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Criminal Procedure--Right to Counsel--Standard for Judging the Effectiveness of Assistance

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CRIMINAL PROCEDURE—RIGHT TO COUNSEL—STANDARD FOR JUDGING THE EFFECTIVENESS OF ASSISTANCE

Frankie Thomas was stopped by police officers as he left a hotel carrying a large plastic bag. The officers observed that Thomas had been drinking, and even though they later admitted he was not sufficiently inebriated to sustain the charge, they arrested him for intoxication. Incident to that arrest, the officers searched the bag and found merchandise from a nearby department store. This led to the discovery of a previously undiscovered break-in. Thomas was then arrested a second time for possession of stolen property and indicted for breaking and entering. Because he was an indigent, the court appointed counsel to represent him at trial.

Thomas was convicted of breaking and entering in the Intermediate Court of Mercer County. During the trial, the prosecution introduced the evidence seized in the initial search and cross-examined the defendant extensively as to prior convictions and charges of collateral crimes. His appointed counsel did not object. Furthermore, counsel neglected to move for a directed verdict at the close of the state's evidence, failed to assign grounds supporting a motion to set aside the verdict and award a new trial, and did not properly process an appeal. In a subsequent habeus corpus proceeding, the intermediate court found no errors in the trial and resentenced Thomas to the same term. The legal effect of that resentencing order was a new appeal period.[1] From a final order of the circuit court of Mercer County denying his petition, Thomas appealed to the West Virginia Supreme Court of Appeals. *Held*, reversed and remanded. In a unanimous decision, the court found that Thomas had not received effective assistance of counsel and had, therefore, been denied a fair trial. The court held that trial counsel effectiveness must be determined by comparing the degree of skill afforded at trial with the degree of skill normally exhibited by attorneys who are reasonably knowledgeable of criminal practice. *State v. Thomas*, 203 S.E.2d 445 (W. Va. 1974).

The court's opinion, written by Justice Haden, clarified exist-

[1] A final judgment of a statutory court in a habeus corpus proceeding may be appealed to a circuit court. A final order of the circuit court rejecting such an appeal may be appealed to the Supreme Court of Appeals within the time limit for civil appeals generally. W. VA. CODE ANN. § 53-4A-9 (Cum. Supp. 1974).

ing law concerning searches incident to arrest[2] and augmented the law concerning the use of evidence of collateral crimes and charges in a criminal prosecution.[3] Far more significant, however, are the principles set forth relative to the right of an accused to the assistance of counsel as guaranteed by the state[4] and federal[5] constitu-

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[2] The initial arrest, made with knowledge that it could not be sustained, was clearly illegal. State v. Lutz, 85 W. Va. 303, 101 S.E. 434 (1919). Evidence seized as a result of an unlawful arrest is equivalent to that seized without a search warrant or probable cause. State v. Duvernoy, 195 S.E.2d 631 (W. Va. 1973). The "plain view" exception to the general requirements for a lawful search does not justify the seizure of evidence unless the officer was lawfully searching at the time. Coolidge v. New Hampshire, 404 U.S. 443 (1971); Vale v. Louisiana, 399 U.S. 30 (1970); Preston v. United States, 376 U.S. 364 (1964); State v. Duvernoy, *supra*. A person cannot voluntarily consent to a search when he is in custody following an illegal arrest. Holtzendorf v. State, 125 Ga. App. 747, 188 S.E.2d 879 (1972). The evidence was therefore inadmissible. State v. Thomas, 203 S.E.2d at 454 (W. Va. 1974).

