will have little problem meeting specific

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151. *See, e.g.*, Johnson v. United States, 404 A.2d 162 (D.C. 1979). In *Johnson* the trial judge, fearing the defendant would perjure himself, required the defendant to choose between not testifying and taking the stand without the assistance of counsel and without having his testimony argued to the jury. The court stated:

> [I]t was improper for the trial court to interfere with counsel's conduct of the trial and to compel appellant [to make such a choice]. . . . The right to testify and the right to the assistance of counsel . . . are not alternative rights. A criminal defendant is entitled to both and one cannot be made to substitute for the other.

Id. at 165; *see* Jackson v. United States, 420 A.2d 1202 (D.C. 1979) (en banc) (trial court order that defendant not discuss testimony with attorney during recess reversible error even absent objection or show of prejudice).

152. *See, e.g.*, Monroe v. United States, 389 A.2d 811 (D.C. 1978). In *Monroe* a defendant's conviction on multiple counts was sustained despite the failure of the trial judge to make a meaningful inquiry into a claim of ineffective assistance. Although the court found the failure to constitute error, the error was cured (harmless beyond a reasonable doubt) by *sua sponte* declarations of defense counsel. The majority opinion, written by Chief Judge Newman, is exceptionally thorough in its discussion of the standards and policy considerations employed in the appellate review of ineffective assistance claims.

153. Bazelon, *The Realities of* Gideon *and* Argersinger, 64 GEO. L.J. 811, 818 (1976).

standards.

B. *Curative Measures*

Courts must assume a leading role in controlling ineffective representation by developing a definitive standard of attorney competence. The various descriptive tests employed by the courts to measure claims of ineffective representation have failed in many important respects.[154] Many of the faults of the existing tests can be eliminated by the courts through a categorical approach to ineffective representation claims which enumerates the steps a lawyer should take in defending a criminal case.[155] Several standards elucidating these steps, including the American Bar Association Standards Relating to the Defense Function,[156] are available.[157]

As a method by which appellate courts can assess the merits of effectiveness claims, the categorical approach reflects the better view. Our legal system demands of counsel as a minimum some reasonable quantum of diligence and competence. This quantum requires only the absence of gross neglect or incompetency, not perfection.[158] The use of guidelines provides notice of minimum standards not only to the profession but also to potential victims of ineffectiveness. Finally, all else failing, specific guidelines provide some objective parameters by which a trial court may detect, and an appellate court assess, claims of ineffective assistance. To

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154. *See* notes 40-49 *supra* and accompanying text.

155. In one of the seminal cases to measure an ineffectiveness claim against an enumeration of the duties of a defense counsel, *Coles v. Peyton,* the Fourth Circuit held that the failure of the accused's public defenders to explain the elements of the crime to the defendant, to interview witnesses and to investigate the reputation of the prosecutrix denied the defendant his right to effective representation. 389 F.2d 224 (4th Cir.), *cert. denied,* 393 U.S. 849 (1968). The court derived a list of duties of defense counsel from earlier Fourth Circuit ineffectiveness decisions. *Id.* at 225. In sum, the court stated:

> Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to defend an accused. Counsel must confer with this client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow enough time for reflection and preparation for trial.

Id. at 226.

For other embryonic attempts at enumeration, see Nelson v. State, 274 So. 2d 256, 258 (Fla. Dist. Ct. App. 1973) and State v. Ercolino, 65 N.J. Super. 20, 27-28, 166 A.2d 797, 803 (App. Div. 1961).

156. A.B.A., PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 141 (Approved Draft 1971). Several state courts have used the ABA standards. *See, e.g.,* State v. Tucker, 97 Idaho 4, 8-9, 539 P.2d 556, 560-62 (1975); State v. Hester, 45 Ohio St. 2d 71, 79, 341 N.E.2d 304, 310 (1976); Baxter v. Rose, 253 S.W.2d 930, 936 (Tenn. 1975); State v. Harper, 57 Wisc. 2d 543, 205 N.W.2d 1 (1973).

157. For a checklist to be used by counsel when preparing a case, see *Report on the Criminal Justice Act of the Judicial Conference of the United States,* 36 F.R.D. 277, 338-41 (1965).

158. *See* United States v. DeCoster, 624 F.2d 196, 205-10 (1976).

the extent that each of these means is tailored to the end of ensuring reasonable diligence and competence, the use of guidelines is beneficial.

