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Substantive and Procedural Aspects of the Right to Effective Assistance of Counsel

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SUBSTANTIVE AND PROCEDURAL ASPECTS OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

In an earlier era trial courts perceived their responsibility regarding the quality of legal assistance to be limited to the appointment of reputable counsel. Unless the circumstances were exceptional, judges confronted with a lack of adequate representation for a defendant "papered over" the problem either because they feared a flood of frivolous claims or because they were reluctant to upset the finality of criminal convictions. Even today, when a growing number of courts have formulated a more stringent sixth amendment standard for judging counsel effectiveness, there remains a judicial reluctance to recognize the fundamental nature of the right to effective assistance of counsel. This reluctance results not from an inarticulated suspicion that "all defendants are guilty anyway," but from conflicting policy interests at work in the criminal justice system. Courts today attempt to balance the constitutional mandate for effective defense counsel against an institutional desire to preserve the finality of criminal litigation. Consequently, the law surrounding effectiveness of counsel lacks clear standards and uniform enforcement.

This Note will consider the constitutional nature of the standard for judging ineffectiveness that is applied by a majority of the federal courts and the West Virginia Supreme Court of Appeals. It will also survey the various types of claims of ineffectiveness considered by the West Virginia court and the procedural setting in which they arise. Finally, the Note will analyze the major procedural aspects of appellate review and their substantive effect on claims of ineffectiveness.

2 "Recent extensions of Sixth Amendment doctrine give calculating defendants the opportunity to divert attention from fundamental issues of guilt and innocence by channeling judicial resources into the resolution of nice questions of legal competence." Carter v. Bordenkircher, 226 S.E.2d 711, 716 n.1 (W. Va. 1976). But see McMann v. Richardson, 397 U.S. 759, 785 (1970) (Brennan, J., dissenting).
4 Tests of ineffectiveness are usually not drawn narrowly enough to provide guidelines in any meaningful sense; and courts use their tests more to rationalize the result than to provide the basis for it. See Bazelon, The Realities of Gideon and Argersinger, 64 Geo. L. J. 811, 816 (1976).
I. THE SIXTH AMENDMENT STANDARD OF EFFECTIVENESS

Although in Powell v. Alabama the United States Supreme Court first recognized that the right to counsel includes the right to the effective aid of counsel, the Court failed to define the meaning of effective aid. As appeals proliferated in the wake of Powell, the lower courts, fearing the impact a literal interpretation could have on the adversary system, severely restricted the scope of judicial scrutiny by rooting the right to effective representation in the fair trial requirement of the due process clause and not in the sixth amendment. Under this standard, ineffectiveness existed only when defense counsel’s assistance was so perfunctory or so outrageous that it rendered the entire trial a “mockery of justice”.

It was not until Gideon v. Wainwright made the sixth amendment directly applicable to the states that any serious reevaluation of the character and quality of defense counsel representation occurred. Gideon established that the sixth amendment right to counsel is a fundamental right and not merely an aspect of due process. Jurists and commentators thus inferred from Gideon a

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2 287 U.S. 45 (1932). While the assistance of counsel is a fundamental right guaranteed by the Constitution, it is not clear from the language of the Constitution that the right to effective assistance is a necessary qualification of the right to counsel. The sixth amendment merely states that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. amend. VI.

6 See Mitchell v. United States, 259 F.2d 787, 790 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958). In the opinion Judge Prettyman forcefully argued that the Supreme Court in Powell had “never used the term (‘effective’) to refer to the quality of service rendered by a lawyer” so long as an operative appointment of counsel had been made.


8 Root v. Cunningham, 344 F.2d 1, 3 (4th Cir. 1965). This test required such a minimal level of performance that lawyers who appeared in court drunk or who fell asleep during trial were found to have rendered assistance sufficient under the Constitution. See Hudspeth v. McDonald, 120 F.2d 962, 967-68 (10th Cir.), cert. denied, 314 U.S. 617 (1941); United States v. Katz, 425 F.2d 928, 931 (2d Cir. 1970) (on appeal the attorney attacked his own trial performance).


9 372 U.S. 335 (1963) (overruling Betts v. Brady, 316 U.S. 455 (1942), which had held that the due process clause of the fourteenth amendment did not encompass the sixth amendment right to appointed counsel).

10 See Bines, supra note 1, at 935-36 & n.47. Post-Gideon cases have established a defendant’s right to the services of an attorney at all “critical stages” of
caveat to tighten standards of performance.\textsuperscript{11}

Notwithstanding \textit{Gideon}'s implications about the importance of a lawyer's services, broad philosophical questions about the finality of criminal trials and judicial resistance to attacks on the bar made most courts hesitant to discard the mockery of justice standard.\textsuperscript{12} Thus the major impetus toward a more stringent sixth amendment standard of review of attorney competency did not occur until the Supreme Court implicitly invalidated the farce the proceedings. For a historical perspective of this development see Douglas v. California, 372 U.S. 353 (1963) (representation required on appeal); Escobedo v. Illinois, 378 U.S. 478 (1964) (representation required at interrogation); Miranda v. Arizona, 384 U.S. 436 (1966) (representation required at every critical stage of a prosecution); In re Gault, 387 U.S. 1 (1967) (representation required at juvenile proceedings); United States v. Wade, 388 U.S. 218 (1967) (representation required at line-ups); Coleman v. Alabama, 399 U.S. 1 (1970) (representation required at preliminary hearings); Argersinger v. Hamlin, 407 U.S. 25 (1972) (representation required in all cases involving possible imprisonment). \textit{But see} Gagnon v. Scarpelli, 411 U.S. 778 (1973) (no requirement of representation at all parole and probation revocation hearings).

\textsuperscript{11} \textit{See} Bines, \textit{supra} note 1; Finer, \textit{Ineffective Assistance of Counsel}, 58 CORNELL L. Rev. 1077 (1973); Waltz, \textit{Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases}, 59 Nw. U.L. Rev. 289 (1964). Since the right to counsel was constitutionally grounded in the sixth amendment, it was viewed as having a meaning more specific than the general ambit of due process and as demanding a stricter, more meaningful standard for judging attorney competency than the mockery of justice test. One court, prior to \textit{Gideon}, had interpreted the sixth amendment right to counsel to be the right to effective counsel and incorporated a standard requiring counsel assistance "reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), \textit{order modified}, 289 F.2d 928, \textit{cert. denied}, 368 U.S. 877 (1961). \textit{MacKenna}, however, did not intend to establish a new standard of review of ineffectiveness cases.

\textsuperscript{12} \textit{See} Note, \textit{Effective Assistance of Counsel: A Constitutional Right in Transition}, 10 VAL. U.L. Rev. 509, 511-13 n.15 (1976). The concept of finality applies chiefly to convictions attacked collaterally on habeas corpus, which is the way the bulk of ineffectiveness claims are raised. Some courts have distinguished between claims raised on direct appeal and claims raised collaterally, exhibiting a greater willingness to reverse when the case is before them on direct appeal because the concept of finality has not yet attached to the conviction. Garton v. Swenson, 497 F.2d 1137 (8th Cir. 1974). This distinction is questionable, however, since the issue of ineffectiveness involves a constitutional claim and "conventional notions of finality have no place where life or liberty is at stake and infringement of constitutional rights is alleged." Sanders v. United States, 373 U.S. 1, 8 (1963) (Brennan, J.). In United States v. DeCoster, 487 F.2d 1197, 1201-02 (D.C. Cir. 1973), the court implied that the distinction between claims raised collaterally and on direct appeal had been erased by the imposition of the sixth amendment requirements in ineffectiveness cases.
standard of review in *McMann v. Richardson.* In *McMann* the Court held that guilty pleas made in open court by a competently represented defendant are unassailable. In so deciding, the Court addressed the general standard of competency that should be required of an attorney who advises his client to plead guilty. After initially recognizing that all defendants are entitled to the effective assistance of competent counsel, the Court observed that the advice rendered by an attorney as to whether a confession would be admissible in evidence should be "within the range of competence demanded of attorneys in criminal cases." This discussion in *McMann* was dictum and aside from emphasizing that judges should require a standard of performance which would guarantee defendants their constitutional right to counsel, it added little substance and meaning to the constitutional concept of effectiveness. Nevertheless, because many lower courts had been groping for the correct prescription to apply in claims alleging ineffective counsel, they adopted *McMann*'s language, minimal as it was, as their general test for judging such claims.