[3] Proof that the accused has been convicted of, or charged with, other crimes is inadmissible for the purpose of showing that the accused committed the crime charged, unless the other offenses are elements of, or are legally connected with, the crime. State v. Hudson, 128 W. Va. 655, 656, 37 S.E.2d 553, 557 (1946). This general rule is subject to certain exceptions. *Id.* at 663, 37 S.E.2d at 557; State v. Greene, 122 W. Va. 51, 54, 7 S.E.2d 90, 92 (1940). According to *Thomas*, the evidence is admissible if it tends to establish motive, intent, the absence of mistake or accident, a close relation in a common scheme or plan, or the identity of the person charged. 203 S.E.2d at 455. In State v. Wilson, 207 S.E.2d 174 (W. Va. 1974), the court cites *Thomas* but seems to follow an earlier decision under which the other crimes must be similar or near in point of time to the crime charged, must have some reasonable relation to the crime, *and* tend to show a common scheme or plan. Trial courts must exercise discretion in determining whether the harmfulness of such evidence outweighs its probative value. MODEL CODE OF EVIDENCE rule 303 (1942). The scope and latitude given to the prosecutor can deny the defendant a fair trial. State v. Thomas, 203 S.E.2d at 456.

[4] W. VA. CONST. art. III, § 14:

> Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay, and in the county where the alleged offence was committed, unless upon petition of the accused, and for good cause shown, it is removed to some other county. *In all such trials, the accused* shall be fully and plainly informed of the character and cause of the accusation, and be confronted with the witnesses against him, and *shall have the assistance of counsel*, and a reasonable time to prepare for his defence; and there shall be awarded to him compulsory process for obtaining witnesses in his favor.

(emphasis added).

[5] U.S. CONST. amend. VI:

> *In all criminal prosecutions, the accused shall enjoy the right to* a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

tions. In *Thomas*, the first West Virginia case voiding a conviction because counsel did not perform satisfactorily, the court glosses over traditional standards and adopts an approach that will require considerably greater competence for criminal defense attorneys.

In early decisions considering the right to counsel, the West Virginia court reasoned that a waiver of the right to counsel was presumed where the accused failed to request assistance or entered a guilty plea.[6] Later decisions, the most influential of which was *State ex rel. May v. Boles*,[7] eliminated any presumption[8] and held that: (1) the protections of the sixth amendment to the United States Constitution are obligatory upon the states under the due process clause;[9] (2) the right to counsel is a fundamental right, an essential element of a fair trial;[10] and (3) the accused is entitled to assistance at every stage where his substantial rights may be affected.[11] The court has recognized that the right to the assistance of counsel includes the right to *effective* assistance,[12] but *Thomas*

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previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to *have Assistance of Counsel* for his defence.

(emphasis added).

[6] In State v. Kellison, 56 W. Va. 690, 692, 47 S.E. 166, 167 (1904), the court stated that since the assistance of counsel is not a prerequisite to a conviction, and since there is a presumption of regularity in trial proceedings, there is no denial of the right to assistance of counsel absent some affirmative showing. Similarly, in State v. Yoes, 67 W. Va. 546, 547, 68 S.E. 181 (1910), the court spoke of the right to assistance as a "mere privilege . . . permissive and conditional upon the pleasure of the accused," and held that a request for assistance must appear on the record if an invasion of the guarantee is to be proven.

[7] 149 W. Va. 155, 139 S.E.2d 177 (1964), *commented on in* 67 W. VA. L. REV. 234 (1965).

[8] The right to assistance of counsel may be waived, but the waiver must be competently and intelligently made. *E.g.*, State *ex rel.* Fountain v. King, 149 W. Va. 511, 142 S.E.2d 59 (1965). A waiver will never be presumed.

[9] *E.g.*, State *ex rel.* Widmyer v. Boles, 150 W. Va. 109, 144 S.E.2d 322 (1965); State *ex rel.* Browning v. Boles, 149 W. Va. 181, 139 S.E.2d 263 (1964).

[10] *E.g.*, State *ex rel.* Waugh v. Boles, 149 W. Va. 525, 142 S.E.2d 62 (1965); State *ex rel.* Stumbo v. Boles, 149 W. Va. 174, 139 S.E.2d 259 (1964).

[11] State *ex rel.* Riffle v. Thorn, 153 W. Va. 76 168 S.E.2d 810 (1969).