Moreover, the use of guidelines promotes stability and predictability in determinations of counsel incompetence.[159] Neither stability nor predictability, however, is sufficiently important to excuse an unwarranted intrusion into the delicate area of defense counsel's professional judgment.[160] To prevent unwarranted intrusion, the categorical approach requires that an injured defendant show a substantial violation of his right to effective counsel. Even the most ardent categorical purist would agree that the excusable or justifiable breach of a guideline does not constitute error.[161] Under categorical theory, counsel may reasonably depart from the guidelines, but counsel may not depart for reason of complacency or incompetency. The use of guidelines provides a proper balance between the interest in protecting the sanctity of professional judgment and the interest in promoting effective representation.

The more moderate categoricalist would use the guidelines merely as indications of what may be required to render effective assistance rather than as minimum duties.[162] This moderate position tips the balance toward protecting the sanctity of professional judgment, but moderate use of the guidelines still promotes reasonable competence. Thus, whether guidelines operate as minimum duties or only as indications, they represent a meaningful addition to our legal system.

The categorical approach gives due consideration to the constitutional rights of a party victimized by ineffective counsel. If a defendant shows a substantial violation, he has established that he has been denied, in some substantial respect, the effective assistance of counsel. To also require the defendant to show the adverse consequences flowing from this denial is to dismantle and reduce the substance of the sixth amendment guarantee.[163] A party's showing that counsel's performance constituted a

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159. The categorical approach will also increase the number of cases reversed for want of the effective assistance of counsel. Relitigation of these cases will act as a catalyst to stability and predictability and will have a significant prophylactic effect for several reasons:

> First, to the extent that trial judges and prosecutors can prevent ineffectiveness from tainting a plea or conviction, they will be encouraged to do so. Second, insofar as ineffectiveness results from indifferent or incompetent lawyers, they will be less likely to receive appointments. Third, in those jurisdictions where ineffectiveness results largely from the unmanageable caseloads of appointed counsel and public defenders, judges will be discouraged from overburdening them. Finally, reversals are likely to attract the attention of the public and may enhance the likelihood of legislative reform.

Id. at 293 n.145 (Bazelon, J., dissenting).

160. *See generally id.* at 228-29 (MacKinnon, J., concurring).

161. *See, e.g., id.* at 281-82 (Bazelon, J., dissenting) (noting as "excusable" a "minor error in an otherwise commendable performance" and as "justifiable" those transgressions from the guidelines justified or mandated by "unique circumstances presented by a given case").

162. *See, e.g., id.* at 250 n.44 (Robinson, J., concurring in result).

163. For a discussion of the sixth amendment right to effective counsel, see text accompanying notes 32-39 *supra.*

substantial violation of competency standards should not be compromised by speculation[164] nor, however, should it result in automatic reversal. The categorical approach, by using the "harmless error" rule[165] upon the showing of a substantial violation, appropriately defers to the constitutional mandate of the sixth amendment and simultaneously provides a mechanism by which frivolous claims can be forestalled.[166]

The Supreme Court has yet to squarely address the issue of ineffective assistance arising from counsel's incompetence. Until the Court speaks to the issue, lower federal and state courts will continue to use a variety of approaches. These courts should, for the sake of preventing injustice, be urged to adopt the categorical approach.

VI. Conclusion

Federal and state appellate courts must adopt a higher, uniform standard of review for claims of ineffective assistance of counsel. The proper standard must, on a step-by-step basis, enumerate the basic acts required to represent properly a criminal defendant from preliminary hearing through sentencing, and must shift the burden of showing prejudice to the government once the defendant has shown sufficient cause.

A higher, uniform standard of review, such as the categorical approach, would offer several improvements in the review of ineffectiveness claims: (1) notice to attorneys and clients of the professional performance standards demanded of counsel; (2) objectivity in the appraisal of counsel's performance in defending a client; (3) guidelines for trial court judges by which they may monitor the performance of counsel who appear before them in the courtroom; (4) consistency and predictability in the outcome of appellate reviews from one jurisdiction to another; (5) guidance for professional and educational programs in fashioning means by which to better prepare lawyers for practice under a higher standard of professional conduct; and (6) eventual improvement in the overall quality of representation offered by the legal community.

In addition to the imposition of a higher, uniform standard, reviewing courts must become willing to reverse convictions on the ground of

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164. Judge Bazelon's observations on leaving the consequences to speculation are persuasive. Speaking of the judgmental analysis of a defense counsel's failure to investigate, he says, "The logic of their position seems to be as follows: If the accused was probably guilty, then nothing helpful could have been found *even through a properly conducted investigation.* Thus, any violation of that duty—no matter how egregious—was inconsequential and hence excusable." *Id.* at 286 (Bazelon, J., dissenting) (emphasis added).