II. STANDARD OF REVIEW AFTER McMANN

Although a majority of the federal courts of appeals now require that defense counsel meet some derivative of the *McMann* "reasonable competency" test, these standards are confusingly

11 Id. at 771.
12 Id.
13 "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases." Id.
14 See also Tollett v. Henderson, 411 U.S. 258, 267-68 (1973) where the Court reiterated the standard in *McMann* and held that mere errors in evaluating facts or predicting how courts will rule do not establish that a defendant received constitutionally defective assistance. *See generally,* Flynn, *Adequacy of Counsel: The Emerging Fair Trial Issue for the Seventies?* 47 N.Y. St. B.J. 19 (1976).
15 See McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974).
16 Only the Second and the Tenth Circuits continue to apply the farce or mockery of justice test. *See United States v. Taylor,* 562 F.2d 1345 (2d Cir.), cert. denied, 432 U.S. 909 (1977) (cross-examination alleged to be inadequate, but counsel challenged witnesses' identification of defendant and other testimony; representation adequate under farce and mockery test); Rickenbacker v. Warden, Auburn Correctional Facility, 550 F.2d 62 (2d Cir. 1976), cert. denied, 434 U.S. 826 (1977) (counsel made no opening statement and failed to object to inadmissible evidence; representation adequate under farce and mockery standard); Gillihan v. Rodriguez, 551 F.2d 1182 (10th Cir. 1977) (counsel failed to make various pretrial motions and
imprecise and cases within the same circuit may frequently disagree about the appropriate language to employ. The Third and Seventh Circuits apply versions of a malpractice standard of ordinary skill and care in the community.20 The Fifth and Sixth Circuits each apply a variant of the "reasonable lawyer" standard of competency originally formulated by the Fifth Circuit in *MacKenna v. Ellis.*21 The Eighth Circuit, although it purports to follow the malpractice standard adopted by the Third and Seventh Circuits, continues to use the mockery of justice standard as an indicator of the defendant's heavy burden of proof in ineffectiveness cases.22 The First and Ninth Circuits conflict within them-

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made uncontested change in defense theory; representation adequate under the farce and mockery standard); United States v. Dingle, 546 F.2d 1378 (10th Cir. 1976) (failure to call certain witnesses, to introduce certain testimony and to request information not grounds for reversal).

20 In Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970), the Third Circuit stated that counsel's overall conduct during preparation and investigation as well as during trial should be of such a quality as to equal "the customary skill and knowledge which normally prevails at the time and place." In United States ex rel. Williams v. Twomey, 510 F.2d 634, 641 (7th Cir.), cert. denied, 423 U.S. 876 (1975), the Seventh Circuit stated that the sixth and fourteenth amendments guarantee a criminal defendant legal assistance which meets a "minimum standard of professional representation." See also Spencer v. Warden, Pontiac Correctional Center, 545 F.2d 21 (7th Cir. 1976) (representation inadequate under minimum standards test because counsel was concededly unprepared, was appointed late, made no opening statement, called no witnesses, and conducted ineffective cross-examination).

21 280 F.2d 592 (5th Cir. 1960), order modified, 289 F.2d 928, cert. denied, 368 U.S. 877 (1961). See note 11 supra. In Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974), the Fifth Circuit awkwardly integrated the reasonable lawyer standard of *MacKenna* into a long-standing series of decisions upholding the mockery of justice standard: "One method of determining whether counsel has rendered reasonably effective assistance is to ask whether the proceedings were a farce or mockery. The farce-mockery test is but one criterion for determining if an accused has received the constitutionally required minimum representation (reasonably effective assistance)." See also United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976). In Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), the Sixth Circuit formally adopted the *MacKenna* standard but referred additionally to *McMann v. Richardson*, holding that reasonable counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law.

22 In United States v. Easter, 539 F.2d 663, 665-66 (8th Cir. 1976), the Eighth Circuit followed the malpractice standard adopted by the Third and Seventh Circuits, but stated additionally that when counsel fails to satisfy his duty to be reasonably competent, the proceedings may be said to have been reduced to a farce and mockery of justice. *Easter* also lacks clarity because the court refused to reconsider its unique use of the mockery of justice standard as an indicator of the defendant's heavy burden of proof adopted in its earlier decision in McQueen v. Swenson,
selves as to the proper standard of effectiveness and have applied both sixth amendment and mockery of justice rationales in recent cases. The District of Columbia and Fourth Circuits have adopted the single-phrase McMann formulation and, in addition, have enumerated guidelines considered relevant to the development of a clearer concept of counsel effectiveness. 

More than half of the state supreme courts have also adopted a "reasonableness" test for measuring effective assistance of counsel. The West Virginia Supreme Court of Appeals did so in State v. Thomas. Stating that the right to effective representation was

498 F.2d 207, 215 (8th Cir. 1974). See text accompanying notes 77-91, infra, for a discussion of the problem of burden of proof in ineffectiveness cases.

21 The First Circuit recently applied a modified community standard test in Dunker v. Vinzant, 505 F.2d 503, 505 (1st Cir. 1974), cert. denied, 421 U.S. 1003 (1975), and a farce and mockery of justice test in United States v. Ramirez, 535 F.2d 125, 129 (1st Cir. 1976). In Cooper v. Fitzharris, 551 F.2d 1162, 1165 (9th Cir. 1977), the Ninth Circuit applied the reasonableness test of the Fifth and Sixth Circuits. In Greenfield v. Gunn, 558 F.2d 935, 938 (9th Cir. 1977), however, the court acknowledged that three alternative standards are available in the circuit: farce or mockery, denial of fundamental fairness, and lack of reasonable counsel. Other decisions acknowledging the availability of several standards in the Ninth Circuit are United States v. Lemon, 550 F.2d 467, 473 (9th Cir. 1977) and de Kaplan v. Enomoto, 540 F.2d 975, 987 (9th Cir. 1976), cert. denied, 429 U.S. 1076 (1977).

22 In United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973), the District of Columbia Circuit articulated a shorthand reasonable lawyer test and pointed out guidelines considered relevant to developing the meaning of counsel effectiveness. Under these guidelines defense counsel is required to confer with and advise his client, protect the rights of the client, and conduct appropriate factual and legal investigations. The court stressed that these guidelines were only a starting point for courts and lawyers to develop a clearer concept. See Bazelon, supra note 4, at 823-24, for a discussion of these guidelines.

In Marzullo v. Maryland, 561 F.2d 540, 543-44 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978) (White, J., dissenting; see note 123 infra), the Fourth Circuit incorporated within its standard the enumeration of duties that it had previously adopted in Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968). The court characterized this standard as "necessarily broad and flexible," and, reflecting the DeCoster view, stated that trial judges "may refer to other sources to determine the normal competency of the bar." These other sources, according to the court, included precedent from state and federal courts, state bar canons, the ABA Standards Relating to the Defense Function, and "in some instances, expert testimony on the particular conduct at issue." Marzullo's dictates have been followed in Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978) and Fuller v. Luther, 575 F.2d 1098 (4th Cir. 1978).

22 See Bazelon, supra note 4, at 820.

“logically compelled” by the right to counsel, it adopted as its test “whether [counsel] exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law.” Although Thomas did not specifically mention the fact, its standard is clearly derived from the language found in McMann v. Richardson.

The West Virginia rule effectively broadens the court’s focus beyond the trial proceedings themselves and includes a critical appraisal of the entire defense function. It does not, however, stipulate any specific guidelines for measuring counsel adequacy, thus leaving trial courts and attorneys to their own perceptions of what effective representation requires.