[12] To assure that the defendant receives effective assistance, counsel must be given sufficient time to adequately prepare for trial. State *ex rel.* Favors v. Tucker, 143 W. Va. 130, 100 S.E.2d 411 (1957). In State *ex rel.* West Virginia-Pittsburgh Coal Co. v. Eno, 135 W. Va. 473, 63 S.E.2d 845 (1951), the court held that the defendants were denied a fair trial when the trial court refused to grant a continuance so that counsel would have time to prepare a defense.

is the first attempt to actually define "effectiveness."

Other courts have been unusually strict, insisting that a conviction cannot be vacated unless counsel's errors were so blatant that the entire trial was reduced to a mockery or a farce.[13] Relief has been granted only when the conduct of defense counsel shocked the conscience of the reviewing court, that is, when counsel's performance was in bad faith, a sham, or a pretense. In jurisdictions using these criteria, effectiveness of assistance has become primarily a question of procedure, not a test of competence.[14]

In *Thomas*, the West Virginia Supreme Court of Appeals rejected the stringent mockery-farce concepts and concluded that "effectiveness" refers to an evaluation of defense counsel's performance vis-a-vis his contemporaries. According to *Thomas*, a criminal defendant in West Virginia has a constitutional right to be represented by an attorney who exhibits "the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law."[15] One commentator cited by the court has argued that a comparative standard is necessary to safeguard the guilt-determining process and is, therefore, more consistent with the policies underlying the sixth amendment.[16]

The language used in *Thomas* is comparable to that found in two federal cases that apparently influenced the Supreme Court of Appeals.[17] West Virginia's standard, however, is distinguishable in

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[13] *E.g.*, United States *ex rel.* Marcelin v. Mancusi, 462 F.2d 36 (2d Cir. 1972). Virginia courts apply this strict standard. *E.g.*, Hern v. Cox, 212 Va. 644, 186 S.E.2d 85 (1972).

[14] It is clear . . . that the term "effective" has been used by the Supreme Court to describe a procedural requirement, as contrasted with a standard of skill. The Court has never held that an accused is entitled to representation by a lawyer meeting a designated aptitude test. It has never used the term to refer to the quality of service rendered by a lawyer.

Mitchell v. United States, 259 F.2d 787, 790 (D.C. Cir. 1958).

[15] 203 S.E.2d at 461.

[16] The reliability of verdicts depends . . . on the prosecution meeting the burden of proof imposed on it. Effective opposing counsel is necessary to ensure that the burden is properly met. . . . Best suited to protect the policies embodied in the sixth amendment right to effective representation is the standard of ordinary skill and care. . . .

Bines, *Remedying Ineffective Representation in Criminal Cases: Departures From Habeus Corpus*, 59 VA. L. REV. 927, 936 (1973).

[17] In Moore v. United States, 432 F.2d 730 (3d Cir. 1970), it was held that the proper standard of adequacy is the "customary skill and knowledge which normally prevails at the time and place." Another court described the standard as "the usual

one important respect: the skill and knowledge required are those that prevail among lawyers who are fairly proficient and experienced in *criminal* practice, not the skill and knowledge that can be expected of lawyers in general. Criminal practice is a particularly technical specialty within the profession. The services of a highly skilled corporate or tax attorney may not be effective in a criminal trial.[18]

The standard adopted in *Thomas* is a familiar one for judging the actions of any person who undertakes the practice of a profession. The *Restatement (Second) of Torts* provides that attorneys, as well as physicians, surgeons, accountants, and so forth, must "exercise the skill and knowledge normally possessed by members of that profession . . . in good standing in similar communities."[19] Justice Haden notes in the court's opinion that the *Thomas* standard resembles the one applied to a physician's conduct in a malpractice case.[20] In West Virginia, a physician is bound to act with the same reasonable and ordinary skill and diligence as practiced by physicians in the same line of practice in similar localities.[21] "Effectiveness," as defined in *Thomas*, however, does not allow for differences in competence between dissimilar communities; the same degree of expertise is required of every practitioner.