165. The "harmless-error" rule "requires the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967). The rule was first applied in the context of ineffective representation claims by the Fourth Circuit in Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied,* 393 U.S. 849 (1968). For a full discussion of the rule, see notes 54-73 *supra* and accompanying text.

166. Only claims that amount to a substantial violation and that cannot be shown harmless beyond a reasonable doubt require reversal.

ineffective counsel, which will serve to deter trial judges from ignoring ineffective performance. Trial judges who fail to scrutinize the performance of attorneys in their courts will be forced to retry cases that are reversed on ineffectiveness grounds.

Realistically, however, no matter how vigilant the trial judge or the reviewing court, and no matter how high the standard of trial performance is established, the problem of ineffective assistance of counsel cannot be solved without a joint renewal of commitment to the problem by the bench, bar, and public.

APPENDIX

I. TESTS OF EFFECTIVE ASSISTANCE OF COUNSEL: UNITED STATES COURTS OF APPEALS

CIRCUIT	MOCKERY OF JUSTICE	MALPRACTICE		SPECIFIC GUIDELINES
		RANGE OF COMPETENCE	REASONABLY EFFECTIVE	
DISTRICT OF COLUMBIA				X[167]
FIRST		X[168]	X[169]	
SECOND	X[170]			
THIRD		X[171]		
FOURTH		X[172]		X[173]
FIFTH	X[174]		X[175]	

167. For a discussion of the standards applied in this circuit, see notes 99-137 and accompanying text *supra.*

168. Theodore v. New Hampshire, 614 F.2d 817 (1st Cir. 1980) (plaintiff failed to demonstrate a specific instance of prejudice or conflict of interest; attorney not fettered in cross-examination of prosecution witness whom he had represented in prior case); Dunker v. Vinzant, 505 F.2d 503, 505 (1st Cir. 1974) (affirming trial court's test of "behavior of counsel falling measurably below that which might be expected of an ordinary fallible lawyer"), *cert. denied,* 421 U.S. 1003 (1975).

169. United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978) (it is sufficient if counsel is prepared and conducts the defense with reasonable knowledge and skill and with an exercise of knowledgeable choices of trial tactics).

170. United States v. Yanishefsky, 500 F.2d 1327, 1333 (2d Cir. 1974) (failure to call known witness, interview all 100 potential witnesses, visit scene of crime, challenge portions of government's evidence, and make clear statement to judge did not require reversal).

171. United States v. Williams, 631 F.2d 198 (3d Cir. 1980) (defendant not denied effective assistance when attorney disobeyed defendant's demand that certain affidavits be used to impeach testimony of two key witnesses testifying against him; standard for effective assistance of counsel is "the exercise of the customary skill and knowledge which normally prevails at the time and place." Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (en banc)).

172. Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977) (en banc as to adoption of *McMann* standard), *cert. denied,* 435 U.S. 1011 (1978).

173. Coles v. Peyton, 389 F.2d 224 (4th Cir.), (counsel for an indigent defendant should be appointed promptly, must be afforded reasonable opportunity to prepare defense, must confer with client without undue delay and as often as necessary to advise him of his rights and ascertain available and unavailable defenses, and must conduct appropriate factual and legal investigations), *cert. denied,* 393 U.S. 849 (1968); *see* Bennett v. Maryland, 425 F.2d 181 (4th Cir.) (farce and mockery), *cert. denied,* 400 U.S. 881 (1970).

174. In United States v. Guerra, 588 F.2d 519 (5th Cir. 1979) the Fifth Circuit applied a quasi-mockery of justice standard of effectiveness against retained counsel. "[I]n order to establish a Sixth Amendment violation it must be shown that the incompetency of retained counsel was so obvious that a reasonably attentive government official connected with the criminal proceeding should have been aware of it and could have taken corrective action." *Id.* at 521.

175. MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960) ("[w]e interpret counsel to

CIRCUIT	MOCKERY OF JUSTICE	MALPRACTICE		SPECIFIC GUIDELINES
		RANGE OF COMPETENCE	REASONABLY EFFECTIVE	
SIXTH			X[176]	
SEVENTH		X[177]		
EIGHTH		X[178]		
NINTH			X[179]	
TENTH			X[180]	
ELEVENTH				

mean . . . counsel reasonably likely to render *and rendering* reasonably effective assistance"), *cert. denied,* 368 U.S. 877 (1961).

176. Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974).

177. United States *ex rel.* Williams v. Twomey, 510 F.2d 634 (7th Cir.), *cert. denied,* 423 U.S. 876 (1975). Counsel appointed on day of trial is not so inevitably . . . unprepared to go to trial . . . ." *Id.* at 639.