Prior to its decision in Thomas, the West Virginia court had only once alluded to ineffectiveness of counsel as a basis for rever-

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28 203 S.E.2d at 461.


30 See Carter v. Bordenkircher, 228 S.E.2d 711, 715 (W. Va. 1976), where the court quoted from Moore v. United States, 432 F.2d 730, 739 (3d Cir. 1970): “[R]epresentation involves more than the courtroom conduct of the advocate. The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange for their attendance.”

31 Precisely because it requires no guidelines, the West Virginia test arguably sets a lower standard of scrutiny than that of the Fourth Circuit. This disparity could result in friction and confusion whenever a petitioner convicted by a West Virginia court exhausts his state remedies and seeks federal habeas corpus relief. Although it has not addressed this issue, the West Virginia court might conceivably be willing to adopt the Fourth Circuit’s Marzullo guidelines. In Housden v. Leverette, 241 S.E.2d 810 (W. Va. 1978), for example, it adopted the Fourth Circuit’s presumption of ineffectiveness when there is less than a one-day interval between the appointment of counsel and trial or the entry of a guilty plea. In so doing the court stated,

“[E]fficient administration and utilization of judicial time provide an additional policy consideration for adopting the approach employed by the Fourth Circuit, since after a prisoner of this state exhausts his state post-conviction remedies, he may, and often does, pursue relief in the federal district courts of this state...”

241 S.E.2d at 812. Admittedly, the court characterized the one-day interval rule as “procedural,” but its basic rationale could be applied to the disparity in the substantive standards of review as well.
sal of a defendant's conviction. Since Thomas, the court has acknowledged ineffectiveness as a basis for possible relief in numerous cases.

III. CLAIMS OF INEFFECTIVE REPRESENTATION

Although the standards of review applied by many courts are disparate and lack clarity, claims of ineffective assistance have proliferated as prisoners have realized that the sixth amendment entitles them to broader opportunities to present successful claims. Because the defendant's right to effective assistance attaches before trial and extends through post-trial proceedings,

32 In State ex rel. West Virginia-Pittsburgh Coal Co. v. Eno, 135 W. Va. 473, 63 S.E.2d 845 (1951), the court reversed a conviction because counsel had been denied a continuance in order to prepare for the case to which he had been appointed less than 24 hours before. The court did express concern that denial of the right to prepare violated defendant's right to effective assistance of counsel. "To hold that counsel should have prepared for trial in less than twenty-four hours after having been employed would, we think, have the effect of denying the defendants a fair trial, and denying unto them the effective assistance of counsel to which they were entitled." 135 W. Va. at 483, 63 S.E.2d at 851.

33 See Housden v. Leverette, 241 S.E.2d 810 (W. Va. 1978) (claim of ineffective assistance of counsel sustained where there was only a one-day interval between appointment of counsel and entry of guilty plea); State v. Pratt, 244 S.E.2d 227 (W. Va. 1978) (trial court held responsible for preventing oppressive overmatch between prosecutor and defense counsel); Cannellas v. McKenzie, 236 S.E.2d 327 (W. Va. 1977) (claim of ineffective assistance of counsel sustained where cumulative effect of numerous instances of trial error is grounds to infer that petitioner did not have a fair trial); Watson v. Black, 239 S.E.2d 664 (W. Va. 1977) (although there are circumstances mandating appointment of new counsel, claims of ineffective assistance rejected where competent counsel appointed and accused did not exert good faith effort to get along with him); State ex rel. Postelwaite v. Bechtold, 212 S.E.2d 69 (W. Va. 1975) (claim of ineffective assistance rejected where petitioner did not demonstrate actual conflict of interest in joint representation). Cf. State ex rel. Wine v. Bordenkircher, 230 S.E.2d 747 (W. Va. 1976) (counsel's efforts so inadequate as to render the trial a farce and a mockery of justice). The confusion generated by Wine was put to rest in Cannellas, 236 S.E.2d at 331.

34 The sizeable increase in the number of ineffectiveness claims can also be attributed, in part, to the expansion of the procedural device of collateral attack. In 1963 the Supreme Court undertook a major reevaluation of postconviction attacks on state convictions, by way of extending federal habeas corpus jurisdiction to claims not knowingly waived which would otherwise be barred by state procedural rules. Fay v. Noia, 372 U.S. 391 (1963). The liberalization of remedies effected by Fay combined with the expansion of sixth amendment rights precipitated the large growth in the number of ineffectiveness claims. See notes 112-19 infra and accompanying text for a discussion of recent constrictions in the use of federal habeas by the Supreme Court.

35 See Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978) (right to reasonably effective counsel attaches when lawyer appointed) and United States v. Pinkney,
the task of measuring individual effectiveness encompasses many different factual situations. Federal courts have thus been pre-

551 F.2d 1241 (D.C. Cir. 1976) (ineffectiveness inquiry applied to sentencing proceedings).

Courts have previously distinguished not only between different factual situations to analyze ineffectiveness, but also between counsel’s status as assigned or retained. Two reasons have usually been advanced for this distinction: (1) counsel was the employed agent of the accused who was thus bound by his agent’s actions; or (2) the fourteenth amendment is directed to state action, and state action is not involved when counsel is retained. Both the distinction and its reasons have been rejected by the commentators and a majority of the courts. See, e.g., Tolliver v. United States, 563 F.2d 1117 (4th Cir. 1977); Crimson v. United States, 510 F.2d 356 (8th Cir. 1976); United States v. Marshall, 488 F.2d 1169 (9th Cir. 1973); Moore v. United States, 432 F.2d 730 (3d Cir. 1970); U.S. ex rel. Castleberry v. Stieff, 446 F. Supp. 451 (N.D. Ill. 1978); Waltz, supra note 14 at 296-301; 26 A.L.R. Fed. 218, 236-39 (1976). The New York court has labelled as “strained” the distinction between appointed and retained counsel: “To presume that a defendant represented by retained counsel has the capability to discern during the course of the trial that his legal representation is ineffective, let alone exert meaningful control over counsel’s conduct, is . . . unwarranted, either in theory or practice.” People v. Aiken, 380 N.E.2d 272, 276 (N.Y. 1978).

One federal court, however, has developed a bifurcated approach to the status of counsel in an ineffectiveness inquiry. In Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1975), the Fifth Circuit distinguished between actual state responsibility for the conduct of appointed counsel compared to private counsel and held that its sixth amendment standard of the reasonably effective lawyer, see note 21 supra and accompanying text, more strictly applied to protect indigent defendants. A defendant who retained his own counsel would have to show either (1) that his lawyer’s ineffectiveness made the trial fundamentally unfair—in effect adopting the mockery of justice standard for retained counsel—or (2) that the ineffectiveness at least fell below the reasonably effective standard and that a “responsible state official” participating in the trial knew or should have known of the situation and failed to act. 505 F.2d at 1335-38.

The basic requirement that a defendant who hires his own counsel must show requisite “state action” under the fourteenth amendment before ineffectiveness will be found underestimates the pervasiveness of the state’s involvement in the criminal process. See Judge Godbold’s dissent in Fitzgerald v. Estelle: “From arrest to ultimate release, and even afterwards on probation or parole, the accused is at least to some degree in the hands of this system. The lawyer, appointed or retained, is a crucial part of the adjudicatory machinery . . . .” Id. at 1345.

For cases invoking the dual standard from Fitzgerald v. Estelle, see Loftis v. Estelle, 515 F.2d 872 (5th Cir. 1975) (where, in prosecution for possession of narcotics, counsel failed to secure continuance, failed to get petitioner’s case severed from that of a codefendant who had pled guilty before the same jury and who had suffered withdrawal symptoms while in court in the jury’s presence, and failed to object to the admission of petitioner’s confession and of narcotics seized during a search of his home, ineffectiveness not so blatant that the prosecution or trial judge or both should have recognized that the defendant was not receiving effective representation from his privately retained attorney); United States ex rel. Reis v. Wainwright, 525 F.2d 1269, 1273-74 (5th Cir. 1976) (trial strategy of private attorney did
sented with claims asserting a variety of pretrial, trial, and post-trial errors.\textsuperscript{37} Claims in West Virginia are similarly varied.