In managing the strategic aspects of a defense, counsel must often select a single course of action from several plausible alternatives. Courts examining claims of ineffective assistance should recognize such a decision as a valid exercise of professional judgment.[22] Accordingly, the court in *Thomas* insists upon a narrow

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amount of skill and judgment exhibited by an attorney conscientiously seeking to protect his client's interests." Kott v. Green, 303 F. Supp. 821, 822 (N.D. Ohio 1968).

[18] "For ordinary skill and care to be the measure, it must be the skill and care of a competent criminal lawyer." Bines, *supra* note 16, at 939.

[19] RESTATEMENT (SECOND) OF TORTS § 299A (1965). The comments accompanying this section offer some guidelines for the evaluation of counsel's conduct. They describe the minimum competence that must be demonstrated as something less than that of the average member of the profession yet still a "special form of competence" acquired through particular training and experience.

[20] 203 S.E.2d at 459.

[21] Vaughan v. Memorial Hosp., 100 W. Va. 290, 130 S.E. 481 (1925). He is not liable for mere mistakes of judgment unless they are so gross as to be inconsistent with ordinary skill and care. *Id.* If a physician employs a method established and approved by other physicians in the community, he has performed his duty; he is not bound at his peril to adopt the best available method. Browning v. Hoffman, 86 W. Va. 468, 103 S.E. 484 (1920).

[22] Williams v. Beto, 354 F.2d 698 (5th Cir. 1965); *In re* Ernst, 294 F.2d 556 (3d

standard of review when the conduct in question arises from an arguable situation. Tactics are grounds for reversal only if "no reasonably qualified defense attorney would have so acted in the defense of an accused."[23] Although a particular act proves to be detrimental to the defendant's interests, it is constitutionally adequate if it had "any reasonable, tactical or strategic basis."[24] Two West Virginia cases illustrate this principle. In 1941, the court held that there was no sixth amendment violation where appointed counsel chose not to use the majority of the witnesses subpoenaed and did not argue motions for a new trial and in arrest of judgment.[25] Similarly, a 1958 decision affirmed a murder conviction although trial counsel did not move for a change of venue and failed to object or take exceptions.[26] Other courts have found tactical justifications where the purported errors of counsel were failure to make an opening statement,[27] to challenge the admissibility of evidence,[28] to cross-examine witnesses,[29] to raise an available defense,[30] and to request instructions.[31] These cases, however, should only have limited value as precedent, because the effectiveness of

Cir.), *cert. denied*, 364 U.S. 943 (1961); Snider v. Cunningham, 292 F.2d 683 (4th Cir. 1961). The West Virginia court has stated that whether other attorneys may have followed the same course of action is not the test. State *ex rel.* Burkhamer v. Adams, 143 W. Va. 557, 103 S.E.2d 777 (1958).

[23] 203 S.E.2d at 461.

[24] *Id.* at 457.

[25] *Ex parte* Farmer, 123 W. Va. 304, 14 S.E.2d 910 (1941). The attorney found that most of the subpoenaed witnesses were of no value and knew of no grounds to assign for the motions.

[26] State *ex rel.* Burkhamer v. Adams, 143 W. Va. 557, 103 S.E.2d 777 (1958). There was no basis for a motion for a change of venue because a plea of guilty was to be tendered. Under the circumstances of the case, failure to object or except was reasonable.

[27] Tahl v. O'Connor, 336 F. Supp. 576 (S.D. Cal. 1971). Counsel did not want to reveal the weaknesses in his case at the outset.

[28] Barba-Reyes v. United States, 387 F.2d 91 (9th Cir. 1967). Because the only defense presented was that the defendant was totally unaware of the presence of narcotics in his automobile, the decision not to move to suppress the evidence could be explained strategically.

[29] Frand v. United States, 301 F.2d 102 (10th Cir. 1962). The court reasoned that cross-examination would not have been advantageous under the circumstances.

[30] Snider v. Cunningham, 292 F.2d 683 (4th Cir. 1961). Arguing the defense of insanity might have undermined the stronger alibi defense.