178. United States v. Bad Cob, 560 F.2d 877 (8th Cir. 1977) (ineffective assistance when failure to exercise customary skills and diligence).

179. Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978) (counsel reasonably likely to render reasonably effective assistance), *cert. denied,* 440 U.S. 974 (1979).

180. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980).

II. TESTS OF EFFECTIVE ASSISTANCE OF COUNSEL: STATE APPELLATE COURTS OF REVIEW

STATE	MOCKERY OF JUSTICE	MALPRACTICE		SPECIFIC GUIDELINES
		RANGE OF COMPETENCE	REASONABLY EFFECTIVE	
Alabama	X[181]			
Alaska		X[182]		
Arkansas	X[183]	X[184]		
Arizona	X[185]			
California		X[186]		
Colorado			X[187]	
Connecticut		X[188]		
Delaware			X[189]	
Florida			X[190]	
Georgia			X[191]	
Hawaii		X[192]		
Idaho			X[193]	
Illinois	X[194]			
Indiana	X[195]			

181. Lewis v. State, 367 So. 2d 542 (Ala. Crim. App. 1978), *cert. denied*, 367 So. 2d 547 (Ala. 1979).

182. Green v. State, 579 P.2d 14 (Alaska 1978).

183. Haynie v. State, 27 Ark. 542, 518 S.W.2d 492 (1975).

184. Reynolds v. Mabry, 574 F.2d 978 (8th Cir. 1978) (applying state law).

185. State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924 (1979).

186. People v. Pope, 23 Cal. 3d 412, 590 P.2d 859, 152 Cal. Rptr. 732 (1979) (en banc).

187. People v. Grant, 40 Colo. App. 46, 571 P.2d 1111 (1977).

188. State v. Anonymous, 34 Conn. Supp. 656, 384 A.2d 386 (1978).

189. Isijola v. State, 340 A.2d 844 (Del. Super. Ct. 1975).

190. Kimbrough v. State, 352 So. 2d 925 (Fla. App. 1977).

191. Berryhill v. Ricketts, 242 Ga. 447, 249 S.E.2d 197 (1978), *cert. denied*, 441 U.S. 967 (1979).

192. State v. Kahalewai, 54 Hawaii 28, 501 P.2d 977 (1972).

193. State v. Elisondo, 97 Idaho 425, 546 P.2d 380 (1976).

194. People v. Bland, 67 Ill. App. 3d 716, 384 N.E.2d 1380 (1978). Although the standard applicable in determining whether defendant has received effective assistance of retained counsel is whether counsel's conduct amounted to no representation at all or reduced the proceedings to a farce or sham, standard applicable to appointed counsel is whether there has been actual incompetency of counsel. *Id.*

195. Merida v. State, ___ Ind. ___, 383 N.E.2d 1043 (1979).

STATE	MOCKERY OF JUSTICE	MALPRACTICE		SPECIFIC GUIDELINES
		RANGE OF COMPETENCE	REASONABLY EFFECTIVE	
Iowa		X[196]		
Kansas	X[197]		X[198]	
Kentucky	X[199]			
Louisiana			X[200]	
Maine	X[201]			
Maryland			X[202]	
Massachusetts		X[203]		
Michigan		X[204]		
Minnesota		X[205]		
Mississippi	X[206]			
Missouri		X[207]		
Montana	X[208]			
Nebraska		X[209]		
Nevada	X[210]			
New Hampshire		X[211]		

196. State v. Veverka, 271 N.W.2d 744 (Iowa 1978).

197. State v. Pencek, 224 Kan. 725, 585 P.2d 1052 (1978).

198. Turner v. State, 208 Kan. 865, 494 P.2d 1130 (1972).

199. Bishop v. Commonwealth, 549 S.W.2d 519 (Ky. 1977).

200. State v. Stripling, 354 So. 2d 1297 (La. 1978).

201. State v. Dutremble, 392 A.2d 42 (Me. 1978).

202. State v. Renshaw, 276 Md. 259, 347 A.2d 219 (1975).

203. Commonwealth v. Adams, 374 Mass. 722, 375 N.E.2d 681 (1978).

204. People v. Hanna, 85 Mich. App. 516, 271 N.W.2d 299 (1978) (articulating both an enumeration and range of competence standard).

205. White v. State, 309 Minn. 476, 248 N.W.2d 281 (1976).

206. Parham v. State, 229 So. 2d 582 (Miss. 1969).

207. Seales v. State, 580 S.W.2d 733 (Mo. 1979). The court specifically followed the reasonable competence of counsel standard adopted by the Eighth Circuit in Reynolds v. Mabry, 574 F.2d 978 (8th Cir. 1978).