1. \textit{Pretrial Errors.} In West Virginia the effect of a late appointment of counsel is a well-established ground for asserting ineffective representation.\textsuperscript{38} Although the court had previously rejected any per se rule about what constituted sufficient preparation time, \textit{Housden v. Leverette} held that an interval of one day or less between the appointment of counsel and trial or between the appointment of counsel and the entry of a guilty plea raises a rebuttable presumption of ineffectiveness.\textsuperscript{39} In \textit{Carter v. Bordenkircher} the court stated that the failure of counsel to investigate a material element of a client’s defense can constitute ineffectiveness, although it held that in the case before it counsel’s failure to subpoena the defendant’s work record did not amount to ineffective assistance because “in the practice of criminal law it is not always possible for a lawyer to investigate every avenue suggested to him by his client” and because the other evidence against the defendant was overwhelming.\textsuperscript{40}

\textsuperscript{37} Assertions of pretrial error commonly include an attorney’s misadvice to his client to plead guilty, counsel’s lack of preparation because of late appointment, and attorney failure to adequately investigate all the facts and relevant law. Assertions of trial error commonly include counsel’s failure to put a witness or the defendant on the stand, failure to raise an available defense, failure to object to evidence, incompetent cross-examination, failure to make adequate closing arguments and failure to request or object to instructions. Assertions of post-trial error commonly include counsel’s failure to inform his client about his right to appeal or about his right to perfect a requested appeal. Note, \textit{Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review}, 13 Col. J.L. Soc. Probs. 1, 8-15 (1977).

\textsuperscript{38} In \textit{Wilhelm v. Whyte}, 239 S.E.2d 735 (W. Va. 1977), the court recognized a constitutional basis independent of due process for the right to a continuance if a defendant is not accorded a reasonable time to prepare. The accused “shall have the assistance of counsel, and a reasonable time to prepare for his defense.” W. Va. Constr. art. 3, § 14. \textit{See also} the discussion of State \textit{ex rel. West Virginia-Pittsburgh Coal Co. v. Eno}, 135 W. Va. 473, 63 S.E.2d 845 (1951), note 32 \textit{supra}, and State \textit{v. Tapp}, 153 W. Va. 759, 172 S.E.2d 583 (1970) (had counsel alleged he was unprepared because of late appointment, the trial court’s denial of a motion for a continuance might have constituted prejudicial error).

\textsuperscript{39} 241 S.E.2d 810, 811 (W. Va. 1978) (adopting the rule of the Fourth Circuit). \textit{See} note 31, \textit{supra}.

\textsuperscript{40} 226 S.E.2d 711, 715 (W. Va. 1976).
2. **Trial Errors.** Trial counsel’s courtroom performance is the most frequently litigated issue in ineffectiveness cases, and it is the most difficult to judge. Error-free representation is an impossibly high standard to meet, and what in hindsight looks like error may have seemed a wise choice of strategy before trial. On the other hand, not every apparent error is the result of defensible strategy. Thus the West Virginia court has attempted to distinguish gross error from acceptable professional mistake in determining whether to grant or deny relief.41 In *State v. Thomas* the court expressed a general reluctance to second-guess an attorney’s trial tactics on the theory that actions which appear erroneous in hindsight may have been supported by sound reasons at the time of trial. The court held that where counsel’s allegedly ineffective performance arises from occurrences involving strategy, tactics, and arguable courses of action, his conduct will be deemed effective unless no reasonably qualified defense attorney would have so acted.42 In *Carter v. Bordenkircher* the court stated that counsel’s failure to anticipate every avenue of impeachment of witnesses on cross-examination did not amount to ineffectiveness.43

In *State v. Thomas*, however, the court considered counsel’s trial errors to be so egregious that the integrity of the trial process itself had been brought into question. The defendant’s conviction was reversed on the grounds that his constitutional guarantee had been violated by tactics so substandard that no reasonably qualified defense attorney would have so acted.44 Trial counsel’s derelictions were described as: (1) failure to move for the suppression of evidence seized incident to an unlawful arrest; (2) failure to object to the introduction of evidence of collateral crimes in a manner prejudicial to the accused; (3) failure to move for a directed verdict at the close of the state’s evidence; (4) failure to assign grounds in a motion to set aside the verdict and award the defendant a new trial; and (5) failure to file an appeal on behalf of the defendant within the time limits prescribed by law. Additionally, defense counsel inadvertently corroborated the state’s case and aided in

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44 203 S.E.2d at 459.
securing his client's conviction by conducting a demonstration which proved that his shoe size matched the footprints found at the scene of the crime.\(^5\)

In Cannellas v. McKenzie the court implicitly narrowed the scope of its trial tactics exception. Although admitting that it could cite no single instance of counsel ineffectiveness which, if viewed alone, would have entitled petitioner to relief, the court, nevertheless, inferred from all the errors a "substantial probability of actual injury" to the defendant.\(^6\) The shortcomings of counsel were of considerably less consequence in Cannellas than in Thomas.\(^7\) Nevertheless, the court concluded that the errors deprived the defendant of a fair trial. Justice McGraw filed a strong dissent in which he emphasized the subjective nature of the attorney's trial decisions and worried that the court's decision would "chill the willingness of competent attorneys to respond to the call to represent and defend needy litigants."\(^8\)

In both Thomas and Cannellas the crucial questions for review were the same: whether there was a reasonable basis for counsel's tactics and whether the error affected the outcome of the trial. In Thomas the almost total lack of objection by counsel combined with "fundamental" trial errors forced the court to conclude that defense counsel was acting in ignorance and that pervasive ineffectiveness had deprived the defendant of a fair trial. In Cannellas, by contrast, where the nature of the error was more speculative and a reasonable basis for counsel's strategy arguably existed, the court was willing to infer from the cumulative effect of each trial error a "substantial possibility" that defendant had been harmed.\(^9\)

\(^5\) Id. at 453-54. The court later commented that by holding counsel's performance incompetent, it did not intend to disparage his professional qualifications in the general practice of law. Id. at 461.

\(^6\) 236 S.E.2d 327, 329, 332 (W. Va. 1977) (defendant convicted of rape denied a fair trial because of ineffectiveness of counsel at trial and on appeal).

\(^7\) The finding of ineffectiveness in Cannellas resulted from: (1) failure to challenge the chain of custody of the single piece of corroborating evidence; (2) failure to move for a mistrial when prejudicial evidence of a proposed lie detector test of a key witness came out at trial; (3) failure to question prospective jurors as to whether they had read prejudicial articles in the newspaper; and (4) introduction of petitioner's marital status which, if introduced by the prosecution, would have been reversible error in a rape prosecution. Id. at 330-31.

\(^8\) Id. at 336. Certainly Justice McGraw's concern that the court refrain from second-guessing attorneys' performances on appeal is well-placed, for attorneys must know the range of discretionary tactics they will be allowed to employ at trial. See Note, supra note 37, at 23, for some discussion of the attorneys' concerns.

\(^9\) 236 S.E.2d at 332. The court failed to mention whether the record indicated
Cannellas thus indicates that, notwithstanding the language in Thomas, the West Virginia court may be willing to characterize tactics with which it disagrees as ineffectiveness of counsel.