[31] State v. Fulford, 290 Minn. 236, 187 N.W.2d 270 (1971). An instruction defining a lesser offense could result in a conviction which might not otherwise occur.

a given course of action depends entirely upon the surrounding facts and circumstances.[32]

The issue of effectiveness of counsel arises in two ways. Most often, counsel's handling of the case is assigned as grounds supporting a petition for a writ of habeus corpus. The petitioner should pinpoint specific acts or omissions and argue that each of these is wholly unjustified. In other cases, such as *Thomas*, ineffectiveness results in a reversal on direct appeal. The burden of proof is the same in both instances; ineffective assistance must be proven by a preponderance of the evidence.[33] Proof that some other tactic would have changed the outcome is insufficient, because "a defendant is not constitutionally guaranteed such assistance of counsel as will necessarily result in his acquittal."[34] The court's opinion cited several cases where other courts have found ineffective assistance from facts similar to those in *Thomas*.[35] Three of these define the burden of proof in another way—ineffectiveness is established by showing either unawareness of, or a misunderstanding of, a rule of law basic to the case.[36]

Finally, if counsel's conduct has been ineffective under the circumstances *but did not contribute to the conviction below*, it will not be grounds for reversal.[37] This "harmless error" exception is theoretically possible in every case, but, as explained in *Thomas*, it will control only when the absence of prejudice is especially clear. The United States Supreme Court has held that where a constitutional error has been proven, such as the denial of the right to effective assistance of counsel, a state court cannot consider the error as harmless unless the federal standard has been met.[38] Thus,

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[32] For in-depth analysis of these and other tactical justification cases, see Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973).

[33] *E.g.*, State v. Thomas, 203 S.E.2d 445 (W. Va. 1974); State *ex rel.* Owens v. King, 149 W. Va. 637, 142 S.E.2d 880 (1965); State *ex rel.* Clark v. Adams, 144 W. Va. 771, 111 S.E.2d 336 (1959).

[34] 203 S.E.2d at 461.

[35] United States *ex rel.* Williams v. Brierly, 291 F. Supp. 912 (E.D. Pa. 1968); Poe v. United States, 233 F. Supp. 173 (D.D.C. 1964).

[36] *In re* Williams, 1 Cal. 3d 168, 460 P.2d 984, 81 Cal. Rptr. 784 (1969); People v. McDowell, 69 Cal. 2d 737, 447 P.2d 97, 73 Cal. Rptr. 1 (1968); People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963).

[37] W. VA. CODE ANN. § 58-1-2 (1966). Harmless error rules are designed "to block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." Chapman v. California, 386 U.S. 18, 20 (1967).

[38] Chapman v. California, 386 U.S. 18 (1967); Fahy v. Connecticut, 375 U.S. 85 (1963).

if there was any legitimate possibility that counsel's ineffectiveness was a cause of conviction, the court must conclude that the trial court lacked valid jurisdiction.[39] The harmless constitutional error standard is strict; it seems unlikely that the Supreme Court of Appeals will often find substandard defense work harmless beyond a reasonable doubt.

In a criminal trial, conviction or acquittal results from the adversity of prosecution and defense, and the underlying theory requires that the adversaries be relatively equal in knowledge and ability. In *Thomas*, the court recognizes that the right to assistance of counsel is empty unless a minimum quality of performance is guaranteed, and the standard by which it judges effectiveness is workable. It is, however, only a cautious suggestion, "to be regarded as developmental and prospective in nature."[40] The presumption in every case is that defense counsel has made a conscientious effort to protect his client's interests, and the court warns that the new criteria will not tolerate "frivolous" or "unfounded" appeals.[41] It must be remembered that Thomas's counsel made a series of grievous mistakes that practically assured conviction; the court can reasonably reject most appeals on the basis of some tactical justification.