208. State v. Miller, 173 Mont. 453, 568 P.2d 130 (1977).

209. State v. Fowler, 201 Neb. 647, 271 N.W.2d 341 (1978).

210. Shuman v. State, 94 Nev. 265, 578 P.2d 1183 (1978).

211. State v. McCarthy, 112 N.H. 437, 298 A.2d 740 (1972).

STATE	MOCKERY OF JUSTICE	MALPRACTICE		SPECIFIC GUIDELINES
		RANGE OF COMPETENCE	REASONABLY EFFECTIVE	
New Jersey	X[212]	X[213]		
New Mexico	X[214]			
New York	X[215]			
N. Carolina	X[216]			
N. Dakota			X[217]	
Ohio				X[218]
Oklahoma	X[219]			
Oregon			X[220]	
Pennsylvania			X[221]	
Rhode Island			X[222]	
S. Carolina	X[223]			
S. Dakota			X[224]	
Tennessee		X[225]		X[226]
Texas			X[227]	
Utah	X[228]			
Vermont			X[229]	

212. State v. Bonet, 132 N.J. Super. 186, 333 A.2d 267 (1975).
213. State v. Anderson, 117 N.J. Super. 507, 285 A.2d 234 (1971), *modified*, 60 N.J. Super. 298, 290 A.2d 447 (1972).
214. State v. French, 92 N.M. 94, 582 P.2d 1307 (1978).
215. People v. Parliman, 56 A.D.2d 966, 393 N.Y.S.2d 94 (1977).
216. State v. Brooks, 38 N.C. App. 48, 247 S.E.2d 38 (1978).
217. State v. LaFramboise, 246 N.W.2d 616 (N.D. 1976).
218. State v. Hester, 45 Ohio St. 71, 341 N.E.2d 304 (1976).
219. Felts v. State, 588 P.2d 572 (Okla. Crim. 1978).
220. Rook v. Cup, 18 Or. App. 608, 526 P.2d 605 (1974).
221. Commonwealth v. Sisco, 482 Pa. 459, 393 A.2d 1197 (1978).
222. State v. Ambrosino, 114 R.I. 99, 329 A.2d 398 (1974); State v. Turley, 113 R.I. 104, 318 A.2d 455 (1974).
223. McCray v. State, 271 S.C. 185, 246 S.E.2d 230 (1978).
224. State v. Pieschke, 262 N.W.2d 40 (S.D. 1978).
225. Baxter v. Rose, ___ Tenn. ___, 523 S.W.2d 930 (1975).
226. Moultrie v. State, ___ Tenn. ___, 542 S.W.2d 835 (1976).
227. Flores v. State, 576 S.W.2d 632 (Tex. 1978).
228. State v. Pierren, 583 P.2d 69 (Utah 1978).
229. *In re* Cronin, 133 Vt. 234, 336 A.2d 164 (1975).

STATE	MOCKERY OF JUSTICE	MALPRACTICE		SPECIFIC GUIDELINES
		RANGE OF COMPETENCE	REASONABLY EFFECTIVE	
Virginia	X[230]			
Washington			X[231]	
W. Virginia		X[232]		
Wisconsin			X[233]	
Wyoming		X[234]		
District of Columbia	X[235]	X[236]		
Puerto Rico		X[237]		
Canal Zone	X[238]			

230. Stayton v. Weinberger, 213 Va. 690, 194 S.E.2d 703 (1973).

231. State v. Cobb, 22 Wash. App. 221, 589 P.2d 297 (1978).

232. State *ex rel.* Wine v. Bordenkircher, ___ W. Va. ___, 230 S.E.2d 747 (1976).

233. State v. Harper, 57 Wis.2d 543, 205 N.W.2d 1 (1973).

234. Adger v. State, 584 P.2d 1056 (Wyo. 1978).

235. Oesby v. United States, 398 A.2d 1 (D.C. 1977) (setting forth standard requiring convicted defendant to show that counsel was grossly incompetent and that incompetence blotted out essence of defense).

236. Ferrell v. United States, 391 A.2d 755 (D.C. 1978) (right to counsel no less than right to effective assistance of counsel within range of competency demanded of attorneys in criminal cases).

237. United States v. Boesch, 584 F.2d 1113 (1st Cir. 1978).

238. Government of Canal Zone v. Hodges, 589 F.2d 207 (5th Cir. 1979) (performance of appointed trial counsel so abysmal as to amount to ineffective assistance).