3. Post-Trial Errors. West Virginia has considered whether counsel's neglect to appeal or to perfect an appeal constitutes ineffective assistance of counsel. In Carter v. Bordenkircher appointed counsel asserted that because of confused communication between himself and the petitioner he was unaware that he had been appointed to perfect the appeal. The petitioner had also failed to inform the court that his appeal had not been prosecuted. The court decided that the petitioner had been denied effective assistance as a result of counsel's failure to prosecute a timely appeal, but determined that the relief granted should not overcompensate for the harm done. Anticipating the rule of "tailored relief" adopted in State ex rel. Johnson v. McKenzie, the court affirmed the circuit court's decision to resentence the petitioner in order to allow his counsel to prosecute a delayed appeal. "[W]here the denial of a timely appeal was probably harmless, except in the case of extraordinary dereliction on the part of the State, the appropriate remedy is not discharge but such remedial steps as will permit the effective prosecution of an appeal." As a result of the confusion over the appointment of counsel, the court in Carter also provided a procedural guarantee so that future indigent cases would be timely appealed: "[W]henever counsel is appointed in trial court for an indigent . . . counsel should be informed that he will also be responsible by separate appointment for the appeal. . . ."

In Rhodes v. Leverette the petitioner had twice been denied...
his right to appeal, once when the state failed to furnish a trial transcript before the appeal period expired, and again when his court-appointed counsel failed to perfect the appeal. Notwithstanding a finding by the court that the petitioner had, as in Carter, neglected his responsibility to take positive action to notify a court of his counsel’s inaction, the court held that he had been denied his right to perfect a timely appeal.\(^{56}\) The defendant’s delay in informing the court of his counsel’s inaction, however, did affect the scope of the relief the court granted.\(^{57}\)

Once an appeal has been perfected, the quality of representation on that appeal may itself become an issue. Whether there is a sixth amendment right to effective appellate counsel is not clear. The United States Supreme Court, however, without making a direct statement regarding a constitutional right to appeal, indicated in Anders v. California that the right to effective counsel on a direct appeal of right was supportable by the due process and equal protection doctrines.\(^{58}\) After describing the advocate role that appellate counsel must fill before he will be allowed to withdraw from an appeal he believes is without merit,\(^{59}\) the Court in Anders stated: “Moreover, such handling would tend to protect counsel from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled.”\(^{60}\)

The West Virginia court relied on the Anders mandate in Turner v. Haynes, where counsel had not perfected his client’s appeal because he did not believe the claim to be meritorious. Stating that it is for the judiciary to determine whether an appeal is frivolous, the court granted relief to the petitioner.\(^{61}\)

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\(^{54}\) 239 S.E.2d 136 (W. Va. 1977).

\(^{55}\) Id. at 145. The court fashioned relief according to State ex rel. Johnson v. McKenzie, 226 S.E.2d 721 (W. Va. 1976) (relief will be given so as to cure the underlying constitutional error), and the guidelines set out in Carter v. Bordenkircher, 226 S.E.2d 711 (W. Va. 1976) (unconditional release in a habeas corpus proceeding only warranted where state guilty of “extraordinary dereliction”). In Rhodes the court recognized the petitioner’s failure to notify the court of counsel’s inaction as a factor tending substantially to negate any implication of extraordinary dereliction by the state. 239 S.E.2d at 144-45.


\(^{57}\) He must first file a brief referring to any matter which might arguably support the appeal. 386 U.S. at 744.

\(^{58}\) Id. at 745.

4. Other Claims. Not all claims of ineffectiveness focus on conduct at a particular stage of the criminal proceedings. Some allege that counsel was generally incompetent or was too inexperienced to provide effective representation. The West Virginia court has considered whether inexperience alone is proof of ineffectiveness. In State v. Pratt an appointed attorney had moved that the trial court appoint additional, more experienced counsel, and the trial court had refused. Although it did not specifically decide the question, the court acknowledged, by way of dictum, that trial courts should be responsible to see that “oppression does not occur in criminal cases because of prosecutorial overmatch with defense counsel.”

IV. PROCEDURAL ASPECTS OF INEFFECTIVENESS CLAIMS

Clarification of the law surrounding the right to effective counsel is complicated by the procedural aspects involved in asserting the claim. As previously noted, countervailing philosophies about institutional efficiency, finality of judgments, and constitutional fairness have influenced the courts in their analysis of these claims, and the procedural rules that have developed in response to these philosophies have had considerable substantive effect on the development of the law of ineffectiveness.

1. The Harmless Error Rule. In Chapman v. California the Supreme Court formulated a harmless error rule for errors reaching constitutional guarantees. Under Chapman a conviction resulting from a trial in which constitutional error was committed will be reversed unless the government can prove beyond a reasonable

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42 The leading case on inexperience of trial counsel is United States ex rel. Williams v. Twomey, 510 F.2d 634 (7th Cir. 1975), in which the Seventh Circuit stated that the mere inexperience of trial counsel was not, in itself, enough to establish lack of effective assistance. Necessarily, said the court, every lawyer must begin his career without experience, but his first case is not inevitably so ill-prepared or poorly presented as to justify a finding of incompetence. “Portia without experience was a remarkably successful representative of Antonio.” Id. at 639. One court, however, has indicated that inexperience should be per se ineffectiveness. See Smotherman v. Beto, 276 F. Supp. 579, 589 (N.D. Tex. 1967): “[I]t is doubtful that the constitutional right to assistance of counsel is fairly met by using the unassisted representation of an indigent defendant as a training method for a neophyte lawyer.”

43 244 S.E.2d 227, 231 (W. Va. 1978).


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doubt that the error was harmless to the defendant.45 For purposes of applying the rule, the Court distinguished between substantial and nonsubstantial rights. Violations of substantial rights, that is, those rights essential to the conduct of a fair trial, would result in automatic reversal because of the inherent prejudice suffered by a defendant. The right to counsel was explicitly mentioned by the Court as a substantial right.46 Chapman did not indicate, however, whether the right to effective counsel was also such a substantial right as to require automatic reversal irrespective of any harm to the defendant. As a consequence of this ambiguity, courts faced with claims of ineffective counsel have split over whether the right to effective assistance is so basic that its violation should automatically be considered prejudicial.47

Two courts have held that once ineffectiveness has been established, a conviction must be reversed without consideration of prejudice. The Sixth Circuit in Beasley v. United States implied that the right to effective assistance of counsel is the equivalent of the right to counsel and that no prejudice need be shown once a defendant has established his trial counsel’s ineffectiveness.48 The Ninth Circuit applied the same rationale in Cooper v. Fitzharris, where it rejected the application of harmless error tests to cases involving ineffective counsel.49

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45 386 U.S. 18, 24 (1967).

46 Id. at 23 n.8 (dictum). The court recently reversed convictions in two right to counsel cases without requiring any showing of prejudice. See Gedders v. United States, 425 U.S. 80, 92-93 (1976) (Marshall, J., concurring) (defendant challenging order prohibiting consultation with his lawyer need not make a preliminary showing of prejudice); Herring v. New York, 422 U.S. 853, 858 (1975) (denial of opportunity to make a summation violates the sixth amendment regardless of the strength of the prosecutor’s case).

47 Courts retaining the mockery of justice standard do not distinguish questions of inadequacy of performance and its resulting prejudice. Under this standard, if counsel’s performance reduced the trial to a sham or a farce, courts presume the defendant was harmed and reversal is required. Of course, under this standard defendant has the heavy burden of showing such error that the trial was rendered fundamentally unfair. Courts which have adopted a sixth amendment standard of effectiveness do differentiate between the burden of proving ineffectiveness and the burden of proving whether defendant was prejudiced as a result.

48 491 F.2d 637 (6th Cir. 1974) (ineffectiveness arose from placing prejudicial witness on stand, failing to obtain fingerprint test, failing to interview or call favorable witnesses, failing to inform defendant that trial judge had earlier read a prejudicial statement concerning the defendant which led to waiver of defendant’s right to trial by jury, cursory investigation of the case, and defendant’s poor health prior to trial). “Harmless error tests do not apply in regard to the deprivation of a procedural right so fundamental as effective assistance of counsel.” Id. at 696.