Thomas, most importantly, recognizes a defect in West Virginia's criminal justice system and calls for reform. At present, every licensed attorney is entitled to practice in all of the state's courts, civil and criminal.[42] This is unrealistic and unnecessary. A competent criminal defense attorney must possess special knowledge and experience; allowing any attorney to do defense work is analogous to allowing any physician to do surgery. As long as other specialists, such as corporate or tax attorneys, are permitted to do criminal work, there will be instances of grossly ineffective assistance similar to that which occurred in *Thomas*. Thus, the court defines effectiveness of assistance as ordinary skill *within a specialty*, criminal practice. It questions the practice of rotating court appointments to represent indigent defendants among the bar without regard to special competence,[43] but the same problem can arise when defense counsel is retained. The court cites Chief

[39] 203 S.E.2d at 461.
[40] *Id.*
[41] *Id.*
[42] W. VA. CODE ANN. § 30-2-1 (Cum. Supp. 1974).
[43] 203 S.E.2d at 460.

Justice Burger's arguments[44] as persuasive and urges that criminal practice should be formally recognized as a specialty, and that persons who have been certified as criminal specialists should be allowed to communicate that status to the general public.

An additional change is also necessary; certification as a criminal specialist should become a prerequisite to practice in West Virginia's criminal courts. The Supreme Court of Appeals can establish a system of certification. The licensing statute imposes upon the court the whole duty of regulating the examination of applicants for admission to the bar and the granting of licenses.[45] The court has held that, beyond the statute, it has the inherent power to define, supervise, regulate, and control the practice of law.[46] Certification should reflect: (1) formal study of substantive criminal law and criminal procedure; (2) adequate performance in examinations designed to measure ability to respond knowledgeably in probable situations; (3) a minimum amount of experience as an assistant to a qualified specialist; and (4) periodic examinations which will assure that the attorney has kept aware of recent developments in the law. Persons certified by the court as criminal specialists could hold themselves out as such to the public without conflicting with bar association policy. The American Bar Association and the West Virginia State Bar recognize that the authority

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[44] What I propose is a broad, four-point program as a first step in specialist certification. We should:

First: Face up to and reject the notion that every law graduate and every lawyer is qualified, simply by virtue of admission to the bar, to be an advocate in trial courts in matters of serious consequence.

Second: Lay aside the proposals for broad and comprehensive specialty certification . . . until we have positive progress in the certification of the one crucial specialty of trial advocacy that is so basic to a fair system of justice and has had historic recognition in the common law systems.

Third: Develop means to evaluate qualifications of lawyers competent to render the effective assistance of counsel in the trial of cases.

Fourth: Call on the American Bar Association, the Federal Bar Association, the American College of Trial Lawyers, the American Association of Law Schools, the Federal Judicial Center, the National Center for State Courts and others to collaborate in prompt and concrete steps to accomplish certification of trail advocates.

Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice*?, 42 FORDHAM L. REV. 227, 240-41 (1973).

[45] W. VA. CODE ANN. § 30-2-1 (Cum. Supp. 1974).

[46] *In re* Daniel, 153 W. Va. 839, 173 S.E.2d 153 (1970); West Virginia State Bar v. Earley, 144 W. Va. 504, 109 S.E.2d 420 (1959).

having jurisdiction under state law to control specialization may prescribe appropriate methods of publicity.[47] The court should, at least, create a separate listing in telephone directories. Furthermore, certification would require a change in compensation rates for the representation of indigent defendants; remuneration for such work should be raised to a realistic amount.[48] These reforms must be implemented so that West Virginia's criminal justice system can conform to the *Thomas* standard.

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[47] ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-105 (1969); adopted by the Supreme Court of Appeals, June 9, 1970.

[48] In West Virginia, a court-appointed defense attorney receives a fee not to exceed one hundred dollars in a misdemeanor case and not to exceed two hundred dollars in a felony case. W. VA. CODE ANN. § 62-3-1 (Cum. Supp. 1974). The maximums in federal courts are four hundred dollars and one thousand dollars, and in protracted cases, the court may award payment in excess of those figures. 18 U.S.C. § 3006A (1970).