49 551 F.2d 1162, 1164-65 (9th Cir. 1977).
For the majority of courts, however, prejudice has emerged as a distinct issue within the ineffectiveness inquiry. The Second, 70 Third, 71 Fourth, 72 Eighth, 73 and District of Columbia 74 Circuits have all held that the right to effective counsel is not so substantial as to require automatic reversal under the strict Chapman rule and that prejudice resulting from the ineffectiveness must be shown. West Virginia is in accord. In State v. Thomas the court stated that unless counsel's ineffectiveness could have changed the outcome of the case, it would be treated as harmless error. 75 This position was reaffirmed in State v. Grimmer where the court stated: "[counsel's] mere technical errors that do not deprive or unduly prejudice the defendant . . . will be considered harmless." 76

2. The Burden of Proof. Those courts which have interpreted Chapman as requiring a showing of prejudice in order to warrant reversal have differed significantly over which party, the government or the defendant, should bear the burden of proof with regard to showing the prejudice. 77 The Third Circuit requires that the defendant carry the burden. 78 The Fourth Circuit, by contrast, has

73 McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974).
77 See Bazelon, supra note 4, at 825 n.65; and Note, Effective Assistance of Counsel: A Constitutional Right in Transition, 10 VAL. U.L. REV. 509, 537-54 (1976). One author argues that important as the right to effective representation may be, it is not as fundamental as the right to counsel, and should not be regarded with the same reverence. Ineffectiveness appears in a multiplicity of forms, some of which are highly probable to cause prejudice but are difficult to prove, and some in which prejudice will be apparent. Thus a per se rule may make sense for some violations of the right to effective representation, but not for all. Failure to advise a client of his right to appeal, note 50 supra, or late appointment of counsel, note 38 supra, are examples of cases where the likelihood of prejudice is usually overwhelming. Note, Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review, 13 COL. J.L. SOC. PROB. 1, 76-77 (1977). Also see Holloway v. Arkansas, 435 U.S. 476 (1978), notes 92-104 infra, and accompanying text, where pervasive ineffectiveness was presumed from the denial to grant a hearing to remove counsel with a conflict of interest.
held that a showing of ineffectiveness creates a prima facie case of prejudice unless the prosecution can establish that the defendant was not thereby prejudiced. The District of Columbia Circuit has adopted a formulation which ostensibly shifts the burden to the prosecution. In fact, however, the burden seldom shifts because the court initially requires the defendant to prove that counsel's ineffectiveness was "substantial," that is, that it impaired the defense. Under this formulation it is difficult to distinguish proof of a substantial violation of ineffectiveness from proof of prejudice. Obviously, the court's intention is to ensure that relief is not granted merely for theoretical flaws.

The Eighth Circuit in a unique approach looks at the exigencies of each case and allocates the burden of proof accordingly. In McQueen v. Swenson the court stated that the petitioner must shoulder the initial burden of either showing the existence of evidence which could have been uncovered by reasonable investigation and which would have proved helpful to the defendant at the original trial, or of demonstrating that changed circumstances beyond his control make it impossible to produce that evidence.

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79 See United States v. Pinkney, 543 F.2d 908 (D.C. Cir. 1976) (the court held that failure to dispute government allocation memorandum used in a sentencing hearing was inconsequential in light of the facts presented); Moore v. United States, 554 F.2d 1086, 1092 (D.C. Cir. 1976) (absent a showing of adverse consequences, the failure of counsel to investigate an alleged love affair between the defendant's wife and a key prosecution witness could not be regarded as substantial). But see Boyer v. Patton, 579 F.2d 284 (3d Cir. 1978) (prejudice as a matter of law where counsel failed to object to testimony regarding prisoner's silence at time of his arrest).
80 See Bazelon, supra note 4, at 825 n.65: "DeCoster, I have come to realize, makes the same mistake, (blurring the issue of ineffectiveness with the question of prejudice) by stating that if a defendant shows a substantial violation . . . he has been denied effective representation unless the government . . . can establish a lack of prejudice thereby." In United States v. DeCoster, No. 72-1283 (D.C. Cir., Oct. 19, 1976) (opinion following remand) (reargued May 26, 1977), the court created a presumption that counsel's failure to investigate constituted a substantial constitutional violation. The court, however, refused to grant automatic reversal, adopting instead the Chapman harmless error analysis. "[W]e distinguish between the question of whether counsel's violations were consequential, i.e., impaired the defense, and the question of whether the impairment was harmful, i.e., affected the outcome." Id. at 21 n.32.
82 498 F.2d 207 (8th Cir. 1974).
the evidence is shown, a new trial is warranted unless the court is able to declare that its omission was harmless beyond a reasonable doubt. If circumstances are shown to have changed, then the burden of showing the absence of prejudice shifts to the state.\textsuperscript{85}

The West Virginia court has discussed the issue of burden of proof in apparently conflicting language. On the one hand, \textit{State v. Thomas} indicates that the defendant must show by a preponderance of the evidence that the ineffectiveness resulted in his conviction.\textsuperscript{86} This requirement seems to be the equivalent of a showing by the defendant by a preponderance of the evidence that the error was not harmless. Yet \textit{State v. Thomas} also considers effective assistance to be a constitutional right, and asserts the \textit{Chapman} principle that where there is constitutional error, the conviction must fall unless the state shows that the error was harmless \textit{beyond a reasonable doubt}.\textsuperscript{87} Since both formulations appear in the same opinion, it is difficult to ascertain the court's precise intent. The court is dealing with what it has asserted to be a constitutional right, so perhaps its language placing the burden on the state for constitutional reasons was more carefully selected and would be mandated by federal law anyway. If so, the West Virginia rule permits the defendant to successfully challenge his conviction by proving the existence of ineffectiveness by a preponderance of the evidence and if the state then maintains that the ineffectiveness had no bearing on the result, it must show the harmlessness beyond a reasonable doubt.\textsuperscript{88}

Courts which place the burden of proof on the prosecutor usually argue that it is unfair to require the defendant to prove prejudice. There may in fact be no evidence of prejudice for the very reason that counsel has been ineffective.\textsuperscript{89} Critics of this ap-

\textsuperscript{85} The Eighth Circuit apparently requires the petitioner in a habeas corpus postconviction proceeding to make a more powerful showing of inadequacy than would be required on direct appeal. \textit{See} Garton v. Swenson, 497 F.2d 1137 (8th Cir. 1974).

\textsuperscript{86} 203 S.E.2d 445, 461 (W. Va. 1974).

\textsuperscript{87} \textit{Id.}

\textsuperscript{88} \textit{State v. Boyd}, 233 S.E.2d 710, 718 (W. Va. 1977), may have clarified the situation. There, in discussing the effect of the \textit{Chapman} test as adopted in \textit{Thomas}, the court said: "[W]here the State defends against a claim that a right guaranteed by our Constitution has been violated, on the basis that the violation is harmless error, it is incumbent on the State to show that the error was harmless beyond a reasonable doubt."

\textsuperscript{89} In \textit{United States v. DeCoster}, 487 F.2d 1197 (D.C. Cir. 1973), the court held that two factors justify placing the burden of proof on the prosecutor. First, under the adversary system the burden is on the government to prove guilt and a rule
proach argue that it is unfair to penalize the prosecution for actions over which it had no control. They feel that the burden should be placed on the person asserting the claim so as to allow a more equitable sharing of the burden of proof. In short, these courts feel that the defendant’s burden should be sufficient to deter frivolous, time-consuming claims.

3. Conflict of Interest. In some instances the nature of the ineffectiveness may make a separate inquiry into actual prejudice unnecessary. Courts have recognized that there are circumstances in which the burden will be excused because of the pervasive nature of the prejudice. One of these circumstances arises where the defense attorney is involved in a conflict of interest. In Holloway v. Arkansas the United States Supreme Court held that prejudice will be presumed when a trial court over a timely objection improperly requires joint representation of conflicting interests. Reversal is automatic regardless of any showing of prejudice in such a case because of the nature of the error. “[T]o assess the impact of conflict of interests on the attorney’s options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.”

Holloway v. Arkansas is primarily significant because it represents a major shift from previous treatment of multiple defendants and attorney conflict of interest. Importantly, however, Holloway

requiring the defendant to show prejudice would improperly shift that burden. It is no answer to this, according to the court, to say that the defendant has already had a trial in which the government was put to its proof because the essence of the complaint is that the incompetency of counsel deprived the defendant of a full adversarial trial. Secondly, proof of prejudice may be absent from the record precisely because counsel has been ineffective. Id. at 1204. But see Note, Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review, 13 Col. J.L. Soc. Prov. 1, 84 n.288 (1977), for a criticism of this statement.

90 See Moore v. United States, 432 F.2d 730 (3d Cir. 1970).


92 See United States ex rel. Green v. Rundle, 434 F.2d 1112, 1115 (3d Cir. 1970) (burden to show prejudice excused when pervasiveness of ineffectiveness makes prejudice impossible to determine); United States v. DeCoster, No. 72-1283 (D.C. Cir., Oct. 19, 1976) (opinion following remand) (a substantial violation will be presumed when counsel’s ineffectiveness impairs the defense in a manner that makes impairment difficult to prove) (reargued May 26, 1977).


94 Id. at 491.

95 Previously, in United States v. Glasser, 315 U.S. 60 n.7 (1942), the Supreme Court had held that denial of independent counsel might be a violation of the sixth
also contains some substantial discussion of the issue of ineffectiveness of counsel by a court which has avoided developing specific law in that area. The Court relied on language in United States v. Glasser and Chapman v. California to rebut the argument that courts should affirm convictions in which conflict of interest is claimed unless the defendant can demonstrate prejudice. Stating that "[t]he mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters," the Court placed great emphasis on the peculiar evil engendered by joint representation of conflicting interests. When an advocate is compelled to refrain from pursuing crucial elements in his client's case, a barren record results from which no court could fairly determine prejudicial error.

Whether Holloway should be extended beyond its facts is questionable. The Court carefully limited its holding to issues of conflicts of interest raised by timely motion in which the trial judge fails to conduct an inquiry. It may therefore be argued that the case is sui generis and provides no indication that the Court would favor automatic reversal under the strict Chapman test in other ineffectiveness situations. There is, however, broad language in the decision about the relationship between prejudice and the amendment right to effective assistance of counsel, but had failed to reverse the conviction of Glasser's codefendant because there was no showing of prejudice. Since then most courts have required a showing of actual prejudice or conflict by the defendant seeking reversal. See United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976); United States v. Huntley, 535 F.2d 1400 (5th Cir. 1976), cert. denied, 430 U.S. 929 (1977); United States v. Donner, 497 F.2d 184 (7th Cir.), cert. denied, 419 U.S. 1047 (1974); United States ex rel. Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973); United States v. Williams, 429 F.2d 158 (8th Cir.), cert. denied, 400 U.S. 947 (1970); Fryar v. United States, 404 F.2d 1071 (10th Cir. 1968), cert. denied, 395 U.S. 964 (1969).


315 U.S. 60, 76 (1942): "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 its denial."

386 U.S. 18, 23 (1967). Assistance of counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."

435 U.S. at 490.

Id. On the other hand, the dissent would require that the record at least offer some reasonable inference that conflicting interests hampered a potentially effective defense. Id. at 495.

Id. at 488-89.
denial of the right to effective counsel.\textsuperscript{102} In addition, the lack of record which the Court found so compelling in conflict of interest situations often exists in other ineffectiveness cases.\textsuperscript{103} Thus crucial indicators of possible prejudice may be just as lacking when counsel has merely failed to raise certain issues or perform certain tasks as when he is compelled by external circumstances to refrain from them. Finally, the standard of proof of conflict under Holloway is minimal: actual conflict need not be shown.\textsuperscript{104} It is possible then that courts, looking to the totality of the Holloway rationale, will be persuaded to follow the Sixth and Ninth Circuits' approach and decide that whenever ineffectiveness of counsel is proved, it is conclusively prejudicial. It is more likely, though, that most courts will limit Holloway to the special nature of its ineffectiveness and continue to treat prejudice as a separate issue from ineffectiveness.\textsuperscript{105}

Prior to Holloway, the West Virginia court in Postelwaite v. Bechtold had condemned joint representation which results in conflict prejudicing a defendant.\textsuperscript{106} The Postelwaite decision differs significantly from Holloway in several respects. Postelwaite held that a defendant must always show actual conflict before a court could reverse on grounds of ineffectiveness. Holloway eases that burden: where a defendant makes a timely representation of possible conflict, the trial judge must order separate representation unless the asserted risk of conflict is "too remote to warrant separate counsel."\textsuperscript{107} In addition, in Holloway counsel had made a pretrial motion to appoint separate counsel. By contrast, counsel in Postelwaite had recommended and defendants had acquiesced in the joint representation as a trial strategy. The West Virginia court concluded that the defendants had knowingly waived their right to complain about any actual conflict which might result at trial. It considered the alleged ineffective advocacy at their trial to be part of a plan of trial tactics gone awry which the court would not second-guess. Thus, even though counsel's options were re-

\textsuperscript{102} Id. at 489-90.
\textsuperscript{103} For example, the record will not indicate which witness could have been called or which defenses could have been raised by counsel.
\textsuperscript{104} 435 U.S. at 488.
\textsuperscript{105} For a discussion advocating that prejudice should be treated as a separate issue in ineffectiveness cases, see Note, Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review, 13 Col. J.L. Soc. Prob. 1, 71-87 (1977).
\textsuperscript{106} 212 S.E.2d 69, 76 (W. Va. 1975).
\textsuperscript{107} 435 U.S. 475, 484 (1978).
stricted during trial by evidence of conflicting interests between the defendants, the court would not presume prejudice where the defendants had voluntarily agreed to the joint representation.\textsuperscript{108} Following Postelwaite, in Watson \textit{v.} Black the West Virginia court ruled that a judge should hold a hearing whenever it is suggested to the court that there is a conflict of interest.\textsuperscript{109} The issue of conflict may be raised by either the lawyer or the defendant himself.\textsuperscript{110}

In light of the dictates of Postelwaite and Watson, with the gloss provided by the Supreme Court's decision in Holloway \textit{v.} Arkansas, it appears that in West Virginia a trial judge must conduct an inquiry into a pretrial claim of conflict of interest or risk automatic reversal. Where counsel and defendants have agreed to joint representation as a strategy, however, later-emerging con-

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{108}] 212 S.E.2d at 76.
\item[\textsuperscript{109}] 239 S.E.2d 664, 668 (W. Va. 1977) (although an indigent defendant has a right to be represented by counsel, he does not have a right to be represented by a particular lawyer, or to demand a different appointed counsel; there may be circumstances, however, that would mandate the appointment of new counsel).
\item[\textsuperscript{110}] \textit{Id.} Watson did not discuss whether a court may order defendants to be separately represented despite their wishes to the contrary. See United States \textit{v.} Carrigan, 543 F.2d 1053, 1058 (2d Cir. 1976) (Lumbard, J., concurring):

[T]here will be cases where the court should require separate counsel to represent certain defendants despite the expressed wishes of such defendants. Indeed, failure of the trial court to require separate representation may . . . require a new trial, even though the defendants have expressed a desire to continue with the same counsel. The right to effective representation by counsel whose loyalty is undivided is so paramount in the proper administration of criminal justice that it must in some cases take precedence over all other considerations, including the expressed preference of the defendants concerned and their attorney.

\textit{But see} United States \textit{v.} Duklewski, 567 F.2d 255, 257 (4th Cir. 1977), on whether a defendant may waive his right to conflict-free counsel:

Even though we recognize that the judge was probably prompted by a becoming desire to protect counsel from possible future embarrassment, his action did not give proper regard to the defendant's rights; and we are forced to find that counsel's withdrawal was not voluntary and that in effect the district judge had disqualified the retained counsel for the defendant without according to the defendant an opportunity to exercise in an intelligent manner, any right of waiver of such conflict as might exist in counsel's representation.

See also United States \textit{v.} Clarkson, 567 F.2d 270 (4th Cir. 1977); In re Investigation Before the February, 1977, Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977); proposed amendment to Fed. R. Crim. P. 44(c); ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function (Approved Draft 1971).
\end{enumerate}
\end{footnotesize}
Conflicts at trial will be treated as unsuccessful trial tactics in spite of the apprehension expressed by the Court in *Holloway*.\textsuperscript{111}

4. Forfeiture. Effective assistance of counsel is essentially a postconviction problem and claims are most frequently raised in petitions for a writ of habeas corpus.\textsuperscript{112} The decision of the United States Supreme Court in *Fay v. Noia*, redefining the doctrine of exhaustion of state remedies, had broadened the availability of the federal habeas corpus remedy to state prisoners claiming an involuntary waiver of a constitutional claim.\textsuperscript{113} Recently, however, the Supreme Court moved to constrict the use of federal habeas corpus as a means of challenging the fairness of trial proceedings. In *Wainwright v. Sykes* the Court held that a failure to enter a timely objection to a confession obtained in violation of *Miranda* rights bars relief on habeas corpus unless there can be shown (1) a cause for the failure and (2) resulting prejudice.\textsuperscript{114} The Court, however, did not define the exact meaning of "cause" and "prejudice."\textsuperscript{115} A reading of the separate concurring opinions in *Sykes* indicates that ineffectiveness of counsel which has affected the outcome of the

\textsuperscript{111} Since *Holloway* one federal court has held that a defendant may knowingly waive any actual or potential conflict of interest. United States v. Cox, 580 F.2d 317, 320 (8th Cir. 1978).

\textsuperscript{112} There are other ways a defendant convicted of a crime can raise the issue. He may claim ineffectiveness in a motion for a new trial or in a motion to vacate sentence or judgment. He may also raise his claim on direct appeal from the judgment. When a defendant raises his claim on direct appeal, however, he is disadvantaged by (1) the principle that additional evidence beyond that contained in the record of the trial cannot be presented, and (2) the practice of appointing the same counsel from trial to prosecute the appeal. But where new counsel is commonly appointed on appeal, as in the District of Columbia Circuit, claims of ineffectiveness on direct appeal are likely to be more frequent. See Bazelon, *supra* note 4, at 27.

In federal court a defendant may raise the issue of ineffectiveness by filing a motion in the sentencing court to vacate, set aside, or correct the sentence imposed. See 28 U.S.C. § 2255.

For full discussions of the use of habeas corpus as a remedy for ineffectiveness of counsel see 5 AM. JUR. 2d P.O.F. 2d Ineffective Assistance of Counsel § 11 (1975); Bines, *supra* note 1 at 999; Waltz, *supra* note 11, at 290.


\textsuperscript{114} 433 U.S. 72, 90-91 (1977).

\textsuperscript{115} We leave open for resolution in future decisions the precise definition of the "cause" -and- "prejudice" standard, and note here only that it is narrower than the standard set forth in dicta in *Fay v. Noia*, 372 U.S. 391 (1963), which would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention.

433 U.S. at 87.
case may fit the definition of "cause" and "prejudice" which would remove the effect of a procedural default and thus allow collateral attack. These opinions clearly indicate, however, that under the "cause" and "prejudice" exception most procedural defaults would be viewed by the Court as tactical decisions left to the discretion of the trial lawyer.

In a dissent joined by Justice Marshall, Justice Brennan made clear that he would be more protective of the defendant and would not draw the majority's subtle distinctions between simple counsel error and ineffective assistance of counsel in cases where such error forfeits habeas review of a constitutional claim. He vigorously argued that the real question was counsel's competency and that the ultimate purpose of the majority's restriction on the availability of the federal habeas remedy was to reduce counsel error at trial. To that end he believed the majority's solution unfairly denied judicial consideration of a defendant's claims "because of errors made by his attorney which lie outside the power of the . . . petitioner to prevent or deter." In the wake of Sykes, Justice Brennan predicted, counsel inadequacy would become the usual means of attacking convictions based on procedural defaults.

Because of the expanded role for the claim of ineffectiveness which he foresaw, Justice Brennan then focused on the failure of the judicial system to deal realistically with the problem of counsel competency.

Most courts, this one included, traditionally have resisted any realistic inquiry into the competency of trial counsel. There is nothing unreasonable, however, in adhering to the proposition that it is the responsibility of a trial lawyer who takes on the defense of another to be aware of his client's basic legal rights and of the legitimate rules of the forum in which he practices his profession. If he should unreasonably permit such rules to bar the assertion of the colorable constitutional claims of his client, then his conduct may well fall below the level of competence that can fairly be expected of him.

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116 Id. at 91-94 (Burger, C.J., concurring); id. at 94-97 (Stevens, J., concurring); id. at 97-99 (White, J., concurring).
118 433 U.S. at 116.
119 Id. at 117-18.
Although it has not specifically considered the *Sykes* decision, West Virginia is apparently in accord with the majority's rationale. In *State v. Grimmer* the court held that a defendant who failed to object at trial to the fact that he had never been formally arraigned had effectively waived any procedural claim he may have had. Critical to the court's reasoning was its minimizing of counsel's omission as harmless technical error and its determination that the defendant had been represented by "learned and effective" counsel. Whether the court intended to relate the prejudicial effect of counsel's error to the level of counsel's competency is not clear. It would appear, however, after *Grimmer*, that if a defendant remains silent at trial and later attempts to raise his counsel's procedural error for the first time on appeal or habeas, he will bear a heavy burden in overcoming a presumption of waiver where the court determines that his counsel acted competently.

*Wainwright v. Sykes* points up the continuing dilemma which exists today over the proper way to deal with the impact of ineffectiveness claims on final judgments. The general approach of the courts has been to minimize the impact of counsel inadequacy on the adversary system by distinguishing mere counsel error (frequently dismissed as trial tactics) and ineffectiveness. As the dissent in *Sykes* points out, the integrity of the judicial process may be risked thereby. Courts cannot maximize the procedural consequences of counsel error without redefining the concept of ineffectiveness to reflect more precisely its impact in the realm of finality of judgments.

V. Conclusion

The task of measuring individual counsel effectiveness is necessarily ad hoc and encompasses many different factual situations. Although the courts which have developed standards for assessing attorney competency claim to have provided an objective measurement, their standards are invariably vague and susceptible to subjective impressions. Clearly, a single objective standard of effectiveness would eliminate the confusion which presently exists.

\footnote{120 251 S.E.2d 780, 785 (W. Va. 1979).}


\footnote{122 For a discussion of West Virginia's particular treatment of trial tactics see text accompanying notes 41-49, *supra*.}
among the courts. The United States Supreme Court, however, has consistently denied certiorari to cases raising effective assistance issues,\textsuperscript{123} and has left to the lower courts and professional associations the task of developing the standards which would give content to the concept of effective assistance.\textsuperscript{124} Until the Court is willing to delineate specific defense guidelines and standardize the procedural aspects surrounding the claim, uniform enforcement of the constitutional right to effective counsel will not be possible.

\textit{Irene M. Keeley}

\textsuperscript{123} In a recent dissent to a denial of certiorari, Mr. Justice White reviewed the various standards utilized in challenges to competency of counsel and concluded:

The decisions of this Court recognize that the right to counsel is fundamental to a fair trial . . . and, in the last analysis, it is this Court's responsibility to determine what level of competence satisfies the constitutional imperative. It also follows that we should attempt to eliminate disparities in the minimum quality of representation required to be provided to indigent defendants. In refusing to review a case which so clearly frames an issue that has divided the courts of appeals, the Court shirks its central responsibility as the court of last resort, particularly its function in the administration of criminal justice under a Constitution such as ours.

\textit{Marzullo v. Maryland, 435 U.S. 1011, 1012-13 (1978).}

\textsuperscript{124} See, e.g., \textit{REPORT AND TENTATIVE RECOMMENDATIONS OF THE COMMITTEE TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS, 79 F.R.D. 187 (1978).}